Higgs and David Mitchell v. The Minister of National Security and Others (Bahamas) [1999] UKPC 55 (14th December, 1999)

Privy Council Appeal No. 45 of 1999

(1) John Junior Higgs and

(2) David Mitchell *Appellants*

v.

The Minister of National Security and Others *Respondents*

FROM

THE COURT OF APPEAL OF THE BAHAMAS

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JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 14th December 1999

Present at the hearing:-

Lord Steyn

Lord Hoffmann

Lord Cooke of Thorndon

Lord Hobhouse of Woodborough

Mr. Justice Henry

[Majority Judgment delivered by **Lord Hoffmann**]

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1. The appellants are held at Fox Hill Prison in The Bahamas under sentence of death for murder. They have exhausted the right to appeal against their convictions. But they have brought constitutional motions claiming that the execution of the death sentences would violate their fundamental rights and freedoms under the Constitution. There are two principal grounds. The first is that each has pending before the Inter-American Commission on Human Rights ("the Commission") a petition complaining that their executions would violate their human rights. The Commission, which is an organ of the Organisation of American States ("OAS") of which The Bahamas is a member, has not yet dealt with the petitions. The appellants say that an execution before the decision of the Commission has been received and considered by the Government of The Bahamas would be contrary to due process of law and would violate their right to life under article 16 of the constitution. The second ground is that having regard to the length of time for which the appellants have been held in prison, both before and after conviction, the conditions in which they have been held and the treatment they have received, the executions would be "inhuman or degrading treatment or punishment" contrary to article 17(1) of the Constitution.

1. <u>The Commission.</u>

2. The Commission has a role in respect both of member states of the OAS which are parties to the American Convention on Human Rights 1969 ("the Convention") and member states, such as the Bahamas, which are not. In relation to states in the former category, it is charged with enforcing the Convention, if necessary by proceedings before the Inter-American Court of Human Rights ("the

Court"). The Convention gives individuals and non-governmental organisations a right to petition the Commission to complain of violations and the Commission, if it is unable to arrive at a satisfactory settlement, may submit the matter to the Court, which has sole jurisdiction to interpret the Convention. The procedure was recently discussed in the judgment of the Board in Briggs v. Baptiste (The Times 3rd November 1999) an appeal from Trinidad and Tobago.

3. In relation to states which are not parties to the Convention, the Commission has a general duty to promote the observance of the human rights set out in the American Declaration of the Rights and Duties of Man 1948 ("the Declaration"). There is no right of individual petition as such, but the Commission has under article 20(b) of its Statute power:-

> "to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights."

4. The "communications" received by the Commission under this article tend in practice to be complaints by individuals of the violation of their rights under the Declaration. The Commission has in fact made procedural regulations which assimilate the preliminary procedures for dealing with such communications with those for petitions

under the Convention. For example, it is a condition of the admissibility of both Convention petitions and non-Convention communications that the petitioner should have exhausted his domestic remedies: see article 37 of the Regulations of the Inter-American Commission on Human Rights. But the outcome of the proceedings in non-Convention cases is that the Commission sends its "decision" in the form of a report to the member state concerned, including any recommendations it may make in accordance with article 20(b) of the Statute. Being recommendations, they are not binding upon the member state as a matter of treaty law or in any other way.

2. The Commission and The Bahamas

5. Although The Bahamas has been a member of the OAS since 1982, it does not appear that until quite recently anyone availed himself of the power of the Commission to receive communications and make inquiries about alleged violations of human rights there. The government was in fact unaware that the assistance of the Commission could be invoked by an individual through this route. In Henfield v. Attorney-General of the Commonwealth of The Bahamas [1997] AC 413 counsel for the government, on instructions, accepted the submission of counsel for the appellants that citizens of The Bahamas had no individual access to the United Nations Human Rights Committee (which was correct) or any other international human rights body (which was not). The context in which the question arose was whether this made any difference to the five year period which the Board had said in Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1, 35 was the period after sentence after which there would normally be "strong grounds for believing" that an execution would be inhuman or degrading punishment. The period of five years had been an attempt to strike a balance between the cruelty of a long delayed execution and the need to allow time for completion of the available appellate processes. In the case of Jamaica, which was party to both the International Covenant on Civil and Political Rights (with its Protocol

giving a right of petition to the U.N. Human Rights Committee) and the American Convention on Human Rights, the Board in calculating the time reasonably required for appeals allowed a period of 18 months for petitions to one or other international body. In Henfield it decided that since neither form of petition existed in The Bahamas, three and a half years was the appropriate period within which an execution could normally be expected to be carried out.

6. The error was corrected in Fisher v. Minister of Public Safety and Immigration [1998] AC 673 (which, in view of a subsequent appeal by the same appellant, their Lordships will call "Fisher No. 1"). In that case the appellant Mr. Fisher had presented a petition to the Commission which was pending at the date of the hearing before the Board. Sir Godfray Le Quesne Q.C., as counsel for the government, informed the Board that the government recognised the power of the Commission to receive communications from citizens of The Bahamas complaining of violations of their human rights. He said at page 685A that "it was the intention of the government that the applicable regulations should be duly respected".

3. The appellants' cases.

7. Their Lordships must now set out some of the chronology of the proceedings against the appellants. First, Mr. Higgs. He murdered his wife in July 1993 and was arrested a few days later. He was committed for trial on 26th November 1993 but there was a technical defect in the committal as a result of which it was quashed on 12th July 1994. On 14th November 1994 he was committed again and on 2nd October 1995 found guilty and sentenced to death. On 16th April 1996 the Court of Appeal allowed his appeal on the grounds of excessive interventions by the judge and ordered a retrial. On 6th August 1996 he was again convicted and sentenced to death. The Court of

Appeal dismissed a second appeal on 2nd May 1997 and a petition for special leave to appeal to Her Majesty in Council was dismissed on 6th November 1997. On the following day he lodged his petition with the Commission. On 21st October 1998 the government wrote to the Commission stating that it considered that 18 months would be a reasonable period to allow for the Commission to reach its decision and make its recommendations. Neither the government nor the Commission sent a copy of this letter to Mr. Higgs. The period expired on 7th May 1999. His execution was fixed for 10th August 1999 and the warrant read to him on 3rd August 1999, but a stay of execution was granted on 9th August 1999 pending the hearing of this constitutional motion. It came before Marques J. and was dismissed on 12th August. An appeal to the Court of Appeal was dismissed on 17th August. From that decision Mr. Higgs now appeals to the Privy Council.

8. Mr. Mitchell's case has followed a rather simpler course. On 9th May 1994 he murdered a couple in their home by stabbing them to death. He was arrested on the same day and on 24th November 1994 he was convicted and sentenced to death. His appeal to the Court of Appeal was dismissed on 2nd October 1995 (with reasons given on 27th October 1995) and (after special leave had been granted) his appeal to the Privy Council was dismissed on 21st January 1998: see Mitchell v. The Queen [1998] AC 695. On 27th January 1998 he lodged his petition with the Commission. In October 1998 the government wrote a similar letter to that in Mr. Higgs's case, informing the Commission that the period of 18 months would expire on 27th July 1999. Thereafter, Mr. Mitchell's execution was fixed for 10th August 1999, the same day as Mr. Higgs, and the warrant was read to him. He brought his constitutional motion on 5th August 1999 and this led to stays of execution being granted to both him and Mr. Higgs. Since then their cases have proceeded together.

9. Both appellants have been in Fox Hill Prison since their respective arrests. For Mr. Higgs, this has been six and a half years. For Mr. Mitchell it has been five and a half. Their Lordships will return later, when they consider the question of whether execution would be an inhuman or degrading punishment, to the question of the conditions in which they have been held and the treatment which they have received. But first they turn to the effect of the unresolved petitions to the Commission.

4. International law in domestic courts.

10. The point of departure in considering the effect of the petitions is the fact that the constitution of the OAS (including the Statute which established and conferred powers upon the Commission) is an international treaty. In the law of England and The Bahamas, the right to enter into treaties is one of the surviving prerogative powers of the Crown. Her Majesty does not require the advice or consent of the legislature or any part thereof to authorise the signature or ratification of a Treaty. The Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government.

11. But the corollary of this unrestricted treaty-making power is that treaties form no part of domestic law unless enacted by the legislature. This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: see J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry [1990] 2 A.C. 418. So, in the present case, the effect of the treaty in international law may be that The Bahamas has a duty to wait indefinitely for the decision of the Commission or that it has a duty to wait a reasonable time or (given the advisory and non-binding nature of the possible recommendations of the Commission) it has no duty to wait

at all. The courts of The Bahamas have no jurisdiction to pronounce upon this question.

12. The second consequence is that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law: see the classic judgment of Sir Robert Phillimore in The Parlement Belge (1879) 4 P.D. 129. They may have an indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty: see Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273. In this respect there is nothing special about a treaty. Such legitimate expectations may arise from any course of conduct which the executive has made it known that it will follow. And, as the High Court of Australia made clear in Teoh's case, the legal effect of creating such a legitimate expectation is purely procedural. The executive cannot depart from the expected course of conduct unless it has given notice that intends to do so and has given the person affected an opportunity to make representations.

13. The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the seventeenth century. And on no point were the claims of the prerogative more resented in those times than in relation to the establishment of courts having jurisdiction in domestic law. There have been no prerogative courts in England since the abolition of Star Chamber and High Commission. But the objection to a prerogative court must be equally strong whether it is created by the Crown alone

or as an international court by the Crown in conjunction with other sovereign states. In neither case is there power to give it any jurisdiction in domestic law.

5. Fisher No. 2

14. These well-established principles were the background to the decision of the Board in Fisher v. Minister of Public Safety and Immigration (No. 2) [1999] 2 WLR 349. Their Lordships have already referred to the first constitutional motion in this case (Fisher No. 1). After the Board had given its decision in that case on 16th December 1997, the government wrote to the Commission (on 29th December 1997) pointing out that more than 18 months had elapsed since the petition had been presented on 7th June 1996. It said that the government could not wait indefinitely and that unless the Commission made its decision by 15th February 1998, the law would have to take its course without further delay. No decision was received and on 26th March 1998 a warrant of execution was read. Mr. Fisher brought a second constitutional motion, alleging that his execution before the decision of the Commission had been received would be a violation of his human rights under the constitution and also contrary to his legitimate expectations created by the government's undertaking given at the earlier hearing.

15. Counsel made alternative submissions as to which of Mr. Fisher's constitutional rights would be violated. His primary case (see page 354G) was that it was his right to life under article 16(1). In answer to the objection that article 16(1) includes the words "save in execution of the sentence of a court", counsel said the article should be given a liberal construction. The execution had to be lawful and it should not be considered lawful if the case was still being considered by the Commission.

16. The judgment of the majority of the Board on this question, delivered by Lord Lloyd of Berwick, was that the legality of the execution, as a matter of domestic law, could not be affected by the terms of an international treaty. He said the government could not, by joining the OAS in 1982, create a new constitutional right or alter what had previously been the legality of executing the sentence of a court. Otherwise "it would mean that the government had introduced new rights into domestic law by entering into a treaty obligation …" at page 355C. On this point the minority of the Board agreed.

17. Counsel's alternative constitutional argument was that the execution would in such circumstances be inhuman or degrading punishment. Lord Lloyd said that if the death penalty was not otherwise inhuman or degrading, as had been held by the Privy Council in Jones v. Attorney-General of the Commonwealth of The Bahamas [1995] 1 W.L.R. 891, it could not become inhuman and degrading on account of an international treaty. The minority of the Board, however, considered that execution would be cruel and inhuman, not because of the pendency of the petition to the Commission as such, but because Mr. Fisher had spent a considerable time in prison since the exhaustion of his domestic remedies anxiously awaiting the decision of the Commission and it would therefore be inhuman to execute him before it was given.

18. Finally counsel argued that Mr. Fisher had a legitimate expectation that the government would await the decision of the Commission, or would wait for a reasonable time which had not yet expired. The expectation was founded upon the undertaking given on behalf of the government in Fisher No. 1 and there was some discussion of what it had meant. At first it was agreed between counsel that it meant that the government would wait a reasonable time for the decision of the Commission, which would then be considered by the appropriate body. The issue was whether

the government had waited a reasonable time. In his reply, however, the appellant's counsel argued that it meant that the government would wait indefinitely. Lord Lloyd of Berwick, who gave the advice of the Board, did not attempt to construe the undertaking. He said instead (at p. 356) that even if the undertaking had given rise to an expectation that the government would wait indefinitely, that expectation could not have survived the communication to Mr. Fisher of the government's letter to the Commission stating that it would not wait longer than 15th February 1998. The minority, on the other hand, considered that there was a continuing legitimate expectation that the government would wait a reasonable time and that this was in the circumstances longer than 18 months.

6. No distinction from Fisher No. 2

19. Their Lordships can find nothing which materially distinguishes this case from Fisher v. Minister of Public Safety and Immigration (No. 2) [1999] 2 WLR 349. The appellant's claim that his execution would violate his constitutional right to life or be, by reason only of the outstanding petition, an inhuman or degrading punishment, were considered and rejected in that case. Only on the issue of legitimate expectation does counsel draw a distinction on the facts. He says that, whereas in Fisher No. 2 the letter to the Commission setting a date for their decision was communicated to the appellant, the government's letters in these cases were not. It could not therefore be said in this case that the government had made its position clear to the appellants. But their Lordships consider that just as the government's undertaking was made public in consequence of Fisher No. 1, so its extent was clarified by the public statement of the government's position in Fisher No. 2, in which the constitutional motion was heard in The Bahamas on 3rd April 1998. No one after the hearing in the latter case could have had a reasonable expectation that the government would wait for more than a reasonable time. And there is no evidential basis for any further expectation, such as that the government would give the appellant notice

of exactly what period it considered to be a reasonable time or that it would exceed 18 months. There are accordingly no relevant factual grounds on which Fisher No. 2 can be distinguished.

7. The effect of Thomas v. Baptiste

20. Counsel submits, however, that Fisher No. 2 ought not to be followed because it is inconsistent with the reasoning in the later decision of the Board in Thomas v. Baptiste [1999] 3 WLR 249. This was a decision on appeal from the Republic of Trinidad and Tobago and its reasoning requires careful study. The Republic, unlike The Bahamas, was a party to the American Convention on Human Rights 1969. On 26th May 1998 it denounced the Convention with effect from 26th May 1999, but the judgment was given on 17th March 1999 and all relevant events took place while the Republic was still a party. In 1997 the government had become concerned that delays in petitions to the Commission and the United Nations Human Rights Committee were preventing executions from taking place within the Pratt five year period. It therefore published Instructions laying down strict timetables for the various steps to be taken by the Commission in dealing with petitions. Thomas and Hilaire were prisoners under sentence of death whose petitions were not dealt with in the relatively short times allowed by the Instructions. Thomas lodged his petition on 31st March 1998 and the Instructions required that the government should have been asked for its response by 1st May 1998. This did not happen. Hilaire lodged his petition on 7th October 1997 and the Instructions required a decision to be given by 11th June 1998. This did not happen either. So in June and July 1998 the warrants were read for the executions of both men. They filed constitutional motions which were dismissed by the courts in Trinidad and came on appeal to the Privy Council.

21. Lord Millett, who gave the judgment of the majority of the Board, said at pages 258-259 that the Instructions were unlawful because they were "disproportionate". It was reasonable for the government to lay down time limits to introduce "an appropriate element of urgency" into the international process but that they "curtailed petitioners' rights further than was necessary". It would have been sufficient to prescribe a period of 18 months for the whole process.

22. Their Lordships note in passing that Lord Millett saw no objection to the imposition of an 18 month time limit on the exercise of the right of petition. That is exactly what the Government of The Bahamas has done in this case.

23. Lord Millett then proceeded to consider how the existence of the Convention might generate rights justiciable in the domestic courts of the Republic. He had drawn attention at the very beginning of his judgment (at p. 255F) to section 4(a) of the Constitution of Trinidad and Tobago, which affirmed the right of the individual to life, liberty, security of the person and the enjoyment of property and the right not to be deprived thereof except by "due process of law". The due process clause, he said at pages 259-260, invoked "the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations". It "gives constitutional protection to the concept of procedural fairness". This included, by analogy with the right to a fair trial, the right to a fair appellate process: "the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action".

24. Lord Millett then dealt with the question of how, consistently with the doctrine that treaties are not part of domestic law, the petition to the Commission should be regarded by the domestic courts of the Republic as a "legal" process. He said at pages 260-261 that the applicants' claim did not infringe the principle that acts under the prerogative cannot change the law:-

> "The right for which [the applicants] contend is not the particular right to petition the commission or even to complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution. The applicants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution."

25. So far, this reasoning still did not explain why, apart from the Republic's treaty obligations, the petition to the Commission should be a "pending appellate or other legal process" when an appeal to Human Rights Watch or Amnesty International would not be. But the answer was given at page 261B in the very next sentence:-

> "By ratifying a treaty which provides for individual access to an international body, the

> government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution."

26. It therefore appears to their Lordships that the ratio decidendi of Thomas v. Baptiste is that the due process clause in section 4(a) of the Trinidad and Tobago Constitution gave the Crown power to accept an international jurisdiction as part of the domestic criminal justice system. It was on this ground that Lord Millett at page 261 distinguished Fisher No. 2:-

> "Their Lordships note that a similar argument was rejected in Fisher v. Minister of Public Safety and Immigration (No. 2) [1999] 2 WLR 349. They observe, however, that the Constitution of The Bahamas which was under consideration in that case does not include a due process clause similar to that contained in section 4(a) of the Constitution of Trinidad and Tobago."

27. The Board in Thomas v. Baptiste did not therefore cast doubt on the correctness of Fisher No. 2. The ground upon which the minority had dissented in that case, namely that execution during the pendency of the petition was a cruel and unusual punishment, was (at p. 262C) summarily rejected. ("The argument has no merit".)

28. Counsel for the appellants say that the distinction which the Board drew between the Constitutions of Trinidad and Tobago and The Bahamas was illogical and wrong. Due process is part of the common law. Lord Millett in fact said at page 261A that it was "accorded by the common law and affirmed by section 4(a)" (emphasis added). There must be an implication in Article 16(1) of the Constitution of The Bahamas that the "execution of the sentence of a court" to which it refers will have been carried out with regard to due process of law. Their Lordships have no difficulty in making this implication of the ordinary common law concept of due process as being in accordance with law and general principles of fairness. But the majority of the Board in Thomas clearly did not regard this common law concept as having the power (absent specific language in the Constitution) to incorporate procedures having an existence only under international law into the domestic criminal justice system. It is not for their Lordships to say whether this was right or wrong. It is impossible, without throwing the law on this subject into a state of total uncertainty, to do otherwise than apply the distinction which the Board has drawn. Fisher No. 2 is a very recent decision of the Board which, as their Lordships have said, is precisely in point. Their Lordships do not think it would be right to re-open it unless they were obliged to do so by precedent or satisfied that it was wrong. Thomas itself makes it clear that it is not a contrary authority and so far from thinking that Fisher No. 2 was wrong, their Lordships are satisfied that it was right.

29. Reference was made to the recent decision of Lewis v. Attorney-General for Jamaica 15th June 1999; Court of Appeal of Jamaica (Supreme Court Civil Appeal No. 7 of 1999) (unreported), which contains an interesting discussion of the relationship between Fisher No. 2 and Thomas v. Baptiste. But since an appeal to the Privy Council in that case is pending, their Lordships think that it would be inappropriate to comment on the judgments.

30. For the sake of completeness, their Lordships note that there are grounds for saying that even if this appeal was from Trinidad and Tobago, the claim that execution before the decision of the Commission was unconstitutional might well fail. First, as already noted, Lord Millett accepted that the government would have had the right to stipulate for an 18 month time limit on the petition process. Secondly, Lord Millett laid stress upon the fact that the applicants' petitions to the Commission complained not only of the carrying out of the sentences (which would have been a matter for the non-justiciable procedures of the advisory committee on the exercise of the power of commutation) but also of the fairness of their trials. He repeated this point in Briggs v. Baptiste (The Times 3rd November 1999). In the present appeals, no complaint is made about the fairness of the trials.

8. Inhuman punishment

31. Their Lordships turn next to the second principal ground for the constitutional motions, namely that the infliction of the death penalty would in the circumstances be an inhuman or degrading punishment, contrary to Article 17(1) of the Constitution. The circumstances relied upon are (1) the length of time which the appellants have been in prison awaiting execution, (2) the length of time they were in custody before conviction and sentence and (3) the conditions in which they have been held and the treatment they have received. Before examining the particular facts relied upon under these three heads, their Lordships must make some general observations about the construction of Article 17(1), which embodies a concept contained, in slightly variant forms of language, in many constitutional instruments since the Bill of Rights 1689 (1 Will. & Mary, sess. 2. c. 2). The original prohibition on "cruel and unusual" punishments was intended, as was the rest of the Act of 1689, to limit the powers of the Crown rather than the legislature. In England, under the doctrine of the sovereignty of Parliament, the Act still has only this function. The mischief against which it was aimed was the

imposition of cruel and degrading treatment by way of addition to the punishment prescribed by common law or statute. Of such practices, the most notorious and obscene were the cruelties and degradations inflicted upon persons condemned to death, both before and after their executions. But, while the 1689 Act took as its benchmark the punishment prescribed by law, the concept soon evolved in other countries into a general prohibition on punishments considered cruel or unusual by the standards of the day, which applied to the legislature as well as the executive. In England the sovereignty of Parliament meant that the prohibition could not, in the last resort, be enforced by the judiciary against the legislature. But the constitution of the United States expressly used the principle to limit the powers of Congress as well as the executive and the constitution of The Bahamas was made in the same mould.

32. In relation to the death sentence which is expressly preserved in Article 16(1) of The Bahamas Constitution, the relevant principle is that lucidly stated in the extract from Montaigne quoted by Lord Steyn in his judgment (dissenting on this point) in Thomas v. Baptiste [1999] 3 WLR 249, 272. If a man has been sentenced to death, it is wrong to add other cruelties to the manner of his death. The prohibition is on the infliction of punishment additional to what Montaigne called "the straightforward death penalty". Thus in Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1 the Board held that execution after excessive delay was an inhuman punishment because it added to the penalty of death the additional torture of a long period of alternating hope and despair. It is not the delay in itself which is a cruel and unusual punishment. As de la Bastide C.J. said in his judgment in the Court of Appeal in Thomas v. Baptiste, "it is the act of hanging the man that is rendered cruel and unusual by the lapse of time". Likewise in his judgment in Thomas when it was before this Board, Lord Millett said (at p. 265E) that the principle would prohibit the infliction of death preceded by torture or flogging (a paradigm example) or detention in solitary confinement.

33. It is however difficult for this principle to apply to treatment, even unlawful treatment, which cannot be regarded as punishment inflicted by way of aggravation of the sentence of death. It was for this reason that the Board in Fisher No. 1 [1998] AC 673, 682 said that only in exceptional (and unspecified) circumstances could pre-trial delay be regarded as something which affected the question of whether it would be inhuman to inflict the death penalty. Pre-trial delay can seldom be regarded as an additional form of punishment. The prisoner charged with murder is detained because he is awaiting trial, in the same way as other prisoners on remand. The detention cannot ordinarily be regarded as an addition to the punishment, aggravating the eventual sentence. It would have taken place even if the prisoner had been acquitted.

34. The same is true of prison conditions. Detention in prison before execution is a necessary part of the death penalty. If additional hardships and privations of the kind mentioned by Lord Millett are inflicted upon prisoners on death row, that may well amount to an aggravation of punishment which would make their subsequent execution inhuman and degrading. It is less easy to regard detention in substantially the same general conditions as other prisoners as something that affects the constitutionality of the execution. As de la Bastide C.J. said in the Thomas judgment to which their Lordships have already referred, "There is not … the same nexus between the abuse complained of and the death sentence as exists between delay in carrying out the death sentence and the actual carrying out of it". This is not to say that the additional cruelties must have been deliberately intended by the prison authorities as additional punishment. That would certainly not have been true of the delays which were held to make the punishment inhuman and degrading in Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1. The question of whether they amount to an aggravation of the punishment of death is an objective one. But there must be

some connection with that punishment which would make the execution itself inhuman and degrading.

35. For this reason the majority of the Board in Thomas held that prison conditions which it described (at p. 265B) as "completely unacceptable in a civilised society" would not render an execution inhuman or degrading, even if they amounted to an infringement of other constitutional rights. The judgment of the Board in that case makes it clear that the fact that the appellants have suffered "inhuman treatment" in prison, contrary to Article 17(1) of the Constitution, will entitle them to a remedy such as was granted by the Supreme Court of Zimbabwe in Conjwayo v. Minister of Justice, Legal and Parliamentary Affairs 1992 (2) S.A. 56 (ordering the prison authorities to allow longer periods for exercise) but not necessarily to commutation of the death sentences. Their Lordships regard their adherence to this ruling as the main difference of principle between themselves and the minority opinions in this case.

36. Their Lordships wish to make it clear that they in no way condone lengthy pre-trial delays or uncivilised prison conditions. They are unacceptable. But they differ sharply from the case of delay in execution because whereas a prisoner cannot be expected to put an end to his uncertainty by demanding his own execution, both pre-trial delay and prison conditions are the subject of other legal remedies. In Fisher No. 1 (at pp. 680-681) Lord Goff of Chieveley drew attention to the remedies open to a prisoner who had been held in custody for an excessive period before trial. He can apply to have the prosecution dismissed as an abuse of process; he may apply under Article 19(3) for an order that unless tried speedily he should be released on bail and he can invoke his constitutional right under Article 20(1) to be tried within a reasonable time. Likewise in the case of prison conditions, the prisoner may apply for injunctive relief. The decision in Conjwayo v. Minister of Justice,

Legal and Parliamentary Affairs 1992 (2) S.A. 56, to which their Lordships have already referred, is a striking example of the grant of such relief to prisoners under sentence of death.

9. The facts

37. Having stated these general principles, their Lordships turn to their application to the facts of these appeals. They will first state the facts relied upon as cumulatively rendering the executions an inhuman punishment.

(a) Post-conviction delay.

38. An unusual feature of Mr. Higgs's case is that he was twice convicted and sentenced to death. He spent six and a half months under sentence of death after his first trial, then just over three months awaiting his second trial and then three more years between sentence and the reading of the death warrant which gave rise to these motions. But on any view, the total falls a long way short of five years. Mr. Mitchell, when the warrant was read to him, had been under sentence of death for four years and eight months.

(b) Pre-trial delay.

39. Mr. Higgs was held in prison for two years and three months before his first trial and another three months between the date on which his appeal was allowed and the second trial. These relatively long periods are explained by the procedural defect in the committal to which their Lordships have already referred and the fact that the first trial was also defective. Mr. Mitchell was held in custody before trial for just over 6 months.

(c) Prison conditions.

40. Mr. Higgs said in an affidavit that while awaiting his trial and retrial, as well as since conviction, he has been "incarcerated on death row together with condemned men awaiting execution". When he swore the affidavit in February 1998 he said that the hour's daily exercise allowed him under the Prison Rules had recently been reduced to half an hour. He also said that in July 1997, after a reading of the death warrant, he was subjected to a "mock execution". He was weighed, measured for a suit for his execution and shown where the execution would be carried out.

41. Mr. Mitchell likewise said that he had been kept on death row during his six months on remand as well as after conviction. He said (in August 1999) that his cell was hot and airless and that he was being allowed only 10 minutes exercise four times a week instead of an hour a day.

42. An affidavit in answer was sworn by the Assistant Superintendent of Fox Hill Prison. He said that there was no place in the prison designated for condemned prisoners ("death row"); they were simply held, whether on remand or after conviction, in the maximum security block, which housed 775 inmates. The only distinction made for prisoners under sentence of death was that they were required to be held in separate cells. The cells, he said, measured six feet by nine and were adjacent to the corridor with grilled doors. Exercise was allowed on four days a week for at least 25-30 minutes each day. This reduction in the time required by the rules was due to the crowded conditions in the prison and lack of sufficient prison officers to supervise exercise.

43. Marques J., hearing the constitutional motion, decided to inspect the prison himself on 30 minutes notice to the Assistant Superintendent. He found that the conditions there did not fall below reasonable standards of decency, having regard to financial and security constraints. He found that the applicants were not held in an area which was solely for condemned prisoners and which could be described as death row, although the room in which executions were carried out was in the same building. He rejected the allegation that Mr. Higgs had been subjected to a "mock execution" and said that he was "not satisfied that either applicant has suffered a deprivation of the entire hour allotted to them by the Prison Rules for exercise". Their Lordships are bound to say that the purport of the last finding is obscure because there was uncontradicted evidence that they had been entirely deprived of exercise on three days a week and that the period had been reduced by at least a half on the other four days.

10. Conclusion

44. Counsel submitted that their Lordships should take a global approach to the question of whether execution had been rendered an inhuman punishment and that although the period for which the appellants had been under sentence of death might not in itself be sufficient, it should be so regarded in conjunction with the pre-trial delay and the conditions under which they had been held. As authority for this approach they relied upon what Lord Goff of Chieveley in Fisher No. 1 (at pp. 681-682) described as "the principle in Guerra's case" (Guerra v. Baptiste [1996] AC 397). That principle was the holding that in a case in which there had been "very substantial" but less than five years post-conviction delay, pre-trial delay "of a serious character" could in principle be taken into account so that "looking at the case in the round", an execution would be inhuman punishment. Likewise in the case of prison conditions, their Lordships were referred to the judgment of the Supreme Court of Zimbabwe in Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General

(1993) 14 H.R.L.J. 323, a case which preceded and was followed in Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1. This was a case in which executions were held unconstitutional on account of delay, but Gubbay C.J. at page 336 also took into account the "demeaning conditions of confinement" of the prisoners. It appears from the statement of facts that condemned prisoners were segregated and subjected to a particularly harsh prison regime.

45. Their Lordships would certainly accept that the question of whether the treatment of the prisoner has been such as to render his execution an inhuman punishment must be looked at in the round, taking into account all matters which would make the totality of his punishment something more than "the straightforward death penalty". But the principle is that the matters to be taken into account must have been an aggravation of the punishment of death. There must be, as de la Bastide C.J. said, a nexus between the matters complained of and the sentence of death. Their Lordships do not say that cruelties inflicted upon condemned prisoners cannot constitute an unlawful aggravation of the death sentence merely because they are also inflicted upon other prisoners. But the establishment of the necessary link is more difficult when the conditions in the prison are a generalised consequence of overcrowding and lack of resources. There appears to their Lordships that there is no such nexus in the present case. The pre-trial delay had no connection with the fact that a sentence of death was eventually imposed. The conditions under which the appellants were held in Fox Hill Prison had no connection (save for their being held in individual cells) with the fact that they were under sentence of death.

46. Their Lordships would say in conclusion that even if the conditions suffered by the appellants had been confined to those on death row, they would not have been inclined to differ from the finding of Marques J. that the they were not

inhuman or degrading treatment and, a fortiori, did not make a subsequent execution inhuman or degrading. This is a question of fact and degree. It has often been said that the Privy Council is not a second court of appeal. Its function is to lay down general principles and to correct substantial miscarriages of justice. Their Lordships think it would create uncertainty and be detrimental to the administration of justice in The Bahamas if this Board were in each case to form its own view on whether local conditions in the prison fell on one side or the other of the imprecise line dividing treatment which is inhuman from that which is not. If one compares the evidence in this case with the conditions in Thomas, vividly described by Lord Steyn in his dissenting judgment at pp. 273-274, which were held not to amount to cruel and unusual punishment or treatment, it seems to their Lordships impossible to say that Marques J. must have erred in principle in making a similar finding in respect of the conditions in this case. The learned judge directed himself correctly on the proper considerations to be applied and his findings should not be disturbed.

47. Their Lordships will therefore humbly advise Her Majesty that these appeals should be dismissed.

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48. Dissenting judgment delivered by **Lord Steyn**

49. The two appellants 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. In fundamental and comprehensive disagreement with all the constituent parts of the reasoning of the majority, I would advise Her Majesty that both appeals should succeed on this primary issue. In these circumstances the appellants' 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) [1999] 2 WLR 349.

Article 17(1) of the Constitution

50. The appellants base their claims that they are entitled to commutation of their sentences on Article 17(1) of the Constitution of The Bahamas. It provides:-

> "No person shall be subjected to torture or to inhuman or degrading treatment or punishment."

51. Not every guarantee in the Constitution is absolute. Sometimes derogation is permitted. But Article 17(1) is unquestionably an absolute guarantee: it imposes irreducible minimum standards. This is clear from the wording of Article 17(1) read against the structure of the Bill of Rights contained in the Constitution. It is hardly surprising. It would have been astonishing if the framers of the Constitution had not adopted an absolute guarantee against torture and inhuman or degrading punishment or treatment. After all, long before 1973 everybody (including transgressor states) condemned torture and inhuman treatment of persons as odious conduct which is never

permissible. When the treatment or punishment passes the threshold of Article 17(1) the guarantee is engaged and effective remedies under the Constitution are available.

52. The genesis of Article 17(1) the Constitution is the ipsissima verba of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 (Cmd. 8969) which is already part of the law of Scotland and will become part of the law of England, Wales and Northern Ireland on 2nd October 2000. What is held in this case about the interpretation of Article 17(1) of the Constitution of The Bahamas is therefore also of importance for the human rights law of the United Kingdom. The European Court of Human Rights has emphasised on numerous occasions that Article 3 of the European Convention prohibits in absolute terms torture or inhuman or degrading treatment of punishment: The Republic of Ireland v. The United Kingdom (1978) 2 E.H.H.R. 25, 79, para. 163 Selcuk and Asker v. Turkey (1998) 26 EHRR 477, 515 at para. 75. The guarantee under Article 3 is a universal minimum standard, the breach of which is protected under the Convention. The only qualification under the Convention system is that in order for the conduct to be covered by the prohibition it must "attain a minimum level of severity". But there is no express or implied derogation in favour of the state: the prohibition is equally applicable during a war or public emergency. The guarantee is subject to no derogation in favour of the state in order to enable it to fight terrorism or violent crime: Tomasi v. France (1992) 15 E.H.R.R. 1, 33, para. 115. Breaches cannot be justified by a lack of resources: see Human Rights Law and Practice, Lester and Pannick, (1999) para. 4.3.1-4.3.8; Jacobs and White, The European Convention on Human Rights, 2nd ed. (1996), p. 49. Similarly, under Article 17(1) of the Bahamian Constitution there is no express or implied derogation in favour of the state. A breach cannot be justified on any grounds. It is an absolute and unqualified constitutional guarantee. These propositions are elementary but

important. They provide a complete answer to the theory hinted at but not articulated at the hearing of the appeals that inhuman treatment of condemned men may be justified by cultural relativism.

53. Article 17(1) is in disjunctive terms. It is not alleged that the appellants were tortured or that, apart from the death sentences, additional punishments were inflicted on them. Much of the reasoning of the majority is concerned with the infliction of "additional punishments" and "additional cruelties". That is not what this case is about. For present purposes the relevant part of Article 17(1) is the free-standing and independent guarantee that no person "shall be subjected to ... inhuman ... treatment". The question is whether the critical words properly construed cover the conditions to which the two condemned men have been subjected in The Bahamas. How such language should be interpreted and applied was explained by Lord Wilberforce in his seminal judgment in Minister of Home Affairs v. Fisher [1980] AC 319. After emphasising the constitutional dimension, Lord Wilberforce observed at page 328F-H:-

> "... the Constitutions of most Caribbean territories, [were] 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."

54. The death sentence is preserved by the Constitution. But Article 17(1) applies to all persons including condemned men. The state is not permitted to inflict inhuman treatment on condemned men beyond the suffering necessarily involved in their imprisonment before the carrying out of the sentence of the court and the execution itself. The guarantee under Article 17(1) forbids the infliction of additional unnecessary suffering. Inhuman treatment may take the form of the causing of physical or mental suffering or both: see The Republic of Ireland v. The United United Kingdom (1978) 2 EHRR 25, 79 para. 167. Unlike torture inhuman treatment under Article 17(1) does not require proof of deliberate causing of very serious or cruel suffering: ibid.

55. Article 17(1) requires a global approach to be adopted to the question whether a condemned man has in fact been inhumanly treated. In judging cases under Article 3 of the European Convention the court considers the actual facts of the case in order to assess whether the impact on the individual of the treatment or punishment was inhuman or degrading. This is illustrated by observations of the court in Soering v. United Kingdom (1989) 11 EHRR 439 where the court held that it would be contrary to Article 3 for a state to extradite a person where there were substantial grounds for believing that the person concerned, if extradited, would face a real risk of being subjected to inhuman or degrading punishment in the requesting country. The applicant faced a possible death sentence in the United States. The court’s decision turned on a combination of the "conditions of detention", viz. the death row phenomenon, and the "personal circumstances" of the

applicant who was 18 years old and somewhat immature. Accepting that the death sentence was a lawful punishment the court observed, at p. 474, para. 104:-

> "The manner in which [the death penalty] is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3."

56. Taking into account the death row phenomenon, and "the personal circumstances of the applicant, especially his age" (see p. 478, para. 111) the court held that the extradition, if implemented, would give rise to a breach of Article 3. A global approach was adopted. Similarly, it follows that Article 17(1) of the Constitution requires the court to take account of the particular circumstances of the treatment of a condemned man. The jurisprudence of the Privy Council is to the same effect. Thus in Guerra v. Baptiste [1996] AC 397 Lord Goff of Chieveley spoke of the Pratt norm applying without "detailed examination of the particular case": at 415H. He plainly contemplated that a focus on the particular facts might dictate a different outcome. The global approach requires the court to examine and consider the actual impact on an individual of the infliction of illegitimate and unnecessary suffering beyond the torment necessarily associated with the death sentence: see Jacobs and White, op. cit., pp. 55-56. If the state superimposes upon the inevitable consequences of the death sentence further unnecessary physical or mental agony and suffering that treatment, if substantial and

prolonged, may be a paradigm of inhuman conduct: see Ireland v. United Kingdom, supra.

Death Row in The Bahamas

57. The basic facts are beyond dispute. In both cases the periods of delay since the imposition of the death sentence fall short of the five year presumptive period mentioned in Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1. In the case of Higgs four years has elapsed from the time that he was first sentenced to death and the reading to him of the death warrant in August this year. It is true that due to the failings of the judge at the first trial his conviction had to be set aside and that until his retrial when he was again convicted and sentenced to death, i.e. period of four months, he was not under sentence of death. But he was exposed to the ordeal of a second imposition of the death sentence. Throughout he remained in a cell reserved for condemned men. In the mind of Higgs the oscillation of the hope and despair about a meeting with the hangman would have been ever present in the intervening few months. It is therefore consistent with the reasoning in Pratt to consider the matter on the basis that the period since he was first sentenced to death was about four years. The argument to the contrary I would reject as a classic example of "the austerity of tabulated legalism".

58. Until the reading to him of the death warrant in August this year Mitchell has been detained for four years and eight months as a prisoner condemned to death. The delay in his case is similar to the period of 4 years and 10 months which led to commutation in Guerra v. Baptiste [1996] AC 397. Given that in Guerra the applicant had escaped and was unlawfully at large for $2^1/_2$ months the relevant period of detention in the present case is longer than in Guerra. Even without calling in aid prison conditions Mitchell has a claim to commutation on the basis of mere delay.

59. The Privy Council has ruled that the five year period is not a rigid yardstick but a norm from which the courts may depart if it is appropriate to do so in the circumstances of a particular case: Guerra v. Baptiste [1996] AC 397; Henfield v. Attorney-General of the Commonwealth of The Bahamas [1997] AC 413. The reason for a departure from the presumptive norm in Pratt is the actual circumstances of the case and in particular the global impact on the condemned man of his treatment on Death Row. Unlike other prisoners condemned men are held in separate cells. In the present case the two condemned men have been detained in small cells, measuring six feet by nine feet, in the Western Block of Fox Hill Prison. The Western Block houses the execution chamber where four executions have been carried out in the last three and a half years. The cells have no windows facing the outside world. Except for the fact the cells have grilled doors adjacent to the corridor, it would be right to call the type of detention solitary confinement. In truth it is virtually solitary confinement. There are toilets in the cells which do not flush. The condemned men are provided with a bucket of water which they use to flush the toilets. This water is also used for washing and drinking. The cells are hot and foul smelling. There is no fresh air. The condemned men are only allowed to shower in the shower facilities during their exercise periods. On the appeal we were shown photographs of typical cells occupied by condemned men. Nobody who has not seen those photographs can truly visualise the horror of it. One is entitled to ask how such conditions can be compatible with the language of the Constitution. But I do not rest my judgment on these circumstances by themselves. It is, however, the essential context of the appellants' main complaint.

60. In principle the law does not end at the gates of Fox Hill Prison. Even condemned men have rights, notably under the Prison Rules and the Constitution. Under the Prison Rules condemned men are entitled to exercise in the

open for a period of one hour per day. For at least the last three years the appellants have only been allowed 25 to 30 minutes exercise on four week days each week. In the result the prison authorities have systematically deprived all condemned men of at least two-thirds of their overall entitlement to exercise. But the position is far worse since from the periods of about half an hour four times a week there must be subtracted time for the condemned men to wash themselves and their clothes. Over the last three years they must have been deprived of about five-sixths of their entitlement to exercise. Moreover, they were locked up in their cramped cells every weekend over the last three years for 72 hours beginning with the last exercise period of the week and ending with the first exercise period of the following week. By the decision of the prison authorities the rights of condemned men to exercise over weekends have unlawfully and permanently been cancelled.

61. The first question is whether this massive infraction of the rights of condemned men to exercise, together with the complete withdrawal of such rights over weekends, over several years, amounts to inhuman treatment. Unaided by authority I would have taken the view in the context of the appalling conditions of incarceration on Death Row in The Bahamas that the question admits of only one answer. The denial of such basic rights must have contributed greatly to the suffering of the condemned men. I would therefore hold that the conduct of the prison authorities amounted to inhuman treatment of the condemned men. If any support for this proposition is needed it is to be found in an important judgment cited on behalf of the appellants. In Conjwayo v. Minster of Justice, Legal and Parliamentary Affairs 1992 (2) S.A. 56 the Supreme Court of Zimbabwe had to consider a complaint by a condemned man about inhuman treatment contrary to a constitutional guarantee against inhuman treatment. The applicant sought declaratory relief. The Chief Justice posed the question as follows [63A-C]:-

> "... the critical issue to be resolved is whether the confinement of the applicant, in a small single cell, for a minimum of 23½ hours every weekd
>
> ay and 24 hours on Saturdays, Sundays and public holidays (except for half an hour each day in which he is allowed out of his cell to attend to his ablutions), without access to natural light and fresh air, and with only a limited ability to exercise his body, infringes his fundamental right under s 15(1) of the Constitution not to be subjected to inhuman treatment."

62. In giving the unanimous and brave judgment of the court Gubbay C.J. observed [64A-B]:-

> "I entertain no doubt that to confine a human being in a small cell over weekends for 47 hours (with the two daily half-hour periods out of the cell but within the condemned section itself and not in the open air), and for a much longer period where a public holiday falls on a day immediately preceding or subsequent to a weekend, is plainly offensive to one's notion of humanity and decency. It transgresses the boundaries of civilised standards and involves the infliction of unnecessary suffering."

63. The Chief Justice trenchantly observed that "to deprive the applicant of access to fresh air, sunlight and the ability to exercise properly for a period of 23½ hours per day, by holding him in a confined space, is virtually to treat him as non-human": at 65G. The Chief Justice described at page 656 it as "repugnant to the attitude of contemporary society". Appropriate declaratory relief was granted: at 66B-C. The court rejected an explanation about staffing problems. And, so far as anybody might think it to be relevant, I would draw attention to the fact that Zimbabwe is a far less prosperous country than The Bahamas. Before I leave the Conjwayo case, I would point out that in Pratt the Privy Council paid tribute to the subsequent but related decision of the Supreme Court of Zimbabwe in Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General 14 H.R.L.J. 323: see Pratt, at 30D. The judgment in Conjwayo supports the view that the condemned men have been subjected to inhuman treatment over a period of years.

Does it matter that the condemned men have been inhumanly treated?

64. The second question is whether it matters on the constitutional motions seeking commutation of the death sentences that the condemned men have systematically been subjected to inhuman treatment. In respect of this question the majority in the present case have placed emphasis on the judgment of the Privy Council in Thomas v. Baptiste [1999] 3 WLR 249, a case from Trinidad. It is true that the prison conditions in which the condemned men in Thomas were held were very bad. But in the present cases the periods during which the men were deprived of meaningful exercise are substantially longer. In Thomas the Chief Justice described the conditions as "unacceptable in a civilised society". In the majority judgment of the Privy Council Lord Millett at page 265B also described the conditions as "appalling" and "unacceptable in a civilised

society". The following passage in Lord Millett's judgment has been emphasised [at 265C-F]:-

> "Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the applicants' constitutional rights, commutation of the sentence would not be the appropriate remedy. ...
>
> It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: 'Enough is enough'. A state which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present cases fall a long way short of this." (my emphasis)

65. The status of this observation is obscure. It was not made with the express approval of three members of the Board. That is perfectly clear from my dissenting judgment about the prison conditions: 272 et seq. The minority (Lord Goff of Chieveley and Lord Hobhouse of Woodborough) contented themselves with the conclusionary statement at page 267A that the carrying out of the death sentences would not be unconstitutional by reason of the conditions in which the applicants have been held or their treatment in custody. In any event Thomas v. Baptiste was concerned with a different jurisdiction and was based on a differently worded constitutional guarantee viz. one directed against cruel and unusual treatment or punishment. In Thomas the

important decision in Conjwayo was not cited. Moreover, the terse and narrow observations of Lord Millett could not have been intended to be exhaustive. Indeed, Sir Godfray Le Quesne Q.C. expressly accepted that if condemned men are totally deprived of exercise such a case would have to be added to Lord Millett's list. Sir Godfray Le Quesne further accepted, as he was bound to do, that matters of degree are involved. If that is so, I ask why is it not enough that for three years these men were locked up for 72 hours every weekend week after week without any opportunity to exercise whatever? Is it not obvious that the State has by unlawful conduct immeasurably increased the suffering of the condemned men? I would adopt the reasoning in Conjwayo. The very basis of the decision in the Privy Council in Pratt was stated by Lord Griffiths to be our humanity at 29G; see also Henfield at 420G. Moreover, in Pratt (at 30D) the Privy Council followed the decision in Catholic Commission for Justice and Peace in Zimbabwe 14 H.R.L.J. 323, a case where the Supreme Court of Zimbabwe commuted death sentences after delays in execution ranging between 52 months and 72 months. Gubbay C.J. relied on the harsh conditions of detention which he spelt out.

66. The Privy Council has held that "a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal": Pratt, supra, at 33. Similarly, it follows that if a state wishes to retain capital punishment it must accept responsibility for ensuring that condemned men are incarcerated in conditions which satisfy a minimum standard of decency. That is how I must approach the present case. In my view the conditions in which the appellants were held for the last three years on Death Row are an affront to the most elementary standards of decency. The Commonwealth of the Bahamas have over a prolonged period treated the appellants as sub-human. And, in Lord Millett's words,

enough is enough. The state has forfeited the right to carry out the death sentences.

67. It is no answer to cite the conditions in which other prisoners are held. Unlike other prisoners condemned men are held in what is virtually solitary confinement. For them exercise is the only remission in the wait for execution: it helps a little to make their fate more bearable. In any event, if it be the case that other prisoners are denied such rights, a matter not investigated at trial, that cannot possibly justify in law the treatment of the condemned men. The majority categorise the case as resulting from "a generalised consequence of overcrowding and lack of resources". This is the theory of cultural relativism: "it would not be tolerated here, but we must make allowance for conditions there". It has no place in the construction and application of Article 17(1) which legislates for irreducible minimum standards. It is wholly incompatible with the absolute nature of the relevant guarantee. Moreover, and as an aside, I observe that it is a curious application of that theory: The Bahamas is a rich and prosperous state.

68. The majority observe that in respect of prison conditions condemned men "may apply for injunctive relief". In The Bahamas condemned men have no access to justice for this purpose. It was common ground that under the law of The Bahamas legal aid is not available for constitutional motions or judicial review. In practice condemned men in The Bahamas have no means of applying to the courts for declaratory relief in respect of their conditions of incarceration on Death Row. Notwithstanding the legal rights of condemned men under the Constitution and the Prison Rules the prison authorities are effectively able to override their rights in whatever manner they choose. The rule of law has been banished from Death Row. The effect of the decision of the majority is to entrench by a judgment of a court sitting in London

the barbarous regime on Death Row which I have described.

The decisions of Marques J and the Court of Appeal

69. The lower courts dealt with the issues in a perfunctory fashion. At first instance Marques J. after an inspection of the prison, found that the conditions did not fall below reasonable standards of decency, having regard to financial and security constraints. In the latter observation he fell into error on fact and law. It was common ground on the appeal before the Privy Council that there was no relevant security aspect. And, in invoking financial constraints, he failed to appreciate that he was dealing with an absolute guarantee. Marques J. concluded "I am not satisfied that either applicant has suffered a deprivation of the entire hour allotted to them by the Prison Rules for exercise". The majority describe the meaning of this observation as "obscure". I agree. The judge failed to consider the substance of the case before him. Nevertheless, the majority conclude (in time honoured words sometimes more appropriately employed) that "The judge directed himself correctly on the proper considerations to be applied and [that] his findings should not be disturbed". This conclusion pushes to its outer limits the policy of deference by appellate courts to decisions of trial courts. In any event, on appeal in The Bahamas, there was an opportunity to consider the matter afresh and in depth. The Court of Appeal disposed of the matter in one sentence as follows:-

> "Counsel for the appellants did not pursue the ground of appeal which, in the teeth of the trial judge's unsupportive findings of fact, sought to make an Article 17(1) case of inhuman or degrading treatment or punishment out of alleged unbearable prison conditions."

70. This latter observation was made in error. The evidence about prison conditions was before the Court of Appeal and the ground of appeal was set out in a skeleton argument. When counsel wished to develop the point he was stopped and told that the point was in the skeleton argument. The Court of Appeal failed to examine and consider the substance of the complaint. The manner in which the lower courts disposed of the questions arising on constitutional motions did not in my view match the gravity of the issues of life or death. There were serious miscarriages of justice in the disposal of the constitutional motions at trial and appellate level in The Bahamas.

Conclusions

71. For these reasons I have come to the conclusion that the appellants' claims to commutation of their sentences are well founded. This conclusion is cogently reinforced by the further considerations set out in the judgment of Lord Cooke of Thorndon. The four weekly exercise periods of both appellants were reduced from one hour to half an hour three years ago. Even before that reduction the conditions were appalling and entailed both men being locked up without any exercise whatever every weekend for 72 hours. In the case of Higgs those conditions have now prevailed for the last five years. In the case of Mitchell he has been subjected to those conditions for the last six years. Moreover, also for the reasons given by Lord Cooke of Thorndon, I am satisfied that various systemic faults which he has described have greatly contributed to the torment of the condemned men. The appellants have committed grave crimes but they are entitled to effective redress under the constitutional guarantee contained in article 17(1). The only available remedy is to commute their sentences.

72. For all these reasons, I would advise Her Majesty that the death sentences of both appellants should be commuted and sentences of life imprisonment substituted.

Postscript

73. The Privy Council regularly hears petitions and appeals in criminal cases from Caribbean countries, notably in cases where the death sentence was imposed. The stark fact is that often the cases have been inadequately investigated by prosecution and defence alike and sometimes the quality of the representation of the defendants in the Caribbean courts leaves much to be desired. Occasionally serious questions arise about the fairness of the trial. There are also substantial issues about the treatment of men held on Death Row. In almost all such cases the Privy Council is crucially dependent on the services of firms of solicitors, organised in a group called The London Panel, as well as on a number of barristers, leading counsel and juniors, who act for applicants and appellants from the Caribbean. These lawyers investigate, research and prepare the cases. Often the issues are complex. The service rendered by these lawyers to the Privy Council, and to the cause of justice, is invaluable. Indeed without it the petitions and appeals from Caribbean countries could not be considered properly. The quality of the preparation of the cases of Higgs and Mitchell, and the arguments on their behalf, are but one example of this superb service. But I would wish to place on record my appreciation of the work done generally by this large band of selfless lawyers. Their work is in the finest tradition of an honourable profession.

Dissenting judgment delivered by **Lord Cooke of Thorndon**

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74. Self-evidently every human being has a natural right not to be subjected to inhuman treatment. A right inherent in the concept of civilisation, it is recognised rather than created by international human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the Constitution of The Bahamas it is to be found in article 17(l). A duty of governments and courts in every civilised state must be to exercise vigilance to guard against violation of this fundamental right. Whenever violation is in issue a court will not fulfil its function without a careful examination of the facts of each individual case and a global assessment of the treatment in question. Commonly decisions in this field are findings of fact and degree, not expositions of law. If more than the assessment is open, the choice made is not one of law or legal principle but one of evaluation. Although it may properly have some influence on a later court faced with somewhat similar facts and anxious to achieve consistency of results, it cannot be a binding precedent. To subscribe to a contrary doctrine of precedent would to be insist on "the austerity of tabulated legalism". If I venture to state these considerations dogmatically, it is only because they seem dictated by the very idea of civilisation.

75. It is because of these considerations, and because the present appellants have been kept for many years in "appalling conditions ... completely unacceptable in a civilised society", that I would join with Lord Steyn in humbly advising Her Majesty to allow these appeals and commute the sentences of the appellants to life imprisonment.

76. The appellant Higgs has now been incarcerated since 19th July 1993 in conditions evidently materially unchanged except that for about the last three years his

opportunities for exercise, previously sub-standard, have been restricted even more. The appellant Mitchell has suffered similarly since 9th May 1994. In the leading case of Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1 egregious delays after the pronouncement of the death sentence were alone enough to justify commutation. It was unnecessary for their Lordships' Board to consider the starting date that should be taken into account when the inhuman treatment consists of a threat to execute a prisoner following a long period of imprisonment in inhuman conditions. In such cases I think that the whole period falls to be considered in accordance with the global approach of the European Court of Human Rights in Soering v. United Kingdom (1989) 11 EHRR 439.

77. For periods of more than six and more than five years respectively these prisoners have spent virtually the whole of their lives in cells measuring six by eight or nine feet, with no window opening to the air and only grilles through which they can see a corridor and call out to fellow prisoners. Lord Steyn has explained the other conditions and the grossly inadequate opportunities for exercise. Each appellant has had the death warrant read to him. Higgs has been weighed for execution and measured for the suit he is to wear then. The execution chamber is in the same building and he has been shown it; no explanation has been offered by the respondents of the reason for the latter procedure. Executions of fellow prisoners have been carried out during this period. In one instance it is understood by the appellants that the executed man was by mischance decapitated. Again the respondents have offered no comment or explanation.

78. The unacceptable treatment has been prolonged and aggravated by systemic failures. Higgs underwent two sets of committal proceedings because on the first occasion the presiding magistrate did not comply with the then requirement to certify the notes of evidence, with the result

that the committal was quashed by the Supreme Court. Approximately a year was consumed in this way (first committal 26th November 1993; second committal 14th November 1994). Then Higgs was tried twice, the first conviction being quashed by the Court of Appeal because the trial judge had intervened excessively during the trial. Another year was added by this unacceptable judicial conduct (first conviction August 1995; second conviction 6th August 1996). And in the cases of both men no notification was given to them or their legal advisers that the Government of The Bahamas had purported to impose a time limit of 18 months on the proceedings of the Inter-American Commission on Human Rights. That was due to no fault of the Government, and it is understandable that the Government may have felt exasperation at the slowness of the Commission. But likewise it was due to no fault on the part of the petitioning prisoners; and effectively they lost the opportunity of urging the Commission to make favourable recommendations in time. One cannot other than cynically dismiss the lost opportunity as of negligible value.

79. At present in The Bahamas the death sentence is not unconstitutional in itself. Considered alone, it has still to be seen as not inhuman punishment. But a sentence of five years very harsh confinement to be followed by execution would manifestly have to be condemned as inhuman. From the point of view of the suffering inflicted on the prisoner there is little, if any, substantial difference between that and the present cases. Whether or not the prison condition are themselves described as punishment is essentially an academic question. Of course, they are not officially imposed as punishment, but the effect is the same. And there would be as much a nexus of continued inhumanity in then carrying out executions as in a case when the gross length of detention alone was enough to make subsequent execution inhuman. How does it come about that such a state of affairs can be tolerated by a court?

80. Probably there are several contributing causes. One cause may be awareness by judges of certain public attitudes. Most people would find a day spent in the conditions which these men have endured distressing and degrading. As days lengthen into weeks, months and years, survival could probably be attributed only to extraordinary fortitude or a debasement of human personality and sensitivity. Yet it is not uncommon for persons invited to consider whether such treatment is acceptable for others to remark that after all they are murderers. In human rights law it is of course elementary that the gravity of a prisoner's crime does not put him or her beyond the pale of entitlement to civilised treatment. Possibly, while no judge would articulate any contradictory premise, there can be at least subconscious influences in that direction.

81. Another factor may be that in some jurisdictions the very prevalence of inhuman prison conditions may tend to induce their acceptance as a norm. Closely connected with this is the effect of apparent tolerance by ultimate appellate courts. In the course of his characteristically clear and firm argument for the respondents, Sir Godfray Le Quesne Q.C. made a deeply disturbing point. It was in the context of a reference to Thomas v. Baptiste [1999] 3 WLR 249, where the majority of the Judicial Committee, after staying the execution of the appellants while proceedings before the Inter-American Commission on Human Rights and possibly the Inter-American Court of Human Rights were pending, made observations about what amounts to "cruel and unusual treatment or punishment" within the meaning of the Constitution of Trinidad and Tobago. They said:-

> "Their Lordships do not wish to seem to minimise the appalling conditions which the appellants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society. But their Lordships would be slow to depart from the careful

assessment of the Court of
Appeal that they did not amount
to cruel and unusual treatment."

82. Sir Godfray Le Quesne's point was that executive authorities in Caribbean countries take careful note of cases where the Privy Council, even if voicing criticisms, is unwilling to interfere with local assessments. It was a plea that governments are entitled to know where they stand. Non-interference may all too readily be construed as condonation. It may tend to perpetuate appalling conditions. I have already said something about precedent in this field and would now add only that humanity might be thought to be more important than consistency.

83. In the Supreme Court in the present cases the judge adopted the opinion of another judge in another case that the prison conditions could not be described as below the "evolving standards of decency that are the hallmark of maturing society" having regard to security and financial constraints. It is difficult, however, to see how security could be a factor in the years of confinement in these conditions; and I did not understand the argument for the respondents to suggest that it was a factor. As for financial constraints, if ever the poverty of a country might arguably excuse such treatment this could hardly be so in The Bahamas, "one of the most prosperous of the Caribbean and Latin American nations" (South America, Central America and the Caribbean, Europa Publications Limited, London, 7th edition, 1999, 83). From the way in which the prison conditions were dismissed in the courts below, the likely fate of an application for injunctive relief (if one could have been mounted in the absence of legal aid) is perhaps not hard to predict.

84. Majorities and responses to broadly similar factual situations vary in the Judicial Committee as in other appellate courts. There are now no small number of members of the Privy Council who, over the years and not always in majority judgments, have taken a view of what humanity requires in capital punishment cases with the spirit of which I hope that my opinion conforms. It is the same spirit as has motivated the members of the bar and the solicitors mentioned by Lord Steyn in his postscript. It has been exemplified in the judgments of Gubbay C.J, and his colleagues in Zimbabwe. It has led to findings by the United Nations Human Rights Committee of breaches of articles 7 and 10 of the International Covenant on Civil and Political Rights, with recommended remedies including in some cases commutation of death sentences: see a series of cases reported respectively in (1998/9) 12 INTERIGHTS Bulletin 138, 144, 151, 158, namely Leslie v. Jamaica (Communication No. 564/1993, Views of the UNHRC, 31st July 1998); Finn v. Jamaica (Communication No. 617/1995, Views of UNHRC, 31st July 1998); Whyte v. Jamaica (Communication No.732/1997, Views of UNHRC, 27th July 1998;

Perkins v. Jamaica (Communication No. 733/1997, Views of UNHRC, 30th July 1998). Ultimately it will prevail. Perhaps even in these two cases, although represented by a minority view, it may yet have some persuasive influence with the executive or its advisers in The Bahamas.