Fisher v. The Minister of Public Safety and Immigration and Others (Bahamas) [1997] UKPC 1 (16th December, 1997)

Privy Council Appeal No. 53 of 1997

Trevor Nathaniel Pennerman Fisher *Appellant*

v.

(1) The Minister of Public Safety and Immigration

(2) the Superintendent of Prisons and

(3) The Attorney General *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 16th December 1997

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Present at the hearing:-

Lord Goff of Chieveley

Lord Steyn

Lord Hoffmann

Lord Hutton

Mr. Justice Gault

*[Majority Judgment Delivered by **Lord Goff of Chieveley**]*

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1. There is before their Lordships an appeal by the appellant, Trevor Nathaniel Pennerman Fisher, from a decision by the Court of Appeal of the Bahamas dated 24th January 1997 in which the Court of Appeal dismissed the appellant's appeal from the decision of Osadebay J. on 30th September 1996 dismissing his motion for constitutional relief on the principle established in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1. The central question in the appeal before their Lordships is whether and, if so, to what extent time spent by the appellant in detention before his trial falls to be taken into account for the purposes of the application of that principle.

2. Their Lordships propose first to set out a chronology of the relevant events leading up to the conviction and sentence of the appellant for murder. Durventon Daniels was

3. Their Lordships propose first to set out a chronology of the relevant events leading up to the conviction and sentence of the appellant for murder. Durventon Daniels was murdered on 16th September 1990. On 4th October 1990 the appellant was arrested for that murder, and also for an attempted murder in a separate incident on 1st October 1990. On 8th October 1990 he was charged with both offences, two other men (Tyrone Thurston and Daze Louis) also being charged with the murder; and on the same day the appellant pleaded guilty to possession of a firearm and ammunition, concurrent sentences of 2 years' and 1 year's imprisonment being then imposed. On 30th July 1991 he was committed to stand trial separately for the murder and the attempted murder. He was arraigned on 1st July 1992 for the murder, and on 7th October 1992 for the attempted murder. On 3rd November 1992 he was convicted of the attempted murder, and also of armed robbery and possession of a firearm. For these offences he was sentenced to concurrent terms of imprisonment of 15 years, 15 years and 3 years respectively. On 13th January 1994 his appeal from these convictions was dismissed. On 21st March 1994 he stood trial with Daze Louis for the murder of Durventon Daniels, the charge against Tyrone Thurston having been withdrawn before the trial. Following a submission at the close of the prosecution case, Louis was acquitted on the direction of the judge. The trial of the appellant continued, and on 25th March 1994 he was convicted of murder and sentenced to death.

4. The appellant's appeal against his conviction for murder was dismissed by the Court of Appeal on 10th October 1994. On 17th May 1995 he gave notice of his intention to petition the Privy Council for leave to appeal as a poor person. The

petition was lodged on 10th February 1996 and heard on 23rd May 1996 when the Judicial Committee directed that it be dismissed, the Order in Council following on 23rd June 1996. On 5th September 1996 a warrant was read for the execution of the appellant on 12th September 1996.

5. On 10th September 1996 the appellant filed an originating motion seeking constitutional relief, and a stay of execution was granted. The notice of motion came before Osadebay J., who dismissed it on 30th September 1996, and as already recorded the Court of Appeal dismissed an appeal from that decision on 24th January 1997. It is from that decision that the appellant now appeals to their Lordships.

The relevant provisions of the Constitution.

"17.-(1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.

...

19.-(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases -

...

(c) for the purpose of bringing him before a court in execution of the order of a court;

(d) upon reasonable suspicion of his having committed, or of being about to commit, a criminal offence;

...

(3) Any person who is arrested or detained in such a case as is mentioned in sub-paragraph (1)(c) or (d) of this Article and who is not released shall be brought without undue delay before a court; and if any person arrested or detained in such a case as is mentioned in the said sub-paragraph (1)(d) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

...

20.-(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

...

28.-(1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction - (a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to in pursuance of paragraph (3) of this Article, 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 the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

The constitutional proceedings.

6. Before Osadebay J., a number of points were taken on behalf of the appellant. These included submissions that (1) it would be unlawful now to execute the appellant, because he had been subjected to inhuman treatment having regard to the conditions in which he had been detained pending execution; (2) the mandatory death sentence in the Bahamas was unconstitutional; (3) the decision to issue the death warrant in respect of the appellant was unlawful, since it was in breach of his legitimate expectation that no such decision would be taken without regard to a petition by him to the Inter-American Commission on Human Rights; and (4) the failure of the Court of Appeal to give reasons for dismissing the appellant's appeal against conviction was unfair and in breach of Articles 19 and/or 20 of the Constitution. As to (1) Osadebay J., having heard the evidence and visited the prison, rejected the complaint on the facts; as to (2), he held that the point had been conclusively decided by the Privy Council adversely to the appellant in the cases of *Jones v. Attorney-General of the Commonwealth of The Bahamas* [1995] 1 W.L.R. 891 and *Reckley v. Minister of Public Safety and Immigration* [1995] 2 A.C. 491, and on this point his decision was upheld by the Court of Appeal; as to (3) he held that

consideration of any representations from the Commission was a matter for the responsible Minister and the Advisory Committee, and not for the courts; and as to (4), the Court of Appeal's decision had in any event been overtaken by the decision of the Privy Council to dismiss the appellant's petition for leave to appeal.

7. The main issue raised by the appellant before Osadebay J. related however to the period of 3 years and 5 months during which the appellant was detained in prison before trial. As to that, it was submitted that, in breach of Article 20(1) of the Constitution, the appellant had not been accorded a fair trial within a reasonable period, and that in considering whether the delay rendered his execution inhuman punishment contrary to Article 17(1) of the Constitution, this period of pre-trial delay should be taken into account in addition to the delay of 2 years and 6 months which occurred between the date of his conviction and sentence and the date when he was due to be executed. As to this submission, Osadebay J. held that any complaint by the appellant in respect of pre-trial delay should have been taken by a motion to stay the indictment, and his failure to do so rendered the issue res judicata, so that it was not open to him to pursue the point by way of an application for relief under the Constitution. He further held that, for the purposes of the principle in *Pratt* [1994] 2 A.C. 1, the relevant delay was that which passed between sentence and the date on which execution was to take place, and that period (two years and six months) fell well short of the necessary period established by the authorities (which was then five years). The Court of Appeal upheld the decision of Osadebay J. on this point. They concluded that the decision in *Pratt*was intended to prevent the death row phenomenon, and so did not apply to a prisoner who had not yet been sentenced to death. No part of the period of pre-sentence delay could therefore be relied on in order to establish that execution would be inhuman punishment under Article 17(1) of the Constitution, on the *Pratt* principle. It is from that decision that the appellant now appeals to their Lordships' Board.

The principle in *Pratt*.

8. The principle established in the case of *Pratt* has been the subject of further consideration by the Privy Council in later cases, notably *Guerra* [1996] 1 A.C. 397, and *Henfield* [1997] A.C. 413. It is founded on the constitutional principle, which in the Bahamas is enshrined in Article 17(1) of the Constitution, that no person shall be subjected to torture or to inhuman or degrading treatment or punishment. As was pointed out in *Henfield* at page 420A-B, the essential question in *Pratt* was whether the execution of a man following long delay after his sentence to death can amount to inhuman punishment contrary to Article 17(1). The Privy Council held that such delay is capable of having that effect. This is because:-

9. "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time." See [1994] 2 A.C. 1, 29.

10. There are other passages in the judgment in *Pratt* which likewise make it clear that it is the inhumanity of keeping a man facing the agony of execution over a long period of time which renders his subsequent execution unlawful.

11. It follows that, as is clear from the authorities, the period of delay which falls to be taken into account when considering whether the constitutional right under Article 17(1) has been infringed in this way is the period beginning with sentence of death. In *Henfield* it was said by the Board at page 421B-C:-

"In considering the effect of such delay, attention 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."

12. In that case it was however decided that in the Bahamas, having regard to the fact that the Government has not become a signatory of the International Covenant on Human Rights and the Optional Protocol, the relevant period is not five years but three and a half years. It was on this basis that the matter was considered by the Court of Appeal in the present case, and on which it has been accepted that this appeal to the Board falls to be decided. This is however a matter to which their Lordships will have to revert at the end of this judgment.

13. It was the primary submission of Sir Godfray Le Quesne Q.C., on behalf of the respondents, that it is not appropriate to bring into account pre-trial delay for the purposes of considering whether execution has been rendered inhuman on the principle in *Pratt*. As a general principle, their Lordships accept this submission. It is, their Lordships consider, clear from the authorities, not only that the question of the impact of pre-trial delay was not considered in the previous cases, but that the principle was so stated as to relate exclusively to the period following sentence of death during which time the convicted man is facing the agony of execution. It follows that simply to extend the relevant period to take into account time awaiting trial, in addition to the period awaiting execution, would not merely be an extension of

the*Pratt* principle, but would involve the application of that principle to circumstances in which it is, as formulated, not applicable.

14. This conclusion is reinforced by other considerations. First of all, since the state of mind of the person in question during this earlier period is not the agony of mind of a man facing execution, but what was described by Powell J. in *Barker v. Wingo* (1972) 407 U.S. 514, 532, as the "anxiety and concern of the accused", it by no means follows that the two periods of delay should be treated in the same way. Next the period of five years, or for present purposes in the Bahamas three and a half years, which has been chosen as a norm, has been so chosen with reference to the appellate processes which may be invoked after conviction. It does not reflect in any way the state of affairs before trial. Third, as was well illustrated by a submission by Mr. Davies on behalf of the appellant before their Lordships, the degree of anxiety and concern felt by an accused man before his trial is likely to be affected by his prospects, as seen by him, of an acquittal by the jury. It was Mr. Davies' submission that the evidence against the appellant at his trial for murder was so strong that his anxiety could be equated, or at least compared, with the agony of mind of a man facing execution. The difficulty with this submission is, however, that cases where a convicted man is facing the actual prospect of execution have been placed in a special category, and are differentiated from cases where men are facing no such prospect but only the possibility of conviction with a very wide variation in the degree of hope of an acquittal.

15. For all these reasons, their Lordships can see no basis for simply extending the *Pratt* principle to take into account delay which has occurred before trial. This would involve consideration of two different types of period - part of the period awaiting trial and the whole period from sentence to the date fixed for execution; and, quite apart from the fundamental objection that the state of mind of the man in question is different during the two periods, it is difficult see on what basis a norm could be established which would accommodate both these periods. In truth, as the Court of Appeal recognised, the principle in *Pratt*was established in response to the fact that, in some Caribbean countries, men sentenced to death were being held on Death Row for wholly unacceptable periods of time, and was specifically fashioned to meet that problem. It does not admit to being extended, in the manner contended for on behalf of the appellant, to address the wholly different problem of pre-trial delay.

<u>The respondent's alternative submission.</u>

16. Sir Godfray Le Quesne advanced an alternative submission in answer to the appellant's claim that pre-trial delay should be taken into account for the purposes of

the principle in *Pratt*. This was founded on the fact that separate provision for delay before trial is made in Articles 19(3) and 20(1) of the Constitution, the terms of which are set out earlier in this judgment, and that the common law itself provides a remedy for such delay. On this basis, Sir Godfray advanced the following twofold submission:-

(1) It cannot have been the intention of the Constitution that such a person could ignore these procedures and then, after conviction, claim that his punishment would be unconstitutional under Article 17(1) by reason of his imprisonment awaiting trial.

(2) If the appellant is being held in custody awaiting trial for an unreasonable time, the Supreme Court has power at common law to fix a date for the trial and, if the court does not then proceed, to dismiss the charge for want of prosecution (see *Bell v. D.P.P.* [1985] 1 A.C. 937, 950-1). This constitutes "adequate means of redress" for the purposes of the proviso to Article 28(2), thereby excluding constitutional relief under Article 28.

17. This twofold submission reflects the fact that provision is made, in the law of the Bahamas, for the protection of those awaiting trial whose trial is delayed for a long period of time. First, there is the protection of the common law, under which the accused can apply to the judge to dismiss the charge for want of prosecution on the ground that for the trial to proceed after so long a delay would amount to an abuse of process of the court: see *D.P.P. v. Tokai* [1996] A.C. 856. Second, there is the constitutional protection provided in Article 19(3) of the Constitution, under which a person who is detained upon reasonable suspicion of his having committed a criminal offence is entitled, if he is not tried within a reasonable time, to be released either unconditionally or upon reasonable conditions. Third, there is the constitutional protection provided in Article 20(1) of the Constitution, under which a person charged with a criminal offence must be tried within a reasonable time. The first and third of these provisions provide protection which specifically addresses the problem of pre-trial delay; and the third is broader than the first in that, to invoke it, it is unnecessary for the accused man to point to any specific prejudice resulting from the delay (see *Bell v. D.P.P.* [1985] 1 A.C. 937, 951). The second limb of Sir Godfray's submission, in which he invoked the proviso to Article 28(2), presupposes that it was open to the appellant to exercise his common law right to apply to the judge to have the charge dismissed for want of prosecution. That may well be right; but since it is not clear, on the facts of the case before their Lordships, that the appellant could point to specific prejudice resulting from the delay, their Lordships prefer to concentrate on the first limb of Sir Godfray's submission.

18. It is apparent that, under the Constitution, pre-trial and post-conviction delay enable the accused or convicted man to invoke rights of a different nature. Pre-trial

delay may, under the Constitution, enable the accused man to attack the trial process itself; and his attack, if successful, can have the effect that he will not be convicted of the charge. Post-conviction delay is not, however, concerned with the validity of the trial process. It presupposes the existence of a valid conviction, and the attack of the convicted man is directed to the punishment to which he has been sentenced following that conviction. It is on this basis that a man who has been sentenced to death may contend, on the principle in *Pratt*, that delay which has elapsed since his conviction and sentence may render the execution of that sentence inhuman punishment contrary to section 17(1) of the Constitution. It follows that a man who relies upon pre-trial delay should direct his complaint to the trial process, his purpose being to prevent his conviction; whereas, in a death sentence case, a man who relies on post-conviction delay should direct his complaint to the inhumanity of carrying out his punishment after the delay which has occurred since his conviction. In the opinion of their Lordships, this analysis supports the conclusion that the principle in*Pratt* is concerned with post-conviction delay, and that it is not permissible for the purposes of invoking that principle simply to add pre-trial delay to the post-conviction delay. It follows that their Lordships accept the first of Sir Godfray's alternative submissions.

The principle in *Guerra*.

19. There is however another possible approach to the problem, viz. taking pre-trial delay into account on the principle established in *Guerra* [1996] 1 A.C. 397. It will be remembered that, in that case, it was recognised that the five year period applicable in Trinidad and Tobago was not to be regarded as "a fixed period applicable in all cases, but rather as a norm which may be departed from if the circumstances of the case so require": see *Henfield* [1997] A.C. 413, 421. In the case of *Guerra*, the delay which followed his conviction was 4 years and 10 months, just 2 months less than the five year period, the principal cause of the delay being the fact that the notes of the evidence at his trial were not available for an appeal until over 4 years after the conclusion of the trial. The Privy Council, taking into account the serious delay which had occurred and the cause of that delay, and the fact that, as a result, the overall lapse of time since sentence was close to the five year period, held that execution in such circumstances would constitute inhuman punishment, notwithstanding that the five year period had not yet elapsed. The question arises whether in a case where there had, as in *Guerra*, been very substantial post-conviction delay, pre-trial delay of a serious character could properly be brought into consideration to enable the court to hold that, looking at the case in the round, it would be inhuman punishment thereafter to execute the man in question, notwithstanding that the relevant period of post-conviction delay (there five years) had not expired.

20. Sir Godfray Le Quesne submitted to their Lordships that the principle in *Guerra* was only concerned with events which occurred after conviction and

sentence. Their Lordships see the logical force of this submission, but they do not feel able to accept it. In *Henfield* (at page 421), it was stated that the five year period applicable in that case was to be regarded as a norm which may be departed from "if the circumstances of the case so require". Their Lordships are unwilling, in a case concerned with constitutional rights, to impose any hard and fast limit on the matters to be taken into account when considering whether a right of this kind, especially one so fundamental as that in Article 17(1) of the Bahamian Constitution, has been infringed. They are unwilling therefore to exclude the possibility that pre-trial delay, if sufficiently serious in character, may be capable of being taken into account for this purpose.

21. Their Lordships however anticipate that only in exceptional circumstances is such a case likely to occur; and they are satisfied that the facts of the present case do not enable the appellant to invoke the principle in *Guerra*. They draw attention in particular to the fact that the delay which occurred between sentence of death and the reading of the death warrant, which was immediately followed by the appellant's constitutional motion, was 2 years and 6 months. Even taking into account the fact that the applicable period is here accepted to be 3 years and 6 months, rather than the 5 year period applicable in *Guerra*, the present delay is of a different order from the delay of 4 years and 10 months which occurred in the latter case. Their Lordships are satisfied that post-conviction delay of this length cannot have the effect that the subsequent execution of the appellant would be inhuman punishment contrary to Article 17(1), on the principle in *Pratt*, even if regard were to be had to the period of pre-trial delay which occurred in the present case.

22. Prosecution for other offences.

23. Even so their Lordships propose to consider one aspect of the pre-trial delay in the present case on which particular reliance was placed by the appellant, viz. his prosecution for other offences after he was arrested on the murder charge. Only four days after his arrest, he pleaded guilty to charges of possession of a firearm and ammunition, found in his possession at the time of his arrest, and was sentenced to terms of imprisonment of 2 years and 1 year concurrent. These terms of imprisonment however expired on 2nd February 1992, while the appellant was on remand, and do not appear to have prolonged the period of time which elapsed before the appellant's trial for murder; their only effect was that, if the appellant was subsequently to be acquitted of all other charges, these terms of imprisonment would have been disposed of while he was on remand. More importantly however the appellant was, while awaiting trial for murder, tried in November 1992 for other serious offences, viz. attempted murder and armed robbery. He was convicted of both offences, and on 17th November 1992 he was sentenced to concurrent terms of 15

years imprisonment. He was not however tried on the murder charge until March 1994, about 16 months later.

24. Their Lordships do not hide their concern that the defendant should have been tried for these offences at a time when he was awaiting trial on a capital charge for another offence. This was plainly undesirable. Their Lordships have been assisted by the affidavit evidence of Mr. Bernard Turner, who has investigated the history of the matter. It appears that the decision to set down the case of attempted murder before the murder case was the result of a lack of communication within the Attorney-General's Office. It also appears that the fact that the attempted murder case was tried first was responsible for some of the subsequent delay in bringing the murder case on for trial, though the length of such delay is uncertain. First of all, counsel for one of the appellant's co-accused in the murder trial, Tyrone Thurston, asked at the start of the April Sessions of 1993 for a review of the evidence against his client before the trial commenced, to determine whether the Attorney-General would agree to withdraw the charges against him. This review was carried out, and in August 1993 it was decided to discontinue the proceedings against Thurston. This matter must of itself have led to a postponement of the trial for about 5 months. Furthermore at the following October 1993 Sessions it was decided not to list the appellant's case for trial, partly because in the very heavy list priority was given to other murder cases listed for trial in respect of murders committed before that committed by the appellant, for which the defendants had been charged before the appellant, but partly also because the appellant was already serving his sentences for attempted murder and armed robbery. In the result, the appellant's case was listed for trial on 28th February 1994, and came on for trial in March. It follows that the delay attributable to the intervening trial for attempted murder was at most 11 months, and may well have been less.

25. It was the submission of Mr. Davies for the appellant that the action of the responsible authorities in the Bahamas in proceeding to prosecute the appellant for the offence of attempted murder before he was tried on the outstanding charge of murder constituted of itself inhuman treatment contrary to Article 17(1). Their Lordships are unable to accept this submission. In their opinion, these events would have been material to a submission that the prosecution for murder should be dismissed for want of prosecution, or to a submission based on his right under Article 20(1) of the Constitution that he should be tried within a reasonable time; but their Lordships cannot see that they provide any basis for a complaint under Article 17(1) which, being concerned to protect citizens from torture or inhuman or degrading treatment or punishment, is directed towards outlawing treatment of a different character.

Conclusion.

26. For the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Two subsidiary matters.

27. There are however two other matters to which their Lordships wish to refer before concluding this judgment.

(1) The Inter-American Commission on Human Rights.

28. The first matter relates to the three and a half year period which, in *Henfield* [1997] A.C. 413, was held by the Privy Council to be applicable in the Bahamas for the purposes of the principle in *Pratt*. This was so held on the basis that the Bahamas is not a signatory to the International Covenant on Civil and Political Rights and the Optional Protocol, with the result that citizens of the Bahamas do not have access to the United Nations Human Rights Committee. Since a period of 18 months had been allowed for such petitions when formulating the five year period in *Pratt*, it was thought right to reduce that period to three and a half years for the Bahamas.

29. No reference was made during the argument in *Henfield* to the Inter-American Commission on Human Rights. During the hearing in the present case, their Lordships were informed that the reason for this was that, although the Bahamas have ratified the Charter of the Organisation of American States, they have never ratified the American

30. Convention on Human Rights. However it was not appreciated at the time of *Henfield* that, under Regulations made pursuant to the Statute of the Inter-American Commission on Human Rights, provision is made for the procedure applicable in the case of complaints of violations of human rights imputable to States which are not Parties to the American Convention on Human Rights. Their Lordships were shown the relevant Regulations which, in general terms, make the same procedure applicable in the case of such States as is applicable in the case of States which are Parties to the Convention, except that in the case of States which are not Parties the ultimate sanction is limited to publication by the Commission of its decisions. This came to the notice of the Government of the Bahamas when the appellant in the present case made a complaint to the Commission, as a result of which the applicable procedure was duly implemented.

31. On behalf of the Government, Sir Godfray Le Quesne drew these matters to the attention of their Lordships, and informed them that it was the intention of the Government that the applicable Regulations should be duly respected. Sir Godfray

also submitted to their Lordships that, since there was (apart from the ultimate sanction) no relevant distinction between the procedure applicable to States which are and those which are not Parties to the Convention, there was no reason why, for the purposes of the principle in *Pratt*, the five year period previously understood to be applicable in the Bahamas should be departed from. He therefore invited their Lordships so to rule.

32. On the material before them there is no reason why their Lordships should not accept the assurances so given by Sir Godfray on behalf of the Government. Indeed it appears that when the appellant lodged his complaint with the Commission, and the Commission implemented the applicable procedure, the Government then complied with its obligations, furnishing the information requested and duly responding to the Commission's initial comments and recommendations. Their Lordships felt some concern at being asked to make the requested ruling in the present case, in which the point does not arise for decision, especially as the matter affects the status of the previous decision of the Privy Council in *Henfield*. They have however come to the conclusion that it is plain, not only that at the time of the argument in *Henfield* the Government must have misunderstood its obligations with regard to the Inter-American Commission, but also that, having regard to the assurance communicated to their Lordships through Sir Godfray Le Quesne, an assurance which has been borne out by the manner in which the Government responded to communications from the Commission in the present case, the Government fully intends to honour its obligations in this respect. In these circumstances, their Lordships think it right now to record that, in their opinion, the decision of the Board in *Henfield* was indeed made *per incuriam* in so far as it decided that a period of three and a half years was applicable in the Bahamas for the purposes of the principle in *Pratt*, in place of the five year period previously understood to be applicable. This conclusion has of course no impact on the decision as it affected the parties to those proceedings.

(2) Leave to appeal.

33. Article 104(2) of the Bahamian Constitution provides as follows:-

"(1) An appeal to the Court of Appeal shall lie as of right from the final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme Court by article 28 of the Constitution (which relates to the enforcement of fundamental rights and freedoms).

(2) An appeal shall lie as of right to the Judicial Committee of Her Majesty's Privy Council or to such other court as may be prescribed by Parliament under article 105(3) of this Constitution from any decision given by the Court of Appeal in any such case."

34. In the present case the appellant, following dismissal of his appeal from the decision of Osadebay J., applied to the Court of Appeal for leave to appeal to the Privy Council. The Court of Appeal however declined to grant leave on the ground that since, under paragraph (2) of Article 104(2), an appeal lies to the Privy Council as of right, the Court of Appeal had no jurisdiction to grant leave.

35. In so acting the Court of Appeal acted under a very understandable misapprehension which arose from the unusual sense in which the word "leave" is used in this context. Under rule 2 of the Judicial Committee (General Appellate Jurisdiction) Rules it is provided that no appeal shall be admitted unless either (a) leave to appeal has been

granted by the Court appealed from, or (b) in the absence of such leave, special leave to appeal has been granted by Her Majesty in Council. In a case such as the present, the function of an application to the Court of Appeal for leave to appeal is to ask the Court of Appeal to indicate that the case is one in which an appeal lies to the Privy Council as of right. If the case falls within that class, the Court of Appeal so indicates by granting leave to appeal. It follows that, in such a case, there is no exercise of discretion by the Court of Appeal which, in a case falling within the second paragraph of article 104(2), is obliged to grant leave; and if the Court of Appeal so grants leave, the case falls within paragraph (a) of rule 2 of the above Rules.

Dissenting Judgment Delivered by ***Lord Steyn***

36. A dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow. In that way a dissenting judgment sometimes contributes to the continuing development of the law. But the innate capacity of different areas of law to develop varies. Thus the law of conveyancing is singularly impervious to change. But constitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced to die by hanging is at the other extreme. The law governing such cases is in transition. This is amply demonstrated by the jurisprudence of the Privy Council over the last twenty years. In 1976, and again in 1979, in unanimous judgments the Privy Council held that a condemned man could not complain about delay of his execution caused by his resort to appellate proceedings: *de Freitas v. Benny* [1976] A.C. 239;*Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342. In 1983 cases involving delays of between six and seven years in the execution of condemned men in Jamaica came before the Privy Council: *Riley v. Attorney-General of Jamaica* [1983] A.C. 719. The majority observed that "... it could hardly lie in any applicant's mouth to complain" about delay caused by appellate proceeding: at 724F. The ruling of the majority was

in absolute terms: "... whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1)"; at 726H. Lord Scarman and Lord Brightman dissented from "the austere legalism" of the majority. That dissent helped to keep alive the idea that under a constitutional guarantee against inhuman or degrading treatment or punishment prolonged and unnecessary delay may render it unlawful to execute the condemned man. Ten years later the issue again came before the Privy Council in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1. The Board observed that in Jamaica alone 23 prisoners had been awaiting execution for more than 10 years and 82 had been under sentence of death for more than 5 years: at 17G. In *Pratt* the Privy Council, exceptionally consisting of seven members, departed from the earlier decisions of the Privy Council and held that prolonged and unacceptable delay, pragmatically set at periods in excess of 5 years, might be unconstitutional. And in important subsequent decisions the Privy Council ruled that the 5 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 case: see *Guerra v. Baptiste* [1996] A.C. 397; and *Henfield v. Attorney-General of The Bahamas* [1997] A.C. 413. After a long struggle effect was given to the constitutional guarantee of human rights enshrined in Article 17(1). But there are important unresolved questions. Now for the first time the important issue must be squarely faced whether prolonged and unacceptable pre-sentence delay may be taken into account to tilt the balance where the delay since sentence of death is 2½ years thus falling short of the 3½ years norm applicable on the authority of *Henfield* in The Bahamas. In these circumstances I must explain the reasons for my dissent from the majority judgment in some detail.

37. On a narrow view the issue before the Privy Council may appear to be confined to the question whether mere pre-sentence delay may as a matter of law be taken into account in deciding whether, by reason of the lapse of time between the imposition of the death sentence and the proposed date of execution, it would be a breach of Article 17(1) of the Constitution of the Commonwealth of The Bahamas to allow an execution to proceed. But it is impossible to divorce the narrow question from related and contributory pre-sentence causes of the mental anguish of the condemned man, such as his detention in appalling conditions contrary to any civilised norm. In the present case there is a finding by the judge that while the conditions under which Fisher and other condemned prisoners were housed could be improved, the condition could not be described as falling below the evolving standards of decency

that are a hallmark of a maturing society "having regard to security and financial constraints". So be it. But in other countries in the Caribbean death row conditions may not meet the criterion of minimum civilised standards. It is therefore necessary to consider the narrow question in the context of a broader perspective.

38. There is no binding authority compelling the Privy Council as a matter of precedent to decide the narrow question one way or the other. Indeed, as recently as October 1996 the Privy Council expressly left this question open for subsequent decision:*Henfield v. Attorney-General of The Bahamas* [1997] A.C. 413, at 426G-427A. Their Lordships are not called upon to decide this question on the basis of their individual views of what is desirable in the interests of the administration of justice in The Bahamas. The question must be resolved on the basis of an evaluation of the strength of the competing arguments on the proper construction of Article 17(1) of the Constitution. Their Lordships are mandated by the Constitution to afford to Fisher the full measure of protection of the rights enshrined in it.

39. Sir Godfray Le Quesne Q.C., who appeared on behalf of the respondents, made one of the most eloquent and powerful speeches that I have ever been privileged to hear. But perhaps I can be forgiven for saying that the longer he spoke the more convinced I became that he was urging on the Board a formalistic method of construction appropriate to the interpretation of a conveyancing statute. It is necessary to bear in mind the genesis of Article 17(1). It was taken from Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), which served as a model for the Constitutions of most of the Caribbean countries. In *Minister of Home Affairs v. Fisher* [1980] A.C. 319 Lord Wilberforce explained how such constitutional guarantees should be construed. Delivering the opinion of the Judicial Committee Lord Wilberforce observed in a classic judgment that such constitutional guarantees must not be subjected to the approach applicable to the interpretation of other legislation. What is needed is "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": at pages 328H. It follows that Article 17(1) ought to be interpreted so as to ensure that it affords meaningful and effective rights protecting individuals from, *inter alia*, inhuman treatment and punishment.

40. Turning from the general to the particular I draw attention to the wording of Article 17(1) which comes within the category of constitutional guarantees described by Lord Wilberforce as "drafted in a broad and ample style which lays down principles of width and generality": see *Fisher's* case, at 328. Furthermore in the jurisprudence of the European Court of Human Rights three principles have emerged with important implications for the proper construction of Article 17(1). First, Article 3 of the European Convention is an unqualified and absolute guarantee of the human rights it protects: *Republic of Ireland v. United Kingdom* (A25) (1978) 2 E.H.R.R. 25 para. 163. In order to filter out insubstantial complaints the only qualification is that in order for 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. There is no derogation in favour of the state in order to enable it to fight terrorism or violent crime: *Tomasi v. France* (1993) 15 E.H.R.R. 1, para. 115; see also Jacobs and White, The European Convention on Human Rights, 2nd ed., 1996, 49; Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights, 1995, 55-56; Constitutional Law and Human Rights, ed. Lester and Oliver, 1997, para. 124 and note 5. Similarly, in Article 17(1) of The Bahamian Constitution there is no express or implied derogation in favour of the State. It is an absolute and unqualified constitutional guarantee of the relevant human rights which it serves to protect. What is the consequence of this general principle? There can under Article 17(1) be no complaint about the inevitable consequences of the need to carry out a death sentence after the lapse of sufficient time to allow for appeal procedures, requests for clemency, and so forth. Such lapses of time are required in the interests of the condemned man. But in principle any substantial and serious suffering of an avoidable nature added to the anguish inevitably resulting from the death sentence may constitute inhuman or degrading treatment or punishment. The State may not superimpose upon the inevitable consequences of a death sentence further unnecessary agony and suffering. The second principle emerging from the jurisprudence of the European Court of Human Rights is the principle of effectiveness, viz. that in interpreting the Convention the court seeks to given the provisions of the Convention the "fullest weight and effect consistent with the language used

and with the rest of the text": Prof. J.G. Merrills, The Development of International Law by the European Court of Human Rights, 1988, 98. The third principle developed in the jurisprudence of the European Court of Human Rights is equally important in the present context. In judging cases under Article 3 the court must consider the actual facts of the case in order to assess whether the treatment or punishment in its impact on the individual was inhuman or degrading. This is illustrated by observations of the court in *Soering v. United Kingdom* (1989) 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: see judgment of 7th July 1989 (No. 161), 11 E.H.R.R. 439. 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 and somewhat immature. Accepting that the death sentence was a lawful punishment the court observed:-

"... 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."

41. Taking into account the death row phenomenon, and "the personal circumstances of the applicant, especially his age ..." the court held that the extradition, if implemented, would give rise to a breach of Article 3. Similarly, it follows that Article 17(1) does not require the court to shut its eyes to realities of particular torment that a condemned man had undergone. It requires the court to take into account the actual impact of the infliction of illegitimate or unnecessary suffering on the individual: see Jacobs and White. op. cit., 55-56. Nothing of a substantial nature that is logically relevant to that question ought to be excluded from consideration.

42. I pause now to mention two arguments advanced by the respondents for the contention that pre-sentence delay is always irrelevant. They said that Article 20 of the Constitution guarantees a fair hearing within a reasonable time, and that it enables a man awaiting trial to seek an order for the expediting of his trial or for a stay. That is so. But the existence of the due process remedy does not mean that the court in judging an issue of delay after the imposition of the death sentence must always ignore what had happened before he was condemned to death, e.g. that awaiting trial for murder for 10 years the individual was held in appalling conditions on death row itself. In constitutional interpretations one does not set off against inhuman treatment a failure of due process. That would be absurd. The respondents also argued that Article 28(1) shuts out any possibility of taking into account pre-sentence delay. It provides that where there is adequate means of redress "under any other law" the court may not allow constitutional redress. The reality is, however, that the appellant does not rely on unnecessary and unacceptable pre-sentence delay as an independent cause of action but merely as evidence tending to aggravate the inhuman or degrading treatment or punishment to which he would be subjected if he were now to be executed. The respondents' legalistic arguments are misconceived in the construction of a constitutional guarantee like Article 17(1).

43. That brings me to the substantial question whether as a matter of constitutional construction Article 17(1) compels the court to ignore any pre-sentence delay. The starting point is that under *Pratt v. Attorney-General for Jamaica* a lapse of 5 years between sentence of death and proposed execution presumptively makes it unlawful to proceed with the execution; under *Henfield* that period is contracted to 3½ years in the case of The Bahamas. But this does not mean that the actual circumstances affecting the condemned man may not be examined. On the contrary in *Henfield* Lord Goff of Chieveley stated (at page 421B-C):-

"In considering the effect of such delay, attention 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."

44. In other words, a shorter period may suffice depending on the circumstances of an individual case. This observation is in line with the earlier observation of Lord Goff in *Guerra v. Baptiste* [1996] 1 A.C. 397 about a norm applying without "detailed examination of the particular case": at page 415H. This approach is consistent with the approach adopted by the European Court of Human Rights in regard to Article 3. Given this recognition that it is sometimes necessary to examine the actual circumstances of a particular case, I venture to suggest that it is self evident that evidence may be placed before a court that the mental suffering involved in the period between the imposition of the death sentence and the proposed execution may affect particularly severely a very immature young man, a mentally retarded man, and so forth. Moreover, one can imagine a case where it is proved that in order to terrify a condemned man prison officers regularly taunted him with the horrors of his meeting with the hangman, or subjected him to a mock reading of the death warrant or even a mock execution. Such cases occur: see Schabas, The Death Penalty as Cruel Treatment and Torture, 199, 101-102. Plainly such circumstances would be relevant to the question whether a shorter period than 5 years or 3½ years may justify the inference that it would be unlawful under Article 17(1) to execute the condemned man. It is true of course that these examples are all special cases affecting a particular condemned man. But there then springs to mind the distinct possibility that in one or more Caribbean countries - not The Bahamas - the conditions under which condemned men are kept on death row are truly appalling. Echoing language of Lord Griffiths in *Pratt v. Attorney-General for Jamaica* I would say that a State that wishes to retain capital punishment must accept the responsibility of ensuring that condemned men are confined in conditions that satisfy a minimum standard of decency. In considering whether a lesser period than the 5 year or 3½ year norms may be sufficient to render a proposed execution unlawful it must be permissible to take into account that the anguish of the condemned man has been greatly increased by his incarceration in appalling conditions. Our humanity permits no other answer to this question.

45. The theme of my reasoning so far is that Article 17(1) requires the court to take into account the whole picture insofar it has an impact on illegitimate and unnecessary suffering inflicted on the individual. But Sir Godfray Le Quesne submitted that even if

this proposition is correct all pre-sentence delay is irrelevant. The substantial argument he advanced is that delays before and after the sentence of death are qualitatively different in their impact on the individual. He said that the agony associated with a sentence of death only starts upon pronouncement of that sentence. That is not a realistic way of looking at the matter. A condemned man usually hopes that his appeals, and application for clemency, will succeed. The uncertainty attaching to those proceedings adds to his anguish. He also suffers the agony of not knowing when the death warrant will be read to him. Uncertainty looms large in the causes of his despair. It is true that in contrast the man still awaiting trial on a charge of murder is assailed by other uncertainties: he hopes to be acquitted. For him the spectre of the macabre meeting with the hangman is somewhat more distant. He has greater hopes of escaping death by hanging than a condemned man. But from the time of his arrest and charge, or at least from the time of his judicial committal for trial on a charge of murder, he is in real jeopardy of eventually being sentenced to death and hanged. And in cases like the present he will be held in prison conditions where he will be exposed to the terror of executions from time to time. Like a distinguished author in this field, who argues that pre-sentence delay is relevant, I too would say that "it is here that the horror of contemplating the sentence would normally begin": Schabas, *op. cit.*, 133-134. There is undoubtedly a difference between the position of a man awaiting a trial at which he may be sentenced to death and a man already condemned to death. On the other hand, it is unrealistic to say either that there is no pre-sentence mental suffering or that it can be ignored in considering the broad question under Article 17(1). If due to the failure of the State there is inflicted on the individual the agony of a prolonged delay of his trial on a charge of murder that must logically be relevant as a contributory and aggravating factor which, depending on the circumstances, may tilt the balance in a given case.

46. Article 17(1) does not mandate a rigid line being drawn between pre-sentence delay and delay after pronouncement of the death sentence. Instead it requires the court to assess the totality of the circumstances regarding the treatment and punishment which may make it inhuman or degrading to execute the condemned man. It is important also to bear in mind a major premise of *Pratt v. Attorney-General for Jamaica*. Lord Griffiths explained at page 29:-

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

47. Equally our humanity does not require us to exclude from consideration circumstances, even if they arose before sentence, if they significantly tend to aggravate the individual's suffering. Our sense of humanity and decency ought not to

permit us to ignore the circumstance, if proved, that he has for several years before sentence been held in appalling conditions with a noose constantly dangling before his mind's eye; it ought not to permit us to ignore a deliberate decision by the State to delay bringing on his trial for several years; and it ought not to permit us to ignore an inexcusable failure to bring him to trial for many years. Moreover, on simple common sense grounds one must recognise the relevance of pre-sentence circumstances, e.g. it must be an aggravating circumstance if the State arranges to delay a murder charge in order to have an accused tried and flogged on a lesser charge before proceeding with the murder charge. Similarly, our common sense tells us that the interaction of pre-sentence delay and prison conditions, with the brooding horror of an awareness of executions going on, may add greatly to sapping the will and increasing the torment of the condemned man. Only by shutting one's eyes to reality can such circumstances be ruled out of consideration on *a priori* grounds.

48. Now I turn to a point of supreme importance. Neither in his written case nor his oral argument did Sir Godfray Le Quesne contend that it is open to their Lordships to exclude pre-sentence delay from consideration on the ground that to do so would cause practical difficulties for The Bahamas. The reason why he did not do so is plain. To admit as relevant such an argument necessarily imports an implied derogation in favour of the State under Article 17(1). That would emasculate the absolute prohibition in Article 17(1) and would be wrong. But, Sir Godfray Le Quesne was specifically asked to deal with the consequences for The Bahamas of a ruling in his case that pre-sentence delay may be relevant. In a written submission he then referred to the following observation in *Bell v. Director of Public Prosecutions*

[1985] 1 A.C. 937. In that case Lord Templeman observed (at 950C):-

"But by section 20(1) [of the Jamaican Constitution] the applicant is entitled to a fair hearing `within a reasonable time', albeit that, in considering whether a reasonable time has elapsed, consideration must be given to the past and current problems which affect the administration of justice in Jamaica."

49. The statement in *Bell* is irrelevant to the construction of Article 17(1) and does not begin to suggest there is an implied derogation in favour of the State in Article 17(1). With characteristic candour Sir Godfray Le Quesne conceded that the problems of the administration of justice in The Bahamas may be irrelevant. Substituting <u>is</u> for <u>may be</u> I agree. The position is clear: if The Bahamas wishes to maintain the death sentence for murder it must ensure that murder trials are not unduly delayed.

50. That brings me to the proposition in the judgment of the majority that, although the possibility of taking into account serous pre-trial delay is not excluded, it is anticipated that it will only occur in exceptional circumstances. In my respectful view

this ruling cannot be reconciled with Article 17(1). It is at odds with constitutional language of width and generality. It fails to give effect to the full measure of the fundamental rights protected by Article 17(1). It means that, unless a court judges that the threshold of exceptionality is passed, even substantial additional suffering caused by prolonged and unjustifiable pre-trial delay caused by the state may not be taken into account in the ultimate decision. Such an exclusionary restriction on what may be considered is contrary to the language, purpose and spirit of Article 17(1).

51. By way of conclusion I would summarise the position as follows. Nobody suggests that a time table must be provided for the conduct of murder trials in The Bahamas. On the other hand their Lordships were informed that in The Bahamas such trials are almost invariably concluded in a period of 18 months. In my view unjustifiable delay beyond 18 months of murder trials in The Bahamas may well be an aggravating circumstance which may entitle the court to depart from the norm.

52. This brings me to a consideration of the facts of the present case. Given a 2½ year delay between the imposition of the death sentence and the reading of the death warrant, the case falls 12 months short of the 3½ years norm applicable in The Bahamas. But a distinctive feature of this case is a wholly exceptional period of pre-sentence delay. The period between Fisher's arrest and the imposition of the death sentence was 3 years and seven months; the period between Fisher's committal and the death sentence was 2 years and eight months. It is necessary to consider how this came about. After his arrest Fisher pleaded guilty to possession of a firearm and was sentenced to 2 years imprisonment. Two years and two months after his arrest, the prosecuting authorities put Fisher on trial on separate charges of attempted murder, armed robbery and possession of a firearm. After a trial he was convicted and sentenced to a total 15 years imprisonment. He appealed to the Court of Appeal but his appeal was dismissed. I am satisfied that this decision to proceed with lesser charges caused a delay in bringing Fisher to trial on the murder charge of about two years. And that period ties in with the undisputed proposition that criminal trials for murder are usually completed within 18 months in The Bahamas. The respondents rightly conceded that the course adopted by the prosecuting authorities in putting Fisher on trial for lesser offences was unprecedented and irregular. Why it happened remains obscure because the respondents say that the prosecutor concerned has left The Bahamas. In any event, in this case the reading of the death warrant was in the result put back by two years. And that was wholly due to the culpable conduct of the prosecuting authorities. Before I leave this aspect I would make clear that, if this exceptional delay had been caused by congestion in the courts of The Bahamas, I would still have regarded that explanation as one that does not assist the respondents. Given the constitutional guarantee in Article 17(1), The Bahamas can only maintain

the death sentence if persons charged with murder are not exposed to exceptional and abnormal pre-trial delays.

53. Now I turn to the impact on Fisher of the exceptionally long delay in bringing him to trial on the murder charge. He would have known that the only sentence for murder is death by hanging. He faced a strong prosecution case. In any event nine months after his arrest he was judicially committed for trial on the murder charge. He knew that he was in jeopardy of being sentenced to death and executed. And it is important not to lose sight of the circumstances in which he lived during that 3½ year period. While I do not criticise the conditions of Fisher's pretrial detention, it is necessary to face the stark picture that on undisputed evidence during the 3½ years leading up to his sentence of death Fisher shared accommodation with condemned men and others awaiting serious charges. While the affidavits filed on Fisher's behalf are unsatisfactory, it is obvious that he was exposed for 3½ years to the travails of condemned men and the horror of executions. Some delay in bringing on his trial was inevitable. But I am satisfied that the prosecuting authorities have added a period of about two years to Fisher's suffering on top of the 2½ years that he has been condemned to death. It would be inhuman to execute him now. If ever there has been a case departing from a norm, this is it.

54. Mr. Owen Davies, who appeared on behalf of Fisher, persuaded me in a careful and balanced argument that it would be contrary to Article 17(1) to allow Fisher to be executed. I would therefore advise Her Majesty that the sentence of death in Fisher's case be quashed and that a sentence of life imprisonment be substituted