Fisher v. The Minister of Public Safety and Immigration and Others (Bahamas) [1998] UKPC 40 (5th October, 1998)

Privy Council Appeal No. 35 of 1998

Trevor Nathaniel Pennerman Fisher *Appellant*

v.

(1) The Minister of Public Safety and Immigration

(2) The Superintendent of Prisons and

(3) The Attorney General of The Bahamas *Respondents*

FROM

THE COURT OF APPEAL OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 5th October 1998

Present at the hearing:-

Lord Slynn of Hadley

Lord Lloyd of Berwick

Lord Hoffmann

Lord Hope of Craighead

Lord Hutton

*[Majority Judgment delivered by **Lord Lloyd of Berwick**]*

The background to this appeal is set out in a previous decision of the Board *Fisher v. Minister of Public Safety and Immigration* ("*Fisher No. 1*") reported at [1998] 3 W.L.R. 201. It is unnecessary to do more than repeat the salient facts. On 4th October 1990 the appellant was arrested for the murder of Durventon Daniels. On 25th March 1994 he was convicted and sentenced to death. His appeal against conviction was dismissed by the Court of Appeal on 10th October 1994. On 10th February 1996 he petitioned for leave to appeal to the Privy Council. On 23rd May 1996 his petition was dismissed. On 7th June 1996 he petitioned the Inter-American Commission on Human Rights ("IACHR") stating that he had exhausted his domestic remedies, and was at imminent risk of being executed. On 23rd September 1996 the Government wrote to the Commission confirming that the appellant had exhausted his domestic remedies. It was not until 5th May 1998 that the appellant's petition was declared admissible. The latest information is that his case will be considered at the next session of the Commission to be held in Washington D.C. between 28th September and 16th October 1998, nearly two and a half years after the petition was received. It is not known whether the Commission will then be in a position to issue its final Report, or whether there will be further delay.

1. Meanwhile on 5th September 1996 a warrant had been read for the execution of the appellant on 12th September 1996. On 10th September 1996 he filed an originating motion claiming constitutional redress. The main issue raised by the appellant related to the period of three years and four months during which he had been detained in prison prior to his trial. It was argued that this period should be added to the period of two years and six months since the trial, so as to arrive at a total period of over five years' delay, thus rendering the appellant's execution inhuman on the principles stated in *Pratt and Another v. Attorney-General for Jamaica*("*Pratt and Morgan*") [1994] 2 A.C. 1.

2. In addition to his main ground of complaint, the appellant relied on other grounds. He argued (i) that it would be unlawful to execute him having regard to the inhuman conditions in which he had been detained, (ii) that the mandatory death sentence in The Bahamas was unconstitutional and (iii) that he had a legitimate expectation that he would not be executed while his petition to the IACHR was outstanding. Osadebay J. rejected all these grounds, and his decision was upheld in the Court of Appeal.

3. When the case came before the Board there does not appear to have been any argument in support of the three additional grounds. As to the main ground, the Board held that while the pre-trial delay might, in exceptional circumstances, be taken into account, there were no exceptional circumstances in the present case. It was not permissible for the purpose of invoking the principle in *Pratt and Morgan* simply to add pre-trial delay to post-conviction delay.

4. But a further subsidiary issue was raised for the first time before the Board. It was destined to become the germ of the current proceedings. In *Henfield v. Attorney-General of the Commonwealth of The Bahamas* [1997] A.C. 413 it had been argued that the 18 month period allowed in *Pratt and Morgan* for presenting a petition to the United Nations Human Rights Committee ("UNHRC") should be deducted from the five years indicated in that case, since The Bahamas is not a signatory to the International Covenant on Civil and Political Rights or the Optional Protocol, so that a citizen of The Bahamas has no right of individual access to UNHRC. This argument was accepted by the Board, though not in precisely the same terms as it was advanced. What had to be done was to identify an overall period which was not only sufficient to allow for appellate procedures, but was also of such a length as to render subsequent execution inhuman treatment. Applying that approach the Board arrived at an overall period for The Bahamas of three and a half years.

5. Unfortunately it was not appreciated when *Henfield* was decided that although citizens of The Bahamas have no right of individual access to UNHRC, they have right of access to IACHR. Accordingly the Board in *Fisher No. 1* was asked by the respondents to reconsider the three and a half years established as the norm for The Bahamas in *Henfield*, and to revert to the five years indicated as the norm in *Pratt and Morgan*.

6. The Board expressed some concern in considering a question which did not arise directly for decision. Nevertheless the Board thought it right to hold that the decision on this point in *Henfield* was *per incuriam*. The Board took into account an assurance given by Sir Godfray Le Quesne Q.C. on behalf of the Government of The Bahamas that the Government would "respect the applicable regulations" under the Convention, and that it "fully intended to honour its obligations in this respect". The Board was also influenced by the fact that the Government had already responded to communications from the Commission in this very case.

7. The Board's decision in *Fisher No. 1* was announced on 16th December 1997. On 26th March 1998 the warrant of execution was read for the second time. Three days later the appellant filed a further motion for constitutional relief. The motion was dismissed by Longley J. on 3rd April, but a conservatory order was granted until 14th April. The Court of Appeal dismissed the appeal on that day, and granted a further

conservatory order to enable a petition to be lodged. On 8th May 1998 the Board gave leave, and granted a conservatory order pending the determination of this appeal.

8. The ground on which the new constitutional motion was argued before Longley J. was that the Government having given an undertaking through Sir Godfray Le Quesne that it would abide by the IACHR Regulations, the appellant had a legitimate expectation that the Government would allow a reasonable time for the completion of the process. It was submitted that a reasonable time in the circumstances was not less than 18 months commencing on 16th December 1997.

9. Longley J. and the Court of Appeal rejected this argument for the following reasons. The appellant had filed his petition on 7th June 1996. It had therefore been under consideration by the Commission for 21 months when the execution warrant was read for the second time on 26th March 1998. No doubt the Commission was entitled to a reasonable time to consider the decision of the Privy Council in *Fisher No. 1*. But two months from 16th December 1997 was long enough for that. The Government was therefore justified in writing to the Commission, as they did on 29th December 1997, inviting it to complete its consideration of the case by 15th February 1998, and in so informing the appellant's solicitors by letters dated 2nd January 1998 and 30th January 1998. In the event over three months had elapsed before the execution warrant was read on 26th March 1998.

10. When the case came on for hearing before their Lordships, Mr. Owen Davies argued that even if (contrary to his submissions) time began to run when the petition was filed on 7th June 1996 the time allowed by the Government was insufficient for the Commission to consider and report on the petition. He relied on Sir Godfray's undertaking given in the course of *Fisher No. 1*. The appellant's case "only came alive" as a consequence of that undertaking. Mr. Davies specifically disclaimed any argument that the Government was obliged to wait indefinitely.

11. Sir Godfray, for his part, accepted that the Government had said, and meant, that it would allow a reasonable time for the completion of the Commission's enquiries. There were therefore two questions for decision, namely, (i) whether a reasonable time had expired by 26th March 1998 and, if not, (ii) whether the law provides the appellant with a remedy, by way of constitutional redress or otherwise.

12. As to the first question, Sir Godfray pointed out that the time limits allowed under Article 34(5) and (7) of the Regulations for the initial processing of petitions in a non-urgent case is 90 days and 30 plus 30 or 60 days respectively. The time allowed under Article 44(3) between the completion of the investigation and the announcement of the decision is 180 days, making 330 days or 11 months in all. If one then allows seven months for the intermediate stages, one arrives at a total of 18 months. This,

said Sir Godfray, suggests that the norm established in *Pratt and Morgan* for petitions to international human rights bodies is not far wrong. Furthermore, the Commission was in possession of all the material it required by 7th April 1997. On 12th August and 21st November 1997 the Government wrote to the Commission asking it to give the case its urgent attention. On 29th December 1997 the Government wrote as follows:-

"As you are aware Excellency, more than 18 months have elapsed since Mr. Fisher filed his Petition with the Commission and in this regard, despite reminders the petition has not been dealt with. I am sure, Excellency, you will appreciate that the Government of The Bahamas cannot wait indefinitely for the Commission to deal with this Petition. Consequently unless the Commission makes its final decision by the 15th day of February, 1998, the Government of The Bahamas will be obliged to take such steps as it deems necessary and in accordance with the law in order to ensure the proper functioning of the legal process."

13. On 12th January 1998 the Government sent a reminder. Yet it was not until 5th May 1998 that the petition was declared admissible. Such dilatoriness could not be justified on the ground that the Commission only meets twice a year, in February and October; and certainly not in the case of a petitioner who is under sentence of death. For these and other reasons Sir Godfray submitted that the reasonable time which the Government undertook to allow for the Commission to complete its investigation had elapsed before 26th March 1998; and even if it had not elapsed by then, it had certainly elapsed by now.

14. Before stating their conclusion on the first of Sir Godfray's submissions, it is necessary to mention a new point taken by Mr. Davies in his reply. He argued for the first time (and contrary to the concession he made in opening) that the appellant has a constitutional right not to be executed until after the Commission has completed its enquiries, however long that might take. It follows that the second of the two questions identified by Sir Godfray will arise in any event, whether or not a reasonable time had expired by 26th March 1998. Can the appellant make good his case in reply? Does the law provide him with a remedy, whether under the Constitution or otherwise?

15. The appellant's primary case in reply was that his right to life is protected by Article 16 of the Constitution, and that the Government would be in breach of his constitutional rights under that Article if he were executed before the Commission has reached a decision and furnished a report for the consideration of the Advisory Committee under Article 92 of the Constitution.

16. Article 16(1) provides:-

"No person shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

17. The difficulty with the appellant's argument under this head lies in the words "save in execution of the sentence of a court". The reference to "court" is clearly a reference to the domestic courts of The Bahamas under Chapter VII of the Constitution. Mr. Davies nevertheless argues that Article 16, like other constitutional provisions, should be given a liberal construction, and that while a case is being considered by the Commission a right to life should be implied. The effect of such an implication would thus be to qualify the saving provision in Article 16(1).

18. But at the time the Constitution was enacted, there could be no question of any implication. For The Bahamas was not then a party to the Organisation of American States. It did not become a party until 1982. If Parliament had intended to introduce a constitutional qualification at that time, it would presumably have done so in express terms. In the circumstances it is difficult to see how a qualification can be implied. It would mean that the Government had introduced new rights into domestic law by entering into a treaty obligation, contrary to the principles stated in *Reg. v. Secretary of State for Home Department, Ex parte Brind* [1991] 1 A.C. 696.

19. There are even greater difficulties in bringing the case within Article 17 of the Constitution. That Article provides:-

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

(2)Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any description of punishment that was lawful in The Bahama Islands immediately before 10th July 1973."

In *Jones v. Attorney-General of the Commonwealth of The Bahamas* [1995] 1 W.L.R. 891 it was decided that the carrying out of the death penalty is not inhuman or degrading treatment or punishment in breach of section 17 of the Constitution. Nor does it become inhuman or degrading treatment, as Mr. Davies argued, by reason of the sentence being carried out while a petition is pending. The fact that a petition is pending might give rise to an argument in public law based on legitimate expectation which their Lordships consider and reject hereafter. But execution while a petition is pending does not *per se* constitute a breach of any constitutional right under section 17(1). Moreover section 17(1) is subject to section 17(2). There can be no doubt that it was lawful to execute a prisoner without waiting for a decision of the Commission before 10th July 1973, since, as already pointed out, The Bahamas was not then a party to the Organisation of American States. It follows that it is not in contravention of Article 17(1) now.

Pratt and Morgan does not help the appellant in that connection. For it was decided in that case that it had never been lawful under Bahamian law to execute a prisoner after five years. Execution after that length of time could always have been stayed as an abuse of process.

20. Mr. Davies also argued that if the Board were otherwise minded to dismiss the appeal, the appellant should not have to endure the reading of the warrant of execution for a third time. This in itself would, he said, constitute inhuman treatment contrary to Article 17(1) of the Constitution, and would justify a further constitutional motion. Mr. Davies therefore invited the Board to deal with that matter now.

21. But their Lordships do not regard the reading of the warrant for a third time as giving rise to a separate ground of complaint distinct from the grounds already considered. No doubt it is a factor which will be borne in mind by the Advisory Committee. It is not a matter for the courts.

22. For the above reasons the appellant has failed to make good his claim for a remedy under the Constitution on the new grounds put forward in reply. But that does not end the matter. For the appellant also puts forward other grounds which lie in the realm of public law rather than constitutional redress.

23. The first of the public law grounds is that the appellant had a legitimate expectation that he would not be executed so long as his petition was outstanding. This was one of the three grounds that was rejected by Osadebay J. in the first of the constitutional motions, and not renewed before the Board in *Fisher No. 1*. However Mr. Davies relied on the decision of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 183 C.L.R. 273. It was held in that case that the ratification of the United Nations Convention on the Rights of the Child by the Commonwealth Executive in 1990 gave rise to a legitimate expectation that the Minister would act in conformity with the Convention, and treat the best interests of the applicant's children as a primary consideration in deciding whether or not he should be deported. But legitimate expectations do not create binding rules of law. As Mason C.J. made clear at page 291 a decision-maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that. Even if therefore the appellant had a legitimate expectation that he would not be executed while his petition was pending his expectation could not survive the Government's letters of 2nd and 30th January 1998 in which it informed the appellant's solicitors in unequivocal terms that it would wait no longer than 15th February 1998.

24. The alternative public law ground is that the decision to read the warrant of execution on 26th March was *Wednesbury* unreasonable. Sir Godfray pointed out, correctly, that this is not the same as the question whether a reasonable time had expired by 26th March 1998. The question here is not whether, in the Board's view, it would have been reasonable to wait longer, but whether the decision by the Government not to wait longer was irrational in the *Wednesbury* sense. Their Lordships are unable to take that view. There were weighty factors pointing in favour of an immediate decision, not least the need to maintain public confidence in the criminal justice system in The Bahamas, and the requirement on humanitarian grounds that in countries which retain the death penalty lawful death sentences should be carried out as swiftly as practicable. As at 26th March 1998 there appeared to be no immediate prospect of the Commission reaching a decision, and subsequent events have shown this to be the case. Even now it is not known when the Commission will report. Nor, as Mr. Davies conceded, is there any provision in the Constitution requiring the Advisory Committee or the designated Minister to comply with any report: see *Reckley v. Minister of Public Safety and Immigration* [1996] A.C. 527. In all these circumstances it would be quite wrong for their Lordships to regard the decision to read the warrant of execution on 26th March 1998 as being *Wednesbury*unreasonable.

25. Their Lordships desire to add that public law points not arising out of or in connection with the Constitution should not normally be raised in a motion claiming constitutional relief. But in the particular circumstances of this case, which they regard as exceptional, their Lordships thought it right to consider the points of public law advanced on behalf of the appellant.

26. Their Lordships now return to Sir Godfray's first submission. Had a reasonable time expired before 26th March 1998? What is a reasonable time in the circumstances of a particular case is a question of fact. On this question their Lordships see no reason to disagree with the conclusion reached by Longley J. and the Court of Appeal. The overriding principle is that execution should follow as swiftly as practicable after sentence of death; see *Pratt and Morgan* at page 20, and*Guerra v. Baptiste* [1996] A.C. 397 at page 413. Of course a defendant is entitled to exercise his domestic rights of appeal. He should also be allowed a reasonable time to petition the IACHR in accordance with Sir Godfray's undertaking. But in determining what is a reasonable time in the present case, it is of critical importance to bear in mind that the appellant has been sentenced to death. For the reasons advanced by Sir Godfray, which have already been outlined and which need not be repeated, their Lordships are in no doubt that a reasonable time for the Commission to complete its investigation had elapsed before 26th March 1998.

27. Mr. Davies pointed out that five years from the date of sentence specified in *Pratt and Morgan* has not yet expired. This is true. But it is nothing to the point. *Pratt and Morgan* decides that it is normally inhuman or degrading treatment to execute a prisoner more than five years after he has been sentenced. It does not decide that he may not be lawfully executed before five years have elapsed: see *Guerra* at pages 414-5. As Gonsalves-Sabola P. observed in the Court of Appeal the complaint in cases where the *Pratt and Morgan* principle has been applied is that the prisoner has been kept too long on death row, not that he has not been kept long enough. It follows that the appellant's case fails not only on the new ground advanced in reply, but also on the original grounds.

28. Finally the appellant complains that he should not have been required by the Court of Appeal to post a bond in the amount of $2,860 as a condition of obtaining leave to appeal to the Privy Council as a poor person. Sir Godfray informed the Board that the Crown did not ask for a bond, and had indeed opposed it. Clause 4 of The Bahama Islands (Procedure in Appeals to Privy Council) Order 1964 (S.I. 1964 No. 2042) provides:-

"Leave to appeal to Her Majesty in Council … shall, in the first instance, be granted by the Court only

(a)upon condition of the appellant … entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding one thousand pounds sterling for the due prosecution of the appeal …"

29. So it would appear that a bond is obligatory. But the amount of the bond is in the discretion of the court. In the case of a poor person appealing as of right the court may well take the view that a nominal sum would suffice.

30. Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

Dissenting judgment delivered by ***Lord Slynn of Hadley*** *and* ***Lord Hope of Craighead***

31. We are unable to agree with the majority judgment that this appeal should be dismissed. The following are the reasons for our dissent.

32. The issue which lies at the heart of this constitutional motion is not an easy one to resolve. It requires a balance to be struck between two powerful and competing interests. On the one hand there are the interests of the Government, whose responsibility it is to uphold the law and to enforce the death penalty. On the other there are the interests of the condemned man. He is entitled to have his sentence carried out without any unreasonable delay. The Government for its part also wishes to avoid any such delay. To this extent the competing interests coincide. But the condemned man has one other overriding interest. He wishes and is entitled to obtain the views on his case of the Inter-American Commission on Human Rights (the I.A.C.H.R.). He also wishes to have those views considered by the Advisory Committee on the Prerogative of Mercy and by the Governor-General before a final decision is taken as to whether or not he should be executed. But the Government is not willing to wait any longer. So the issue is whether the condemned man has a right under the Constitution to insist that his execution should be stayed to give effect to that request.

33. The Government's position is that it cannot afford to risk any further delay in the enforcement of the death penalty. Execution following the lapse of a prolonged period of time after the passing of the death sentence constitutes inhuman punishment: *Pratt and Another v. Attorney-General for Jamaica* ("*Pratt and Morgan*") [1994] 2 A.C. 1. If the delay were to become undue the carrying out of the death sentence would be rendered unconstitutional, as Article 17(1) of the Constitution of The Bahamas provides that no person shall be subjected to inhuman punishment. The time which elapsed between the passing of the death sentence on 25th March 1994 and the reading of the warrant for execution on 26th March 1998 was sufficient to accommodate the domestic appeal process. This process ended on 23rd May 1996 when the Board dismissed Fisher's petition for special leave to appeal against his conviction. It was also sufficient to accommodate the period of 18 months which that case allowed for petitions to the international human rights body.

34. One can readily understand the Government's concern, in the view of the importance which must be attached to the safeguarding of law and order in The Bahamas, that any further delay in the carrying out of the death sentence may be held to be unconstitutional.

35. But Fisher's case is not that he has been or is likely to be the victim of prolonged delay. On the contrary he is asking for more time to enable the I.A.C.H.R. to consider his case and to express its view upon it before the death sentence is carried out. For him further delay in his execution is a necessary part of the process of which he availed himself when he presented his petition to the I.A.C.H.R. after exhausting his domestic remedies. The period of 18 months referred to in *Pratt and Morgan* in respect of complaints to an international human rights body has indeed elapsed since

the petition was presented to the I.A.C.H.R. on 7th June 1996. But when the warrant was read on 26th March 1998 there were still 12 months left of the five-year period. Fisher maintains that there was no reason to regard the delay up to that date as undue. It was all attributable to his decision to avail himself, without any unreasonable delay on his part, of the various appeal processes. He points also to the progress which has been made since then in the consideration of his case by the I.A.C.H.R. On 5th May 1998 his application was held by them to be admissible. They have now informed the Government that, following an inconclusive Friendly Settlement Meeting which took place on 26th June 1998, they will consider his case at its next Regular Session, which will be held from 28th September to 16th October 1998. At the end of that period a further five months will remain before the expiry of the five-year period. So the inhuman treatment of which Fisher complains is not prolonged delay in the carrying out of the death sentence. What he is complaining about is the carrying out of the death sentence while the I.A.C.H.R. are still considering his case.

36. Article 15 of the Constitution declares that every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual. These include, subject to respect for the rights and freedoms of others and for the public interest, the right to life, liberty, security of the person and the protection of the law. The Article, which is not itself directly enforceable, concludes with these words:-

"… the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

37. The right to life is protected by Article 16(1), which provides that no person shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. But we think that it is clear that Fisher has no complaint under this Article, as the sentence of death was pronounced after his trial in the High Court for murder and the domestic appeal process which has been made available to him has been exhausted. Petitions to the I.A.C.H.R. are not part of the domestic process of which he was entitled to avail himself under the laws of The Bahamas. So he cannot claim a constitutional right under Article 16 to present such a petition and to await its result. His complaint that his execution at this stage would be contrary to his fundamental rights and freedoms must therefore be found in Article 17. That is the Article which provides protection from inhuman treatment.

38. Article 17 is in these terms:-

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

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any description of punishment that was lawful in The Bahama Islands immediately before 10th July 1973."

In *Pratt and Morgan* Lord Griffiths, delivering the judgment of the Judicial Committee, said at pages 28-29 that the purpose of section 17(2) of the Jamaican Constitution, which is *mutatis mutandis* in the same terms as Article 17(2) of the Constitution of The Bahamas, was to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. It did not address the question of delay - in other words, it was not concerned with the circumstances in which the executive intended to carry out the death sentence. So the question is whether Article 17(1) applies to the circumstances which form the basis of Fisher's complaint that it would be premature for him to be executed at this stage.

39. In his dissenting judgment in *Fisher v. Minister of Public Safety and Immigration* [1998] 3 W.L.R. 201, 215 Lord Steyn drew attention to the observations of Lord Wilberforce in *Minister of Home Affairs v. Fisher* [1980] A.C. 319, 328 where, delivering the judgment of the Board, he explained how such constitutional guarantees should be construed when he was examining the Chapter in the Constitution of Bermuda which deals with the protection of fundamental rights and freedoms of the individual:-

"It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

40. Lord Wilberforce went on to add this further explanation:-

"This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the

character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

41. In our opinion it is plain that we are concerned in this case with the circumstances in which the Government is proposing to carry out the death sentence. The purpose of Fisher's petition to the I.A.C.H.R. was to obtain their view as to whether the carrying out of that sentence would be a violation of his human rights. The Government of The Bahamas is not party to the American Convention on Human Rights. Accordingly it is not subject to the jurisdiction of the Inter-American Court of Human Rights. The ultimate sanction is limited to publication of their decision by the I.A.C.H.R. Nevertheless Fisher's right to petition the I.A.C.H.R. under Article 51 of the Regulations of the Inter-American Commission on Human Rights, as applicable to States who are members of the Organisation but who are not parties to the Convention, is not in dispute. And the Government accepts that it has a responsibility to consider the I.A.C.H.R.'s recommendations. It is clearly right to do so. In*Bradshaw v. The Attorney General of Barbados* [1995] 1 W.L.R. 936 the Board, having stressed that the acceptance of international conventions on human rights had been an important development since the Second World War, commented "where a right of individual petition has been granted, the time taken to process it cannot possibly be excluded from the overall computation of time between sentence and intended execution". The only qualification which the Government wishes to attach to this responsibility, balancing the public interest against that of the individual, is that the recommendations must be made within a reasonable time. But it has no power under the Regulations to impose a time limit on the I.A.C.H.R.

42. It seems to us that the fact that the Government have participated in this procedure - they furnished the information requested by the I.A.C.H.R. after the Commission's receipt of Fisher's application, they responded to their initial comments and recommendations and they presented a statement of their position at the Friendly Settlement Meeting in Washington - has provided Fisher with a legitimate expectation that, if the I.A.C.H.R. were to recommend against the carrying out of the death sentence, their views would be considered before the final decision is taken as to whether or not he is to be executed. But any such recommendation would plainly be pointless if he were to be executed before the recommendation was made and communicated to the Government. For the Government to carry out the death sentence while still awaiting a recommendation which might, when considered, lead to its commutation to a sentence of life imprisonment would seem in itself to be an obvious violation of Fisher's right to life. But we think that it is proper also for this purpose to take into account not only that legitimate expectation but also the many months which Fisher has already spent in the condemned cell, following the completion of the domestic appeal process. This was for no other purpose than to

await the recommendation of the I.A.C.H.R. In these circumstances the argument that for him to be executed before that recommendation is received would constitute "inhuman treatment" within the meaning of Article 17(1) appears to us to be unanswerable. It is hard to imagine a more obvious denial of human rights than to execute a man, after many months of waiting for the result, while his case is still under legitimate consideration by an international human rights body. If a legalistic interpretation of Article 17(1) leads to the conclusion that its provisions would not be violated in such circumstances, that interpretation must surely give way to an interpretation which protects the individual from such treatment and respects his human rights.

43. We recognise the acute problem which would confront the Government if the delay which were to result from the application to the I.A.C.H.R. were to be so prolonged as to make it impossible to carry out the death penalty. But is it right that the Government should be able to meet this problem by proceeding to execute the prisoner as soon as the 18 month period is over? And, if the answer to this question is in the negative, does it follow that the Government must wait for the I.A.C.H.R. to complete their work however long this takes?

44. We do not, for our part, think that the acute dilemma which is posed by these questions has yet arisen. This is because the 18 month period should be understood as no more than one of several components in the overall period of five years. It was never intended in *Pratt and Morgan* itself to be an absolute limit. At page 34 Lord Griffiths said in relation to domestic proceedings "Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases …". The same applies *mutatis mutandis* to complaints to the human rights bodies. In *Henfield v. Attorney-General of the Commonwealth of The Bahamas* [1997] A.C. 413 Lord Goff of Chieveley, delivering the judgment of the Board, said at page 424 that it was the lapse of the whole period which was relevant to the question whether there has been an inordinate delay. Where, as in this case, the domestic appeal process has been completed well within the period which was regarded in *Pratt and Morgan* as a reasonable target period, any delay in dealing with the petition to the I.A.C.H.R. beyond the 18 month target period for this stage ought to be capable of being accommodated within the overall five-year period. Furthermore, as the decision in *Guerra v. Baptiste* [1996] A.C. 397 illustrates, the five-year period has in practice been treated not as a limit but as a norm, from which - as Lord Goff said in *Henfield* - the courts may depart if it is appropriate to do so in the circumstances of the case. The decision in *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] A.C. 527, in which the petition for special leave to the Judicial Committee was dismissed more than five years after the passing of the death

sentence, shows that there is room for some latitude either way in the application of the five-year period, depending on the circumstances.

45. As an alternative to his contention that the Government had to wait for the I.A.C.H.R. to complete its report Mr. Owen Davies submitted that, even if the Government did not have to wait indefinitely, it could only execute after a reasonable time had passed and when it was reasonable to do so, despite the fact that the decision of the I.A.C.H.R. had not been taken. On the facts of this case it was not reasonable to read the warrant of execution on 26th March 1998, and it would not be reasonable to do so now. We agree with that contention. We reach our conclusion on the basis of the factors to which we have referred as justifying the appellant's legitimate expectation. We stress that 18 months is not a rigid rule (as it appears to have been regarded by the authorities and the courts in the present case). It was in any event mentioned by Lord Griffiths at page 35F-G in *Pratt and Morgan* as being the period within which it "should be possible" for the U.N.H.R.C. to dispose of cases where there had been no unacceptable delay in the domestic proceedings - i.e. when one of the main grounds, indeed in some cases the only ground, for complaint no longer arose for investigation. It may well be that the period of 18 months was in any event unrealistic, and in *Bradshaw (supra)* the Government said that applications to the human rights bodies took an average two years.

46. In deciding what is reasonable we think that it is not right to compare the time taken for domestic proceedings with that taken by international bodies. It is apparent that proceedings even in the European Commission and Court of Human Rights can take five years, or occasionally even more. The I.A.C.H.R. only normally meets twice a year and its members act on a part-time basis.

47. We also take into account that in the present case six months or so was lost between the Commission asking the Government for comments on the appellant's observations by the Commission's letter dated 30th October 1996 and the Government's reply dated 7th April 1997. We do not know how this occurred - whether the letter never arrived or whether it was not dealt with on arrival. But on any view the delay cannot, nor can any other delay, be laid at the door of the appellant. He petitioned in good time and he and his lawyers replied timeously to requests for information.

48. Whilst we understand the Government's sense of frustration at the delay, we do not think that the letter of 29th December 1997 (saying that unless the final decision was taken by 15th February 1998 the Government would be obliged to act) gave a reasonable time for the decision to be taken, in view of the fact that the Commission normally only meets twice a year. In these circumstances the reading of the warrant was unreasonable in March, and events which have happened since would make it

unreasonable to execute before a reasonable time had been allowed for the matter to be considered on its merits following the decision on admissibility and the holding of the Friendly Settlement Meeting.

49. This does not mean that we endorse or approve of the sort of timescale which this case reveals, which we recognise may not be typical in death sentence cases. On the contrary it seems to us to be essential for death sentence cases to be treated as urgent cases calling for a shortening of the relevant timetables. Not only the Government's desire to enforce the law but the condemned man's human rights under an international convention themselves require that his complaint should be dealt with expeditiously and that he be not kept waiting longer than necessary under sentence of death. But it was suggested by Sir Godfray Le Quesne Q.C. that in the judgment of the High Court in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 183 C.L.R. 273 had accepted that a Government could clearly announce a change of policy to prevent legitimate expectations from continuing. We fully accept that a change of policy might be announced to prevent legitimate expectations arising in the future, but we do not read the judgment as saying that once a procedure like the present has actually begun that a Government can by a unilateral announcement terminate legitimate expectations already created.

50. Mr. Owen Davies puts his case in the alternative to his claim under the Constitution on the basis that as a matter of good administration the law required his legitimate expectations to be respected in that he should not be executed until the decision of the I.A.C.H.R. is received, and that to do otherwise would be a wholly unreasonable exercise of power or discretion. Sir Godfray Le Quesne did not suggest that these matters could not be gone into on this appeal and we think that he was right to take that course. He contends of course that the appellant has no right even on that basis to have his execution further delayed as a matter of administrative law. The essence of the arguments on this basis is really the same as the arguments which we favour on our approach to the Constitution, and we consider that the answer is the same.

51. In these circumstances it would, in our opinion, be a misuse of the decision in *Pratt and Morgan* for the Government to insist upon Fisher's execution, within the five-year period, while he was still seeking the views of the I.A.C.H.R. on his case. We would accordingly have humbly advised Her Majesty to allow the appeal.