Trinity Term

[2017] UKPC 25

Privy Council Appeals No 0055 of 2015 and 0086 of 2015

JUDGMENT

Lendore and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance

Lord Kerr

Lord Sumption

Lord Reed

Lord Hughes

JUDGMENT GIVEN ON

31 July 2017

Heard on 26 and 27 April 2017

Appellants	Respondent
Edward Fitzgerald QC	Peter Knox QC
Ruth Brander	Navjot Atwal
Amanda Clift-Matthews	
Gregory Delzin	
Mark Seepersad	
Theresa Hadad-Maraj	
(Instructed by Simons Muirhead and Burton LLP)	(Instructed by Charles Russell Speechlys LLP)

LORD HUGHES:

1.
In Pratt and Morgan v Attorney General for Jamaica [1993] UKPC 37; [1994] 2 AC 1 (“Pratt & Morgan”) this Board, sitting as an expanded bench of seven, held that undue delay in carrying out the execution of a prisoner lawfully sentenced to death rendered it unlawful to proceed to the

implementation of that penalty. Ordinarily, it held, a period of more than five years would amount to such undue delay, so that the prisoner could no longer be executed. The Board was well aware, in giving the judgment which it did, that it would be applicable also in states other than Jamaica, and that there was likely to be a significant number of prisoners to whom it would apply. It gave considered guidance as to how its decision might be implemented. After setting out advice as to the management of the post-conviction process so as to improve expedition, Lord Griffiths, giving its judgment, said this at 35G:

“These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute ‘inhuman or degrading punishment or other treatment.’ If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the [Jamaican Privy Council] who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).”

2.
An executive power of pardon, in terms essentially identical to the Jamaican one there referred to, is contained in the Constitution of Trinidad and Tobago. Section 87 of that Constitution provides:

“87(1) The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof.

(2) The President may -

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

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

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

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

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

Sections 87(3), 88 and 89 go on to provide for the President to act on ministerial advice, and for an Advisory Committee to advise both the minister and the President on the exercise of this power. These arrangements and the Advisory Committee (also known as the Mercy Committee) are considered at (E) below. Section 70 of the Criminal Procedure Act (set out at (C) below) provides for a substituted sentence imposed as a condition of a pardon to be made an order of the court.

3.

The several appellants in this case were all convicted of murder in Trinidad and Tobago. In that country, the statutory sentence for murder is (except in the case of felony-murder) a mandatory sentence of death which is saved from constitutional invalidity because it was an existing law preserved at the time when the Constitution was adopted in 1962 (see Matthew v State of Trinidad and Tobago [2004] UKPC 33; [2005] 1 AC 433). Accordingly, sentence of death was passed on the appellants, as was lawfully required of the court. In the cases of all of them, either more than five years passed after they were sentenced to death, or that period was approaching. In most cases that period had already passed when Pratt & Morgan was decided. In others, time ran subsequently.

4.
Following the procedure suggested by the Board in Pratt & Morgan, the Presidential power of pardon was exercised for each of the appellants by commuting the death sentence to one of imprisonment. That was an exercise of the precise power provided by section 87(2)(a) and (c) of the Constitution. Those decisions were made by the President, or Acting President, for a number of prisoners at a time, and without distinction between the different members of the group dealt with at the same time. The first group, which was of 47 prisoners who included five of the appellants, received such conditional pardons on or shortly after 31 December 1993. Their death sentences were commuted to life imprisonment with hard labour for the rest of their natural lives. The second group, of five prisoners including the appellant Lendore, were granted similar pardons on 23 April 1998. In their cases the death sentences were commuted to sentences of 75 years imprisonment with hard labour.

5.
These are test cases. The appellants, like others, have lodged motions for constitutional relief under section 14 of the Constitution. Their cases, in essence, challenge the substituted sentences attached as conditions to the grants of pardon from the death sentences originally imposed on them. The several bases of that challenge have, however, shifted significantly over the course of the litigation, including after the decision of the Court of Appeal. Some refinement of argument is only to be expected and is the common coin of the progress of a case through successive layers of court, but in this case the changes of stance went further than this, and have included the argument of grounds which were not advanced before the judge or Court of Appeal. The obvious general importance for other cases of the issues raised, and the realistic readiness of the State to advance its submissions despite the alterations in stance, led the Board to permit these arguments to be advanced, although on some issues, as appears below, it would have preferred to have the benefit of the informed views of the local courts.

The issues before the Board

6.
As the argument was developed before the Board, the issues are:

(A)
Has the President any power to exercise the power of pardon and substitution in a delay case?

(B)
Alternatively, are prisoners in a delay case nevertheless entitled, despite the exercise of the Presidential power to pardon, to have the substitute sentence determined by a court?

(C)
Should section 70 of the Criminal Procedure Act be modified so that it provides the court with the power to vary the substituted sentence ordered by the President as a condition of the pardon?

(D)
Given the presidential power of pardon, has the High Court power, on a motion for constitutional relief by a prisoner in a Pratt & Morgan case, to substitute a lesser sentence; if it has, should it decline to exercise it?

(E)
What are the legal requirements for the process of considering the exercise of the power of pardon?

(F)
What is the correct legal analysis of the substitute terms which were attached to the pardons in the present case?

(G)
What are the requirements for periodic review of the cases of prisoners such as the appellants?

(H)
Are those substituted terms of imprisonment unlawful as cruel and unusual punishment on the grounds that they are irreducible life sentences?

(I)
Are those substituted terms of imprisonment unlawful as cruel and unusual punishment on the grounds that they were imposed in the same terms for a number of prisoners and without consideration of their individual circumstances?

(J)
Given that it is now common ground that a prisoner has the right to make representations to the Advisory Board and Minister considering the exercise of the power of pardon, and that the appellants were not afforded that opportunity, were they for that reason entitled to an order remitting the issue of substituted sentence to the High Court?

(A) Is there a power to pardon at all in a delay case?

7.
In the courts below, and in their initial written case before the Board, the appellants contended that the Presidential power of pardon, and therefore of substitution, does not extend to cases of the Pratt & Morgan type. In oral argument this contention, which was rejected in the High Court and in the Court of Appeal, was only very faintly renewed. Rather, the argument was that even though the President has the power of pardon, he cannot lawfully exercise it by substituting a lesser sentence. This modified contention is considered at (B) below. But it ought to be made clear that it is impossible to read section 87 of the Constitution in a manner which excludes Pratt & Morgan type delay cases. The decisions below to that effect were plainly correct.

8.
The explicit terms of section 87 confer the power of pardon in respect of any person for any offence. It is quite impossible to read them as excluding Pratt & Morgan type cases. Moreover, to do so would be contrary to the express decision of the Board in that case, and to the established practice which has obtained in numerous Caribbean states since then. It is unrealistic to treat Lord Griffiths' words, set out at para 1 above, as of no or little weight because they were technically obiter in relation to the appellants Pratt & Morgan themselves, who had brought applications for constitutional relief. At the time of the Board's decision there were over 100 prisoners in Jamaica alone who had been sentenced to death more than five years previously, together with over 50 more in Trinidad and Tobago and nine

in Barbados: see Attorney General for Barbados v Boyce (2006) 69 WIR 104, in the Caribbean Court of Justice, CCJ Appeal No CV2 of 2005 at para 46. The Board's advice as to how in practice the continuing Damoclean sword of impending execution might be removed in cases where it has become unconstitutional to carry out the sentence was plainly carefully considered and intended to be acted upon generally, as it has been for more than 20 years.

(B) An entitlement to judicial substitution of sentence?

9.
This was the substantial argument advanced by Mr Fitzgerald QC before the Board. On the assumption that a Pratt & Morgan case is within section 87, it ran as follows:

(a) the death sentence has become unlawful;

(b) the prisoner has become entitled as a matter of law to commutation of the death penalty and substitution of a lesser sentence;

(c) even though the President can pardon from execution, the additional substitution of a lesser sentence is a judicial function; for the President to assume it to himself is contrary to the principle of the separation of powers which is inherent in the Constitution; only the court can do it; the prisoner is entitled to judicial determination of his substitute sentence;

(d) in substituting a sentence, the President would not be exercising the power of mercy but rather exercising the sentencing process which is the proper remit of the courts;

(e) additionally, for the President to exercise the power of substituting a sentence is to infringe the prisoner's right under the Constitution to due process and the protection of the law because once the death sentence has become unlawful so has the detention of the prisoner, and only a court can impose a new order depriving a subject of his liberty.

10.
This argument fails at each of these several stages.

11.
First, as to (a), the original sentence has not become unlawful; it has become unlawful to carry it out. The original sentence of death was lawful. Indeed it was mandatory; the court of trial had no choice. All that has become unlawful is carrying it out after unreasonable delay.

12.
The argument assumes, at both (a) and (b), an equivalence between a sentence which was unlawful (or legally erroneous) when passed and one which was lawful but which it has subsequently become unlawful to carry out. There is no such equivalence. The difference is of importance. If the original sentence is one which the trial court could not (or indeed should not) have passed, the convicted defendant has a right of appeal to the Court of Appeal, and that court will substitute the correct sentence in the usual way. In a Pratt & Morgan case, such as that of these appellants, there could be no appeal to the Court of Appeal because there was nothing wrong, in law, with the sentence passed by the trial judge. There can be no question of an appeal against sentence succeeding, even after the passage of a period amounting to unreasonable delay. The available legal remedy is, by section 14 of the Constitution, an originating motion for relief lodged in the High Court. For this reason, the Board in Hunte v State of Trinidad and Tobago [2015] UKPC 33, having considered but rejected grounds of appeal against conviction, held that it lacked jurisdiction, despite what was by then delay beyond the

term contemplated in Pratt & Morgan, to proceed to quash the sentences of death. It could not do so by way of appeal against sentence because the sentence was perfectly lawful and properly passed. Nor could it do so by way of constitutional relief because, however predictable the outcome of an application to the High Court for such relief might be, the Board has no original jurisdiction to entertain such an application; it must first be made to, and considered by, the High Court, as required by section 14.

13.
The difference between a sentence which was unlawful when passed and one which was lawful but which cannot now be carried out is also illustrated by Coard v Attorney General of Grenada [2007] UKPC 7. In that case the statutory provision for a mandatory death penalty (in Grenada) was unconstitutional. It followed that there had never been a lawful sentencing exercise, and no valid sentence to which the power of pardon could be applied. In that case, therefore, unlike the present, the purported commutation and substituted sentence were also unlawful. That is of no assistance to the present appellants, because in their cases there has been a lawful sentence, to which the power of pardon has lawfully been applied.

14.
There is nothing in Bowe v The Queen [2006] UKPC 10; [2006] 1 WLR 1623 which contradicts these conclusions. Certainly, the Board there held that since a legislative provision for a mandatory death penalty was, in the Bahamas unlike in Trinidad and Tobago, unconstitutional because not saved by an existing laws exception, the Court of Criminal Appeal could and should entertain an appeal against a death sentence passed in reliance on that mandatory statute. But that was because the mandatory death penalty was unlawful and hence a sentence passed in reliance upon it was also unlawful at the time it was passed. It was not a case in which a lawful sentence was passed, the carrying out of which subsequently became unlawful. True it is also that in the concluding paragraph 44 of its judgment in that case the Board said that it would be absurd to hold that a sentence was constitutional but that giving effect to it was not. That, however, was said in the quite different context of a supplementary contention by the appellants that even if (contrary to the conclusion arrived at by the Board) it had been held that the mandatory death penalty was lawful, the carrying out (timeously) of such a sentence by the executive could still be unconstitutional. It is one thing to say that if a sentence is lawfully passed it can lawfully be carried out; it is quite another to say that a sentence lawfully passed is retrospectively transformed into an unlawful one when, as a result of subsequent events, here unreasonable delay, it becomes unconstitutional to carry it out.

15.
It does not at all follow from the fact that the appellants became entitled to constitutional relief from the carrying out of the original death sentences that that excludes the power of pardon. On the contrary, if the power of pardon be exercised, as contemplated by the Board in Pratt & Morgan, that itself relieves the convicted person of the threat of unconstitutional execution. There then remains no occasion for a constitutional motion to restrain it, even if there could in some cases be scope for a motion for other relief, as to which it is unnecessary here to express any opinion. This was undoubtedly the basis of the advice given by the Board in Pratt & Morgan (see para 1 above).

16.
As to (c), it is of course axiomatic that the Constitution assumes some separation of powers between the executive and the judiciary, and for that matter between both of them and the legislature and the President. Such separation is a common feature of all Westminster model constitutions. The Constitution of Trinidad and Tobago deals separately with the principal arms of the State. Chapter 3

relates to the President, Chapter 4 to Parliament, Chapter 5 to the Executive, Chapter 6 to the Director of Public Prosecutions and the Ombudsman, and Chapter 7 to the judiciary. In the absence of explicit provision in a constitution such as this, it may be necessary to construe legislation in a manner which remains consistent with the separation of powers: a clear example is afforded by Liyanage v The Queen [1967] 1 AC 259 where legislation designed to take effect ad homines by prescribing sentences for particular defendants was held to be ultra vires as inconsistent with the Constitution of Ceylon which manifested an intention to secure judicial independence. But this is the process of ensuring that the Constitution prevails over ordinary legislation, or executive acts. There is no room for this process when the provision under consideration is itself an entrenched rule of the Constitution, as section 87 here is. The Constitution is, by section 2, the supreme law of Trinidad and Tobago. It itself defines the manner in which effect is given to the separation of powers. There is no power in a court to go behind its explicit provisions by asserting some yet higher norm of legal theory. The submission invites the Board to treat section 87 of the Constitution as unconstitutional.

17.
A similar argument was advanced before the Board in Boyce v The Queen [2004] UKPC 32; [2005] 1 AC 400, but was rejected for the same reason. The Board there held that in Barbados (as in Trinidad and Tobago) the mandatory statutory death penalty was lawfully preserved by an existing laws exception in the Constitution. The Constitution also contained, as here, provisions for executive clemency. Referring to these two provisions, Lord Hoffmann, delivering the majority opinion, said at para 70:

“70. It follows that neither can be rejected on the ground that it infringes the principle of the separation of powers. Although [counsel] submitted that it was a principle which overrode even the terms of the Constitution itself, their Lordships regard that as an extravagant proposition. To say that a constitution is based upon the principle of the separation of powers is a pithy description of how the constitution works. But different constitutions apply this principle in their own ways and a court can concern itself only with the actual constitution and not with what it thinks might have been an ideal one. All that matters is whether the mandatory death penalty and executive clemency are in accordance with the Constitution of Barbados. In their Lordships’ opinion, they are.”

18.
Proposition (d) was founded by Mr Fitzgerald principally on an observation of Lord Bingham in Reyes v The Queen [2002] UKPC 11; [2002] 2 AC 235. That was another case of a statutory mandatory death sentence held to be unconstitutional, there in Belize and for a particular category of murder. One contention considered and rejected by the Board was that the executive power of clemency saved the mandatory sentence from being unlawful. At para 44, Lord Bingham explained:

“44. In reaching this decision the Board is mindful of the constitutional provisions, summarised above, governing the exercise of mercy by the Governor General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the Constitution. Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore, the provisions governing

the Advisory Council appear in Part V of the Constitution, dealing with the executive. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions ... The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process: see Edwards v Bahamas Report No 48/01, paras 167-168, Downer and Tracy v Jamaica Report No 41/00, paras 224-226 and Baptiste v Grenada Report No 38/00, paras 117-119."

19.
What was under consideration in Reyes was the lawfulness of the sentencing statute. Plainly, executive clemency is not part of the sentencing process; it is a separate power which falls to be exercised, where appropriate, independently of sentencing. There is no reason to doubt the general proposition that the exercise of mercy is distinct from the application of the sentencing process. There are clear differences between them. One is a judicial process; the other is not. Whilst it is to be expected that a sentencing court may be activated by mercy, amongst other considerations, that is not by any means its sole, or even principal, consideration. When, as in Reyes, the legality of the sentencing process is under examination, defects in it cannot be rectified by the separate power of clemency. But it does not begin to follow from that that the exercise of the power of clemency, separately from the sentencing process, is ruled out; on the contrary, it is plainly designed to be used.

20.
Next, it is also plainly correct that the exercise of the power of pardon is not necessarily, or even ordinarily, part of a process of vindicating constitutional rights. Its ordinary use is discretionary and designed to provide an extra-judicial dispensation from the consequences of conviction. But that does not mean that the power to pardon cannot be exercised in a manner designed to avoid a breach of an individual's constitutional rights. In the present cases, it was so used. The power of pardon was intended to reflect the common law prerogative power as exercised in the UK - see confirmation in section 69 Criminal Procedure Act. That power was used not only for mercy but also where the prisoner was entitled not to be executed, for example by reason of insanity: see Pitman and Hernandez v State of Trinidad and Tobago [2017] UKPC 6 at paras 34-35, and Rolph The Royal Pardon (1978) at pp 28-29 and 47-52.

21.
Contention (e) was grounded on the proposition that because to carry out a death sentence after the passage of an unreasonable period of delay has become unconstitutional, the sentence of the court has no further effect whatever. There is no reason at all why that should be so, and it is clearly not correct. The prisoner remains convicted. The President has the explicit power to substitute a different sentence under section 87(2)(c), and that not only includes imprisonment but almost invariably will take that form. The argument is a further variant of the proposition considered above, that the consequence of delay is to vitiate the original sentence in law, and it assumes what it seeks to prove.

22.
Nor can the suggested analogy with R (Lumba v Secretary of State for the Home Department (JUSTICE intervening) [2011] UKSC 12; [2012] 1 AC 245 and R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888; [2003] INLR 196 avail the appellants. Whilst those cases held continued detention unlawful if the particular occasion for it relied upon had ceased to exist, that was because the power of detention in question was explicitly given by the statute only in aid of proposed deportation; it was a power which could only be exercised where there was the prospect of deportation within a reasonable time. By contrast, the detention by the State of a person convicted of murder is clearly authorised, whether explicitly or implicitly, by the sentence (of death) which the

court has pronounced. That authority continues unless and until a court orders otherwise, or a pardon is granted without substitute imprisonment. That the execution cannot any longer proceed does not alter this position.

23.
For these reasons the modified argument (B) advanced on behalf of the appellants must be rejected. The Presidential power of pardon does extend to substituting a lesser sentence in a Pratt & Morgan case.

24.
The Board would not altogether rule out the legal possibility that the exercise of the power of pardon and substitution of alternative sentence could in certain very limited circumstances infringe a prisoner's right under the Constitution to the protection of the law. One could theoretically envisage the purported exercise of the power of pardon and substitution in the case of a convicted prisoner who has a viable right of appeal against sentence to the Court of Appeal. Theoretically the position could arise in which the substituted sentence attached to a pardon was more severe than the one which the Court of Appeal might, if it allowed the appeal, order. In such a case, the power of pardon might indeed deprive the prisoner of an existing legal right to appeal and to the normal operation of the criminal justice system, and to that extent might deprive him of the protection of the law. But that is far removed from the present cases, and from any known practice of the power of pardon. The difference in the present cases is that the exercise of the power of pardon does not deprive the prisoner of any existing legal right of appeal to the Court of Appeal, because he has none in the face of a mandatory sentence. Nor can it be regarded as depriving him of a vested right to launch a constitutional motion against execution because the operation of the pardon has itself removed that threat from him. Where carrying out the death sentence is impermissible because the conditions outlined in Pratt & Morgan exist, concurrent alternative routes to relief from the threat of unconstitutional execution exist, and it must be open to the State to redress the position without requiring the prisoner to seek constitutional relief. Indeed, the Board made this clear in its opinion in Pratt & Morgan.

25.
The power of pardon might be exercised after proceedings in the Court of Appeal were concluded, if there appeared good grounds for mitigating as a matter of discretion and mercy that Court's substituted sentence, but that would be the orthodox use of the power. There can of course be no question of the power of pardon being exercised to impose a sentence more severe than that substituted by the Court of Appeal, for section 87(2)(c) makes clear that only a less severe punishment can be substituted.

(C) Section 70 Criminal Procedure Act

26.
Section 70 provides:

"70. When any person is convicted of any crime punishable by death, if the President in the name and on behalf of the State intends to extend mercy to any such person upon condition of imprisonment, and such intention of mercy is signified by the President to the Court during the Criminal Sessions at which such person was convicted, the Court shall allow to such person the benefit of a conditional pardon, and make an order for imprisonment, of such person; and where such intention of mercy is so signified to the Court at any time when the Court is not in session, the Chief Justice shall allow to such person the benefit of a conditional pardon, and make an order for the imprisonment of such person, in

the same manner as if such intention of mercy had been signified to the Court during the Criminal Sessions at which such person was convicted; and such allowance and order shall be considered as an allowance and order made by the Court, and shall be entered on the records of the Court by the Registrar, and shall be as effectual to all intents and purposes as if such allowance had been made by the Court during the continuance of the same Criminal Sessions, and every such order shall subject the person to be so imprisoned."

27.
The plain purpose of this section (an existing law at the time of the Constitution) is to give effect to a Presidential pardon by means of an order of the court before which the prisoner either is, or was, indicted. The contention of the appellants is that it ought to be interpreted as enabling the court to depart from whatever substitute sentence the President attaches to his pardon, and to proceed to determine sentence for itself. As a matter of construction, this is simply not a possible reading of the section.

28.
The section deals in the same manner with two situations: (1) where the pardon is signified to the court whilst it is still in session; and (2) where the pardon is notified after the end of the relevant court session. In the first of those two situations the notification of pardon could, theoretically at least, be received either before or after the mandatory sentence of death is pronounced. Whichever of these three factual positions obtains, the section requires the court not simply to pass a sentence of imprisonment, but to "allow to such person the benefit of a conditional pardon". If the prisoner is to be given the benefit of the President's conditional pardon, he must be made subject to the condition which is an integral part of it. If the court were to assert the power to re-sentence for itself, it would not be giving effect to the conditional pardon. Rather, it would be giving the prisoner the benefit of the remission of the death sentence without attaching to that remission the substitute sentence which is the basis on which it has been given. The section is enacted to avoid there remaining in place inconsistent directions relating to the prisoner from (a) the President and (b) the court. The suggested construction would contradict that purpose and leave in place two inconsistent substitute sentences, both having the force of law.

29.
Secondly, because section 70 deals in exactly the same way with the case of a pardon granted shortly after the trial and one granted years later, it follows that it deals identically with the prisoner whose pardon is a pure act of mercy and the one, such as these appellants, to whom a pardon is granted as a means of relieving him from an execution which has become unconstitutional through the passage of time. In the case of the former, it cannot be suggested that the court has any power to modify the substitute sentence which is attached as a condition to the pardon. In such a case there could be no colour for any suggestion that the prisoner had any kind of right to a pardon and to a substituted sentence. Nor, therefore, can a pardon granted after the passage of time has made execution unconstitutional be treated differently.

30.
Thirdly, sentencing by the court is a statute-governed operation. In a case where a mandatory death penalty is prescribed by statute and remains constitutional, there is no residual sentencing power which the court of trial can invoke to impose any different order. This applies equally to pardons granted at or about the time of trial and to those granted after unreasonable delay has made execution unconstitutional.

31.
Fourthly, since section 70 is an existing law, the suggested construction cannot be forced upon it by the terms of the Constitution. More fundamentally, such a construction would in any event be inconsistent with the Constitution. It would heavily qualify the presidential power set out in section 87(2) of the Constitution, because it would effectively remove from it section 87(2)(c) in all delay cases.

32.
It may well be that if one were starting afresh with a new constitutional and statutory scheme for the handling of Pratt and Morgan prisoners whom it has become unlawful to execute, a system which committed the substitution of sentence to the judiciary would have considerable appeal. The question before the Board, however, concerns the law which is presently in place.

(D) The powers of the High Court on constitutional motion

33. This question does not arise on the appeals of these appellants, but was addressed by the State in argument. Attention was invited to the proper course to be adopted if a constitutional motion were to be brought before the High Court by a prisoner who contended that he had been the victim of unreasonable delay within the principle of Pratt & Morgan. In particular, the Board was invited to consider whether the presence of the Presidential power of pardon in the Constitution meant that the court should defer to it by leaving remission of the death sentence and substitution of an alternative sentence to the President.

33.
Section 14 of the Constitution gives the High Court very wide powers to ensure that a citizen is not deprived of his fundamental constitutional rights under Chapter 1. It provides:

“14.(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter 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 High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction -

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

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4),

and may, subject to subsection (3), 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 this Chapter to the protection of which the person concerned is entitled.”

34.
Subsection (3), there referred to, applies the State Liability and Proceedings Act to such an application, but that does not limit the breadth of the power of the court to make such order and to give such directions as it considers appropriate for giving effect to the constitutional rights concerned. Section 14(2) is, for present purposes, in terms identical to section 25(2) of the Constitution of Jamaica, which was the governing supreme law in Pratt & Morgan. In that case, the prisoners had brought constitutional motions under section 25. The Board entertained no doubt that the provisions of that section were amply wide enough to enable it not only to declare that execution

after unreasonable delay would be unconstitutional but also to substitute sentences of life imprisonment: see para 78. It did so notwithstanding the presence in Jamaica of a power of pardon in terms essentially identical to those in place in Trinidad and Tobago. The Board sees no reason to depart from the view which it expressed in Pratt & Morgan. The very wide words of section 14(2) of the Constitution of Trinidad and Tobago empower the High Court, if on a constitutional motion it finds that execution has become unlawful by reason of unreasonable delay, so to declare and to order commutation to an appropriate substitute sentence.

35.
The occasion for the High Court to do so may be relatively rare, if the practice of issuing a Presidential pardon after the passage of five years is followed, as presently it appears to be. But if for any reason there has been no pardon at the time when the High Court determines an application under section 14, the Board can see no reason why the court should feel constrained to confine itself to a declaration of unconstitutionality, together with any other relief, and should not proceed to substitute an alternative sentence. It is clear that the President has the power to substitute a sentence if he exercises his power of pardon, but this is a supplemental power and does not, for the reasons set out above, constitute him a sentencing organ within the criminal justice system. Still less does it make him the sole re-sentencing organ.

(E) The legal requirements for the process of considering pardon

36.
Section 87(3) of the Constitution provides that the Presidential power of pardon may be exercised in accordance with the advice of a minister, which minister may be designated by the President on the advice of the Prime Minister. The relevant minister is and for some time has been the Minister for National Security. Section 88 of the Constitution requires the creation of an Advisory Committee on the power of pardon. Its members are stipulated by section 88; the designated minister is its chair, the Attorney General and the Director of Public Prosecutions must be members, and there may be up to four others, appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. The Committee has the power under section 89 to regulate its own procedure. It must consider the case of any person sentenced to death, and may consider any other possible exercise of the power of pardon. The minister is not obliged to follow the advice of the Committee (section 89(3)).

37.
In the present case the Court of Appeal (on this point reversing the judge) held that the effect of the Board’s decision in Lewis v Attorney General of Jamaica [2001] 2 AC 50; [2000] UKPC 35 is that it has always been the law that a person in whose case a pardon is under consideration must have the opportunity to make representations of his own. The present appellants, who were granted pardons before Lewis, were not given that opportunity. The decision of the Court of Appeal on this point has not been challenged by the State, and the Board endorses it for the reasons that court very fully gave.

(F) Analysis of the substitute terms imposed

38.
It was common ground between the parties in the Court of Appeal that a sentence which incarcerates a prisoner for ever, without any prospect of release, whatever might be the change in the prisoner or his circumstances, is unlawful as cruel and unusual punishment. In that court, the argument of the appellants was that the substitute sentences in the present cases could not be lawful as conditions attached to the pardons, for three different reasons:

(a) because a sentence of imprisonment for the rest of the prisoner's natural life is unknown to law;

(b) because a sentence of imprisonment for 75 years is obscure, arbitrary and, because longer than imprisonment for life, exceeded the maximum powers available in Trinidad and Tobago; and

(c) because, when making the order under section 70 the Chief Justice had added to both forms of substitute terms the direction that the appellants should remain imprisoned for the whole of the term of imprisonment, and that had rendered the substitute term one from which there was no prospect of release, however conditional.

39.
Both the judge and the Court of Appeal held that the use of the words "natural life" did not alter the nature of the term imposed from one of life imprisonment, which is well known to the legal system in Trinidad and Tobago. That conclusion is not disputed by the State and the Board is satisfied that it is plainly correct. The substitute sentence should be construed as the form of indefinite imprisonment known to the law of Trinidad and Tobago. Such construction also follows from the provisions of the Prison Rules which ordain regular reviews of life prisoners' cases, for which see below.

40.
The judge held that the terms of 75 years ought also to be construed as sentences of life imprisonment. The Court of Appeal disagreed, holding that those terms were determinate, if long, and also lawful. The Board agrees with the Court of Appeal. The suggestion had been that the sentence was the equivalent of life because the average time served by those sentenced to life imprisonment was well below 75 years, or even the 50 years to which such a term would in effect be reduced by full remission (see below). That process of reasoning is illegitimate. The form of sentence cannot be read as indeterminate. These terms of 75 years can no more be construed as indeterminate life sentences than can any other determinate sentence imposed on a man who may not survive its full length, something which can occasionally be true of relatively short sentences. As to the average time actually served by others sentenced to life imprisonment, that depends on the offences of which they have been committed, which by definition cannot include murder, and the outcome of the regular reviews to which life prisoners are subject. Such an average of experience cannot convert a determinate term into an indeterminate one.

41.
These contentions (a) and (b) were not renewed before the Board. As to (c), for the reasons set out above the addition to the section 70 court order could not alter, but could only give effect to, lawful substitute sentences imposed by the President as a condition of his pardons. Nor could a section 70 order displace the provisions of the Prison Rules for review and remission (for which see below). So the substitute sentences to which these appellants, and others like them, are presently subject are either ones of life imprisonment or are determinate sentences of 75 years.

42.
Prison Rule 285 and following provide for remission in the case of determinate sentences. Rule 285 provides:

"285 - Remission

With a view to encouraging good conduct and industry and to facilitating the reformative treatment of prisoners, arrangements shall be made by which a convicted prisoner serving imprisonment, whether under one sentence or consecutive sentences or under any such sentence or sentences and the

remnant of a previous sentence, for a period exceeding one month, may become eligible for discharge when a portion of his term of imprisonment, not exceeding one-third of the whole term of imprisonment, has yet to run: Provided that nothing in the said arrangements shall authorise the reduction of any period of imprisonment to be served to less than 30 days."

43.
The ensuing rules set out a scheme of progressive earning of marks, essentially for good behaviour. It follows that a prisoner serving a 75 year sentence can, providing his behaviour is good, earn remission of one third. Even a 50 year sentence is, however, plainly one which will in almost all cases take effect in practice but not in form as an indefinite one in the sense that it may well last the lifetime of the prisoner.

(G) The regime for review

44.
The Prison Rules contain two relevant provisions for periodic reviews of prisoners' cases. Rules 281 and 282 are both headed "Review of Long Sentences":

"281. The case of every prisoner serving a life sentence shall be reviewed … at the 4th, 8th, 12th, 16th, and 20th year of the sentence.

282. The case of every prisoner serving a term of imprisonment exceeding four (4) years shall be reviewed … at intervals of four years or at shorter periods if deemed advisable."

It follows that prisoners subject either to life sentences or to determinate sentences of 75 years are entitled to review at not less than four year intervals. Rule 281 must clearly be construed as requiring such four yearly reviews also after more than 20 years, if that period should pass, and even if it were not so read, a life prisoner would be entitled to similar reviews under Rule 282, since a life sentence is plainly a sentence to a term exceeding four years.

45.
The evidence shows that these reviews are undertaken initially by the superintendent of the relevant prison. Reports of the prisoner's behaviour, attitude, disciplinary record, educational work, sporting progress and the like are collated. The prisoner is interviewed. He is also examined medically. A written report is sent to the Minister for National Security with a recommendation addressing response to rehabilitative efforts, and whether the prisoner is suitable for early release. The Commissioner for Prisons may add his own recommendation, either concurring or disagreeing. Early release, if it occurs, is accomplished through the exercise of the power of Presidential pardon under section 87 of the Constitution. If the prison recommendation is for release, a Minister (designated by the President, acting in accordance with the advice of the Prime Minister) consults the Advisory Committee before tendering advice to the President, upon which the President "may" (and by convention no doubt will) exercise his power (section 87(3)). Rajkumar J's judgment, p 88, suggests that the designated Minister was the Minister for National Security himself.

46.
Apart from the regular reviews, a prisoner is entitled himself to petition the President for clemency by way of pardon, as may relatives or others on his behalf. Such an application is referred to the Advisory Committee, together with the assessment of the prison superintendent and/or Commissioner of Prisons.

47.

Both processes are explained to the prisoner on admission at the start of his sentence.

48.
Since the Board's decision in Lewis v Attorney General of Jamaica [2001] 2 AC 50; [2000] UKPC 35 the papers considered under either process by the Advisory Committee are made available to the prisoner, who may make representations to it. Until recently the documents prepared in the four yearly reviews were not made available unless they went on to the Advisory Committee because they included a recommendation for early release; the prisoner's input was limited to his personal interview. But in the High Court in the current litigation, Rajkumar J declared that natural justice and section 4(b) of the Constitution require that the prisoner be provided with the material being considered, and be given sufficient time and opportunity to make representations, either personally or through representatives, in such manner as the reviewing authorities should deem most appropriate to any issue raised. That finding, which follows the principle of Lewis, has not been challenged and now represents the law. The process of review is, moreover, on the authority of Lewis, subject to judicial review if legal error, including error of fairness, be in question.

49.
Mr Fitzgerald advanced four criticisms of the review process as it operates in Trinidad and Tobago.

50.
Firstly, it was said to be flawed because administered by the Executive rather than by judicial process; Mr Fitzgerald relied upon the first instance Eastern Caribbean decision in In the Matter of Section 6 of the Anguilla Constitution Order SI No 334 as amended v Attorney General of Anguilla [2010] ECSCJ Mp 359. But that impressive judgment was that a mandatory life sentence, with no system for either parole or the setting of minimum term tariffs, was unconstitutional because invariable, and thus disproportionate and cruel and unusual punishment. The reasoning was the same as applied by the Board to mandatory death penalties in places where, unlike in Trinidad and Tobago, they are not saved by existing laws provisions. Because the mandatory life sentence was thus unconstitutional, the original sentence was unlawful. From that it followed that the Governor's power of pardon could not be relied upon as the passing of a sentence. That is not authority for the different proposition that where a power of pardon is used not to pass a sentence but to relieve the defendant from the court's sentence, it must be exercised by a judicial body: see paras 12-14 above for the difference. It is to be noted that this point was not taken in either of the courts below. On a point like this the Board would be much assisted by the view of the local courts, who have noticeably not identified any problem. There is clearly no general rule that all reviews must be judicial.

51.
Secondly, it was said that the reviews must be conducted "by the decision-making bodies themselves". This appeared to be a complaint about the manner in which prison reviews are conducted initially by the prison authorities and passed on, either invariably or where release is recommended, to the Advisory Board and the minister. This point was completely new and the exact practice has neither been explored in evidence nor received the consideration of the local courts. It seems natural enough that the initial report on the prisoner, with recommendation, is undertaken by those supervising him in custody. In any event, if there is complaint about the fairness of the manner of review, the remedy is to challenge the procedure by judicial review; such complaint would not affect the validity of the substituted sentence.

52.

Thirdly, the Board was referred to a four-year Report (the most recent available) made in 2012 by Daniel I Khan, Inspector of Prisons (2011-2012), which is sharply critical of the adequacy and effectiveness in practice of the review process at that time. It was submitted that this goes to show that the review process was irregular, that it failed to meet a Strasbourg-derived test of pre-established objective criteria (for which see paras 55-74 below) and that the sentences cannot truly be regarded as having been “irreducible”. This report was not available at the time of the hearing before the judge, but it was by the time the case reached the Court of Appeal; it was not relied upon there. That alone militates against admitting the point without the considered view of the local court. There are aspects of the report which make concerning reading. It demonstrates that some reviews were delayed, erratically carried out and, in the case of some prisoners serving non-commuted sentences, altogether omitted. Separately, the Board observes that the evidence filed in the case of the appellant Williams demonstrates that his 2002 and 2006 reviews were both delayed and the reports appear to bear dates only in 2008. The Inspector’s report relates to a period several years ago and, importantly, before the judge and Court of Appeal laid down clear rules as to the requirement of natural justice. If this pattern of reviewing still persists, then challenge to the operation of the process may be necessary, by way of judicial review. What the report does show is that there is a genuine process of review and that in the period May 2011 to March 2012 the cases of 11 commutation prisoners were reviewed, of whom seven were recommended for release on reasoned grounds generally connected either to behaviour, risk or physical condition. Those who were refused were likewise refused on reasoned grounds. There is no question of there being a lack of any prospect of release.

53.
Fourthly, criticism was made before the Board of the composition of the Advisory Committee, on the grounds that it contains representatives of the prosecution and/or the State, namely the Attorney General and the Director of Public Prosecutions. Such criticism is misplaced. The composition of the Committee, so far as the membership of those two officers of state is concerned, is prescribed by section 88 of the Constitution and accordingly cannot be questioned. The appointment of other members is, under section 88, for the President, after consultation with the Prime Minister and Leader of the Opposition. The Board has no jurisdiction to control such appointments. It was suggested to the Board that the identity of these other members might have to be kept confidential for reasons of personal safety. Whether that is so or not, it is certainly open to the President to seek to include appointees whose approach contributes some kind of balance to the ex officio members and, given the need to deal fairly with the representations of prisoners and the importance of presenting a public appearance of objectivity, to include persons with some judicial or sentencing experience, but that is a matter for him.

(H) Cruel and unusual punishment; irreducible sentences?

54.
That will bring the Board to the second principal substantive argument advanced before it for the appellants. This was that these sentences amount to irreducible life sentences and thus to cruel and unusual punishment and are for that reason alone unlawful. That argument was largely based upon decisions of the European Court of Human Rights. None of those decisions was relied upon before the courts below. The Board would have benefited from the informed view of the local courts as to the practical operation of the review and pardon system judged against such general principles as can be extracted from those decisions, but has been able to reach clear conclusions nevertheless upon the question whether these sentences are illegitimately irreducible.

(H-i) The use of Strasbourg decisions

55.
The Board takes this opportunity to make some general observations about the use of the case law of the European Court of Human Rights to interpret the rights and freedoms protected by the Constitution.

56.
The European Convention for the Protection of Human Rights ("ECHR") has historical links to states such as Trinidad and Tobago which were formerly dependencies of the United Kingdom. In 1953, two years after it ratified the ECHR, the United Kingdom made a declaration under article 56 extending its operation to most territories for whose international relations it was then responsible. These included Trinidad and Tobago. The effect was to create an international law obligation of the United Kingdom to secure to everyone in Trinidad and Tobago the rights and freedoms defined in the ECHR. That obligation subsisted until the United Kingdom ceased to be responsible for the territory's international relations upon independence in 1962 (by which time the European Court of Human Rights had given only four judgments: Lawless v Ireland (No 1) (1960) 1 EHRR 1, Lawless v Ireland (No 2) (1961) 1 EHRR 13, Lawless v Ireland (No 3) (1961) 1 EHRR 15 and De Becker v Belgium (1962) 1 EHRR 43). Although corresponding rights and freedoms are protected by other international human rights instruments, as a matter of history entrenched rights and freedoms such as those protected by section 4 of the Constitution of Trinidad and Tobago were derived from the ECHR, as the Board has more than once observed. Since 1962, however, the ECHR has, so far as Trinidad and Tobago is concerned, been replaced on the plane of international law by other treaties and other international instruments to which Trinidad and Tobago has acceded as an independent state, including the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the Charter of the Organisation of American States and the American Convention on Human Rights. On the domestic law plane, the sole basis for their protection is the Constitution.

57.
The Board has frequently resorted to the sources of international human rights law when considering the general principles governing rights which are the common currency of civilised nations. These include international human rights instruments, the case law of international bodies charged with their interpretation, and the decisions of the domestic courts of common law jurisdictions including those of the Board on appeal from them. In Reyes v The Queen (supra) Lord Bingham, delivering the advice of the Board, endorsed this practice, while emphasising that the starting point was the Constitution. The court was required to "consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society" (para 26). At the same time, this

"does not mean that in interpreting the Constitution … effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does."

See also Matthew v State of Trinidad and Tobago [2004] UKPC 33; [2005] 1 AC 433, paras 36-39 and Watson v The Queen (Attorney General for Jamaica intervening) [2004] UKPC 34; [2005] AC 472, para 30.

58.
Constitutional provisions, especially those protecting fundamental rights, generally fall to be interpreted in the light of the developing values of the societies for which they were made. Such instruments were described by the Privy Council as long ago as 1930 as “a living tree capable of growth and expansion within its natural limits”: Edwards v Attorney General for Canada [1930] AC 124, 136. The European Court of Human Rights has always applied a corresponding principle. In Tyrer v United Kingdom (1978) 2 EHRR 1, 31, where it was first articulated, the court described the ECHR as

“a living instrument which … must be interpreted in the light of present day conditions … [T]he Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe.”

59.
It is inherent in this concept of fundamental rights that different jurisdictions may develop the law in ways that reflect their own constitutional traditions, legal procedures and collective values. The European Court of Human Rights has been the most prolific single international source of judicial decisions on human rights which in one form or another are protected under many instruments in many countries. But in considering the persuasiveness of its decisions in Trinidad and Tobago, some significant features of its jurisprudence must be born in mind. First, the Convention is a regional human rights instrument and, as the Strasbourg court’s observations in Tyrer show, the values which it seeks to apply are those of the member states of the Council of Europe so far as it is possible to generalise about them. Criminal law and procedure, and penal policy in general, are areas in which accepted practices are particularly liable to diverge as between different jurisdictions and different parts of the world, where patterns of criminality, social attitudes to crime and the practical implications of penal policy may not be the same. Secondly, the Strasbourg court has not been content to lay down general principles to be applied by national courts in accordance with divergent national practice. Its practice has been to define the incidents of human rights prescriptively and in considerable detail. This means that the scope for inconsistency between the decisions of the court as an international court and the values and practices of individual jurisdictions is necessarily increased. Thirdly, perhaps because of the enormous volume of its decisions and the differing composition of its chambers, as well as because it is evolutionary, the jurisprudence of the Strasbourg court may sometimes not be entirely consistent internally, which can require analysis by States which are parties to the ECHR. It is not the duty of the courts of independent non-party States to follow every turn in its case law as it occurs.

60.
Compliance with the decisions of the European Court of Human Rights is not an international obligation of Trinidad and Tobago as it is of the United Kingdom. Instead, the international obligations of Trinidad and Tobago in relation to human rights arise under the instruments to which it is party, some of which have their own decision-making bodies and their own corpus of decisions. The decisions of the European Court of Human Rights are not a source of law which the courts of Trinidad and Tobago are bound to take into account, as the domestic courts of the United Kingdom are by virtue of section 2(1) of the Human Rights Act 1998, let alone are they a source of binding authority. They may bear valuable persuasive authority on the general principles underlying the protection of particular rights. But they are likely to be less valuable when prescribing the detailed content of those rights or the mode of giving effect to them procedurally. As far as the Board is concerned, particular importance will generally be attached to the views of the courts below before recognising any

development of the law which is not warranted by the express terms of the Constitution or necessarily implicit in them.

(H-ii) Irreducible life sentences?

61.
The contention of the appellants is that the life sentences (and equally the 75 year sentences since they are de facto indefinite for the person on whom they are imposed) are irreducible unless there exists:

(a) a prescribed review mechanism, which is

(b) based upon “objective pre-established criteria, of which the prisoner had precise cognisance at the time of the imposition of the life sentence”, and

(c) which have “a sufficient degree of clarity and certainty” to enable the prisoner, at the time the sentence is imposed “to know what he must do to be considered for release”, and

(d) which require the authorities to determine “whether the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds”.

These propositions, save perhaps for the first, are all derived directly from recent cases in the European Court of Human Rights, in particular Kafkaris v Cyprus [2008] ECHR 143, Vinter v United Kingdom [2013] ECHR 645, Magyar v Hungary [2014] ECHR 1456, Trabelsi v Belgium [2014] ECHR 893 and Murray v The Netherlands [2016] ECHR 408.

62.
Valuable as these judgments are, this process of reasoning directly from specific passages in them exhibits precisely the difficulties set out at paras 52-57 above. Firstly, those decisions are firmly based upon what is identified as a regional European consensus as to the objectives and minimum standards of punishment for crime. Secondly, they are by no means clear and consistent amongst themselves. Before attempting to deduce from Strasbourg decisions on article 3 ECHR the correct application of section 5(2)(b) of the Constitution it is necessary to concentrate upon the underlying principle rather than simply to transpose either the decisions themselves or, even less appropriately, extracted quotations.

63.
The Strasbourg decisions are reached against the background of a Europe-wide consensus about certain aspects of punishment. But there are legitimate differences of view in other parts of the world about matters which are uncontroversial in Europe. In Europe, it is a fundamental principle that the death penalty is abjured, as a discretionary as well as a mandatory penalty. That is not the case in the Caribbean, nor in many other parts of the world. The life sentences under consideration in the present cases have been imposed by way of substitution for execution in a legal system which recognises such a penalty. (To the extent that it is a mandatory penalty it is, although cruel and unusual punishment, saved from illegality by the existing laws provision. As a discretionary penalty there is in this legal system no question of illegality.) There is, next, a mass of European material, collected and analysed in Vinter at para 59 and repeated in subsequent cases, to the effect that conditional release should be the objective of imprisonment when it can properly be achieved. That is against the legal framework, applicable in most European States, of a system of parole, that is to say of release on conditions or licence, under supervision, sometimes very close, and with the sanction of recall in event of breach. There is no parole system in Trinidad and Tobago, nor in many other Caribbean States. Release, if it is

affected, is unconditional. The decision not to inaugurate a parole and licence system may be in part attributable to the fact that such systems are heavily resource-intensive, not only or mainly in terms of money, but also of expertise, but it may also be a decision of penal policy, if one which may be under debate. Similarly, there is predominately European material, analysed in Vinter at paras 77 and 115 and in Murray at paras 70-76 and 101-104, justifying the Court's extracted principle that "While punishment remained one of the aims of imprisonment, the emphasis in European penal policy was now on the rehabilitative aim of imprisonment, even in the case of life prisoners". The balance of punishment and rehabilitation is a matter on which there may be legitimate difference of view, and certainly of emphasis, amongst States. The non-European sources of international learning on this topic which are cited in these cases, the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners, refer in general terms to the principle of rehabilitation in the context of equipping prisoners for life in society on release but do not address indefinite sentences.

64.
The underlying principle of the Strasbourg cases may readily be accepted as applicable in Trinidad and Tobago. It is that, however grave the crime, to imprison someone without any prospect of ever being released, no matter what change of circumstances there may be, is punishment which is cruel and unusual and accordingly a breach of section 5(2)(b) of the Constitution. Therefore, secondly, any such sentence must offer, in some form or another, the possibility of release. That in turn must mean, thirdly, that there must exist a system of review, for without it the prospect of release would be a matter merely of chance. And fourthly, if the decision to release or to continue to hold is not to be simply arbitrary, it must be based upon either pure mercy, or an assessment of whether continued detention is justified on legitimate grounds or not. Lord Bingham was recognising the same principles when, in R v Lichniak [2002] UKHL 47; [2003] 1 AC 903 at para 8, he observed in passing that release cannot be left to the chance of whether the Executive of its own initiative elects to decide simply that the public interest now favours release over detention.

65.
Conversely, the fact that a prisoner may well serve his whole life in prison does not by itself achieve the minimum level of severity required for breach of section 5(2)(b), or of A3 ECHR. Nor does the necessity to avoid cruel and unusual punishment mandate the attachment to every life sentence of a minimum "tariff" term of the kind which is required in England and Wales and permissible to courts in Trinidad and Tobago under section 69A of the Interpretation Act. Nor is a system of parole, or a separate Parole Board, a necessity.

66.
These principles are set out in all the Strasbourg decisions. They derive from Kafkaris. Those cases also establish a further proposition which can readily be accepted, namely that the characterisation of a sentence as impermissibly irreducible is one which can be made at the time of imposition. Equally, the Strasbourg cases emphasise that the form of review is a matter for individual States. Frequency is a matter for State judgment; the cases suggest "clear support" for a first review not later than 25 years after sentence and periodically thereafter. Nor does the avoidance of cruel and unusual punishment mandate a particular form of review. In Kafkaris it took the forms of presidential action, by way either of pardon or of conditional release on licence. On the evidence, the President in that case took into account all relevant circumstances including any change in the prisoner, the nature of his offence, any danger to the public and whether it was necessary to continue to hold him for retribution, deterrence or public safety. Some life prisoners were released under these powers. That sufficed.

67.
What has happened since then is that subsequent Strasbourg decisions, whilst reiterating these general principles, usually in identical terms, have in some instances expanded on the nature of the review which is required. They have not always done so consistently. Indeed, Mr Fitzgerald's submission was that, notwithstanding the brief time which has elapsed since Kafkaris, ECHR law has changed significantly.

68.
Vinter contains, at para 122, the form of words now relied upon by the appellants, that the prisoner "is entitled to know what he must do" to achieve release. This has been represented subsequently to carry the implication that there must exist some kind of code of relevant factors which must be applied when release is under consideration. That is what led a chamber of the Court in Trabelsi to refer to "objective pre-established criteria" and to add moreover that the prisoner must have "precise cognisance" of what they are (para 137). On any view that is a considerable departure from Kafkaris, which contains clear decisions that what makes a life sentence cruel and unusual punishment is the absence of any prospect of release and that the system to be adopted was one to be determined by individual States. It may simply be a misunderstanding of Vinter. Paragraph 122 of Vinter was disposing of the argument that there could be no breach of article 3 until the point had been reached at which detention had gone on for so long that a review ought to have taken place. That was why the court said that it was wrong to expect the prisoner to work towards possible release in a vacuum and without knowing whether there ever would be a system of review. If it had meant to lay down the requirement for a code for reviews, still more for a published set of criteria available at the time of sentence, the court would no doubt have said so, and indeed would have made it clear that it was to that extent departing from Kafkaris. The proposition that the prisoner "must know what he has to do" may well have been meant simply to import that he must be aware of the available process, in the present cases by regular reviews and/or by petition to the President. It is not easy to see what else it could mean. If it means that he should know that good behaviour will redound to his advantage, and bad to his disadvantage, it tells him nothing which is not obvious. If it means that he should know that the nature of his offence, and any danger which he poses to the public will be taken into account that, as well as being obvious, is not to tell him about anything that he "must do". It clearly cannot mean that any State is obliged to lay out at the commencement of the sentence a programme of education, treatment or behaviour which will lead to release; such is simply not possible and is inconsistent with the concept of an indefinite sentence. Whilst the Grand Chamber in Murray, at para 100, noted the Trabelsi expansion of para 122 of Vinter with the carefully neutral words that "A chamber of the Court has held … that the assessment must be based on objective pre-established criteria", it perhaps understandably made no attempt to define what they might have to be.

69.
Moreover, in the most recent of the line of Strasbourg authorities in this area Hutchinson v United Kingdom (App No 57592/08) (17 January 2017), the Grand Chamber addressed some important remarks to Trabelsi. Hutchinson concerned a whole life sentence (ie a life sentence where the tariff was "whole life"), and the effect of section 30 of the England and Wales Crime (Sentences) Act 1997, providing that "the Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoners' release on compassionate ground". The prisoner had relied "in particular" on para 137 of Trabelsi, as in the present appeals before the Board. The Grand Chamber observed, as the Board has done, that there was "some variation in the formulations employed in [Strasbourg] judgments", and went on to say that although "there needs to be degree of specificity or precision as to the criteria and conditions attaching to

sentence review, in keeping with the general requirement of legal certainty" (para 60), "a high degree is not required in order to satisfy the Convention" (para 61). In Hutchinson itself, the Grand Chamber found the domestic system to be compliant, because the Strasbourg case law, including the then instant case, provided guidance as to what was required and "it can be expected that the concrete meaning of the terms used in section 30 will continue to be fleshed out in practice". The Grand Chamber mentioned "the duty on the Secretary of State to give the reasons each such decision, subject to judicial review" as being of significance (para 64; see also para 70).

70.
In the present cases, the proper procedure for review has been the subject of judicial examination and definition, underlined by the making of declarations, by Rajkumar J at pp 86-94 of his judgment, upheld by the Court of Appeal at paras 101 and 119 of Mohammed JA's judgment, and has been further examined in paras 45-54 above. Plainly, each prisoner must be entitled to copies of the written reviews prepared in his case, at least absent a reasoned justification for gisting. So long as the procedure is properly conducted, then, as Rajkumar J held, a prisoner will have no further complaint. Should the system at some future time be shown to have broken down, the position will of course be different, and courts will have to determine the consequences.

71.
Vinter also contains at para 111, the unexceptional proposition that it is axiomatic that continued detention must be based upon "legitimate penological grounds". Beyond adapting from the English Court of Appeal decision in R v Bieber [2008] EWCA Crim 1601; [2009] 1 WLR 223, para 40 the proposition that the legitimate objectives of imprisonment "include" punishment, deterrence, rehabilitation and the protection of the public, the Court made no attempt, consistently with Kafkaris, to bind the several States party to the ECHR to any particular formulation of how legitimate penological grounds are to be either defined or, more significantly, balanced. The Chamber in Trabelsi was not so cautious. At para 137 it expressed the view that any review must ascertain "whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds." Whilst it is undoubtedly true that any review process must examine any change in the prisoner or progress he has made, the ultimate question is not answered simply by examining his circumstances, but by balancing them against the competing penological considerations, including any public need for continued retribution and/or deterrence (of others as well as the prisoner) and/or protection.

72.
What should be drawn by way of instructive example from these decisions of the European Court of Human Rights are the fundamental principles. It is apparent that the system of four-yearly review provides what is required, indeed considerably more regularly than is contemplated by the Strasbourg cases as the minimum necessary. The principal focus of the reviews is whether release should occur or not. It is neither practicable nor consistent with the underlying principles to attempt to resolve the Strasbourg differences as to the manner in which the review should proceed beyond the fact that in addition, in an appropriate case, to considering pure mercy, the Advisory Committee and the Minister giving advice to the President must consider, in broad terms, whether all the circumstances of the case call for continued detention or do not. That is all that is required to prevent the sentence failing to offer any prospect of release and thus being characterised as illegitimately irreducible and thus cruel and unusual punishment. The need to avoid irreducibility is not to be converted into a draftsman's scheme for a system of public law. It is sufficiently clear that the present process avoids the sentence failing to offer any prospect of release. If, as Mr Fitzgerald suggested, there might be

occasions when the ultimate recommendation of the Minister could be demonstrated to be based on irrelevant considerations, then judicial review is available to put the legal error right. There must also be sufficient due process, which will be achieved if the ruling of Rajkumar J set out at para 47 above is followed.

73.
For these reasons, as well as what has been said in para 53 above the Board concludes that the present sentences cannot be found to be unlawful as irreducible.

(I) Collective determination of substitute terms

74.
It is apparent that the President, on the advice of the relevant Minister, set the substitute terms in the present cases in batches. The appellants contend that sentencing is an individual exercise and that accordingly the decisions gave rise to cruel and unusual punishment which is unlawful because contrary to section 5(2)(b) of the Constitution. They rely on the fact that these days, when a court passes sentence for murder in circumstances when a death sentence is not either required or merited, it does not necessarily follow that it imposes a life sentence, and refer to Abraham v State Cr App 43 of 2008 and Harris v Attorney General of Belize Claim 339 of 2006 as examples. Further, they point to factual differences which can be shown to exist between the cases of the several appellants.

75.
It is of course true that sentencing by a court is an individual exercise. At least in the absence of a statutory mandatory sentence, a court is required to consider all the facts of each case before it. Sometimes many cases may share sufficient facts to call for the same sentence. This is especially true at the bottom end of the scale of severity of offence, but may also apply to serious offending, as is clearly recognised by the existence in many jurisdictions of sentencing guidelines of varying degrees of prescription. But that does not absolve the court from determining an individual sentence in each case. When exercising his power of conditional pardon, however, the President is not operating as a court and he is not, for the reasons previously set out, exercising a sentencing function. Rather, he is exercising a sui generis power of dispensation.

76.
Nor would it follow, even if he were exercising a sentencing function, that to impose the same sentence in multiple cases would necessarily render those sentences cruel and unusual. What renders a sentence cruel and unusual is gross disproportion to the offence. Suppose the (entirely hypothetical) case in which the President determines, on advice, to substitute a sentence of (say) two years in all the murder cases before him. A two year sentence for murder simply cannot achieve the level of severity necessary for characterisation as cruel and unusual.

77.
It follows that the mere fact that these sentences were substituted in batches cannot by itself render them unlawful. Further, viewing the position as at the time when these sentences were substituted in the 1990s, it can hardly be regarded as surprising that the view then taken was that the only viable alternative in cases which called in the Trinidadian legal system for a mandatory death penalty was a sentence which was either expressly a life sentence or, as the Court of Appeal has held, a sentence taking effect as such. That was the view taken by the Board in both Pratt & Morgan and Lewis. Given the four yearly reviews that are integral to it, it may be that a life sentence will still often be a practical substitute for the President to impose, but that is for the future and for those advising him. However, it can now be seen that these appellants did not have the opportunity which they ought to

have had to make individual representations at the pardon stage, with a view to having their substitute sentences set in the light of circumstances as they then are. The appropriate substitute sentences are going, therefore, in any event, to have to be reconsidered on that basis. The remaining issue in this appeal is by whom.

(J) Remedy for absence of a hearing at the pardon stage

78.
Mr Fitzgerald invited the Board to hold that once it had been decided, by the Court of Appeal, that the appellants were entitled to make representations at the pardon stage, they were also entitled to remission of their cases to the High Court for a judicial determination of the substitute sentence. For all the reasons previously set out, this does not follow. If a defect in the pardon process is identified, as it has been, the appropriate remedy is to put the defect right, not to substitute an entirely different judicial sentencing process for the executive power of pardon.

79.
It should be noted, however, that the effect of the Court of Appeal's correct order to remit the decisions to the original decision-maker, the President, is that individual representations will also mean that each appellant's case must be individually addressed, thus removing the complaint that the earlier decisions were made in batches. Failure thus to address them can, like other procedural unfairness, unreasonableness, or any error of law, be controlled by judicial review as explained in Lewis. The Board expresses no view about what substitute sentences ought to be imposed in these or comparable cases, nor as to whether they will necessarily differ amongst themselves. Whether they differ will no doubt depend on the weight accorded in each case to the individual and to the general factors, and all substitute sentences will take into account the system of reviews which will attend them. The fixing of substitute sentences will be for the President acting on the advice of the Minister, who will be informed by the views of the Advisory Committee. The exercise does share this important feature with judicial sentencing, namely that it is of considerable importance that any tariff level of sentence should be assessed by those who are immersed in the standards of Trinidad and Tobago and who make their decisions informed by the realities of crime and punishment in that State.

Conclusion

80.
Despite Mr Fitzgerald's submissions, for the several reasons explained above, which are very largely those so fully developed in the Court of Appeal's careful judgment, these appeals must be dismissed.