Hilary Term
[2025] UKPC 21
Privy Council Appeal No 0117 of 2021

JUDGMENT

Ricardo Farrington (Appellant) *v* The King (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Hodge
Lord Hamblen
Lord Burrows
Lord Stephens
Dame Janice Pereira

JUDGMENT GIVEN ON
22 April 2025

Heard on 10 December 2024

Appellant
Amanda Clift-Matthews
Kyan Pucks
(Instructed by BCL Solicitors LLP)

Respondent
Howard Stevens KC
Rowan Pennington-Benton
(Instructed by Charles Russell Speechlys LLP (London))

LORD STEPHENS:

1. Introduction

1. This is an appeal brought by Ricardo Farrington against the order of the Court of Appeal dated 17 December 2018 dismissing his application for constitutional redress. It is also an application by him to the Board to reconsider its earlier advice in 1996 proffered to Her Majesty as to the constitutional redress which was then to be afforded to him: see *Henfield and Farrington v Attorney-General of the Commonwealth of The Bahamas* [1997] AC 413. The Board will refer to the earlier advice as "the Board's 1996 advice". Accordingly, Ricardo Farrington is both the appellant and the applicant. For ease of exposition, the Board will refer to him as the appellant or as Mr Farrington.

(a) The central issue

2. The central issue on the application is whether there was a serious breach of procedural fairness when the Board's 1996 advice to Her Majesty included imposing on the appellant a life sentence, in substitution for a death sentence, without affording the appellant an opportunity to be heard on the question of the appropriate substitute sentence. Some 28 years after the Board's 1996 advice and because of what the appellant contends was a serious breach of procedural fairness, the appellant submits that the Board should now advise His Majesty to quash the life sentence and to remit the matter to the Supreme Court for resentencing. The response given by the Attorney General, in the respondent's written case before the Board, was that the Attorney General would *not object* if the Board were to reconsider its earlier advice in 1996 by now advising His Majesty that the matter be remitted to the Court of Appeal or to the Supreme Court to review the sentence so that a lower court could vary or substitute the life sentence with whatever sentence it considered appropriate taking into account all relevant matters. Mr Stevens KC, on behalf of the Attorney General, went further in oral submissions stating that the Attorney General would be *content* for the life sentence to be quashed and the matter of resentencing to be remitted to a lower court, provided this was done on the basis of an application to the Board, pursuant to its inherent jurisdiction, to rescind or vary its earlier advice: see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 ("*Pinochet*") and *Attorney General v Crosland* [2021] UKSC 58; [2022] 1 WLR 367, paras 35 and 36 ("*Crosland*"). Mr Stevens also informed the Board that the Attorney General would be content for the Board to grant bail to the appellant so that he could be released prior to resentencing by the lower court.

3. The same central issue arises on the appeal namely, whether there was a serious breach of procedural fairness in the process adopted in 1996 in that the appellant ought to have been, but was not, afforded an opportunity to be heard on the question of the appropriate substitute sentence.

4. In relation to the central issue, the appellant and the respondent, in effect, were agreed as to the outcome, namely that the Board should advise His Majesty to quash the life sentence and order that resentencing should be remitted to a lower court. Also, in effect, it was agreed that the Board should grant the appellant bail to secure his immediate release from prison and that the only condition of bail be that he wear an electronic monitoring brace to ensure his attendance for resentencing. Whilst an agreement between the appellant and the respondent is of assistance, it is for the Board to determine the advice to be tendered to His Majesty as to whether there has been a serious breach of procedural fairness so that the life sentence should be quashed and the matter remitted to a lower court for resentencing. It is also for the Board to determine whether to grant bail pending resentencing. At the conclusion of the hearing on 10 December 2024, the Board, having considered the factual and procedural background and the written and oral submissions, announced that it would advise His Majesty, with reasons to follow, that an order should be made: (a) quashing the life sentence imposed on the appellant in 1996; and (b) remitting resentencing of the appellant to a lower court. The Board now gives its reasons for so advising His Majesty.

5. At the conclusion of the hearing on 10 December 2024, the Board also announced that the appellant was entitled to his liberty in advance of His Majesty considering the advice of the Board. Accordingly, by order dated 13 December 2024, the Board, exercising its inherent power to admit an appellant before it to bail (see *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd (Nos 3 to 5)* [2013] UKPC 25; [2016] AC 923, para 17; and *Washington v The King* [2024] UKPC 34 at [12]) directed that the appellant be released on bail subject to the condition that he wear an electronic monitoring brace.

6. Whilst the appellant and the Attorney General, in effect, were agreed on the outcome and were agreed that it was only the Board which had jurisdiction to vary its earlier advice, there was disagreement as to: (a) the procedural route to be taken to bring the matter before the Board; (b) the jurisdictional basis for arriving at the outcome; and (c) whether resentencing should be remitted to the Court of Appeal or to the Supreme Court.

(b) The procedural route

7. In relation to the procedural route, the Attorney General submitted that an application could and should have been made by the appellant directly to the Board to rescind or vary its 1996 advice as to the constitutional redress then to be afforded to the appellant. The Attorney General submitted that there was no requirement for the appellant to bring any new constitutional proceedings before the lower courts to challenge the Board's 1996 advice. On behalf of the appellant, Ms Clift-Matthews accepted that an application could have been made directly to the Board and she made that application. However, she submitted that in addition an application could be made, and in fact had

been made, to the Supreme Court for constitutional redress under article 28 of the Constitution of the Commonwealth of The Bahamas as scheduled to The Bahamas Independence Order 1973 (SI 1973 No 1080) ("the Constitution"). She submitted that if constitutional redress was not available in the Supreme Court by virtue of the principle that the advice of the Board, the highest appellate court, and the order of Her Majesty were final, then the matter could be appealed to the Court of Appeal. Again, if constitutional redress was not available in the Court of Appeal, by virtue of the principle of finality, then the matter could be appealed to the Board and the Board it was suggested could then make an order under article 28 of the Constitution.

(c) Jurisdictional basis

8. In relation to the jurisdictional basis, the Attorney General submitted that the correct jurisdiction was the inherent jurisdiction of the Board in appropriate cases to rescind or vary its earlier advice. The Board will term this jurisdictional basis "the *Pinochet* jurisdiction." However, Ms Clift-Matthews on behalf of the appellant, whilst accepting that the jurisdictional basis included the *Pinochet* jurisdiction, contended that there was also a parallel jurisdiction by virtue of the new constitutional proceedings which had been initiated in the Supreme Court challenging the Board's 1996 advice. The Board will term this proposed jurisdictional basis, which relies on new constitutional proceedings, as "the constitutional jurisdiction based on new proceedings."

9. In relation to the constitutional jurisdiction based on new proceedings, Ms Clift-Matthews submitted that the earlier advice of the Board was in breach of, for instance, article 20(1) of the Constitution. Article 20(1), in so far as relevant, provides that "[i]f any person is charged with a criminal offence, then … the case shall be afforded a fair hearing …." Accordingly, she submits that, as the appellant was not afforded a fair hearing before the Board in 1996, he could apply, pursuant to article 28(1) of the Constitution, to the Supreme Court for redress. Article 28(1), in so far as relevant, provides:

> "If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been … contravened in relation to him then, *without prejudice to any other action with respect to the same matter which is lawfully available*, that person may apply to the Supreme Court for redress." (Emphasis added.)

It is convenient at this stage to note that the right to apply for redress is "without prejudice to any other action with respect to the same matter which is lawfully available." The right to apply directly to the Board to reconsider its 1996 advice is such a lawfully available action. It is also convenient at this stage to set out the proviso to article 28(2) which provides that:

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

Accordingly, the power under article 28(2) of the Constitution for the Supreme Court to make, for instance, such orders as are appropriate for the purpose of enforcing the protections in article 20(1) is subject to the proviso that it shall not exercise its powers if it is satisfied that adequate means of redress are available to the person concerned under any other law.

10. In relation to the constitutional jurisdiction based on new proceedings, Ms Clift-Matthews, on behalf of the appellant, accepted that by virtue of the principle of finality the Supreme Court could not grant any redress where it was contended that a judgment of the Court of Appeal or the advice of the Board, the highest appellate court, had been given in contravention of any of the provisions of articles 16 to 27 of the Constitution. She also accepted that by virtue of the principle of finality the Court of Appeal could not grant any redress where it was contended that the advice of the Board had been given in contravention of any of the provisions of articles 16 to 27 of the Constitution. It was only when the matter reached the Board that constitutional redress could be granted. Despite the delay and wasted costs involved in bringing these new proceedings all the way up through the appellate structure, Ms Clift-Matthews submitted that the new proceedings also afforded a jurisdictional basis for relief in this case.

(d) The issue as to whether resentencing should be undertaken by the Court of Appeal or by the Supreme Court

11. In relation to resentencing, the Bahamian courts are best placed to judge the appropriate sentence to be imposed on the appellant. However, the parties differ as to whether resentencing should be conducted by the Court of Appeal, as contended for by the Attorney General, or by the Supreme Court, as contended for by the appellant.

2. The authorities which have developed a fuller understanding of the applicable legal principles and the sentencing guideline cases in The Bahamas in relation to the offence of murder

12. To place the Board's 1996 advice and the factual and procedural background of this case into context it is appropriate for the Board to set out the various authorities, both prior to and since 1996, which have developed an understanding of the applicable legal principles.

(a) Pratt and Morgan v Attorney General for Jamaica

13. On 2 November 1993, some three years prior to the Board's 1996 advice, Lord Griffiths delivered the judgment of the Board in *Pratt and Morgan v Attorney-General for Jamaica* [1994] 2 AC 1 ("*Pratt and Morgan*"). The Board's judgment in *Pratt and Morgan* was founded upon section 17(1) of the Constitution of Jamaica, which provides that "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." The essential question in the case was whether the execution of a person following a long delay after the imposition of a death sentence could amount to inhuman punishment contrary to section 17(1). The decision established that such delay was capable of having that effect as it is "an inhuman act to keep a [person] facing the agony of execution over a long extended period of time." Therefore, after a long delay it was no longer lawful to implement the death sentence.

14. The authority also established, at p 35G-H, that in Jamaica 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." In formulating the five year period, the Board made allowances for domestic appeals (two years) and for petitions to the United Nations Human Rights Committee (18 months); the basic function of doing so being to ensure that the period so chosen accommodated target periods for both of these. The five year period was then chosen as being long enough, in the Jamaican context, to accommodate the relevant appellate procedures, but also as being (special cases apart) long enough, in that context, to constitute inordinate delay.

15. In *Pratt and Morgan*, at p 34A, the Board held that the width of the language used in the relevant provision of the Jamaican Constitution (section 25(2)) enabled the court to substitute for the sentence of death such order as it considered appropriate. In the cases of the appellants, Mr Pratt and Mr Morgan, the appropriate order was that the sentences of death should be commuted to life imprisonment. However, the Board was conscious that there were many prisoners in Jamaica who were under sentence of death and awaiting the outcome of the appeal. It therefore made some general observations "[i]n an attempt to assist the Jamaican authorities who may be faced with a large number of appeals." In doing so, Lord Griffiths said this at pp 35G-36A:

> "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)."

Subsequently, in *Boodram v Attorney General of Trinidad and Tobago* [2022] UKPC 20 ("*Boodram*") the Board, in a judgment delivered by Lord Lloyd-Jones and Sir Tim Holroyde, stated, at para 35, that in that passage Lord Griffiths:

> "… was simply indicating to the Jamaican authorities, in particular the Governor-General and the [Jamaican Privy Council] - the executive, not the judiciary, - a pragmatic course which might be taken; but [the Board] did not say that the relevant provision of the Jamaican Constitution would not permit any substitute sentence other than life imprisonment. On the contrary, it made clear at p 34A that the court had power to substitute for the death sentence 'such order as it considers appropriate.'"

(b) The Board's 1996 advice

16. The second authority is the Board's 1996 advice in *Henfield and Farrington v Attorney-General of the Commonwealth of The Bahamas*. Following their convictions for murder, both Mr Henfield and Mr Farrington had been sentenced to death under section 312 of the Penal Code of the Bahamas. In 1992 it was understood that section 312 imposed a mandatory requirement to impose a death sentence, so that there was no consideration of discretion when the sentences of death were imposed. After the death sentences were imposed, the delay which occurred between Mr Henfield's conviction and sentence and the launching of his constitutional motion claiming that his execution would be unlawful based on the principle in *Pratt and Morgan*, was six years and eight months. The equivalent delay in relation to Mr Farrington was three years and four months. This was substantially less than the five year period specified in *Pratt and Morgan* from which there may be inferred strong ground for believing that there has been such delay as will render execution unlawful. Accordingly, an issue arose as to whether the five year period applied in The Bahamas. In the context of the legal system in The Bahamas, in which the target period for appeals is two years, the Board held, at p 424H-425C, that the overall period of time of three and a half years is an inordinate time. The period of delay in Mr Farrington's case was two months short of the three and a half year period. However, the Board held, at p 421B-C and p 424F-G, that the target period was a norm from which the courts may depart if it was appropriate to do so in the circumstances of the case. The Board, p 426C-F, considered that it was appropriate to depart from the three and a half

year period in the circumstances of Mr Farrington's case and held that the delay in carrying out his execution contravened his fundamental right to protection from inhuman and degrading treatment guaranteed by article 17(1) of the Constitution.

17. The Board, p 418A, had defined the issue in *Henfield and Farrington v Attorney-General of the Commonwealth of The Bahamas* as being:

> "… whether, on the principles stated by the Privy Council in [*Pratt and Morgan*], the appellant's sentence to death for murder *should be commuted to life imprisonment* on the ground that delay which has elapsed since he was sentenced to death has had the effect that his execution would constitute inhuman punishment, contrary to article 17(1) of the Constitution of the Commonwealth of The Bahamas." (Emphasis added.)

The Board did not define the issue as being whether it was no longer lawful to implement the appellant's sentence to death for murder on the principles stated in *Pratt and Morgan* and if so, to determine the appropriate sentence to substitute for the death penalty. In this way, the issue as defined by the Board dictated the substitute sentence as being a sentence of life imprisonment. Consistently with the way in which the Board defined the issue, and after it had decided that it had become unlawful to implement the death sentence imposed on Mr Farrington, the Board advised, at p 429E, that the constitutional redress to be afforded to him was "that there ought to be substituted for the sentence of death a sentence of life imprisonment ….". In proffering that advice, the Board did not afford to the appellant an opportunity to be heard on the question of the appropriate substitute sentence.

18. On 15 October 1996, the Board's 1996 advice was considered by Her Majesty in Council. Her Majesty, in accordance with the advice of Her Privy Council, ordered that a life sentence be substituted for the death penalty which had been imposed on the appellant. Accordingly, since 15 October 1996 the appellant has been subject to a life sentence and has not been subject to a death penalty.

19. In 1996, there was no challenge to the constitutionality of the mandatory requirement in section 312 of the Penal Code of The Bahamas (now section 291) that a sentence of death be passed on adults (other than pregnant women) convicted of murder. The only issue before the Board was whether implementing the sentence of death was no longer lawful given the period of delay.

(c) Bowe and Davis v The Queen

20. The third authority is *Bowe and Davis v The Queen* [2006] UKPC 10; [2006] 1 WLR 1623 ("*Bowe*") in which the issue as to the constitutionality of the mandatory imposition of a death sentence arose for determination. The contention on behalf of the appellants was that section 312 of the Penal Code of The Bahamas was inconsistent with the Constitution, and that the section must be modified so as to conform with the Constitution by prescribing a discretionary instead of a mandatory sentence of death. The unusual feature of the case was that because of the interaction of the various constitutions and orders, the compatibility of the mandatory death sentence had to be judged by the law as it was before the introduction of the 1973 Constitution. However, prior to 1973 it had not been recognised that the mandatory death sentence was unconstitutional. The Board addressed this unusual feature at para 42, stating:

> "…. The task is to ascertain what the law, correctly understood, was at the relevant time, unaffected by later legal developments, since that is plainly the law which should have been declared had the challenge been presented then. As it is, all the building blocks of a correct constitutional exposition were in place well before 1973. It matters little what lawyers and judges might have thought in their own minds: in the context of a codified Constitution, what matters is what the Constitution says and what it has been interpreted to mean. In 1973 there was no good authority contrary to the appellants' argument, and much to support it. In the final resort, the most important consideration is that those who are entitled to the protection of human rights guarantees should enjoy that protection. The appellants should not be denied such protection because, a quarter century before they were condemned to death, the law was not fully understood."

21. The Board, at para 43, advised Her Majesty that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death and therefore, as the judge did not exercise discretion, the death sentence was unlawful. The Board advised that the appeals should be allowed, the death sentences quashed, and the cases remitted to the Supreme Court for consideration of the appropriate sentences. The appropriate sentence to be imposed would reflect the "fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted" and the fact that "[t]he criminal culpability of those convicted of murder varies very widely": see paras 29-31.

22. As the Board has indicated in *Henfield and Farrington v Attorney-General of the Commonwealth of The Bahamas,* there was no challenge to the mandatory nature of the death sentence imposed on the appellant. If there had been such a challenge, then the appellant could have expected the same redress as granted in *Bowe*, namely quashing the appellant's death sentence and remittal to the Supreme Court for resentencing.

(d) Moss v The Queen

23. The fourth authority is *Moss v The Queen* [2013] UKPC 32; [2013] 1 WLR 3884 ("*Moss*"). In that case, the defendant was convicted of murder and sentenced to death. Subsequently, the Court of Appeal of the Commonwealth of The Bahamas quashed the defendant's conviction for murder and substituted a conviction for manslaughter. Thereafter, the Court of Appeal, exercising its jurisdiction under section 13(3) of the Court of Appeal Act, and without first giving the defendant any opportunity to make any representations, resentenced him to 25 years imprisonment. The defendant appealed against sentence to the Privy Council, submitting that it is a fundamental breach of natural justice to pass the substitute sentence without giving a defendant the opportunity to be heard. The appeal was not presented as an infringement of a constitutional right seeking constitutional redress. Rather, the appeal was an ordinary criminal appeal. Lord Hughes, delivering the judgment of the Board stated, at para 5:

> "It is elementary that, at least where the sentence is not fixed by law, a criminal court has a duty to give a defendant the opportunity to be heard, through counsel or otherwise, before sentence on him is passed. … An omission to hear a defendant before passing sentence is a serious breach of procedural fairness. That simple proposition does not need the citation of authority."

24. Lord Hughes, at para 7, made some non-exhaustive practical suggestions as to the procedure which might be adopted to satisfy this duty to give the defendant an opportunity to be heard. Lord Hughes accepted, at para 8, "that there may be cases in which, despite a breach of this duty by the court, a reviewing court can be confident that no injury can have been done to the defendant because no submissions that might have been made on his behalf could have reduced the sentence below that passed."

25. As the Court of Appeal had not afforded the defendant an opportunity to address it on sentence for the newly substituted conviction of manslaughter, there had been a serious breach of procedural fairness. Lord Hughes stated, at para 9, that the Board could not be confident that no injury had been done to the defendant by virtue of that breach of procedural fairness. Rather, Lord Hughes stated that "[t]he defendant was, and is, entitled to address the proper factual basis for sentence now that the conviction for murder has been quashed" and proceeded to give examples of various matters which the defendant could address when a court came to determine the appropriate substitute sentence. Therefore, the Board advised Her Majesty that the appeal against sentence ought to be allowed and the sentence of 25 years quashed. The advice continued that the case should be remitted to the Court of Appeal of the Commonwealth of The Bahamas to hear counsel on both sides as to sentence and to determine what that sentence should be.

26. The elementary and simple proposition that Lord Hughes identified, at para 5 of the Board's judgment in *Moss*, was applied by the Board in *Watson v The King* [2023] UKPC 32; [2024] 2 All ER 605, paras 18-21.

(e) Boodram v Attorney General of Trinidad and Tobago

27. The fifth authority is *Boodram*. In that case, Mr Boodram was convicted of two offences of murder and lawfully sentenced to death. Following his conviction, Mr Boodram was placed on death row in prison, where he remained for several years: well beyond the period of five years which was held in *Pratt and Morgan* to provide strong grounds for believing that the delay in execution was such as to constitute inhuman or degrading punishment or other treatment so as to make the implementation of the death sentence unlawful. On 3 December 2007, some 11 years after sentence of death had been pronounced, he commenced a claim in the High Court, seeking an order pursuant to section 14(1) of the Constitution of Trinidad and Tobago that his death sentence be vacated, by reason of the long delay in carrying it out, and that he be brought before the High Court for resentencing to any lawful penalty other than the death sentence. The principal issue in the appeal to the Board was whether the High Court could lawfully commute the death sentence to a sentence other than life imprisonment. The Court of Appeal had concluded that in granting relief under section 14 of the Constitution of Trinidad and Tobago, the High Court had jurisdiction to take into account normal sentencing factors on vacating the death sentence, so that the High Court could impose a substitute sentence other than a life sentence. The Board agreed and dismissed the Attorney General's appeal. The Board stated, at para 40, that "sentencing by a court is an individual exercise which requires the court to consider all the facts of the case before it." The Board also stated, at para 41, that:

> "Often, life imprisonment will be appropriate; but it would be arbitrary, and would in some cases even amount to cruel and unusual punishment or other treatment, for the court to be constrained to impose the same substitute sentence in every case."

The need for an individualised substitute sentence was required in *Boodram* to replace a lawful death sentence and was required in *Bowe* to replace an unlawful death sentence.

(f) Sentencing guideline authorities in The Bahamas in relation to the offence of murder

28. On 23 October 2008, some 12 years after the Board's 1996 advice and two years after the Board's judgment in *Bowe*, the Court of Appeal of the Commonwealth of The Bahamas, in *Attorney General v Jones* SCCr App Nos 12, 18 and 19 of 2007 ("*Jones*"),

gave sentencing guidelines for the offence of murder. The Court of Appeal stated, at para 13, that:

> "… the discretionary death penalty should be reserved for the 'worst' cases of murder of which we have given some examples in our judgment in *Maxo Tido v Regina* (SCCr App No 12 of 2006) delivered on 14 October, 2008."

However, if a discretionary death penalty were considered inappropriate, the Court of Appeal made no reference to the imposition of a life sentence as a possible penalty for murder. Rather, the Court of Appeal gave guidance in relation to determinate custodial sentences. The Court of Appeal stated, at para 17:

> "In our judgment, where, for one reason or another, a sentencing judge is called upon to sentence a person convicted of a depraved/heinous crime of murder and the death penalty is considered inappropriate or not open to the sentencing judge and where none of the partial excuses or other relevant factors are considered weighty enough to call for any great degree of mercy, then the range of sentences of imprisonment should be from 30 years to 60 years, bearing in mind whether the convicted person is considered to be a danger to the public or not, the likelihood of the convict being reformed as well as his mental condition. Such a range of sentences would maintain the proportionality of the sentences for murder when compared with sentences for manslaughter."

29. After the Court of Appeal's decision in *Jones*, sections 290 and 291 of the Penal Code of The Bahamas were amended and murder was categorised into those categories for which the death penalty or life imprisonment was apposite, and those for which the sentence of life imprisonment or a term of years in the range set by the Court in *Jones* was applicable. A "life sentence" was also defined by the amendments as: "imprisonment for the whole of the remaining years of a convicted person's life." On 3 July 2013 the Court of Appeal, in giving judgment in *Poitier v The Queen* SCCr App No 95 of 2011 ("*Poitier*"), referred to the uncertain nature of a life sentence, and to the interests of certainty and clarity in the sentencing process. The Court of Appeal substituted for a life sentence a sentence of 40 years' imprisonment for the offence of murder committed by Mr Poitier.

30. Ms Clift-Matthews, on behalf of the appellant, submits that, since and because of the decisions in *Jones* and *Poitier,* the courts in The Bahamas have consistently sentenced

offenders convicted of murder to determinate sentences of imprisonment within the range of 30 to 60 years.

3. Factual background and the procedural history

(a) The factual background to the murder

31. On 15 May 1990, Raynard Richardson and Joshua Davis were both cycling along Klonaris Acres. The appellant and another, Eneas Burrows, were walking along the same road. According to Mr Burrows, the two cyclists circled behind them and Mr Burrows said to the appellant, "It looked like these two guys want to rob us", whereupon the appellant took a sawn-off shotgun from under his jacket and shot Mr Richardson in the head, thereby causing his death. The appellant and Mr Burrows rode away on the bicycles to Mr Burrows' home. The appellant subsequently left with both bicycles. Neither bicycle was recovered. The appellant made a statement to the police in which he said that Mr Richardson refused to give up his bicycle, "so I just shot him in his head and he fall off the bike." Subsequently, the appellant took the police to where he had hidden the gun.

(b) The appellant's conviction and sentence together with his subsequent appeals against conviction

32. On 30 November 1992, the appellant was convicted of the offence of murder. The trial judge sentenced the appellant to what was understood at the time to be a mandatory death penalty under section 312 of the Penal Code of The Bahamas. Therefore, when imposing the death sentence, the judge did not exercise discretion taking into account, for instance, the circumstances of the offence and aggravating and mitigating features.

33. On 28 April 1994, the Court of Appeal dismissed the appellant's appeal against his conviction.

34. On 7 September 1995, the Appellant filed a petition for special leave to appeal to the Privy Council against (it is believed) his conviction. On 4 March 1996, the Privy Council dismissed the petition.

(c) The warrant for the appellant's execution and the appellant's 1996 constitutional motion based on the principle established in Pratt and Morgan

35. On 27 March 1996, a warrant was read for the appellant's execution on 9 April 1996.

36. On 2 April 1996, the appellant filed a motion under article 28 of the Constitution, claiming, on the principle established in *Pratt and Morgan*, that the delay in carrying out the execution in his case contravened his fundamental right to protection from inhuman and degrading treatment guaranteed by article 17(1) of the Constitution ("the 1996 constitutional motion"). At the same time, the appellant applied for an order staying his execution pending determination of the 1996 constitutional motion.

37. On 4 April 1996, Osadebay J dismissed the application for a stay of the warrant but granted a short stay pending appeal.

38. On 29 April 1996, the Court of Appeal dismissed the appeal, but likewise granted a short stay to allow the appellant to submit a petition for special leave to appeal to the Privy Council.

39. On 22 May 1996, the Privy Council granted special leave to appeal.

40. As discussed in paras 16-18 above, on 14 October 1996, the Board's 1996 advice was given, allowing the appeal on the basis that the lapse of time following imposition of the death sentence was such as to render execution inhuman punishment, contrary to article 17(1) of the Constitution. The constitutional redress afforded to the appellant was to commute the appellant's sentence to one of life imprisonment. On 15 October 1996, Her Majesty, in Council, ordered that a sentence of life imprisonment be substituted for the death penalty.

(d) The time served in prison by the appellant under the life sentence and the comparison with a determinate sentence taking into account remission

41. On 31 May 1990, the appellant was remanded in custody awaiting his trial. He has remained in prison since then so that by the date of the hearing before the Board on 10 December 2024, he has been incarcerated for more than 34 years and six months.

42. Ms Clift-Matthews, on behalf of the appellant, submits that the period served is equivalent to a determinate sentence in excess of 50 years, given that remission is available for up to one third of the duration of a fixed term sentence under section 27 of the Correctional Services Act 2014.

(e) The appellant's 2012 constitutional motion following the decision in Bowe

43. As discussed in paras 20-22 above, in 2006 the Board gave judgment in *Bowe,* holding that the requirement in section 312 of the Penal Code of The Bahamas to impose a sentence of death in all cases of murder violated the constitutional protection from inhuman and degrading treatment and "should be construed as imposing a discretionary and not a mandatory sentence of death." Some six years later, in 2012, the appellant filed a motion under article 28 of the Constitution for constitutional redress, presumably relying on the decision of the Board in *Bowe* ("the 2012 constitutional motion").

44. On 14 September 2012, Isaacs J dismissed the 2012 constitutional motion. The parties currently do not have a copy of the judgment of Isaacs J so the exact nature of the 2012 constitutional motion and the terms of the judgment are unknown. However, based on the appellant's letter in a later application decided by Gomez J in 2017, the appellant, in the 2012 constitutional motion, submitted that he was entitled to a resentencing exercise as the original mandatory sentence of death which had been imposed on him was unlawful.

(f) The appellant's 2017 constitutional motion

45. The appellant brought a further constitutional motion in 2017 ("the 2017 constitutional motion"). He appears to have commenced this constitutional motion informally by way of a letter dated 12 April 2017. The application was heard and determined by Gomez J, in a judgment delivered on 6 September 2017, held that the appellant's grievance was with the life sentence imposed on the advice of the Board. Gomez J explained, at para 7 of his judgment, that "Essentially, therefore, the Applicant wants this Court to interfere with his life sentence fixed by the Privy Council having commuted his death sentence to life imprisonment." Gomez J, at para 14, dismissed the appellant's application for constitutional redress.

46. On 17 December 2018, the Court of Appeal (Longley P and Isaacs and Barnett JJA) heard the appellant's appeal against the order of Gomez J dismissing the 2017 constitutional motion. During argument, the President indicated that "it is beginning to look like the sentence which Mr. Farrington is serving is a sentence which was imposed by the Privy Council and that is a sentence imposed by a court that is higher than us; so, I do not think there is jurisdiction in this court to reduce the sentence … ." The appeal was dismissed.

47. On 14 December 2021, the appellant filed an application to the Privy Council seeking permission to appeal against the decision of the Court of Appeal dated 17 December 2018. On 15 February 2023, permission to appeal was granted.

48. In his application for leave to appeal to the Privy Council, the appellant raised three grounds of appeal, including the ground that the life sentence imposed upon him on the

advice of the Board was unduly severe and manifestly excessive and had been imposed in circumstances where no mitigation had been advanced. On the hearing of the appeal the appellant sought permission to rely upon new grounds of appeal, which it was submitted better reflect the appellant's claim. The Board summarises the two main proposed new grounds as follows:

> First, the death sentence imposed upon the appellant in 1992 was unconstitutional, and the appellant was denied a proper sentencing hearing where aggravating and mitigating circumstances could be taken into account to determine the most appropriate punishment.
>
> Secondly, the validity of the sentence of life imprisonment imposed upon the appellant in 1996 in accordance with the advice of the Board depended upon the validity of the death sentence which it substituted. Therefore, the life sentence was also invalid.

49. The matter came before the Board by way of an appeal from the order of the Court of Appeal dismissing the appellant's 2017 constitutional motion. However, on the hearing of the appeal the matter was also treated as an application to the Board to reconsider the Board's 1996 advice.

(g) The appellant's applications for the prerogative of mercy

50. Since his incarceration, the appellant has submitted 12 clemency petitions to the Advisory Committee on the Prerogative of Mercy ("the Advisory Committee") established under article 91 of the Constitution.

51. Under article 90 of the Constitution, the Governor-General in His Majesty's name and on His Majesty's behalf may, for instance, determine that a convicted person sentenced to life imprisonment should serve something less than the whole of his life. The power of the Governor-General must be exercised by him in accordance with the advice of a designated Government Minister: see article 90(2) of the Constitution. The designated Minister, in tendering any advice to the Governor-General, is not obliged in any case to act in accordance with the advice of the Advisory Committee: see article 92(3) of the Constitution.

52. The website of the Government of The Bahamas states that the purpose of Clemency Petitions "is to allow for some measure of compassion to be extended to persons who have been sentenced to [His] Majesty's Prison for criminal offences, and have demonstrated, through rehabilitation programmes, the ability to be reintegrated into society."

53. On 9 December 2024, one day prior to the hearing before the Board on 10 December 2024, the Bahamas Department of Correctional Services attached to an email to the appellant's solicitors a "Corrections Report" in respect of the appellant. The Corrections Report reveals that on 8 July 2024 the Advisory Committee approved the appellant's petition for early release. However, the Corrections Report added that "the official pardon document" "has not yet [been] received" by "the institution." The Board is unaware as to: (a) whether the designated Minister has submitted advice to the Governor-General; (b) if so, whether the advice of the designated Minister accords with the advice of the Advisory Committee; and (c) whether the Governor-General has exercised powers under article 90 of the Constitution to release the appellant.

(h) Some details in relation to the appellant's personal circumstances

54. The appellant, who was born on 13 May 1966, was 24 when he murdered Mr Richardson. He is now 58.

55. The appellant states that he has participated in several courses in prison including self-development, anger management, bible-based and spiritual programs such as the Alpha Course, conflict resolution and co-existing with others. He also states that he has assisted with the maintenance of prison buildings and structures on a daily basis.

56. The Corrections Report states that "[t]here are no records of any recent infractions or misconduct while incarcerated." Under the heading of "Analysis of Offender", the Corrections Report states that "[d]uring the interview, Mr Farrington was coherent and respectful. His overall demeanour was calm. He was co-operative while answering any question asked. As he was describing the specifics of his [offence], he was very open and collected."

57. The appellant has several medical conditions including hypertension and an abdominal aortic aneurysm. There is a risk of rupture of the abdominal blood vessel if physically triggered by trauma or an increase in abdominal pressure or blood pressure. If a rupture occurs it would be life threatening.

4. The appellant's proposed new grounds of appeal

(a) The first proposed new ground of appeal

58. Ms Clift-Matthews, on behalf of the appellant, submits that the death sentence imposed upon the appellant in 1992 was unconstitutional, and that he has been denied the constitutional redress afforded to the appellants in *Bowe* of remitting for resentencing so

that a proper sentencing hearing could be carried out where aggravating and mitigating circumstances were taken into account to determine the most appropriate punishment: see paras 21-22 above. The Board agrees that the appellant has never had a sentencing hearing where the circumstances of the offence together with aggravating and mitigating features in relation to the offence and to the offender were taken into account in imposing an appropriate sentence on him. The Board also agrees that the death sentence imposed on the appellant in 1992 was unlawful: see *Bowe* and para 21 above. However, the remedy in *Bowe* of quashing the unlawful death sentence and remitting to the Supreme Court for resentencing was based on the premise of there being an unlawful death sentence. In this case, since 15 October 1996, there is no extant death sentence in respect of the appellant as the death sentence was then commuted to a sentence of imprisonment for life. Therefore, the Board cannot grant relief consequential on quashing an unlawful death sentence. The Board considers that the first proposed new ground of appeal is unsustainable as it involves a challenge to a death sentence which no longer exists. The Board refuses permission to rely on this new ground of appeal.

(b) The second proposed new ground of appeal

59. Ms Clift-Matthews, on behalf of the appellant, submits that the validity of the sentence of life imprisonment imposed upon the appellant in accordance with the Board's 1996 advice depended upon the validity of the death sentence which it substituted. In making this submission Ms Clift-Matthews did not seek to challenge the lawfulness of a life sentence. In effect, the proposition she advanced was that the Board in 1996, as an appellate court, had no jurisdiction to quash an unlawful sentence (the mandatory death sentence) and to substitute a lawful sentence (life imprisonment). In advancing this proposition she relied on *Coard v Attorney General of Grenada* [2007] UKPC 7 ("*Coard*") and *Lendore v Attorney General of Trinidad and Tobago* [2017] UKPC 25; [2017] 1 WLR 3369 ("*Lendore*").

60. The decision of the Board in *Coard* did not concern the jurisdiction of an appellate court to quash an unlawful sentence and to substitute a lawful sentence. Rather, it concerned, amongst other matters, the jurisdiction of the Governor-General, under the Constitution of Grenada, to commute unlawful sentences of death to sentences of life imprisonment. The Board held that the mandatory death sentences imposed on the appellants were unlawful and that the Governor-General's jurisdiction to substitute a sentence of life imprisonment was dependent on there being a lawful sentence. Therefore, the Board's advice was that the unlawful death sentences should be quashed and the matter be remitted to the Supreme Court of Grenada for the Supreme Court to determine the sentences which the appellants should serve.

61. The decision in *Coard* does not support the proposition advanced on behalf of the appellant. The Governor-General's jurisdiction under the prerogative of mercy to substitute a sentence is dependent on the sentence which has been imposed by the court

being a lawful sentence. There was no valid sentence to which the power of pardon could be applied. In contrast, an ordinary everyday function of an appellate court is to determine whether a sentence imposed by a lower court is unlawful and if so for the appellate court to substitute a lawful sentence. In such circumstances, the validity of the substitute sentence imposed by the courts is not dependent on the validity of the original sentence. If it were otherwise, the absurd consequence would be that once an unlawful sentence has been imposed and then quashed on appeal, it would be impossible to impose an appropriate lawful sentence.

62. The Board's decision in *Lendore* also does not support the proposition advanced on behalf of the appellant. *Lendore* concerned the Presidential power of pardon under the Constitution of Trinidad and Tobago. It did not concern the jurisdiction of an appellate court to impose a valid sentence in circumstances where the sentence imposed by the trial judge was unlawful. Even though it did not concern the jurisdiction of an appellate court, Lord Hughes, delivering the judgment of the Board, stated, at para 12, that "[i]f 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." (Emphasis added.) The Board's decision in *Lendore* undermines rather than supports the proposition advanced on behalf of the appellant.

63. The Board considers that the second proposed new ground of appeal is unsustainable and refuses permission to rely on this new ground of appeal.

(c) Conclusion in relation to the proposed new grounds of appeal and the main ground of appeal as originally formulated

64. As indicated, the Board refuses permission to rely on the proposed new grounds of appeal. The outstanding and main ground of appeal concerned the process adopted by the Board in 1996 in determining the appropriate substitute sentence for the sentence of death. The appellant contends that there was a serious procedural error in the process adopted by the Board in 1996 in that the appellant ought to have been, but was not, afforded an opportunity to be heard on the question of the appropriate substitute sentence.

5. The *Pinochet* jurisdiction

65. In *Pinochet,* the House of Lords heard a petition by General Pinochet to set aside its previous decision that he was not immune from prosecution. The ground relied on was that of apparent bias on the part of one of the judges involved in the previous decision. The House of Lords, relying on its inherent jurisdiction to rescind or vary an earlier order of the House, set aside its previous decision. Lord Browne-Wilkinson, at p 132, said:

> "As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.
>
> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

66. The Board also has an inherent jurisdiction to revisit and if necessary to vary or rescind its previous advice which is alleged to have been vitiated by unfair procedural error. In *Bain v The Queen* [2009] UKPC 4; 2009 WL 678788 the Board stated, at para 6, that:

> "The Privy Council, like other final courts of appeal, has an inherent jurisdiction to discharge or vary its own orders in cases in which this is necessary for the purposes of justice. But the exercise of this jurisdiction will be rare, because finality is generally in the interests of justice."

67. If, as in this case, the Board's previous advice was advice as to constitutional redress under article 28 of the Constitution, then the Board's inherent jurisdiction includes, if necessary, varying or rescinding its previous advice as to constitutional redress.

68. The Board's exceptional inherent jurisdiction to revisit and if necessary to vary or rescind its previous advice is limited to serious procedural error (in *Pinochet,* apparent

bias) and admits no challenge to findings of law or fact, or the egregious exercise of discretion: see *Crosland* at paras 35 and 36.

69. The procedure to avail of the Board's inherent jurisdiction is to petition the Board to revisit and if necessary to vary or rescind its previous advice.

70. In this case, the appellant has applied directly to the Board to revisit its 1996 advice. The Board has jurisdiction to do so.

6. The new constitutional proceedings

(a) Application of the principle of finality to the new constitutional proceedings

71. Ms Clift-Matthews, on behalf of the appellant, concedes, in the Board's view correctly, that by virtue of the principle of finality on its own and also considered alongside the requirements of the rule of law and the doctrine of precedent, the Supreme Court and the Court of Appeal have no jurisdiction to revisit the advice of the highest appellate court on foot of new constitutional proceedings seeking to challenge that advice. If it were otherwise the system of justice would go round in circles, with the decisions of the highest appellate court being subjected to review once again by a first instance court in new constitutional proceedings, with further rights of appeal against that decision to the Court of Appeal. Such circularity would be quite irrational and subversive to the rule of law, undermining a coherent and stable system of judicial decision making.

(b) No distinction between the applicable tests and the available redress under the Pinochet jurisdiction and in the new constitutional proceedings

72. Ms Clift-Matthews did not seek to draw any distinction, in the context of this case, between the appellant establishing: (a) a contravention of the constitutional right in article 20(1) to a "fair hearing"; and (b) "a serious procedural error" under the *Pinochet* jurisdiction. In the context of this case, the Board considers that she was correct not to do so. Therefore, there is no advantage for the appellant to proceed by way of new constitutional proceedings or to rely on article 20(1) of the Constitution as opposed to relying on the *Pinochet* jurisdiction in respect of the matters which the appellant must establish.

73. In terms of available redress, there is also no advantage for the appellant in proceeding by way of new constitutional proceedings or in relying on article 20(1) of the Constitution, as opposed to proceeding under the *Pinochet* jurisdiction. The Board's 1996 advice was proffered in relation to a constitutional motion challenging the lawfulness of

implementing the death sentence which had been imposed on the appellant. The constitutional redress afforded to the appellant in 1996 was to commute the death sentence to a sentence of life imprisonment. The present application, under the *Pinochet* jurisdiction, is for the Board to vary its 1996 advice as to the constitutional redress to be afforded to him under article 28(2) of the Constitution by remitting resentencing to a lower court (which advice necessarily involves quashing the life sentence). The appellant seeks the same constitutional redress under article 28(2) in the appeal to the Board against the order of the Court of Appeal dismissing the 2017 constitutional proceedings. Whether viewed as an application under the *Pinochet* jurisdiction or as an appeal against the dismissal of the new constitutional proceedings, the powers being exercised by the Board are the same powers under article 28(2) of the Constitution.

(c) The sequential procedure involved in the new constitutional proceedings

74. Whilst Ms Clift-Matthews accepts that the Supreme Court and the Court of Appeal cannot vary or rescind the Board's previous advice, she contends that it is still open to an applicant to adopt what the Board terms a sequential procedure. Under the sequential procedure, a person first applies in new constitutional proceedings to the Supreme Court, then appeals to the Court of Appeal and then eventually appeals to the Board to challenge the Board's previous advice. At that final appellate stage, Ms Clift-Matthews submits that the Board would have jurisdiction to grant constitutional redress in the new proceedings. Ms Clift-Matthews asserts that the advantage of the sequential procedure is that bringing a constitutional motion before the Supreme Court is an established and familiar procedure whereas a petition to the Board under the *Pinochet* jurisdiction is a relatively obscure procedure not set out in any statute or procedural rule. Therefore, applying the sequential procedure would aid access to justice by enabling a litigant to follow a familiar and readily accessible procedure rather than compelling him or her to research and use a relatively obscure procedure.

75. The Board considers that the sequential procedure is a highly impractical procedure involving much wasted expenditure in costs and necessarily entails a further lapse of time. The disadvantages far outweigh any advantage as suggested on behalf of the appellant. Quite apart from the question as to whether the grant of constitutional relief in the new proceedings is excluded by virtue of the proviso to article 28(2) of the Constitution, the sequential procedure is to be deprecated and should not be followed. Rather, the *Pinochet* jurisdiction is available, known, accessible, and, in comparison with the sequential procedure, affordable. It is also capable of providing redress. Furthermore, the parameters of the *Pinochet* jurisdiction are sufficiently certain. The appropriate and only procedure to be followed is to petition the Board under the *Pinochet* jurisdiction.

(d) The application of the proviso in article 28(2) of the Constitution to the new constitutional proceedings

76. Mr Stevens, on behalf of the Attorney General, submitted that an order in the new proceedings for the purpose of enforcing the protections in article 20(1) of the Constitution was prohibited by virtue of the proviso to article 28(2) of the Constitution. The proviso states that "… the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are … available to the person concerned under any other law." Mr Stevens submitted that the Supreme Court ought to have been satisfied that there are adequate (and indeed identical) means of redress available to the appellant under the *Pinochet* jurisdiction. Therefore, he submitted that the Supreme Court and any appellate court "shall not" exercise its powers under article 28(2) in the new constitutional proceedings.

77. In response, Ms Clift-Matthews, on behalf of the appellant, submitted that it is only when a constitutional motion is properly to be regarded as an abuse of the court's process that it will be dismissed by reference to some other available remedy. In making that submission she relied on *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26; [2005] 1 AC 190, para 76 ("*Independent Publishing")*. To address her submission, it will be necessary to consider *Independent Publishing* in some detail. However, prior to doing so it is appropriate to say something about: (i) the discretion in Trinidad and Tobago to decline to grant constitutional relief where there is an adequate parallel remedy; and (ii) the preclusion of constitutional redress in The Bahamas where the court is satisfied as to the availability of "adequate means of redress … under any other law."

(i) The discretion in Trinidad and Tobago to decline to grant constitutional redress where there is an adequate parallel remedy

78. The Constitution of Trinidad and Tobago contains no term equivalent to the proviso in article 28(2) of the Constitution of The Bahamas *precluding* the exercise by the court of its power to grant constitutional redress if "satisfied that adequate means of redress are or have been available to the person concerned under any other law." Furthermore, the Constitution of Trinidad and Tobago does not contain a provision *empowering* the court to decline to grant constitutional relief in such circumstances. However, as Lord Nicholls explained in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328 such a power exists in Trinidad and Tobago. Lord Nicholls stated, at para 23, that a *discretion* to decline to grant constitutional relief was "built into the Constitution of Trinidad and Tobago" as section 14(2) of the Constitution of Trinidad and Tobago "provides that the court 'may' make such orders, etc, as it may consider appropriate for the purpose of enforcing a constitutional right." Lord Nicholls then continued by articulating the approach to the exercise of discretion to decline to grant constitutional relief in Trinidad and Tobago when considering adequate alternative means of redress. He stated, at para 25, that:

> "… where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be *a misuse, or abuse, of the court's process*. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power." (Emphasis added.)

79. The rationale underpinning the discretion in Trinidad and Tobago to decline to grant constitutional redress where there is an adequate parallel remedy is to prevent "misuse, or abuse, of the court's process." The discretion is a form of the abuse of process doctrine.

(ii) The preclusion of constitutional redress in The Bahamas where the court is satisfied as to the availability of "adequate means of redress … under any other law"

80. In The Bahamas, the proviso to article 28(2) of the Constitution provides that where the court is satisfied that adequate means of redress are available elsewhere it "shall not" grant any relief under article 28(2). If there is doubt as to the adequacy of the alternative means of redress, so that the court is not so satisfied, then the possibility of constitutional relief remains open. However, if the court is so satisfied, then the proviso shuts out completely the grant of constitutional redress.

81. The rationale underpinning the proviso to article 28(2) of the Constitution of The Bahamas is the same rationale that underpins the discretion under the Constitution of Trinidad and Tobago, namely, to prevent "misuse, or abuse, of the court's process." The proviso to article 28(2) in The Bahamas and the discretion in Trinidad and Tobago are both forms of the abuse of process doctrine. However, in The Bahamas the parameter of the abuse of process doctrine is fixed by the Constitution. The proviso is expressed in mandatory terms so that circumventing another adequate means of redress and instead seeking constitutional redress is an abuse of process.

(iii) Independent Publishing

82. The factual background in *Independent Publishing* included the imposition by a trial judge of an order prohibiting the media until further notice from referring to certain events at a criminal trial ("the first postponement order"). Two journalists, who breached the first postponement order, were convicted by the judge of contempt of court. The trial

of the contempt proceedings was heard at "fever pitch." One of the journalists was sentenced to imprisonment and the other was fined. The judge made a further order prohibiting until further notice any reference to the contempt proceedings ("the second postponement order"). The journalists appealed against their convictions, contending that the judge had no power to make the first postponement order. They also contended that the judge's failure to grant them sufficient time to prepare their defence to the contempt proceedings breached their constitutional right to due process of law. The journalists also issued separate proceedings by way of a constitutional motion in the High Court in which they also contended that the trial judge had no power to make either of the postponement orders and that the orders infringed, for instance, their freedom of speech and the freedom of the press under section 4(i) and (k) of the Constitution of Trinidad and Tobago.

83. Both sets of proceedings came on appeal before the Court of Appeal, which allowed the journalists' appeals against their convictions on the due process ground but held that the judge had the power to make the postponement orders and dismissed the constitutional proceedings. The journalists appealed as of right to the Board in relation to the constitutional proceedings contending, successfully (see para 67), that the judge had no power to make either of the postponement orders. On the appeal to the Board, an issue arose as to whether the constitutional proceedings were an abuse of the court's process on the basis that the journalists had the opportunity to dispute the constitutionality of the first postponement order (although not of course the second postponement order) in the course of appealing against their contempt convictions. The Board, in a judgment delivered by Lord Brown, stated, at para 76, "… that it is only when a constitutional motion is properly to be regarded as an abuse of the court's process that it will be dismissed by reference to some other available remedy." The Board held, at para 82, that by bringing the constitutional motion the journalists were not concerned with making a parallel or collateral attack on their contempt convictions but rather with vindicating and securing for the future their right to free expression.

84. In *Independent Publishing*, the other remedy available to the journalists of challenging the constitutionality of the first postponement order in the appeal against their convictions was not an adequate alternative remedy as it failed to vindicate and secure for the future their right to free expression. Therefore, the journalists were entitled to seek constitutional relief and in the event the Board held, at para 82, that the journalists were "entitled to a declaration that [their right to free expression] should not hereafter be contravened by non-publication orders made in excess of the court's jurisdiction."

85. In The Bahamas, under the proviso to article 28(2) of the Constitution, the court must also address the adequacy of the alternative remedy. However, once the court is "satisfied that adequate means of redress are or have been available to the person concerned under any other law" the Supreme Court of The Bahamas, unlike the High Court of Trinidad and Tobago, has no discretion. The Supreme Court of The Bahamas "shall not" grant any relief under article 28(2).

(iv) Application of the proviso to article 28(2) of the Constitution in the circumstances of this appeal

86. The Board is satisfied that adequate (and indeed identical) means of redress are available to the appellant by way of an application to the Board under the *Pinochet* jurisdiction. Therefore, the Board is precluded by the proviso from granting any constitutional redress on the appeal from the dismissal of the new constitutional proceedings. This means that the appeal is dismissed on that basis and the only procedural route to be taken to bring this matter before the Board is by way of a petition under the *Pinochet* jurisdiction. The Board will determine this case on the basis of the application under the *Pinochet* jurisdiction.

7. The application of the *Pinochet* jurisdiction to the facts of this case

87. In 1996, in the appellant's written case the constitutional redress sought by him was any of the following redress, namely: (a) ordering a permanent stay upon the execution; (b) declaring that the proposed execution would be unlawful; or (c) commuting the sentence to one of life imprisonment. Therefore, a potential explanation for the failure in 1996 to afford the appellant an opportunity to be heard on the appropriate substitute sentence was that one aspect of the constitutional redress sought by him was to commute the death sentence to a sentence of life imprisonment. However, whilst the redress sought in the appellant's written case makes it understandable as to why the Board did not afford the appellant an opportunity to be heard on the question of an appropriate substitute sentence, it does not mean that a serious procedural error did not occur. It remains the position that the appellant ought to have been, but was not, afforded an opportunity to be heard on the appropriate substitute sentence after the Board in 1996 had decided that it was no longer lawful to implement the death sentence.

88. The question then arises as to whether the Board can be confident that no injury had been done to the appellant by virtue of the serious procedural error. If, in 1996, the appellant had been afforded an opportunity to address the question of an appropriate substitute sentence, various matters could have been brought to the Board's attention based on the law as then understood. The Board's attention could have been taken to *Pratt and Morgan*, at p 34A, in which it was stated that the court had power to substitute for the death sentence such order as it considered appropriate: see para 15 above. Thereafter, the elementary proposition could have been advanced that a just sentence, where the sentence is not fixed by law, should be proportionate to the gravity of the crime considering aggravating and mitigating circumstances: see paras 21, 23, 26 and 27 above. In addition, in considering what submissions could have been made in 1996 to the Board in relation to the appropriate substitute sentence, the appellant is entitled to rely on the sentencing guidance in *Jones* and *Poitier* as correctly reflecting the law at the time, as

now fully understood given the decision in *Bowe*. In short, the Board cannot be confident that no injury had been done to the appellant by virtue of the serious procedural error.

89. Given the serious procedural error, the Board varies its 1996 advice and humbly advises His Majesty that: (a) the life sentence imposed on the appellant is quashed; (b) the appellant should now be resentenced; and (c) resentencing should be remitted to a lower court.

90. Finally, the Board notes that the appellant may have been released or may shortly be released under the prerogative of mercy: see paras 50-53 above. Even if that is so, it remains the position that the appellant, the victim's family and the public are entitled to know the appropriate sentence in his case for the serious crime which he committed. Therefore, even if the appellant has been or will be released under the prerogative of mercy, he should still be resentenced.

8. Whether resentencing should be undertaken by the Court of Appeal or by the Supreme Court

91. In varying the 1996 advice, the Board may fashion a remedy to give effective relief within the broad limits of article 28(2) of the Constitution: see *Gairy v Attorney General of Grenada* [2001] UKPC 30; [2002] 1 AC 167, paras 9 and 23. The Attorney General and the appellant agree and the Board accepts that, in fashioning a remedy in this case, the Board may remit for resentencing to either the Court of Appeal or to the Supreme Court.

92. The Board considers it appropriate to remit to the Supreme Court so that an individualised assessment can be made as to the appellant's culpability and as to aggravating and mitigating features whilst also preserving a right of appeal in relation to his sentence from the Supreme Court to the Court of Appeal, which would have been lost if resentencing were remitted to the Court of Appeal.

9. Conclusion

93. The Board varies its 1996 advice and now humbly advises His Majesty that: (a) the life sentence imposed on the appellant should be quashed; (b) the appellant should be resentenced; and (c) resentencing should be remitted to the Supreme Court.