BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 14 of 2009

BETWEEN:

THE ATTORNEY- GENERAL ***Appellant***

AND

FRANK ANDERSON CARTER ***First Respondent***

ANTHONY LEROY AUSTIN ***Second Respondent***

BEFORE: The Hon. Frederick L.A. Waterman, CHB, The Hon. Peter D.H. Williams and The Hon. Sandra P. Mason, Justices of Appeal.

2009: 3 and 4 December; 2010: 12 October

Mr. Wayne A. Clarke for the Appellant

Mr. Alair P. Shepherd Q.C. and Mr. Douglas L. Mendes S.C. for the First Respondent Carter

Mr. Robert L.M. Clarke for the Second Respondent Austin

JUDGMENT

PETER WILLIAMS JA

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I. INTRODUCTION

[1] The quest to temper justice with mercy is never-ending. In many cultures the taking of a life justified similar state action against the perpetrator. However, as the concept of the right to life, the most fundamental of all human rights, has become more defined, the search for some alternative form of fair punishment has intensified.

[2] This case concerns two men convicted of murder on whom the court imposed mandatory death sentences but who were subsequently pardoned. The Governor-General at the time, acting in accordance with the advice of the Barbados Privy Council (the BPC) pardoned the condemned men for their offences on condition that they be imprisoned for the remainder of their natural lives, subject to the Prisons Rules. A further condition or stipulation was that their cases were to be reviewed when they would have served a period of imprisonment of 30 years.

[3] Nevertheless, over 20 years having elapsed since their convictions they have applied to have the period of 30 years abrogated and to be set free. We have to decide whether the Court has any constitutional power to interfere with the conditions imposed by the then Governors-General in the exercise of the prerogative of mercy in relation to these two respondents.

II. BACKGROUND

[4] Both respondents, Frank Anderson Carter (Carter) and Anthony Leroy Austin (Austin), were convicted of murder on 25 January 1985 and 19 February 1986 respectively and sentenced to death. Both appealed their convictions and the Court of Appeal dismissed their appeals on 10 June 1986 and 31 July 1987 respectively. The Judicial Committee of the Privy Council (the JCPC) dismissed their appeals. They had therefore exhausted their legal rights.

[5] Thereafter, the only recourse of Carter and Austin to avoid the carrying into effect of the mandatory death sentences was to seek mercy by way of executive clemency. They therefore petitioned the Governors-General, who on the advice of the BPC commuted their sentences on 14 November 1989 and 13 September 1990 respectively to life imprisonment.

[6] It is important to quote the Warrants of Commutation of Sentence in respect of Carter and Austin, which were in similar terms. The Warrant in respect of Carter reads as follows:

"By His
Excellency Sir Denys Ambrose Williams,
Knight Bachelor, holder of the Gold Crown of Merit, Acting Governor-General of Barbados.

D. A. WILLIAMS

ACTING GOVERNOR-GENERAL

TO: EDGAR
ALONSO HENDY, ESQUIRE, SUPERINTENDENT OF THE PRISON AT GLENDAIRY (Ag.)

WHEREAS
FRANK ANDERSON CARTER of the parish of ST. MICHAEL was on the 25th day of January, 1985, convicted before a sitting of the High Court for the trial of criminal causes of the offence of MURDER, and was by the said Court sentenced for this said offence to suffer DEATH:

AND
WHEREAS the said FRANK ANDERSON CARTER appealed against the said conviction and sentence being Criminal Appeal No. 5 of 1985, to the Court of Appeal:

AND
WHEREAS the Court of Appeal on the 10th day of June, 1986, dismissed the said Appeal:

AND
WHEREAS the said FRANK ANDERSON CARTER appealed to Her Majesty in Council, against the decision of the Court of Appeal No. 5 of 1985:

AND
WHEREAS the Judicial Committee of the Privy Council advised Her Majesty that the appeal ought to be dismissed:

AND
WHEREAS I have been advised that the Queen's mercy should, subject to the

conditions hereinafter mentioned, be extended to the said FRANK ANDERSON CARTER:

NOW
THEREFORE I, SIR DENYS AMBROSE WILLIAMS, Acting Governor-General of Barbados, by virtue and in exercise of the powers in me vested by section 78 of the Constitution of Barbados and in accordance with the advice of the Privy Council, do hereby, in Her Majesty's name and on Her Majesty's behalf, grant unto the said FRANK ANDERSON CARTER Her Majesty's pardon for the offence whereof he stands so convicted, on condition that the said FRANK ANDERSON CARTER shall be confined and imprisoned in the prison at Glendairy for the remainder of his natural life and that his case be reviewed again when he would have served a period of imprisonment of NOT LESS THAN 30 years, and that he be subject to the Prison[s] Rules and Regulations for the time being in force in the said prison:

AND THESE PRESENTS do authorise and command you, the Superintendent of the said prison, to keep the said FRANK ANDERSON CARTER in your custody in the said prison and thereto carry out the punishment of imprisonment, and for so doing this shall be your sufficient warrant.

IN WITNESS
HEREOF I have subscribed my name and affixed the Public Seal of Barbados at Government House, Barbados this 14th day of November, 1989, and

in the
Thirty-Eighth Year of Her Majesty's Reign."

[7] The wording of the preamble to the Warrant issued in respect of Austin was identical to that issued in respect of Carter except for the personal details and the fact that the Governor-General who issued the warrant in respect of Austin was Dame Ruth Nita Barrow. The terms of the Warrant issued in respect of Austin were identical to those in Carter's Warrant except that the words "NOT LESS THAN" appearing in Carter's Warrant were absent in Austin's Warrant.

[8] We postpone for later discussion the attempts made by Carter and Austin to have their cases reviewed by the Governor-General. Suffice it to say at this stage that following unsuccessful attempts to have a positive review in their favour, they commenced proceedings in the High Court.

III. PROCEEDINGS AND ORDERS

(a) Originating Motions

[9] On 30 October 2003 and 28 November 2003 respectively,

Carter and Austin filed Originating Motions similarly worded seeking constitutional redress pursuant to ***section 24*** of the ***Constitution***. In order to have a good understanding of the nature of these proceedings it is necessary to quote in full the relief and/or redress claimed by the applicants. The redress sought by Carter in his Originating Motion was similar to that sought by Austin in his amended Originating Motion, which we set out as follows:

"1. A Declaration that the commutation of the Applicant's sentence to death to that of life imprisonment is constitutionally null and void as it offends the Applicant's right to life liberty and protection of law as enshrined in Sections 13, 15, and 18 of the Constitution and protected by Section 11.

2. A Declaration that the commutation of the Applicant's sentence to death to that of life imprisonment is constitutionally null and void as it is contrary to the separation of powers as enshrined in the Constitution and in particular amounts to the unconstitutional exercise of the executive powers set out in Section 63 of the Constitution.

3. A Declaration that the imposition of a sentence of imprisonment for the rest of his natural life breaches the Applicant's rights guaranteed by Chapter III of the Constitution of Barbados, namely the right:

(i) to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law (Section 11(a) of the Constitution);

(ii) to the protection of the law (Section 11(c) of the Constitution);

(iii) not to be subjected to arbitrary detention and imprisonment (Section 13 of the Constitution);

(iv) not to be subjected to inhuman or degrading punishment or other treatment (Section 15 of the Constitution);

(v) to a fair hearing in accordance with the principles of natural justice for the determination of his rights and obligations (Section 18 of the Constitution);

(vi) to be legally represented (Section 18(2)(d) of the Constitution);

(vii) to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights (Section 18 of the Constitution).

4. A Declaration that His Excellency the Governor-General and/or the Privy Council in purporting to recommend that the Applicant's sentence not be reviewed before the expiration of thirty (30) years was in breach of the doctrine of separation of powers.

5. An Order that the decision of His Excellency the Governor-General acting on the advice of the Privy Council, which, imposed the sentence of life imprisonment, be quashed.

6. An Order that the decision of His Excellency the Governor-General acting on the advice of the Privy Council not to review the Applicant's sentence for a period of thirty (30) years be quashed.

7. An Order providing for all questions as to sentence which then arise to be determined in accordance with the law and Constitution of Barbados.

8. Damages.

9. Further
and/or other redress.

10. Costs."

[10] The grounds on which the Originating Motions were based are sufficiently set out in the narrative of this judgment. They were supported by affidavits of the applicants outlining their circumstances. Carter also exhibited to his affidavit a plethora of personal references in support of his application.

(b) Decisions of Chandler J

[11] On 7 March 2005, ***Chandler J*** heard applications by Carter and Austin for discovery of the documents that were before the BPC at the time that their petitions for the exercise of the prerogative of mercy were being considered. On 6 October 2006, the judge gave a written decision in which he dismissed the applications. This decision was not appealed, but the interlocutory applications help to explain some of the delay in the proceedings.

[12] On 16 July 2007, the judge gave his substantive decision on the Originating Motions, the subject of this appeal. On the core issue he decided that the Governors-General had "prescribed a sentence to be served prior to review, which is a judicial function, as distinct from an executive act" (paragraph [37] of the decision). He therefore found that the Governors-General were "not empowered to impose the restriction of thirty years before review" (paragraph [94]) and that the same was unconstitutional (paragraph [96]).

[13] The judge further held that the respondents were entitled to a review of their sentences at four-yearly intervals by the Governor-General pursuant to ***Rule 42*** of the ***Prisons Rules, 1974*** (paragraphs [56] and [57]) and that there was a "lack of

access to ***Rule 42*** (paragraph [96]). The judge found merit in the applicants' submissions (paragraph [61]) that there had been a breach of their right to personal liberty under ***section 13(1)*** of the ***Constitution*** and that they had also been denied their right to protection of the law as guaranteed under ***section 11*** of the ***Constitution*** (paragraph [45]).

[14] There were other issues discussed in the judge's decision which we reserve for comment later in the judgment.

[15] The judge disposed of the Originating Motions as follows:

> "**DISPOSAL**
>
> [95] This court is of the view that the applicants should remain incarcerated and the case be remitted for sentencing.
>
> [96] However given the unconstitutionality of the conditions attached to the commutation above outlined, and lack of access to ***Rule 42*** of the ***Prisons Rules, 1974*** and the fact that both applicants have not been properly reviewed as required, I would not send these matters to be reviewed in the present circumstances, but would order these matters to be remitted to the Chief Justice for imposition of sentence in accordance with the directions given in ***Mormon Scantlebury***." (His emphasis.)

IV. EVENTS SUBSEQUENT TO DECISION

(a) Notice of Appeal No. 17 of 2007

[16] The Attorney-General filed a Notice of Appeal on 9 August 2007, Civil Appeal No. 17 of 2007, against the decision. The record of appeal was settled on 14 April 2008. On 17 December 2008, following applications to strike out the appeal for want of prosecution, this Court made an order granting the respondents leave to file cross- appeals, made an order with respect to the documents that were to form part of the record, ordered the filing of written submissions and set the appeal down for hearing on 16 to 18 March 2009. Two grounds of appeal were filed prior to a copy of the judge's written decision being made available on 26 January 2009. Mr. Wayne Clarke stated that the grounds as filed "were unsustainable" having read the written decision. Mr. Clarke's explanation was that at the time of filing the original appeal the appellant was unable to

"properly formulate its grounds" given "the absence of the written judgment at the time".

[17] On 16 March 2009, this Court granted the appellant leave to withdraw the appeal. The appellant agreed to pay the respondents' costs in the Court of Appeal and in the High Court, certified fit for two counsel for each respondent in the Court of Appeal and for two counsel for both applicants in the High Court. An order was made in those terms.

(b) Aborted High Court hearing

[18] The appeal having been withdrawn, on 26 June 2009, Carter and Austin sought to have the matter disposed of pursuant to the judge's order that the cases be "remitted to the Chief Justice for sentence in accordance with the directions of ***Mormon Scantlebury***". Applications by notices of motion were therefore filed on behalf of both applicants for orders that upon review the applicants be released from prison. The Chief Justice, ***Sir David Simmons***, requested from the Superintendent of Prisons comprehensive reports dealing with the conduct of the prisoners during their incarceration, their responses to training and rehabilitation, their performance in prison in vocational activities and their assessment for release. The applications came on for hearing before the Chief Justice on 16 June but were adjourned to 26 June 2009.

[19] On the said 26 June, the applications came before ***Waterman CJ (Acting)***. The Acting Chief Justice felt uneasy with the judge's order that the cases of Carter and Austin be remitted to the Chief Justice for imposition of sentence in accordance with the directions given in ***Mormon Scantlebury***. In view of our decision there was justification for the Acting Chief Justice's unease. The applications were adjourned *sine die.* This is a convenient place to state that counsel for all parties have confirmed that they have no objection in spite of the circumstances to ***Waterman JA*** presiding over the hearing of this appeal.

(c) Notice of Appeal No. 14 of 2009

[20] On 27 July 2009, this Court granted the Attorney-General leave to file out of time a second appeal against the judge's decision made two years earlier. The Court gave directions on the documents to be filed within specified times so as to bring the appeal on for hearing by 9 October 2009. On the said date the appeal was still not ready for hearing and was adjourned for hearing on 3 and 4 December 2009.

[21] The Notice of Appeal was filed on 24 September 2009. The grounds of appeal were wide ranging and we set them out as follows:

> "1. That the Learned Trial Judge (LTJ) erred in law when he declared that the commutations prescribed a quantity of sentence to be served prior to review, which is a judicial function, as distinct from an executive act.
>
> 2. That the LTJ erred in law when he declared that s.78 of the Constitution does not give power to impose or prescribe minimum sentences or minimum sentences to be served before review.
>
> 3. That the LTJ erred in law in finding that the conditions attached to the commutations were unconstitutional.
>
> 4. That the LTJ erred in law in finding that Rule 42 of the Prisons Rules 1974 is applicable to all prisoners serving a term of imprisonment exceeding four years and does not rule out the review of commuted sentences of death to life imprisonment.
>
> 5. That the LTJ misdirected himself in law and in fact in concluding that the Respondents/Applicants were entitled to a review every four years pursuant to Rule 42 of the Prisons Rules 1974.
>
> 6. That the LTJ erred in law in holding that the Constitution does not give the Governor-General the power to dis-apply *(sic)* Rule 42 so as to disentitle the Applicants to their review.

7. That
the LTJ erred in law when he declared that the ouster clause at s. 77(4) of the Constitution does not apply so as to oust the Court's jurisdiction in this matter.

8. That
the LTJ misdirected himself in law in finding that there were breaches of natural justice when the Governor-General exercised the prerogative of mercy under s. 78 of Constitution and commuted the Respondents/Applicants' sentences to death.

9. That
the LTJ erred in law in directing that these matters be remitted to the Chief Justice for the imposition of sentence."

[22] The appellant seeks a reversal of the judge's order that the cases be remitted to the Chief Justice for sentence and that his order be set aside. Alternatively, in the event that this Court is of the view that the condition that the respondents' cases be reviewed only after a period of 30 years is objectionable, the appellant seeks an order that the condition be struck out and that the respondents be imprisoned for the rest of their natural lives.

(d) Respondents' Notice

[23] On 14 October 2009, a Respondents' Notice was filed. The judge's decision was challenged and the respondents relied on the following facts and circumstances: (i) there was ample evidence of persons in similar circumstances being released from prison after periods of imprisonment shorter than those served by the respondents; (ii) imprisonment for the rest of one's natural life is inhuman and degrading; (iii) the requirement that the respondents spend 30 years in prison before being considered for release is inhuman and degrading; (iv) the

respondents having been denied four-yearly reviews of their sentences were entitled to an order of release; and (v) common law decisions apply retroactively.

[24] The respondents seek to be released immediately and only as an alternative do they accept the judge's decision to have the matter remitted to the Chief Justice for sentencing.

V. ISSUE 1: WHETHER THE GOVERNOR-GENERAL PERFORMED A SENTENCING FUNCTION

(a) Introduction

[25] The first issue, which is the core issue that we have to determine, is whether the Governor-General acting on the advice of the BPC performed a sentencing function in commuting the death penalty with a condition of life imprisonment with no review for 30 years. In this determination we have to consider the constitutional provision for the exercise of the prerogative of mercy, the conditions attached to the pardon and what constitutes sentencing in the light of the separation of powers. This issue encompasses the first three grounds of appeal and the ninth ground, set out in paragraph [21] above.

(b) Sentencing for murder

[26] The starting point for consideration of the core issue, whether the Governor-General performed a sentencing function which should now properly be performed by the court, is the provision for punishment for murder in the ***Offences Against the Person Act, Cap. 141, section 2*** which provides:

> "Any person convicted of murder shall be sentenced to, and suffer, death."

The penalty is automatic in capital cases; the judge has no discretion in spite of the fact that the circumstances in which murders are committed vary greatly. After a conviction for murder and the sentence of death has been pronounced, there is no statutory or other provision for the case to be "remitted" for the "imposition" of any further sentence by a judge. In other words, after pronouncing the death sentence a judge has no further statutory role to play in sentencing.

[27] It is worth recording that even in England where the death penalty was abolished there is still a mandatory sentence for murder of imprisonment for life which the judge must impose. In ***R. (Anderson) v. Secretary of State for the Home Department [2003] 1 AC 837*** HL***, Lord Bingham of Cornhill*** explained the position at page ***872***:

> "[J]udges have never in modern times enjoyed any discretion in passing sentence on a convicted murderer. Until 1957 the sentence was one of death. Under the Homicide Act 1957 death continued to be the sentence mandatorily passed on those convicted of capital or multiple murders (sections 5 and 6), while other convicted murderers were mandatorily sentenced to imprisonment for life (sections 7 and 9(1)). By the Murder (Abolition of Death Penalty) Act 1965 it was provided that convicted murderers should be sentenced to imprisonment for life (section 1(1))."

[28] ***Anderson*** had been convicted of two murders and complained that the Home Secretary had increased the time that he was to spend in prison and set a longer period than that recommended by the judiciary. The House of Lords sat as a seven member panel and unanimously concluded that in fixing the convicted murderer's tariff, the Home Secretary was assessing the term of imprisonment which he should serve. The Court held at page ***838***:

> "That, since the imposition of sentence was part of a trial for the purposes of the right to a fair hearing by an independent and impartial tribunal guaranteed by article 6(1) [of the European Convention on Human Rights], and since tariff fixing was legally indistinguishable from the imposition of a sentence, the tariff was required to be set by an independent and impartial tribunal; and that, since, as a member of the executive, the Secretary of State was neither independent of the executive nor a tribunal, it followed that he should play no part in fixing the claimant's tariff."

[29] ***Lord Bingham of Cornhill*** at page ***876*** explained what constitutes sentencing:

> "I return to the fixing of the convicted murderer's tariff term by the Home Secretary…The true nature of the procedure must be judged as one of substance, not of form or description. It is what happens in

practice that matters…What happens in practice is that, having taken advice from the trial judge, the Lord Chief Justice and departmental officials, the Home Secretary assesses the term of imprisonment which the convicted murderer should serve as punishment for his crime or crimes. That decision defines the period to be served before release on licence is considered.
This is a classical sentencing function. It is what, in the case of other crimes, judges and magistrates do every day."
(Emphasis added.)

[30] It is noteworthy that the Court did not (in the absence of a statutory provision) itself undertake the sentencing function or remit the same to the High Court. Instead, Government took into account the ***Anderson*** decision given on 25 November 2002 and enacted in a timely manner the Criminal Justice Act 2003 which came into force on 18 December 2003.
The Act established a new scheme under which a court, instead of the Home Secretary, determines the minimum term to be served in prison: see ***R. v. Sullivan [2005] 1 Cr App R 3*** CA. Further, the Parole Board has sole responsibility for determining when it is safe to release the prisoner.

[31] Although the judicial statements quoted above are in relation to the English legislation, it is also helpful towards a better understanding of the issues that arise in relation to persons whose sentences have been commuted and have been ordered to be imprisoned for the balance of their natural lives to quote one of the foremost authorities on sentencing. ***David Thomas*** in his article, ***"The Criminal Justice Act 2003: Custodial Sentences" [2004] Crim.L.R. 702*** at ***703*** explained the sentencing practice in England (and Wales) initiated by the new Act:

"**Sentences for murder**

Chapter 7 of Pt 12 of the Act establishes a new scheme of sentences for murder. These *(sic)* represent a fundamental change in the administration of the law, forced on the Government by decisions of the House of Lords [**Anderson**, decision 25 November 2002] and the European Court of Human Rights [**Stafford**, decision 28 May 2002] on the application of the European Convention of Human Rights.

The effect of the changes can be stated simply. In future, the Home Secretary will play no part in determining how long a person convicted of murder will spend in prison. The "minimum term" or tariff as it was commonly known, will be fixed by order of the sentencing court as part of the process of sentencing. The order of the court is subject to appeal to the Court of Appeal by the offender, or a reference by the Attorney-General if it is considered unduly lenient. **Once the minimum term has been fixed and the appellate process is exhausted, there is no provision for further review of the minimum term at a later stage**.

Once the offender has served the minimum term, he may require his case to be referred to the Parole Board, and the Parole Board may direct his release if it is satisfied that the protection of the public does not require that he should continue to be detained. If the Parole Board directs his release, the Secretary of State must release him on licence. The Secretary of State retains no power to delay the release of the prisoner. Once released on licence, the prisoner remains on licence until his death, and his licence may be revoked at any time in accordance with the normal procedure for the revocation of parole licences.

These are welcome developments. The new system places the decision on the minimum term precisely where it belongs - in open court and within the judicial process."
(Emphasis added.)

(c) Commutation of Sentences

[32] The next exercise that we should undertake is an interpretation of the Warrants of Commutation of Sentence. The word commutation is not used in the ***Constitution*** but the dictionary meaning of commutation of a sentence simply means the substitution of a different and lesser punishment for the one imposed by the court; a capital sentence is often referred to as being commuted to imprisonment for life. The Warrants speak of the Queen's mercy being extended subject to conditions (in the plural).
The prerogative of mercy is expressly stated as being exercised under ***section 78*** of the ***Constitution***. The Warrants constitute a pardon for the convictions of murder but the pardon is granted on condition (in the singular but the phrase 'on condition' is grammatically apt to include more than one condition) that the recipients of the pardon (i) be confined and imprisoned for the remainder of their natural lives; (ii) have their cases reviewed again when they would have served a period of imprisonment of 30 years (Carter's warrant was more specific in containing the words in capitals, "NOT LESS THAN"); and (iii) be subject to the Prisons Rules and Regulations.

[33] The first condition of the pardon is clear; the recipients save their lives but forfeit their freedom for the rest of their lives. The second condition that they must be imprisoned for 30 years could be at variance with the first condition. The third condition is that the Prisons Rules apply. ***Rule 42*** stipulates that sentences of imprisonment for over four years are subject to four-yearly reviews. However, a four-yearly review of the sentences would seem to be pointless if the minimum term of imprisonment was 30 years.

(d) Section 78 of the Constitution

[34] It is next necessary to examine how the terms of the Warrants reflect the constitutional provisions for the exercise of the prerogative of mercy in ***section 78*** of the ***Constitution*** (as amended in 2002), which reads as follows:

"78.(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf-

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

(b) **grant** to any person **a respite**, either indefinitely 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 on any person for such an offence; or

(d) **remit** the whole or part of any **punishment** imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence. (Emphasis added.)

(2) The Governor-General shall, in the exercise of the powers conferred on him by subsection (1) **or any power conferred on him by any other law to remit any penalty** or forfeiture due to any person other than the Crown, **act in accordance with the advice of the Privy Council**.
(Emphasis added.)

(3) **Where any person has been sentenced to death** for an offence against the law of Barbados, **the Governor-General shall** cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council **so that the Privy Council may advise him on the exercise of the powers** conferred on him by subsection (1) in relation to that person. (Emphasis added.)

(4) The power of requiring information conferred by the Governor-General by subsection (3) shall be exercised by him on the recommendation of the Privy Council or, in a case in which in his judgment the matter is too urgent to admit of such a recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

(5) A person has a right to submit directly or through a legal or other representative written representation in relation to the exercise by the Governor-General or the Privy Council of any of their respective functions under this section, but is not entitled to an oral hearing. (This subsection was added as an amendment in 2002.)

(6) ...

(7) ... "

The Governor-General acts on behalf of Her Majesty but he must act on the advice of the BPC. Accordingly, the decision is not a personal one but is the collective and collegiate decision of the BPC over which the Governor-General presides: ***Lewis (Neville) v. Attorney-General of Jamaica (2000) 57 WIR 275*** at page ***291***.

[35] The Governor-General may therefore under ***section 78*** in accordance with the advice of the BPC grant a pardon, grant a respite, substitute a form of punishment or remit the punishment. These forms of executive clemency were defined and discussed by ***Professor Richard Fox*** in his article ***"When Justice Sheds a Tear: The Place of Mercy in Sentencing"***, Monash University Law Review [Vol. 25, No.1 '99]. A pardon is granted by warrant under the public seal by which the Governor-General, either absolutely or conditionally, forgives for the benefit of the person to whom it is granted the legal consequences of a crime he has committed. A respite is the temporary postponement or suspension of the execution of the sentence. A substitute form of punishment is the imposition of a different and lesser form of punishment to the one imposed by the court. A remission of the punishment is the reduction of the amount of sentence or penalty imposed without changing its character.

[36] It is the grant of a pardon to Carter and Austin in terms of ***section 78(1)(a)*** that we have to consider. A pardon has been defined as a solemn act by which the Governor-General acting on behalf of the Sovereign, either absolutely or conditionally forgives for the benefit of the person to whom it is granted the legal consequences of a crime he has committed. The nature of a pardon is explained in ***8(2) Halsbury's Laws, Fourth Edition Reissue 1996*** on ***Constitutional Law and Human Rights*** at paragraph ***824***:

"The pardon is part of the prerogative of mercy. The prerogative is not an arbitrary monarchical right of grace and favour, but a constitutional safeguard against mistakes. The prerogative of mercy is capable of being exercised in many different circumstances and over a wide range. The prerogative is a flexible power and its exercise can and should be adapted to meet the circumstances of the particular case."

[37] The effect of the pardon depends on the precise wording used in the grant. Carter and Austin were not granted "free", full or absolute pardons; they were not released from prison when they were pardoned. Instead, they were granted conditional pardons whereby the penalty of death was removed on condition that they were imprisoned for life. The substitution of imprisonment for life would have constituted a pardon subject to a lawful condition as stated in ***R. v. Secretary of State for the Home Department, ex parte Bentley [1993] 4 All ER 442*** at ***454*** QBD DC. The substitution would seem also to have been in terms of ***section 78(1)(c)*** by providing a less severe form of punishment; the word sentence is not used in ***section 78(1)***. However, a pardon does not remove the conviction: ***R. v. Foster [1984] 2 All ER 679*** CA.

(d) Submissions and discussion

[38] Mr. Wayne Clarke submitted that the pardons of the Governors-General were constitutional and that the condition that the respondents should serve 30 years before being reviewed was lawful. Mr. Clarke draws a clear distinction between the judicial function of a court in passing sentence and the executive function of the BPC in advising the Governor-General to dispense mercy. In his oral submissions, he stated that:

"There seems to be some discord between sentence which is a judicial function and the operation of 30 years which is not necessarily a sentence but is a condition of the pardon even though the end result may full well be the same. The premise is totally different. When the Governor-General is exercising the prerogative of mercy he is not sentencing."

[39] Mr. Clarke relies on the much quoted passage in the judgment of the JCPC in ***Reyes (Patrick) v. R. (2002) 60 WIR 42***, an appeal from Belize. ***Lord Bingham*** stated at paragraph ***[44]***:

"[T]he Board is mindful of the constitutional provisions... 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 the 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."

[40] However, we should hasten to point out
that the decision in ***Reyes*** was
given by the JCPC on 11 March 2002 and predated the decisions in ***Stafford*** and ***Anderson*** given later in the same year
by the European Court of
Human Rights and the House of Lords respectively as stated above in paragraph [31]. Moreover, although ***Lord Bingham*** gave the judgment of the JCPC in ***Reyes*** and the leading judgment of
the House of Lords in ***Anderson***,
Reyes was not cited or
referred to in ***Anderson***. ***Reyes***
therefore has to be read in the light of subsequent statements in ***Anderson***. ***Stafford***
and ***Anderson*** illustrate
that there are not always clearly defined boundaries between the judicial and
executive function in determining the appropriate punishment to impose on a person
convicted of murder. This is especially
the case when the judiciary has a mandatory power but discretionary power rests
with the executive. This position led ***Lord Bingham*** to the conclusion in ***Anderson*** that the Home Secretary
though purporting to exercise executive functions in relation to the punishment
of convicted murderers was in fact exercising "a classic sentencing function"
as quoted in paragraph [29] above. ***Lord Bingham*** at the end of his
judgment in ***Reyes*** stated at paragraph ***[47]*** that the Advisory Council as "a
non-judicial body cannot decide what is the appropriate measure of punishment
to be visited on a defendant for the crime he has committed". Thus Mr. Clarke in his written submissions
had to concede that the substitution of a less severe form of punishment for
that imposed "has the appearance of sentencing" and that the 30 year period of
incarceration is "on a practical level akin to a sentence".

[41] Mr. Mendes' submission was that the
respondents received 30 year minimum sentences with no stated starting points as
to whether they were from conviction or commutation. They were effectively "sentenced" by the BPC but
they could have been properly sentenced only by a court. The respondents' written submissions stated:

"It is submitted that where ***section 78*** permits the
Governor-General to issue a pardon subject to lawful conditions, he is not
permitted to make his pardon subject to the condition that the prisoner serve a
specific term of imprisonment. Any such
condition would be tantamount to the imposition of a sentence by him and would
be in violation of the separation of powers doctrine and so unlawful. Similarly, where ***section 78*** permits
the Governor-General to substitute a less
severe 'form' of punishment, this must be interpreted, consistent with the need
to reserve the sentencing function for the judiciary, as empowering him only to
identify the form of punishment which is to be substituted and not the measure
of it."

[42] Mr. Mendes submitted further that the
respondents were subjected to arbitrary detention and imprisonment, namely a "sentence"
for the rest of their natural lives and were not to be considered for release
for 30 years. He argued that such a sentence
constitutes inhuman or degrading punishment or treatment in breach of ***section 15(1)*** of the ***Constitution***. However,
a similar submission was made and

rejected in the JCPC appeal of ***Coard (Bernard) and Others v. Attorney-General of Grenada (2007) 69 WIR 295*** at paragraphs ***[13]*** and ***[14]*** as follows:

> "**[13]** [Counsel] said that, whatever might be said about the legality of the sentence of death, the warrant of commutation was itself invalid. It recited that the Minister had advised commutation to a sentence of life imprisonment, but the warrant then purported to grant a conditional pardon, which was something different. Furthermore, the condition – that the appellants be imprisoned for the rest of their 'natural lives' – was unknown to the law and would be an inhuman punishment because it would preclude any account being taken of individual circumstances or progress in prison.
>
> **[14]** Their Lordships consider that if the condition attached to the pardon is read literally, there is much in what [counsel] says. But the document should be construed on the assumption that the Governor-General intended to do what he was constitutionally required to do, namely to give effect to the advice of the Minister… Their Lordships therefore interpret the warrants as having been intended to do no more than substitute a sentence of life imprisonment."

Although in theory imprisonment for life means what it says, in practice rarely does life imprisonment result in incarceration for the prisoner's natural life. We therefore interpret the Warrants in the same manner as the JCPC did in the ***Bernard Coard*** case.

[43] It is important to bear in mind the chronology of events. The Warrants of Commutation were issued in 1989 and 1990 at a time when there was not the same awareness of the separation of powers in relation to the sentencing function as there is today. At that time the view was that the "legal nature of the exercise of the royal prerogative of mercy" contained in the Constitution remained "the same as it was in England at common law" according to ***Lord Diplock*** in ***de Freitas v. Benny (1975) 27 WIR 318*** at ***322*** JCPC. In the same paragraph ***Lord Diplock*** stated, "Mercy is not the subject of legal rights. It begins where legal rights end". His aphorism has haunted the jurisprudence in this area since 1975. The 30 year condition was at the time that it was imposed in keeping with ***de Freitas*** and with the wide discretion exercised in England by the Home Secretary.

[44] However, twenty five years later the JCPC "overruled" ***de Freitas*** in ***Neville Lewis*** and held that although the ultimate decision as to the exercise of mercy was for the Governor-General acting on the advice of the BPC, it did not "follow that the whole process is beyond review by the courts" (page ***292***). It should be noted, in agreement with the Respondents' Notice, that decisions developing or changing the common law as a general rule apply retrospectively. ***Lord Hoffmann*** confirmed in ***Bernard Coard*** at paragraph ***[28]*** "the principle that judicial decisions on the meaning of the Constitution have retrospective effect". Similarly in ***Bowe (Forrester) and Davis (Trono) v. R. (2006) 68 WIR 10***, ***Lord Bingham*** giving the judgment of the JCPC applied recent decisions of that Court retrospectively to order a review of the death sentences imposed on

the appellants many years earlier.

[45] The vintage year was 2002. In that year ***Reyes, Stafford*** and ***Anderson*** were decided. ***Anderson*** stated clearly that the fixing of a tariff period now known as the minimum term of imprisonment was "a classical sentencing function". Mr. Clarke's submissions "echoed" (to use Mr. Mendes' word) those made in ***Anderson*** on behalf of the Home Secretary. It was submitted that the Home Secretary in setting the tariff was carrying out an "administrative procedure" which complemented the punishment for murder of life imprisonment already pronounced by the court on conviction. It was contended that the Home Secretary was administering a sentence already imposed, not imposing a sentence. Those arguments were rejected by the House of Lords in favour of a realistic approach that in fixing a number of years the Home Secretary was in substance carrying out a sentencing and therefore a judicial function. ***Lord Steyn*** answered the submission succinctly at paragraph ***52*** when he said:

> "A decision fixing the tariff in an individual case is unquestionably a decision about the level of punishment which is appropriate. Mellifluous words cannot hide this reality."

[46] It follows that we agree with paragraph [37] of the judge's decision where he stated:

> "It would appear that the further condition of non-reviewability purported to prescribe the quantity of time which should be served by the applicants prior to review. To that extent, therefore, the commutation not only substituted the form of punishment i.e. from death to life but went further and prescribed a minimum period of time to be served before review. It therefore, prescribed a quantity of sentence to be served prior to review, which is a judicial function, as distinct from an executive act."

[47] We are of the view that the 30 year condition in the Warrants should not be adhered to by the BPC so as to fetter its power to advise the Governor-General. In any event, the BPC has an overriding discretion in advising the Governor-General on the exercise of mercy and it is always open to that body not to follow the 30 year condition. We therefore hold that the BPC should not be restricted by the 30 year condition, which in the light of current jurisprudence is an unlawful condition.

VI. ISSUE 2: THE PRISONS ACT AND RULES

(a) Introduction

[48] The second issue relates to whether it was lawful to make the respondents subject to ***Rule 42*** of the ***Prisons Rules, 1974*** as a condition of the pardons. Although the Warrants stated that the prisoners' cases were to be reviewed again when they had served a period of imprisonment of 30 years, the Warrants also stated that the prisoners were subject to the ***Prisons Rules***. This issue encompasses the fourth, fifth and sixth grounds of appeal; that the judge was in error in holding that the respondents were entitled to four-yearly reviews of their imprisonment.

(b) Rule 42

[49] ***Rule 42*** is made pursuant to ***section 66*** of the ***Prisons Act, Cap. 168*** (the ***Act***) and provides for a review of sentence by the Governor-General:

> "The case of **every prisoner** serving a term of imprisonment exceeding 4 years **shall be reviewed** by the Governor-General at four-yearly intervals **or shorter periods** if deemed desirable."
> (Emphasis added.)

The ***Rule*** makes no other provision in relation to review of sentence.

[50] The judge held as stated above in paragraph [11] that the respondents were entitled under ***Rule 42*** to four-yearly reviews of their sentences. As we understand it, the essence of Mr. Clarke's submission was that ***Rule 42*** "applies to persons serving court appointed sentences exceeding four years [whereas] the respondents were incarcerated as a condition of the exercise of the prerogative of mercy and [their cases] were not subject to review".

[51] Mr. Mendes in his written submissions dated 13 February and filed in the High Court on 20 February 2007 explained why ***Rule 42*** was applicable to the respondents. The first point to note is that the ***Prisons Rules*** post-date the ***Constitution***. They were obviously intended to give the Governor-General additional powers to those given to him in ***section 78*** of the ***Constitution*** and were not in derogation of his constitutional powers. Further, ***Rule 42*** expressly applies to every prisoner serving a term of imprisonment for over four years. In support of his submission, Mr. Mendes pointed out by way of contrast that there is an express exclusion in the proviso to ***section 58(1)*** of the ***Act*** exempting prisoners sentenced to life imprisonment (from benefiting from an order to be at large).

(c)
Section 53

[52] We add for the record that at paragraph [47] of his decision the judge quoted ***section 53*** of the ***Act,*** which gives the Minister power acting in accordance with the advice of the Advisory Board of the Prisons ***(section 65)*** to release on supervision persons serving imprisonment for life. Mr. Wayne Clarke submitted to the judge that the applicants could have availed themselves of this section which provides:

> "53. (1) The Minister may, at any time if he thinks fit, release on a supervision order a person serving a term of imprisonment for life subject to compliance with such conditions, if any, as the Minister may from time to time determine.
>
> (2) The Minister may at any time by order recall to prison a person released on a supervision order under this section, but without prejudice to the power of the Minister to release him on supervision again.
>
> (3) Where a person is recalled under subsection (2), his order shall cease to have effect and he shall, if at large, be deemed to be unlawfully at large."

[53] However, there was no evidence in the record or submissions made on the practical operation of ***section 53***. In fact, contrary to Mr. Clarke's submission, Carter did write the Attorney-General (Minister of Home Affairs) on 25 May 2000 requesting the Minister to facilitate his release but instead of his letter being dealt with by the Minister it was passed to the Clerk of the BPC on 10 September 2001, over a year after it was received. It therefore does not seem in the light of the circumstances that ***section 53*** would avail the respondents an effective means of relief.

[54] Mr. Clarke's submission was that ***section 53(1)*** is to be contrasted with ***Rule 42*** because the former applies to prisoners serving life sentences while the latter applies to prisoners serving sentences only for fixed terms over four years but not to prisoners serving sentences for indeterminate terms. Mr. Mendes in his written submissions rejected Mr. Clarke's submission as follows:

> "A term of imprisonment exceeding a specified number of years is to be interpreted as including a term of imprisonment for life…The express reference in section 53(1) to prisoners serving terms of imprisonment for life does not alter this conclusion. It is plain that the intention in section 53(1) is to create a separate power of release under supervision in relation to life prisoners only…The result is that between the Prisons Act and the Constitution the power to effect the early release of

prisoners serving terms of imprisonment is shared between the Governor-General and the Minister, with the Minister being empowered to order release only under supervision or temporarily under condition, while the Governor-General may effect the actual reduction of a prison sentence thereby causing the unconditional release of a prisoner."

[55] We agree with Mr. Mendes' submissions and the judge's ruling that ***Rule 42*** is applicable to all prisoners serving a term of imprisonment exceeding four years and therefore to the respondents.

VII. OTHER ISSUES

(a) *Ouster clause*

[56] The ouster clause issue is the seventh ground of appeal. We agree with the judge at paragraph [86] of his decision that the ouster clause in ***section 77(4)*** of the ***Constitution*** stating that whether the BPC has validly performed any function vested in it by the ***Constitution*** shall not be enquired into in any court did not prevent the court from examining the issues in this case. Although the judge did not refer to the decisions in ***Joseph and Boyce*** (references are at paragraph [69] below), the legal interpretation of the said ouster clause is now well settled following the judgment in that case of this Court (at paragraph ***[54]*** to ***[59]***) and the judgment of the Caribbean Court of Justice (the CCJ) where it was held at page ***107***:

> "That the processes involved in the exercise of the prerogative of mercy were amenable to judicial review; and the ouster clause in s 77(4) of the Constitution did not preclude the courts from inquiring into whether the Barbados Privy Council, a decision-making body and a part of the executive arm of Government, had performed its functions in contravention of the fundamental rights guaranteed by the Constitution, in particular the right to procedural fairness."

There is no merit in the appellant's contention that this Court's jurisdiction is ousted in the circumstances of this case.

(b) *Natural justice*

[57] The eighth ground of appeal challenges the judge's finding that there were breaches of natural justice. On the basis that

the respondents were entitled to have reviews under ***Rule 42*** and did not, they contend that they were deprived of natural justice and their constitutional rights. They further contend that they were denied the right of having their cases considered fairly by the BPC in the light of the decision of ***Neville Lewis***.

[58] The Clerk of the BPC, Miss Yvonne Payne, swore two affidavits on 27 February 2004, one in respect of Carter and the other in respect of Austin relating to their applications made to the BPC. The BPC considered the applications and recommended that there should be "no remission of sentence". Miss Payne's affidavits make only one reference to ***Rule 42*** of the ***Prisons Rules*** where at paragraph 16 of the affidavit on Carter, she stated:

> "On November 16th 1998, in accordance with rule 42 of the Prisons Rules, 1974 the Superintendent of Prisons submitted to the Privy Council a four-yearly report on the Applicant."

Carter and Austin appear to have suffered no prejudice in that their cases were reviewed (albeit not at four-yearly intervals) by the BPC.

[59] According to Miss Payne's affidavit, Carter's case was reviewed by the BPC on 22 February 1999 when reports from the Superintendent of Prisons, the psychiatrist, the chaplain and a medical report were presented. However, the BPC advised The Governor-General that there should be no remission of sentence and he accepted that advice and so ordered. There was a meeting of the BPC on 18 September 2000 when another petition was considered and the BPC again advised against remission of sentence. Carter petitioned the Governor-General again on 6 October 2000 and 14 August 2001. The BPC met yet again on 24 September 2001 and decided to adhere to its earlier decision of 18 September 2000. Miss Payne stated in her affidavit that the procedure adopted by the BPC was fair and impartial and gave due consideration to the representations tendered on behalf of Carter.

[60] Austin's case was reviewed once on 29 November 1999. The BPC advised that there should be no remission of punishment. Miss Payne stated in her affidavit in relation to Austin that the procedure adopted by the BPC was fair and impartial and gave due consideration to the representations tendered on behalf of Austin.

[61] Mr. Mendes' contention was that the respondents were deprived of natural justice by the failure to have their cases reviewed in terms of ***Rule 42*** and that they were deprived of procedural fairness in the reviews that did take place. There are a few answers to the submission. It was highly unlikely that the respondents would have been released prior to 2003 when they commenced these proceedings and had served less than 20 years since the date of their convictions. It was reasonable that their punishment was not reviewed by the BPC while the court proceedings were pending though it is regrettable that they have been pending for nearly seven years. With regard to the fair procedures that the BPC should adopt, these were not spelt out until the ***Neville Lewis*** case and more recently in the CCJ decision of ***Joseph and***

Boyce.

[62] It was further contended that the respondents were treated less favourably than other prisoners who had been released in similar circumstances and that the respondents were the longest serving prisoners. It is unnecessary to dwell on this submission because it does not advance the case for the respondents' release as the merits of each case must be examined individually. We cannot therefore agree with counsel's submissions that the respondents were deprived of natural justice such as to justify their immediate release by this Court.

VIII. DISPOSAL

(a) The High Court - Mormon Scantlebury

[63] The judge disposed of the applications by ordering that the matters be "remitted" to the Chief Justice for sentencing in accordance with the directions given in ***Scantlebury (Mormon) v. R. (2005) 68 WIR 88*** as set out at paragraph [13] above. We do not agree with the order. The circumstances of ***Mormon Scantlebury*** were distinguishable from those of the instant case both on the facts and in relation to the statutory provisions.

[64] Mormon Scantlebury was 17 years old at the time he committed murder. ***Section 14*** of the ***Juvenile Offenders Act, Cap. 138*** prohibited the sentence of death being pronounced on him; he had to be sentenced "to be detained during Her Majesty's pleasure". This Court held that the section should be construed and modified by substituting "the court's pleasure" for that of Her Majesty's. However, the manner in which the provisions of the ***Offences against the Person Act*** can and should be modified to accommodate a sentencing hearing before a High Court judge was not stated in the judge's decision in the instant case or in counsel's submissions made to us. In the absence of authority, we are of the view that the provisions of the ***Offences against the Person Act*** do not lend themselves to modification whereby a person convicted of murder could be referred to the High Court for some further sentencing process to be conducted after the mandatory death sentence had been pronounced.

[65] It is also important to note that ***Mormon Scantlebury*** followed established precedent from the JCPC in ***Browne (Greene) v. R. (1994) 54 WIR 213 (St. Christopher and Nevis, 6 May 1999)***, ***Director of Public Prosecutions v. Mollison (Kurk) (2003) 64 WIR 140 (Jamaica, 22 January 2003)*** and ***Griffith (Tennyson) and others v. R. (2004) 65 WIR 50 (Barbados, 16 December 2004)***. All of the cases involved convictions for murder against persons who were juveniles when the offences took place. For example, in ***Tennyson Griffith*** the appellants were sentenced to be detained during Her Majesty's pleasure. The JCPC held that the length of sentence of the appellants was properly determined by the court and not the executive and therefore construed ***section 14*** of the ***Juvenile Offenders Act*** as providing that the court should sentence the offenders to be detained during the court's pleasure until the court directed their release. The cases were carefully set out in the judgment of ***Mormon Scantlebury*** from paragraph ***[50]*** to ***[60]***. There is no similar precedent or circumstance that would permit the Court to construe the ***Offences against the Person Act*** so as to permit the respondents to be re-sentenced.

[66] It is also not possible in this case to resort to the device employed in the ***Coard*** case. In that case the appeal was allowed and it was declared that the sentence of death imposed on the appellants was invalid and that the case should be remitted to the Supreme Court of Grenada for the appellants to be sentenced in accordance with the construction of the Criminal Code based on the JCPC decision already referred to at paragraph [44] above of ***Bowe and Davis*** which held in relation to the Penal Code of the Bahamas that the imposition of a mandatory (as opposed to a discretionary) death sentence was unconstitutional. The headnote states at page ***11*** that:

> "**In the absence of any relevant savings provisions** in the Constitutions of the Bahamas, there was a mandatory duty to construe existing laws with such modifications, adaptations, qualifications and exceptions as were necessary to bring them into conformity with the constitutional provisions on (inter alia) human rights...the Penal Code required the death penalty to be imposed on any person convicted of murder...in accordance with the [Constitution] the Penal Code should have been construed...as prescribing the imposition of a discretionary (and not a mandatory) penalty for murder." (Emphasis added.)

[67] This Court does not have the option of similarly modifying the ***Offences against the Person Act*** because the majority judgment of the JCPC in ***Boyce and Joseph v. R. (2004) 64 WIR 37*** held the ***Act*** to be an "existing law" which could not be modified because of the savings clause in the Constitution which immunised pre-independence law from being declared unconstitutional. The JCPC rejected the argument that it was possible to modify that ***Act*** to conform to the constitutional provision against inhuman and degrading punishment contrary to ***section 15(1)*** of the ***Constitution*** by deeming the imposition of the death penalty to be discretionary following a conviction for murder. ***Lord Hoffmann*** described the argument "as completely untenable" (paragraph [5] of his judgment). The JCPC decision in ***Boyce and Joseph*** is binding on this Court. However, that decision has to be considered in the light of the subsequent Inter-American Court of Human Rights (IACHR) decision in ***Boyce and Joseph v. Barbados***, given on 20 November 2007, Ser. C, No. 169. The IACHR decision stated at paragraph 71 that the **mandatory** death sentence was in violation of the American Convention on Human Rights because as explained at paragraph 77:

> "In accordance with the Vienna Convention on the Law of Treaties, Barbados is bound to comply with its obligations under the American Convention in good faith."

It follows that the state's legislation should comply with its treaty obligations for the courts' decisions to be Convention compliant. However, the courts are bound by the existing law as interpreted by the JCPC with the result that this Court cannot remit the respondents' cases to the High Court for sentence.

[68] It is also not possible to interpret the provisions for the mandatory death sentence and the prerogative of mercy in such a way as to allow some scope for the accommodation of a sentencing hearing before the High Court after commutation of the sentences. Such a sentencing hearing could only properly be accommodated "under the new legislative framework"

mandated by the IACHR to be adopted by the State: see paragraph [109] of the IACHR decision in ***DaCosta Cadogan v. Barbados***, given on 24 September 2009, Ser. C, No. 204. By analogy the House of Lords in ***Anderson*** considered that under the existing legislation it could not take away from the Home Secretary the power to decide the length of the tariff period and give it to the judiciary. ***Lord Hutton*** at page ***901*** said "for this House to do so would be for it to engage in the amendment of a statute and not in its interpretation". ***Lord Bingham*** stated at page ***883*** that such interpretation "would not be judicial interpretation but judicial vandalism".

(b) The Court of Appeal - section 24 of the Constitution

[69] The wide-ranging power of the court to grant constitutional redress under ***section 24*** of the ***Constitution*** is not in dispute. This fact has been stated clearly in ***Joseph and Boyce v. Attorney-General (2005) 68 WIR 123*** at paragraph ***[74]*** ***CA*** and ***Attorney-General v. Joseph and Boyce (2006) 69 WIR 104 CCJ, de la Bastide P*** and ***Saunders J*** at paragraph ***[57]*** to ***[66], Wit J*** at paragraph ***[20],*** and ***Hayton J*** at paragraph ***[3]***. The Court on an appeal from a decision of the High Court has power to make such orders and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the fundamental rights and freedoms provisions of the ***Constitution***. The critical point for determination is not the extent of the power given in ***section 24*** but the limits that the Court should impose in exercising its discretion under the section.

[70] Mr. Mendes submitted that the Court should invoke ***section 24*** and order the immediate release of the respondents. He supported the order of the judge but "only as an alternative to an order for immediate release" of the respondents from prison. The conclusion of the Respondents' Written Submissions was as follows:

> "The respondents have been deprived of the opportunity of having had their cases reviewed at four-yearly intervals since their sentences of death were commuted. They have accordingly also been imprisoned for longer periods of time than any other prisoner in similar circumstances. This Honourable Court could order that the 30 year condition be set aside and the Privy Council engage in an immediate review of the respondent's cases. Such an order would correct the situation but would leave un-redressed the lost opportunity of review and possible release which the respondents may have enjoyed had they been reviewed at four-yearly intervals. That they may have been released is not at all farfetched given that all persons who have had their sentences to death commuted to life have been released after serving periods of imprisonment much shorter than that served by the respondents. In all the circumstances, and bearing in mind in particular that prisoners in like circumstances have been released after serving shorter periods of time, it is respectfully submitted that the appropriate remedy in this case to redress the wrongs suffered by the respondents is to order their immediate release."

[71] A helpful discussion on the approach to be adopted in this type of situation is to be found in the judgment of ***Hayton J*** in the CCJ decision of ***Joseph***

and Boyce at paragraph ***[3],***
[6] and ***[7]*** where he
considered the respective roles of the BPC and the court:

> "**[3]** I have some comments on the relationship between s 24 and s 78 of the Barbados Constitution which concern the role of the court and the role of the BPC. On a breach of 'the provisions of sections 12 to 23' of the Constitution, s 24 confers on the courts exceptionally flexible positive powers…The question arises as to what is the position if a convicted murderer successfully alleges that there has been a breach of his right to procedural fairness in the exercise of the prerogative of mercy under s 78 of the Constitution. Must the court refer the matter back to the BPC or can it deal with the matter itself?
>
> …
>
> **[6]** [I]t seems that only the standard judicial review powers are available for breach of procedural fairness in the exercise of the prerogative of mercy under s 78. On such a breach the BPC's decision will be quashed so that the BPC, as a responsible body, can reconsider the matter in the light of the court's judgment providing guidance as to what is a procedurally fair process.
>
> **[7]** [I]n the joint judgment of de la Bastide P and Saunders J…they envisage (para [66] of the joint judgment) that the appropriate relief *normally* would be to quash the decision of the BPC and remit the matter to it for a further but a procedurally fair consideration of the matter."

We appreciate the fact that in ***Joseph and Boyce*** the CCJ was specifically dealing in the passages quoted above with "the right to procedural fairness" by the BPC in the exercise of its powers under ***section 78***. Nevertheless, the approach in that case is helpful in determining the approach that should be adopted in this case.

[72] Contrary to the submissions of counsel, we cannot release the respondents under ***section 24*** of the ***Constitution***. The respondents' claim that they have served enough time as punishment, they have been rehabilitated in prison, they are model prisoners and it is right after all these years that they should be released. However, it is not for this (or any) Court to release them. The power to exercise executive clemency is reserved for the Governor-General acting on the advice of the BPC. The court is expressly prohibited from exercising its powers under ***section 24*** "if it is satisfied that adequate means of redress are or have been available to the person concerned

under any other law".

[73] It follows that this Court can neither properly re-sentence the respondents nor exercise the prerogative of mercy in their favour. To release the prisoners would not be a proper exercise of our power to grant redress under ***section 24*** and would be highly irresponsible.

(c) The Governor-General – Rule 42 of the Prisons Rules

[74] We are of the view that the appropriate redress for Carter and Austin is that their cases should be reviewed by the Governor-General under ***Rule 42*** of the ***Prisons Rules*** at the earliest opportunity.

[75] We have taken an overview of the facts and circumstances of this matter to determine whether Carter and Austin have been treated fairly or whether they have been merely victims of the constitutional niceties raised by their cases.

[76] We have, of course, no power to review the merits of the advice tendered by the BPC to the Governor-General as to whether Carter and Austin should be released. That is a matter under our existing constitutional arrangements on which the Governor-General has the sole power to act in accordance with the advice of the BPC.
However, in considering the issue of fairness, it would not be inappropriate for us to state that both Carter and Austin were convicted for murders which are sometimes described in the cases as "heinous" or "horrendous". Carter threw a stick and a half of dynamite into Alfred Morris' home on 19 February 1984 and blew him up. Austin on 3 July 1985 butchered Germaine Griffith his 76 year old neighbour with a hatchet inflicting twenty-six wounds on her.

[77] It is helpful to note the provisions of section 269 and Schedule 21 of the English Criminal Justice Act 2003, which were referred to in ***Mormon Scantlebury*** at paragraph ***[82]***. The Schedule provides that "the appropriate starting point, in determining the minimum term, is 30 years" where "the seriousness of the offence is particularly high". An example quoted is "a murder involving the use of a firearm or explosive". It is also helpful to note that a distinction is made between the minimum term, which is intended to reflect the punitive aspect of the punishment, and the separate matter of the dangerousness of the prisoner on release. In American phraseology the former is described as "time for the crime" while the latter consists of detention determined by considerations of public protection or whether it is "safe" to return the prisoner to the community; the matter is discussed in the article ***"Dangerousness and the Tariff"*** by ***Maguire, Pinter and Collis*** ***(1984) 24 British Journal of Criminology 250*** at ***258***. This distinction was highlighted by the English Court of Appeal in ***R. v. Duncan [2007] 1 Cr. App. R. (S.) 127***. According to ***Gibbs J*** at page ***139***:

> "In fixing the minimum period, we are not permitted to take into consideration the danger posed by the appellant in the light of his personality and his propensities. That is a matter for others (almost certainly the Parole Board) if and when there is an application for early release."

We have referred to the English position in support of our holding that it would be inappropriate for the High Court or this Court to determine what further relief (if any) should be granted to the respondents. We therefore hold that whether the respondents should be released is a matter that can properly be determined only under the existing constitutional and legislative provisions by way of executive clemency exercised by the Governor-General acting on the advice of the BPC.

(d)
General comments

[78] It follows from the above discussion that we do not agree with the manner in which the judge disposed of the applications. However, we acknowledge that the issues raised in this matter are not straightforward and do not lend themselves to easy resolution. This circumstance is partly because the fundamental rights and freedoms provisions of the ***Constitution*** were modelled on those of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) which has been the subject of a rapidly growing jurisprudence. Further, little guidance can be obtained on the constitutionality of the exercise of the prerogative of mercy for capital offences from other jurisdictions as most have either abolished capital punishment completely or the mandatory death sentence. For example, ***Watkins LJ*** stated in ***Bentley*** (1993) at page ***451*** that "there are no English cases dealing with the prerogative of mercy since 1985".

[79] The ***Constitution*** is nearly 44 years old. The jurisprudence on the fundamental rights and freedoms of the individual has developed considerably during that period of time. This jurisprudence has inevitably impacted on the interpretation of the ***Constitution***. Some of the developments have been outlined by ***Lord Bingham*** in his judgment under the heading *"International Developments"* in ***Reyes*** at paragraph

17 to ***27***. ***Lord Bingham*** also makes the point at paragraph ***44*** that little assistance can be gained from the earlier decisions "made at a time when international jurisprudence on human rights was rudimentary". We are therefore faced with the challenge of trying to accommodate within an existing but dated framework a jurisprudential culture of steadily enhancing human rights as expounded by the JCPC and more recently by the CCJ. ***Nelson J*** in the CCJ decision of ***Joseph and Boyce*** at paragraph ***[15]*** pointed to the ambivalence of the statutory and constitutional provisions and "the paradox" between the statutory requirement for the mandatory imposition of the death sentence and the requirement of the Governor-General to convene a meeting of the BPC to advise him on the exercise of the powers of clemency.

[80] The role of the BPC will become "increasingly difficult to reconcile with the concept of the separation of powers between the executive and the judiciary which is an essential element of democracy" to quote the words of ***Lord Hutton*** in ***Anderson*** at page ***899*** albeit in a somewhat different context. The dilemma that this Court faces is not too dissimilar from that which the JCPC faced in the ***Coard*** appeal which ***Lord Hoffmann*** described at paragraph ***[28]*** as "no ordinary case" and where he said at paragraphs ***[30]*** and ***[31]***:

> "[T]here has never been any **judicial** contribution to determining the sentences which the appellants should serve. Byron J, correctly applying the law at the time, exercised no discretion. And the appellant's present detention is solely by the authority of the executive.
>
> [T]here appears to be no adequate mechanism in Grenada for providing the appellants, even now, with the **judicial** sentencing procedure to which they were entitled. The only prospect of a review of the sentences is by means of the exercise of the royal prerogative of mercy, which depends entirely on executive discretion."
> (Emphasis added.)

[81] Similarly, the statutory framework in this jurisdiction was the subject of scrutiny by the IACHR and an order for legislative reform. The Court stated in the case of ***DaCosta Cadogan*** at paragraphs 109 and 128 (No. 9) as follows:

> "[T]he present case should take into account that 'sentencing is a judicial function' and that the commutation of a sentence corresponds to a non-judicial process. Therefore…the State must provide …a hearing for the judicial determination of the appropriate sentence…
>
> The State shall adopt…the legislative or other measures necessary to ensure that the Constitution and laws of Barbados, particularly Section 2 of the Offences

Against the Person Act [the mandatory death sentence] and Section 26 of the Constitution [the savings clause] are brought into compliance with the American Convention [of Human Rights]."

We would emphasise that the IACHR envisaged legislative measures being necessary.

[82] ***Sir Louis Blom-Cooper Q.C.*** in a case note entitled ***"Justice and Mercy in the Caribbean" [1997] Crim.L.R. 116*** expressed the view that in the Caribbean:

> "[T]he so-called prerogative of mercy is an essential part of the sentencing process...The result of the public realisation of the absurdity of the fixed penalty for murder is that the prerogative of mercy in the strict sense of an act of grace or clemency...is perforce being used in circumstances for which it was never designed. It is no longer an exercise of mercy – whatever title is given to the body purporting to exercise mercy – but an adjustment of the fixed penalty so as to prevent injustice. It is the method by which the mandatory sentence can be adjusted to deal with the facts of the particular case and so produce a fair result. "Prerogative of Mercy" is nowadays a misleading expression to describe what is in reality an essential part of the process of criminal justice."

[83] In the context of the developing human rights jurisprudence it should be noted that ***section 78*** of the ***Constitution*** was amended in 2002 by adding (among others) ***subsection (5)***, quoted at paragraph [34] above. However, the subsection curtailed, rather than enhanced, existing rights by prohibiting the right of an oral hearing to a prisoner sentenced to death after 5 September 2002 when the Privy Council is considering the exercise of the prerogative of mercy. We adopt the language of ***Lord Bingham*** in ***Reyes*** at paragraphs ***24*** and ***29*** in relation to an appeal from Belize and instead substitute the references to Barbados, as follows:

> "The European Convention applied to Barbados as a dependent territory of the Crown from 25 October 1953 when it came into force until 30 November 1966 when Barbados became independent...[F]or 13 years preceding independence the country was covered by the European Convention, the provisions of which were in large measure incorporated into Part III of the Constitution: **it could scarcely be thought that it was intended, in adopting and giving primacy to these new rights in the new Constitution, to diminish rights which the people had previously been entitled to enjoy**. This does not mean that in interpreting the Constitution of Barbados effect need be given to treaties not incorporated into the domestic law of Barbados 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 [to] international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does." (Emphasis added.)

[84] The amendments by way of additions to ***section 78*** were the subject of adverse comment by ***Lord Nicholls of Birkenhead*** in the JCPC case of ***Matthew v. State of Trinidad and Tobago [2005] 1 AC 433***. ***Lord Nicholls*** stated at paragraphs ***[72]*** and ***[74]***:

"For some years now their Lordships' Board, in discharge of its responsibilities as the supreme court of a number of countries, has sought to give effect to the human values declared and entrenched in the constitutions of these countries. It has done so by decisions such as *Pratt and Morgan v Attorney-General for Jamaica* [1994] 2 AC 1, concerning time spent on death row, *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50, concerning conditions on death row, and *Reyes v The Queen* [2002] 2 AC 235, concerning mandatory sentences of death. **By the Constitution (Amendment) Act, 2002 the Constitution of Barbados was amended so as to reverse the effect of all three of these decisions**. This was done by enacting that, for the future, the conduct declared to be unconstitutional by these decisions of the Board shall not be held to contravene section 15 of the of the Constitution...**If departure from fundamental human rights is desired, that is the way it should be done**. The Constitution should be amended explicitly." (Emphasis added.)

(d) Costs

[85] The factual position is that the applicants sought redress under ***section 24*** of the ***Constitution.*** The judge granted redress by referring the case to the Chief Justice in his capacity as a High Court judge. We have held that the redress to which the respondents are entitled is to have their cases reviewed by the Governor-General. Carter and Austin have therefore been granted constitutional redress before the High Court and this Court. Further, their cases involve questions as to the interpretation and application of the ***Constitution*** and are concerned with the exercise of the jurisdiction conferred upon the High Court relating to redress for the contravention of the provisions of the ***Constitution*** for the protection of fundamental rights. It is therefore proper that Carter and Austin should be awarded costs. In the High Court, Carter and Austin were jointly represented by Mr. Douglas Mendes S.C, Mr. Robert Clarke and Ms. Lisa Gaskin. Before us Mr. Mendes made the oral submissions on behalf of both respondents. We therefore are of the view that a fair order would be that Carter and Austin have costs for one counsel each in the High Court and the Court of Appeal.

[86] We would add that this order does not conflict with the order made by this Court on 16 March 2009 and set out in paragraph [17] above. With regard to the interlocutory hearings before this Court, we confirm the order made on 16 March 2009 that the applicants should have their costs for 17 December 2008 and the said 16 March 2009 for two counsel for each respondent.
With regard to the High Court hearing on 26 June 2009 before ***Waterman CJ (Acting)*** we would make no order as to costs. With regard to the hearing before this Court on 27 July 2009, we would make a similar order to that made on 16 March 2009 for two counsel for each respondent. With regard to the hearing before this Court on 9 October 2009 when the parties were not ready to proceed we would make no order as to costs. We make our order on costs subject to any written representations which the parties may wish to file within 14 days of the date of this judgment for our further consideration without a hearing, failing which our order becomes absolute.

(e) Order

[87] The case of ***Bentley*** referred to at paragraph [37] above concerned the conviction for murder of a police officer and the refusal of the Home Secretary to recommend a posthumous free pardon for Derek Bentley who had been hanged 40 years previously when he should have been reprieved. ***Watkins LJ*** recommended at page ***455*** that the approach of the Court of Appeal should be as follows:

> "In these circumstances the court, though it has no power to direct the way in which the prerogative of mercy should be exercised, has some role to play. The Home Secretary's decision was directed to the grant of a free pardon. In these circumstances we do not think it would be right to make any formal order nor is this an appropriate case for the grant of a declaration. Nevertheless, we would invite the Home Secretary to look at the matter again and to examine whether it would be just to exercise the prerogative of mercy in such a way as to give full recognition to the now generally accepted view that this young man should have been reprieved."

[88] Similarly, in the instant case executive clemency is properly exercised in accordance with the ***Constitution*** by the Governor-General acting on the advice of the BPC. We should add that the Governor-General has under ***section 77*** of the ***Constitution*** the authority acting in his discretion to summon the BPC. He shall attend and preside at all meetings of the BPC so far as is practicable and subject to the provisions of the ***Constitution*** the BPC may regulate its own procedure.

[89] Although it is inappropriate to make a mandatory order in the circumstances of this case, it would be helpful to indicate what action is required to be taken by the Governor-General and the BPC in order to vindicate the rights of the respondents. The recent CCJ decision in ***Gibson v. Attorney-General CCJ Appeal No. CV1 of 2010*** given on 15 August 2010, implied at paragraph ***[23]*** that it was important for the Court to indicate what action was required to be taken by the Government in order to vindicate the constitutional rights of the appellant in the particular circumstances of that case.

[90] The CCJ gave guidance to the BPC with regard to the exercise of the prerogative of mercy in ***Joseph and Boyce*** at paragraph ***[140]*** to ***[143]*** and at paragraph ***[36]*** approved the guidance given in ***Neville Lewis*** at pages ***292*** and ***293*** where the JCPC stated that the Jamaica Privy Council should be required to receive the representations of a man condemned to die and that he should have an opportunity to see and comment on the material which is before that body. Similarly, the JCPC issued guidelines to the Governor-General and the Jamaica Privy Council to be applied in circumstances where five years had elapsed since the sentence of death had been imposed: see ***Pratt and Morgan v. Attorney-General of Jamaica (1993) 43 WIR 340***.

[91] It must be emphasised that unlike the last three mentioned cases, in the instant case the respondents' sentences of death have already been commuted. A review of their cases would be under ***Rule 42*** of the ***Prisons Rules***. The advice given by the CCJ in ***Joseph and Boyce*** as to the manner in which the BPC should act in relation to commutation is nevertheless helpful in relation to the exercise that will have to be carried out following this judgment. The CCJ said at paragraph ***[143]*** that the BPC "should make available to the condemned man all the material upon which they propose to make their decision, give him reasonable notice of the date of the meeting and invite him to submit written representations". In a somewhat different context the JCPC has recently stressed the importance of obtaining in these types of cases a comprehensive social inquiry report and a psychiatric report and in cases where the possibility of mental disability exists, a psychological report as well: see ***White v. R. (Belize) [2010] UKPC 22 (29 July 2010)*** at paragraphs ***27*** and ***28***.

[92] It is recommended that the Governor-General should review the cases of Carter and Austin as soon as possible. As a consequence a meeting of the BPC would be convened to consider whether it is appropriate to exercise any further executive clemency towards the respondents. However, it must be clear that the BPC in advising the Governor-General must not be seen to be exercising a sentencing function.

[93] We therefore order that the appeal be allowed in part. The cases of Carter and Austin should be reviewed by the Governor-General in compliance with ***Rule 42*** of the ***Prisons Rules, 1974*** and the Governor-General should exercise such powers under ***section 78(1)*** of the ***Constitution*** as he is advised by the BPC in the light of this judgment. We order that the respondents are to have their costs against the appellant, here and in the court below, as set out in paragraphs [85] and [86] above, to be agreed and failing agreement as is prescribed.

[94] We conclude this judgment by acknowledging the research and high quality of submissions presented by counsel for both parties. We would particularly express our appreciation to Mr. Mendes for his assistance in this area of the law in which his expertise is rightly recognised and highly regarded.

Justice of Appeal

Justice of Appeal

Justice
of Appeal