Privy Council Appeals Nos. 26 and 37 of 1996

Dwight Lamott Henfield *Appellant*

v.

The Attorney General of the Commonwealth of The Bahamas *Respondent*

and

Ricardo Farrington *Appellant*

v.

The Minister of Public Safety and Immigration and Others *Respondents*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH

OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 14th October 1996

Present at the hearing:–

Lord Keith of Kinkel
Lord Goff of Chieveley
Lord Browne–Wilkinson
Lord Steyn
Lord Hope of Craighead
[Delivered by Lord Goff of Chieveley]

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Introduction There are before their Lordships two appeals from the Court of Appeal of The Bahamas, by Dwight Lamott Henfield and Ricardo Farrington respectively. Each case raises the question whether, on the principles stated by the Privy Council in Pratt and Another v. Attorney–General for Jamaica [1994] 2 A.C. 1, 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 Bahamas. The two appeals shared certain common features, and as a result were heard together.

It is necessary for their Lordships to set out the chronologies of these two cases; but before they do so they should record that another case has had an impact on the issue of delay in the present appeals. This was the case concerned with a constitutional motion brought in The Bahamas by Larry Raymond Jones and others, in which the applicants claimed (inter alia) a declaration that the death penalty was contrary to the Constitution of The Bahamas. These consolidated proceedings led to a decision by the authorities not to carry out any executions pending the decision on the question whether the death penalty was unlawful. The proceedings in the first of the consolidated motions began on 21st June 1989, and final judgment was not given by the Privy Council until 3rd April 1995 (see Jones and Others v. Attorney–General of the Commonwealth of The Bahamas [1995] 1 W.L.R. 891) so that the proceedings occupied a total period of 5 years and 10 months. The decision not to carry out any executions pending the outcome of these proceedings had an impact on both cases now before their Lordships.

In this connection, it is necessary also to refer to another case from The Bahamas, Reckley v. Minister of Public Safety and Immigration [1995] 2 A.C. 491. In that case the applicant, who had been convicted and sentenced to death for murder, was granted a stay of execution by the Privy Council on 13th June 1995 to enable him to pursue a claim that he was entitled to be heard by the Advisory Committee on the Prerogative of Mercy, and for that purpose to see material available to the Committee. That claim which, if accepted, required that the earlier decision of the

Privy Council in de Freitas v. Benny [1976] A.C. 239 should be departed from, was rejected by the Privy Council on 5th February 1996; see Reckley v. Minister of Public Safety and Immigration (No. 2) [1996] A.C. 527. In the case of Reckley, as in the case of Jones, the authorities in The Bahamas ordered a suspension of executions pending the outcome of the proceedings; and this decision had some impact upon the delay in the case of Farrington. Their Lordships wish to place on record that it was entirely proper for the authorities in The Bahamas to order these suspensions of executions, in the interests of all those men who were then under sentence of death or might thereafter be sentenced in the meanwhile.

Their Lordships propose now to set out the chronologies in the two cases before them in tabular form.

(1) Henfield

26th May 1988	Conviction and sentence to death.
24th February 1989	Appeal against conviction dismissed by Court of Appeal.
18th September 1989	Warrant read for execution on 24th October.
11th October 1989	Stay of execution pending appeal to Privy Council.
28th July 1993	Petition for leave to appeal to Privy Council.
16th December 1993	Petition dismissed by Privy Council.
3rd February 1995	Proceedings begun claiming execution unlawful on principle in *Pratt*.
3rd April 1995	Privy Council dismisses appeal in *Jones*.
12th July 1995	Thorne J. commutes Henfield's sentence to life imprisonment.
15th April 1996	Court of Appeal allows appeal from Thorne J.'s decision.

N.B. The delay which elapsed between Henfield's conviction and sentence on 26th May 1988 and the launching of his constitutional proceedings on 3rd February 1995 was 6 years and 6 months.

(2) Farrington

30th November 1992	Conviction and sentence to death.
28th April 1994	

	Appeal against conviction dismissed by Court of Appeal.
3rd April 1995	Privy Council dismisses appeal in *Jones*.
13th June 1995	Privy Council adjourns Reckley's application for stay of execution.
7th September 1995	Petition for leave to appeal filed with Privy Council on behalf of Farrington.
3rd January 1996	Supplemental petition filed.
5th February 1996	Privy Council dismisses Reckley's application.
4th March 1996	Farrington's petition for leave dismissed.
27th March 1996	Warrant read for execution on 9th April. 3rd April 1996 Ex parte application for stay of execution on principle in *Pratt*.
4th April 1996	Osadebay J. refuses stay.
29th April 1996	Court of Appeal dismisses appeal from Osadebay J.

N.B. The delay which elapsed between Farrington's sentence on 30th November 1992 and the launching of his application for a stay of execution on 3rd April 1996 was 3 years and 4 months.

The applicable principles

These were stated in the leading case of Pratt [1994] 2 A.C. 1. The judgment in that case 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 treatment". The essential question in the case was whether the execution of a man following a long delay after his sentence to death could amount to inhuman punishment contrary to section 17(1). The Privy Council, departing from the previous decision of the Board in Riley v. Attorney–General for Jamaica [1983] A.C. 719, held that such delay was capable of having that effect. This was because (see page 29G):–

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

> agony of execution over a long extended period of time."

Furthermore the Board held that parts of this time occupied in legitimate resort by the convicted man to appellate procedures should not be left out of account in computing the relevant period of delay. In reaching this conclusion the Board, invoking in particular the decision of the European Court of Human Rights in Soering v. United Kingdom (1989) 11 E.H.R.R. 439, explicitly repudiated the death row phenomenon which has developed in certain states of the United States of America, where men may be executed after a prolonged period of time which has elapsed while their lawyers pursue a multiplicity of appellate procedures. The Board expressed its conclusion on the point in the following passage (see page 33B–D):–

> "In their Lordships' view a state which wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence."

In Pratt itself the Board was faced with applications by two convicted men who had been held on death row for over 14 years, and it was plain that their death sentences must be commuted to sentences of life imprisonment under section 25(2) of the Jamaican Constitution. However the Board was conscious that many other prisoners had been held on death row in Jamaica for long periods of time, and that their position would have to be dealt with as a matter of urgency following the outcome of the appeal in Pratt. They therefore reviewed the relevant considerations (at pages 34–35) and concluded that in any case in which execution was to take place more than five years after sentence there would be strong grounds for believing that the delay was such that execution thereafter would constitute inhuman punishment contrary to section 17(1). Following that guidance, the Jamaican authorities were enabled to act expeditiously in commuting the death sentences on a substantial number of prisoners on death row to sentences of life imprisonment; and other Caribbean states, whose constitutions contained

provisions similar or identical to section 17(1), did likewise.

The five year period

The question of the effect of prolonged delay following sentence of death normally arises in the context of the domestic appellate system. In considering the effect of such delay, attention has been concentrated on the 5 year period specified in Pratt. This period has been treated as the overall period which, in ordinary circumstances, must have passed since sentence of death before it can be said that execution will constitute cruel or inhuman punishment. It has not however been regarded as a fixed limit applicable in all cases, but rather as a norm which may be departed from if the circumstances of the case so require. This is shown by two contrasting cases, Guerra v. Baptiste [1996] A.C. 397, from Trinidad, and Reckley v. Minister of Public Safety and Immigration (No. 2) [1996] A.C. 527, from The Bahamas. In Guerra, the notes of the evidence given at his trial were not made available until over 4 years after he had been sentenced to death. His appeal against conviction was not heard and dismissed until 6 months later, and leave to appeal to the Privy Council was refused 4 months later; as a result the total delay amounted to 4 years and 10 months. The Privy Council held that, following such delay, execution would constitute cruel and unusual punishment and so be unlawful. In so holding the Board had regard to the serious delay which had occurred and to the cause of that delay, and to the fact that, as a result, the overall lapse of time since sentence of death was close to the 5 year period. That case should be contrasted with Reckley. He was sentenced to death on 7th November 1990, and had exhausted his rights of appeal by 12th March 1992. At that time there was in force the decision not to carry out any executions pending the outcome of the proceedings in Jones, in which the constitutional motion was ultimately dismissed on 3rd April 1995. After a warrant for Reckley's execution had been read to him on 26th May 1995, a constitutional motion was issued on his behalf claiming that his execution would be unlawful on two grounds, first that having regard to the time which had elapsed since his sentence (viz. 4 years and 6 months) his execution would be unlawful on the principle in Pratt; and second that he had been denied the opportunity of being heard by the Advisory Committee on Mercy, or of seeing the material before the Committee relating to his case. This latter contention required that the decision of the Privy Council in de Freitas v. Benny [1976] A.C. 239 should be departed from. A stay of execution was refused by the Bahamian courts, but the Privy Council allowed his appeal and granted a stay. The delay which had occurred arose from the suspension of executions pending the outcome of Jones, but no criticism was made on this score. Understandably at that time, the argument on the point of delay was advanced with reference to the 5 year period, on the basis

that, having regard to the period of 4 years and 6 months which had elapsed since sentence of death, this should be regarded as a borderline case in which it would be right to hold that the threshold had been passed. The Board felt unable to accept this argument, and indeed rejected an application for a stay on this ground as hopeless. However a stay was granted to await the decision on the Advisory Committee point in Guerra, in which that point had been taken. Unfortunately the point was held not to arise for decision in Guerra, in which judgment was given on 6th November 1995. An application for the continuation of the stay of Reckley's execution was made to the Board on 9th November 1995, two days after the expiry of the 5 year period in his case. In the exceptional circumstances of the case, the Board extended the stay of execution to enable the argument on the Advisory Committee point, though not the point on delay, to be advanced. The argument was heard in December but was rejected, judgment being given on 5th February 1996. A further application for a stay was made to the Board on 13th March on the ground of delay, but was again rejected. In this case too, therefore, the 5 year period was treated as the period which, in ordinary circumstances, must be passed before the principle in Pratt can be invoked; but since the stay took the form of a respite to enable the Advisory Committee point to be argued on Reckley's behalf, the effect was to extend, rather than to reduce, the 5 year period for that purpose.

Farrington

This appeal raises issues more complex than those raised in the case of *Henfield*. Moreover, the conclusion reached by their Lordships on one of the issues in *Farrington* will have an impact on the outcome in *Henfield*. Their Lordships will therefore turn first to consider the appeal in *Farrington*.

As appears from the chronology set out earlier in this judgment, the period of time which elapsed between sentence of death and the application for a stay of execution which is the subject of Farrington's appeal was 3 years and 4 months. This is substantially less than the 5 year period specified in *Pratt*. Of this period, 1 year and 5 months elapsed between sentence and the dismissal of Farrington's appeal by the Court of Appeal, which is 5 months longer than the target period specified in Pratt. The principal cause of the delay was however the further period of 1 year and 4 months which elapsed between the decision of the Court of Appeal, and the filing of Farrington's petition for leave to appeal to the Privy Council, which was dismissed 5 months later. At first sight, it is not easy to see why execution after this lapse of time should, on the accepted principles, constitute inhuman punishment.

However Mr. O'Connor, in a powerful argument, submitted that this would indeed be so. He advanced the following particular submissions:

(1) He first relied on the fact that The Bahamas, unlike Jamaica, were not signatories of the Optional Protocol to the U.N. Covenant on Human Rights. He submitted that the 5 year period specified in Pratt took into account the possibility of an application to the U.N. Human Rights Committee, for which a target period of 18 months was allowed; and he drew the conclusion that in The Bahamas there should be substituted a period of 3 years and 6 months, in place of the 5 year period applicable in Jamaica, from which there may be inferred strong grounds for believing that there has been such delay as will render execution unlawful.

(2) He next submitted that the delay in the case of Farrington arose from the fact that it occurred in the shadow of the decision by the authorities not to carry out any executions pending the outcome of the constitutional proceedings in *Jones*. While those proceedings were continuing, no executions could be carried out; and those proceedings were prolonged by reason of the failure of the respondent authorities to take steps to curtail the serious delays in the applicants' conduct of the proceedings. If it had not been for this failure on the part of the authorities, he submitted, the proceedings in *Jones* would have occupied a far shorter time. The dismissal of Farrington's appeal by the Court of Appeal would have been rapidly followed by a reference to the Advisory Committee and the issue of a warrant for his execution, so that his petition for leave to appeal to the Privy Council would have been filed as rapidly as possible in order to obtain a stay of execution, and thereafter would have been disposed of without delay. It followed that the failure of the authorities to curtail the delays in Jones was the cause of a substantial part of the delay which occurred in the case of *Farrington* and in all the circumstances his execution would constitute inhuman punishment.

(3) He relied on two other matters as relevant to the issue of delay, viz. (a) the fact that Farrington had been held in prison for 2½ years before his trial, and (b) the conditions in which he was held on death row following his sentence. He submitted that if either or both of these factors were taken into account, a significantly shorter period of delay after his sentence was sufficient to render Farrington's execution unlawful.

It is right to record that, as far as their Lordships are aware, none of these points has previously been raised before the Privy Council on appeals concerned with the principle in *Pratt*.

(1) <u>Does the 5 year period apply in The Bahamas?</u>

It was the submission of Mr. O'Connor that, since the Commonwealth of The Bahamas was not a signatory to the International Covenant on Civil and Political Rights and to the Optional Protocol, so that citizens of The Bahamas had no access to the U.N. Human Rights Committee, it followed that, in ascertaining the length of period which constituted inordinate delay in relation to executions in The Bahamas, no time should be allowed for petitions to the U.N. Committee. He further submitted that, when formulating the 5 year period in *Pratt*, the Board allowed a period of 18 months for such petitions. It followed, the submission ran, that for The Bahamas the 5 year period should be reduced to a period of 3½ years.

There is no doubt that in *Pratt* the Board, when formulating the 5 year period, did indeed make an allowance of 18 months in respect of petitions to the U.N. Committee. But simply on this account to reduce the 5 year period applicable in Jamaica to a 3½ year period for The Bahamas would, in their Lordships' opinion, be too simplistic a reaction.

Their Lordships start with the fundamental principle that the reason why execution following the lapse of a prolonged period of time after sentence of death would constitute inhuman punishment is that the condemned man has suffered the agony of mind of facing the prospect of execution over that period (see *Pratt* at page 29G–H). Moreover, although part of that period will have been occupied with appellate procedures, it is the lapse of the whole period which is relevant to the question whether there has been an inordinate delay. This is because the agony of mind is the same, whatever the cause of the delay (see *Pratt* at pages 30–33). It was on this basis that the death row phenomenon in the United States was rejected.

It is against this background that the formulation of the 5 year period in *Pratt* is to be understood. It is true that, in formulating that period, the Board made allowances both for domestic appeals (2 years) and for petitions to the U.N. Committee (18 months), the basic function of doing so being to ensure that the period so chosen accommodated target periods for both of these. But it is the whole period of 5 years, not just the balance of 18 months, which constitutes the inordinate delay; and the choice of 5 years indicates that that period was 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.

It is against this background that a simple mathematical deduction of 18 months for The Bahamas appears simplistic. Let it be supposed that consideration is being given to the appropriate period for a country which has only one appellate court. On the mathematical approach, the period selected would be 2½ years (1 year for

appeals to the Court of Appeal plus 18 months). It is not, in their Lordships' opinion, self–evident that, even in these circumstances, such a period would be sufficiently long to constitute inordinate delay for present purposes. It follows that the identification of an inordinate period of delay is not achieved by simply adding 18 months to the target period for appeals. What has to be done is to identify an overall period which not only accommodates the target periods for the relevant appellate procedures, but is in itself so prolonged as to render subsequent execution inhuman punishment.

It follows that the question in the present case is whether the 5 year period applicable in Jamaica as being sufficiently prolonged for that purpose should be applicable in The Bahamas, where no time has to be allowed for petitions to the U.N. Committee. If it was so applied, however, it would have the effect that only after a delay of 3 years beyond the target periods for appeals (2 years) would an inordinate period have elapsed. In their Lordships' opinion, such a period of delay would be disproportionately long. On the other hand, as the example just given in respect of a country which has only one appellate court demonstrates, simply to add a period of 1½ years to the target periods for the relevant appeals may not be apt to produce an appropriate overall period for inordinate delay; and where the relevant target periods are relatively short, a longer period may have to be added for that purpose. Their Lordships have considered whether the appropriate period for The Bahamas should be a period of 4 years, in place of the 5 year period applicable in Jamaica. However, taking all the relevant considerations into account, they are satisfied that, in the context of a legal system in which the target period for appeals is 2 years, the lapse of an overall period of time of 3½ years following sentence of death is indeed an inordinate time. Accordingly they accept Mr. O'Connor's submission on this point.

(2) <u>Impact of the suspension of executions</u>

Their Lordships have already observed that the overall lapse of time between the sentence of death on Farrington (30th November 1992) and his application for a stay of execution (3rd April 1996) was 3 years and 4 months. It was therefore within the period of 3½ years applicable in The Bahamas.

However their Lordships turn to consider the impact on *Farrington* of the suspension of executions arising from the constitutional motion in *Jones*. This was in force at the date when *Farrington* was sentenced to death, and remained in force until 3rd April 1995 (to be followed after a short interval by the suspension of executions arising from *Reckley*, which remained in force until 5th February 1996). It was submitted on behalf of Farrington that, if steps had been taken by the

authorities to keep the proceedings in *Jones* under control, they would have been disposed of before Farrington's appeal was dismissed by the Court of Appeal on 28th April 1994. If so, his case would then have been referred to the Advisory Committee (in accordance with the judgment in *Pratt*, delivered on 2nd November 1993) and a warrant for his execution would have been issued soon after. The effect of this would have been that Farrington's advisers would have had to apply for a stay of execution, and would for that purpose have had to proceed with expedition with his petition for leave to appeal to the Privy Council, which would have been dismissed a few months later. In the result, it was submitted, the delay in his execution which subsequently occurred did not finally end until after the outcome of the case of *Reckley* on 5th February 1996.

This submission does not however alter the fact that in *Farrington* the 3½ year period applicable in The Bahamas had not been exceeded at the time of his application for a stay of execution on 3rd April 1996. As will be seen, in this respect *Farrington* differs from *Henfield*, where 3½ years had already passed; and the question then arose whether, by reason of the suspension of executions following the constitutional proceedings in *Jones*, the running of the 3½ year period was so interrupted as to lead to the result that the period had not been exceeded. No such question arises in *Farrington*; and the only way in which reliance can here be placed upon the failure by the authorities to curtail the delay in *Jones* is to argue, on the basis of *Guerra*, that the effect of that failure was to cause such delay that his execution thereafter would constitute inhuman punishment, despite the fact that the 3½ year period had not been exceeded.

The decision in *Guerra* reflected the fact that the 5 year period has been treated not as a limit but as a norm, from which the courts may depart if it is appropriate to do so in the circumstances of the case. In that case, owing to a very serious delay in producing the notes of evidence for the Court of Appeal, a delay of 3 years occurred, as a result of which an overall period of 4 years and 10 months had elapsed since his sentence of death – only 2 months short of the 5 year period. The Board thought it right to order that Guerra's sentence should be commuted, notwithstanding that the 5 year period had not elapsed. In the present case, the delay affecting Farrington's case was a little under 18 months which, though not as great as in Guerra's case, was still substantial. Moreover this delay was the product of a much more lengthy delay in the case of Jones which, although it cannot on the evidence before their Lordships be precisely quantified, must be counted in years rather than months, and which was bound to have the effect of delaying the cases of those men who, like Farrington, would be affected by the suspension of executions pending the outcome of *Jones*. In all the circumstances, having regard

to the fact that the time which has passed since sentence of death was passed on Farrington is only two months short of the applicable period, their Lordships consider it appropriate to apply the principle in *Guerra* in his case. It follows that his appeal must be allowed, and his sentence commuted to life imprisonment.

(3) Relevance of (a) imprisonment before trial and (b) conditions of imprisonment after sentence of death

In view of their conclusions on the first and second of Mr. O'Connor's submissions, neither of these points arises and their Lordships need not consider them.

They wish however to record that both points were raised for the first time before their Lordships, neither having been taken before the courts below. This created a most unsatisfactory situation. First, these are points upon which findings of fact by the judge of first instance are essential. Second, in the case of both points an assessment both by the judge of first instance and by the Court of Appeal, taking full advantage of their knowledge and experience of local conditions, would have been of the greatest assistance to their Lordships. In the present case, therefore, their Lordships were faced with the prospect of having to remit the case to the Bahamian courts. Not only would this have involved much wasted expenditure in costs, but it would necessarily have entailed a further lapse of time while the appellant was in prison awaiting execution.

Their Lordships trust that, if either of these points is taken in future in a case of this kind, it will have been taken at first instance in the ordinary way so that, if the case should come before the Privy Council, it will do so in proper form.

Henfield

In the case of Henfield, as already recorded, the total lapse of time between sentence of death (26th May 1988) and the launch of his constitutional proceedings raising the issue of delay on the principle in Pratt (3rd February 1995) was 6 years and 8 months. The appeal against his conviction was dismissed within 9 months. Following the reading of the warrant for his execution, a stay of execution was obtained on 11th October 1989 pending a petition for leave to appeal to the Privy Council. It was at about that time that the decision to suspend executions pending the outcome in Jones was announced. It was no doubt as a result of that announcement that Henfield's petition for leave was not filed until 28th July 1993; it was dismissed 5 months later on 16th December 1993. His constitutional motion invoking the principle in Pratt was launched 2 months before the Privy Council gave judgment in Jones on 3rd April 1995. In the result there was a total delay

between sentence of death and the start of the constitutional proceedings of 6 years and 8 months.

The principal delay took place between dismissal of his appeal against conviction in February 1989 and the launching of his constitutional motion in February 1995, with a short interlude of 5 months in 1993 occupied by his unsuccessful petition for leave to appeal to the Privy Council. There can be no doubt that the reason for this long delay lay in the suspension of executions pending the outcome of *Jones*. It is with the effect of that suspension that this appeal is concerned. No importance can be attached to the long delay in the filing of Henfield's petition for leave to appeal to the Privy Council, since that can be attributed to the continuing impact of the suspension of executions; had that not been in place, there can be no doubt that, following the reading of the warrant for Henfield's execution on 18th September 1989, a stay of execution would have been sought and, if obtained, would have been followed by the prompt filing of Henfield's petition to the Privy Council.

The effect of such a suspension of executions was not directly addressed by the Board in *Pratt*, although the analogous case of a political moratorium was briefly discussed (at page 34E). It was there suggested that a respite pending the outcome of such a moratorium would, if it resulted in "delay running into several years", lead to a breach of the condemned man's constitutional right not to be subjected to cruel or inhuman punishment. The implication was that the interposition of a moratorium could have the effect of extending the period of 5 years applicable in Jamaica in favour of condemned men. This must be on the basis that the interest of condemned men that such a moratorium should be declared pending any reconsideration of the death penalty justifies the extension of the relevant period, though only for a limited time. If that is right, the same should apply to a suspension of executions pending the outcome of constitutional proceedings by another person.

Their Lordships do not however have to explore the effect of suspension of executions in any depth in the present case because in their opinion there is here a short answer to the point. If a suspension of executions is to have such an effect, it can only do so to the extent that it is causative of the relevant delay. In the opinion of their Lordships, the suspension cannot be so causative in so far as the relevant proceedings are prolonged by reason of failure on the part of the respondent authorities to take steps open to them to curtail or prevent any delay by the applicant in the progress of the proceedings.

The constitutional proceedings in *Jones* occupied the extraordinarily long period of 5 years and 10 months. Moreover, despite enquiries in the course of the hearing, no

explanation for this delay was given to their Lordships. They have however been able to examine the records in the Privy Council; and there is every indication that a substantial part of the delay at that stage was due to slowness on the part of the applicants, which the respondent had failed to take active steps to reduce. It is not to be forgotten that the judgment in Pratt was not delivered until 2nd November 1993; and until then it may not have appeared to the authorities in The Bahamas that there was any need for them to take active steps to curtail delay by the applicant in proceedings of this kind. Their Lordships are left with the overwhelming impression that the time occupied in *Jones* was far longer than was necessary, and that the delay could indeed have been substantially curtailed by the respondents in that case.

In the present appeal, the period which elapsed between Henfield's sentence of death and his constitutional motion on the principle in *Pratt* was 6 years and 8 months. On the evidence before them, their Lordships are satisfied that this lapse of time far exceeds the period of 3½ years extended by such further period as would have been appropriate to allow for the suspension of executions following Jones if proper steps had been taken to curtail the time occupied by that case. For these reasons the appeal of Henfield must be allowed, and his sentence of death commuted to life imprisonment.

The Court of Appeal felt constrained by the judgment of the Privy Council in *Reckley* [1995] 2 A.C. 491 to reach a different conclusion. Their Lordships wish however to record that the argument in that case was advanced on the basis of the 5 year period then understood to be applicable in The Bahamas, and that that period had not expired at the time of his constitutional motion on the principle in Pratt.

Postscript

Their Lordships are conscious that the conclusion which they have reached regarding the period of 3½ years applicable in the case of these two appeals may cause some concern among those responsible for the administration of justice in The Bahamas. They are very much aware of the problems in certain countries in the Caribbean which have given rise to unacceptable delays in execution, which in their turn have inevitably led to the establishment of the principle in Pratt. However their Lordships are also aware of the energetic steps which are being taken to bring these delays under control and to prevent their repetition in future. If the appeal against conviction in these cases can be disposed of within the target period of 1 year and (if the appeal is dismissed) the case can then be referred to the Advisory Committee as recommended in Pratt, there should be no further delay. For, if it is decided that the law should take its course, a warrant of execution can

be issued and all further steps will require a stay of execution which should ensure that there is thereafter no delay on the part of those representing the condemned man; and there should in any event be no delay on the part of the authorities, such as the failure to curtail the delay which occurred in Jones. Seen in this context it is to be hoped that, the setting of 3½ years as the norm for inordinate delay should present no serious problems for those responsible for the administration of justice in The Bahamas. But in any event their Lordships have had to form a judgment as to the period which should be held to constitute that norm and, having given the matter careful consideration, have concluded, taking into account an appropriate period of time for the domestic appeals available to condemned men in their own interest, that a period of 3½ years in prison awaiting execution, with all the agony of mind which that entails, would in all the circumstances be so prolonged a time as to render execution cruel or inhuman punishment.

Their Lordships will accordingly humbly advise Her Majesty that both appeals ought to be allowed and that there ought to be substituted for the sentence of death a sentence of life imprisonment in each case.

[48]