

The Caribbean Court of Justice: Precedents, Human Rights and Incrementalism

Honourable Mr. Justice David Hayton

Attorney General v Joseph and Boyce

The recent CCJ judgment in *Att-Gen v Joseph and Boyce*¹ raised issues concerning precedents of the Judicial Committee of the UK Privy Council (“JCPC”), human rights and an incremental approach to developing the law. As it happened, it was unfortunate that the particular circumstances of the two convicted murderers and of 2002 amendments to the Barbados Constitution led to counsel taking a narrow approach, so that some very significant issues were not canvassed by them. In the absence of argument on these issues, I am expressing my personal provisional views in the hope that this will stimulate argument in future cases: well-argued law is tough law, after all, as Megarry V-C made clear when as a judge² rejecting the views he had expressed in *Megarry & Wade*, *The Law of Real Property*.

The two murderers were convicted and sentenced to the mandatory death sentence on 2 February 2001. They challenged the validity of a mandatory death sentence but in July 2004 the JCPC (5:4) in *Boyce v The Queen*³ rejected its earlier decision in *Roodal v The State*⁴ so that it could uphold the validity of such a sentence. The murderers then filed constitutional motions seeking, *inter alia*, a stay of execution of their sentences until

¹ 8 November 2006, CCJ Appeal No CV2 of 2006, on web-site of caribbeancourtofjustice.org

² *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9 at 16

³ [2005] 1 AC 400

⁴ [2005] 1 AC 328

the Inter-American Human Rights system had taken its course. They argued that the Inter-American Human Rights Commission (the “IAHRC”) needed to produce a clemency report for consideration by the Barbados Privy Council (“BPC”) before the BPC could decide whether or not mercy should be accorded under s 78 of the Constitution. The particularly strong advantage of these motions was to take up time so as to enable the murderers to be under the threat of execution for more than five years after conviction. After such period, under the *Pratt and Morgan*⁵ guidelines provided by the JCPC, they would have suffered inhuman or degrading treatment within s 15 of the Constitution, so that under s 24 their death sentences would have to be commuted to sentences of life imprisonment.

Indeed, when their motions were heard by the Court of Appeal, it was clear that the extra time to be taken through the IAHRC process and an appeal to the CCJ would inevitably lead to contravention of the 5 year rule. Thus, on 31 May 2005, the Court of Appeal, after following the JCPC majority decision in *Neville Lewis v Att-Gen of Jamaica*⁶ so as to hold that the murderers were entitled to have an IAHRC report on them considered by the BPC before it fulfilled its clemency consideration role, itself commuted the death sentences to life imprisonment in the light of *Pratt and Morgan*.

⁵ [1994] 2 AC 1

⁶ [2001] 2 AC 50

After Roger Forde QC, counsel for the Att-Gen, had finished his submissions on how badly flawed was *Neville Lewis*, I asked him whether on 21 June 2006 he accepted that, over 5 years and 4 months having elapsed since the High Court first imposed the death sentence, a sentence of life imprisonment was the appropriate sentence in the light of *Pratt and Morgan*, since he had not challenged the validity of that decision. He agreed, so we had to dismiss the appeal. We could there and then have dismissed the appeal without bothering to hear the respondents about the correctness or otherwise of *Neville Lewis*.

However, because we were seriously bothered by certain aspects of that decision and its ramifications for the Caribbean region, we went on to hear counsel for the respondents, who simply insisted that the CCJ must accept the correctness of the reasoning in *Neville Lewis* and follow that decision, and then apply *Pratt and Morgan*.

Neville Lewis as a Precedent

We had no difficulty at all in accepting the first half of the majority decision of the JCPC in *Neville Lewis*. The BPC's mercy function under s 78 had to be capable of being judicially reviewed if exercised in a procedurally unfair fashion, and the jurisdiction of the courts could not be ousted by s 77 (4). This reflected the gradual development of UK case law and Caribbean case law in the last 20 to 30 years.

What was controversial about *Neville Lewis* was how it dealt with the relationship between domestic Barbados law and international law founded on the American Convention on Human Rights. In order to maintain the separation of the powers of the Executive and the powers of the Legislature there is a hallowed English principle, endorsed in many JCPC judgments, that *international* law cannot become part of *domestic* law unless the Legislature enacts it into domestic law: otherwise, the Executive by entering into an international treaty could seriously affect domestic law, whether for better or for worse, and by-pass an antagonistic Legislature or the need for a special majority to pass legislation affecting entrenched Constitutional provisions in the Caribbean .

However, the three judges in the majority of the JCPC in *Thomas v Baptiste*⁷, against strong well-based dissent from Lord Goff and Lord Hobhouse⁸, asserted

“By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby, temporarily at least, extended the scope of the ‘due process’ clause in the Constitution. Their Lordships note that a similar argument was rejected in *Fisher v Ministry of Public Safety (No 2)*⁹ . They

⁷ [2000] 2 AC 1, especially at 23 per Lord Millett

⁸ [2000] 2 AC 1 at 33. “An unincorporated treaty cannot make something due process: nor can such a treaty make something not due process unless some separate principle of municipal law makes it so.....Whilst the content of what is due process may change from time to time... the change must derive from a change in the law of the Republic”

⁹ [2000] 1 AC 434

observe, however, that the Constitution of The Bahamas which was under consideration in that case does not include a ‘due process’ clause”.

The Constitutions of The Bahamas, Barbados and Jamaica have a clause concerning “the protection of the law” but no “due process” clause, while the Trinidad and Tobago Constitution has both clauses. Thus, subsequently, in *Higgs v Minister of National Security*¹⁰ Lord Hoffmann for the majority of the JCPC tried to settle a compromise, restricting the out-of-line *Thomas v Baptiste* to Trinidad and Tobago via its “due process” clause, but in the case of “protection of the law” clauses following *Fisher v Ministry of Public Safety (No 2)*: it followed that murderers had no right to invoke the Inter-American human rights system before being executed in The Bahamas, Barbados and Jamaica.

The majority of the JCPC in *Neville Lewis*, however, wanted nothing to do with this compromise and applied what was asserted in *Thomas v Baptiste* on “due process” clauses to “the protection of the law” clauses. In exasperation at international law provisions being transformed into domestic law via Constitutional provisions concerning domestic rights, Lord Hoffmann vigorously dissented¹¹.

“On the Inter-American Commission issue, the majority have found in the ancient concept of due process of law a philosopher’s stone, undetected by generations of

¹⁰ [2000] 2 AC 228

¹¹ [2001] 2 AC 50 at 88

judges, which can convert the base metal of executive action into the gold of legislative power. It does not, however, explain how the trick is done. *Fisher v Ministry of Public Safety (No 2)* and *Higgs v Minister of National Security* are overruled but the arguments are brushed aside rather than confronted. In particular there is no explanation of how, in the domestic law of Jamaica the proceedings before the commission [the IAHRC] constitute a legal process (as opposed to the proceedings of any other non-governmental body) which must be duly completed.”

It can thus be seen that the JCPC has been much divided in its views (which is not surprising when one considers the large pool of judges from which its membership is drawn) but has not been frightened of refusing to follow its earlier decisions when it has considered this to be required in the interests of justice in capital punishment cases.

The CCJ, which is a small constant pool of judges, all seven of us sitting in significant cases, will take the same approach as the JCPC did to earlier JCPC decisions, though we will hope that it will not be possible to say of us that we brushed aside arguments rather than confronting them.

Thus, in *Att-Gen v Joseph and Boyce* we provided plenty of reasons for rejecting the simplistic approach in *Neville Lewis* that rights under the Inter-American Convention

on Human Rights are “mediated”¹² into domestic law via “due process” or “protection of the law” clauses entrenched in Constitutions, thereby conferring a domestic right on condemned murderers to be permitted a reasonable time for the Inter-American Human Rights process to be completed, so that the BPC in fully-informed fashion can then perform its mercy function.

However, we upheld the existence of such a right, but on the narrow basis that the Treaty-complaint behaviour of the Barbados Government had given rise to the two murderers having an indefeasible legitimate expectation that they would not be executed until after a reasonable time had been allowed for the Inter-American human rights system to run its course and the result thereof to have been considered by the BPC under s 78 of the Constitution. Our own thorough researches, without the benefit of input from counsel, enabled us to provide plenty of support for such a conclusion that developed the legitimate expectation doctrine further than had hitherto been thought possible.

As a matter of precedent we also indicated¹³ that, as in the case of JCPC decisions, our decisions should be regarded as binding in all jurisdictions where we are the final appellate court and a matter arises that is covered by one of our earlier decisions.

A “reasonable” time and *Pratt and Morgan*

¹² This was how Lord Millett in *Briggs v Baptiste* [2000] 2 AC 40 at 54 explained his judgment in *Thomas v Baptiste* [2000] 2 AC 1

¹³ See joint judgment of the President and Saunders J at [18] in *Att-Gen v Joseph & Boyce* (note 1 above)

As already adverted to, *Pratt and Morgan* had been interpreted as requiring a murderer's death sentence to be commuted to life imprisonment once he had been under the threat of execution for 5 years (in the absence of some very exceptional reason). The Inter-American Human Rights process can only be invoked once all domestic appellate legal proceedings have finished, so that once the JCPC or the CCJ has delivered judgment one would expect the IAHR to proceed with reasonable expedition to produce a report on the anxious condemned man. The sooner it is produced the sooner the BPC can remove the murderer's agonizing uncertainty over his fate by deciding whether or not to direct the Governor-General to commute the death sentence.

However, as apparent from many judgments of the JCPC, the IAHR is a body opposed to capital punishment and so happy with delay that ensures the 5 year guideline in *Pratt and Morgan* is reached, so that the murderer's death sentence is converted into one of life imprisonment. As this wholly undermines the mandatory death sentence promulgated in the Constitution, the Barbados Parliament enacted the Constitution (Amendment) Act 2002-14 so as prospectively to add to s 15 a provision designed to oust the impact of *Pratt and Morgan* by providing that "any delay in executing a sentence of death" "shall not be held to be inconsistent with or in contravention of" s 15.

Leaving this amendment aside as inapplicable to the case in hand, but hoping to influence the JCPC and the position in Guyana, we considered in *obiter dicta*¹⁴ that while *Pratt and Morgan* correctly provided a time limit to encourage expedition in dealing with murderers' clemency claims, the five year time limit had proved to be unsatisfactory in the light of the practices of the IAHRC, an international body wholly outside the control of the Barbados Parliament or Executive. Thus, the IAHRC needed to be given the incentive to produce its report within a limited reasonable period of 18, or perhaps 24 months so that, after expiry of this reasonable period, time would not count for the purpose of the five year period being exceeded (assuming the delay was not caused by delay in Government responses to requests from the IAHRC). Thus, if the domestic appellate processes (from the High Court to the Court of Appeal to the CCJ) are completed within 30 months and the IAHRC takes 36 months to produce a report for the mercy committee to consider, then the murderer cannot complain that he has been on death row for a period exceeding five years and that in itself amounts to inhuman or degrading punishment requiring commutation to a life sentence. He has to accept the burden of being on death row for over 5 years in order to receive the benefit of the IAHRC report. However, as an incentive to the appellate courts to act expeditiously, if, heavens forbid, the period of time they took coupled with the reasonable period permitted for the IAHRC to produce its report would take the murderer over the five year period on death row, then he would be entitled to have his death sentence commuted to

¹⁴ See joint judgment of the President & Saunders J at [138], Bernard J at [34] & [36], Wit J at [13-14], [26], and Hayton J at [10-11]

one of life imprisonment (on the inevitable assumption that the IAHC would not speed up its report so as to further the possibility of a death sentence).

A further consideration is whether there should be a particularly strong incentive for the IAHC to act expeditiously. Why does a Government not make clear what precisely is the reasonable period (eg 18 or 24 months) for which it will wait for a report from the IAHC before it will go ahead with the execution of a murderer? The legitimate expectation of a condemned murderer will then only be that he will not be executed until after the IAHC has been given that reasonable period in which to produce a report to help the BPC fulfil its mercy function¹⁵. This should still enable matters to be resolved well within five years of imposition of the death sentence, because it is difficult to see how the domestic appellate processes should not be completed within two years.

Other Future Issues

(a) Possible radical incorporation of international human rights into domestic law of Caribbean States

As indicated in Justice Wit's stimulating and radical judgment in *Joseph & Boyce*, it is open to counsel to canvass two further possible developments in the law. A radical step would be taken if the CCJ were to hold that, outside the British historical context but in the context of Caribbean written Constitutions with much correlation between

¹⁵ See the President and Saunders J at [139]

membership of the executive and the legislature, rights of individuals under international human rights treaties become part of domestic law where increasing the rights of individuals without infringing upon the rights of other individuals or the overriding interests of the State. However, the need for such a development is unlikely to arise due to the impact of the indefeasible legitimate expectation doctrine developed in *Joseph & Boyce*.

(b) Possible extension of Wednesbury irrationality principle to BPC decisions

A relatively minor step would be taken if the CCJ were to hold that it had power to quash decisions of the BPC that are irrational under principles established first in *Associated Provincial Pictures Limited v Wednesbury Corporation*¹⁶, so that a decision can be quashed if it is one that no properly-informed rational body could have made if acting in a procedurally fair fashion.

Thus, if an 85 year old man had been automatically sentenced to death for the mercy killing of his terminally-ill, pain-ridden, 80 year old spouse, yet the BPC refused to commute the death sentence or commuted it to imprisonment for life or even 10 years, the CCJ could intervene to quash the decision of the BPC. Query what the attitude of the CCJ might have been if it had been argued that the BPC's decision not to commute the death sentences of Joseph and Boyce was *Wednesbury* irrational. After all, the two other men involved in the brutal killing were offered by the executive the opportunity to plead

¹⁶ [1948] 1 KB 123, CA

guilty to manslaughter, did so plead and received a sentence of only 12 years. Joseph and Boyce, who regarded themselves not involved at all or very much less involved than the other two, rejected the same offer made to them and so pleaded not guilty to murder. They were found guilty and received the mandatory death penalty. Was the difference between this death penalty and imprisonment for 12 years proportionate to the circumstance that the other two killers had spared the Crown the time and costs of a trial while Joseph and Boyce had not? Was it perhaps, irrational for the executive to be prepared to accept a plea of guilty to manslaughter with a sentence of 12 years for two of the killers yet insist on the other two being hanged?

Indeed, it was assumed that on contravention of section 15 of the Constitution a mandatory death sentence was commuted to imprisonment for life under a judicial exercise of discretion under section 24(2). However, upon reflection, if the point had been raised could “such order as [the Court] may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions 12 to 23” have been a sentence of eighteen or even fifteen years?

(c) Possible right to review merits of BPC’s decision so that it must provide reasons

A large step further than quashing a decision on *Wednesbury* principles (as one that must have been reached by procedurally unfair processes because no rational body could have reached such a decision) would be to hold that the courts can review the merits of the decision so that the BPC must give reasons for any decision, thereby

enabling the merits to be properly investigated. However, even the bold JCPC in *Neville Lewis v Att-Gen of Jamaica* held¹⁷ “The merits are not for the courts to review”, though it did not therefore follow that the whole process was beyond review by the courts because the courts could intervene if the process by which a decision was reached was procedurally unfair.

(d) Width of Court’s powers under s 24 of Constitution and its inherent jurisdiction

A final issue on which there are *obiter dicta*¹⁸ in *Joseph and Boyce* concerns the relationship between the BPC and the court and the extent of the powers of court when interfering with decisions of the BPC.

Back in 1966 when the Barbados Constitution became law a court faced a “No Entry” sign when it came to the functions of the BPC under s 78, it being clear orthodox law that the exercise of prerogative of mercy was not judicially reviewable¹⁹, quite apart from the s 77 (4) express ouster of the court’s role as to BPC proceedings which was then considered capable of being effective²⁰. It soon became clear that such ouster clauses could not exclude judicial review, though it took some time for the courts to establish that the exercise of the prerogative of mercy had to be done in a procedurally fair fashion, as held in *Neville Lewis*.

¹⁷ [2001] 2 AC 50 at 75

¹⁸ The *ratio* was that because the murderers had been on death row for over five years this amounted to cruel and inhuman treatment prohibited under s 15 of the Constitution (following the unchallenged *Pratt and Morgan*) so that under s 24 of the Constitution the murderers could not be executed but would suffer life imprisonment instead.

¹⁹ *de Freitas v Benny* [1976] AC 239

²⁰ *Smith v East Elloe* RDC [1956] AC 736

The question then arises as to whether the court can interfere with decisions of the BPC only to the traditional negative extent of quashing such decisions if made in procedurally unfair fashion - or if amounting to a *Wednesbury* irrational decision - or whether the court can positively intervene and exercise the BPC's prerogative of mercy itself to commute a death sentence e.g. to a sentence of imprisonment for life or 20 years or 10 years or 5 years or, even, a conditional discharge.

The exclusion of the court from any sentencing input when having to pronounce the mandatory death sentence can be regarded as supporting the exclusion of the court from any positive sentencing discretion where the BPC is exercising its apparently exclusive mercy function under s 78, even if nowadays the court can judicially review and negatively quash a decision of the BPC.

It is true that the court has flexible positive discretionary sentencing powers under s 24, but this is only if there is a breach of "the provisions of sections 12 to 23" of the Constitution, while s 11 (c), as a preamble, recites that "the protection of the law" is one of the fundamental rights before providing "the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions". Section 18, by its heading and content, is the provision "to secure protection of the law" but, as might be expected when it was drafted in 1966, its wording does not stretch to the exercise of

mercy (reserved to the BPC in s 78 in a much later Chapter) once there has been a due conviction under the protection of the law.

There is thus much to be said for holding that the failure of the BPC to act in a procedurally fair fashion (eg by refusing to wait for a Report from the IAHR) leads only to the court quashing the BPC's decision, leaving it to the BPC to go on to make a fresh decision in a procedurally fair fashion. If the BPC's decision is a *Wednesbury* irrational one, then the court can quash it and make clear that any refusal to commute the death sentence is irrational, so the BPC must re-consider in its discretion what the lesser sentence should be eg 20 years, 10 years, 5 years, 1 year, a conditional discharge.

However, it is tempting for the court to be able to take a short-cut and itself decide on a substituted sentence in merciful fashion, thereby saving time, cost, and further anxieties on the part of the convicted murderer. To justify this, the court²¹ can hold that the right to the protection of the law is imported into s 12 by necessary implication, with s 12 reading either "No person shall be deprived of his life intentionally save in *due* execution of the sentence of a court ..." or "save in execution, *in accordance with the protection of the law*, of the sentence of a court ...". The flexible powers in s 24 for breach of any of ss 12 to 23 are then available in death penalty cases, but not other cases where a litigant is seeking to assert his right to "the protection of the law" under s 11. Indeed, if s 24 conferring plenipotentiary powers on the Court to make such orders

²¹ See *Wir J in R v Joseph & Boyce* (note 1 above) at [25]

(positive or negative) “as it may consider appropriate” applies to s 11 , then in judicial review cases the court, instead of merely quashing decisions, could itself make a positive decision, obviating any need to refer the matter back to the appropriate body. The President and Saunders J in their joint judgment, while prepared to accept that a breach of s 11 did not trigger the Court’s powers under s 24²² , took an alternative bold approach to hold that, where any breach of the protection of the law under s 11 is involved, the court has an inherent jurisdiction to grant any appropriate remedy. However, they indicated that a BPC decision made without waiting for assistance from a report from the IAHRRC would normally warrant only the quashing of the decision.

Because many other Caribbean Constitutions have provisions virtually identical to those in ss 11 to 24 of the Barbados Constitution, we in the CCJ need to tread carefully, as also when dealing with other matters where the law in a CCJ jurisdiction appears likely to be the same in a CARICOM jurisdiction still subject to the JCPC. We would hope that the CCJ’s closer connection with CARICOM values, practices and expectations will lead the JCPC to give great consideration to the views of the CCJ, but such consideration could well be diminished if the JCPC considers that the issues had not been fully argued before us and not thought through thoroughly by us.

²² See joint judgment of the President and Saunders J in *R v Joseph & Boyce* (note 1 above) at 41 and [57] – [65]. Nelson J at [34] of his judgment considered that s 24 was available for breaches of s 11.

It is noteworthy that the practice of the JCPC, when hearing an appeal from one Caribbean jurisdiction on a Constitutional matter which would affect the law in other Caribbean jurisdictions is to invite the other jurisdictions to appear before the JCPC to make representations. Taking the strict view that what the CCJ holds to be the law in a CCJ jurisdiction has no force (yet) in a JCPC jurisdiction, it seems the JCPC governments are not considering whether the CCJ would be happy to have them appear before it as *amici curiae*²³ in cases where CCJ views are likely to influence the JCPC and, indeed, to become binding in JCPC jurisdictions once they implement their obligation (under the 2001 Agreement Establishing the Caribbean Court of Justice) to replace the JCPC with the CCJ.

Conclusion

Progressive development of the law thus needs to be incremental, but in areas where decisions by the CCJ have potential repercussions for CARICOM jurisdictions still subject to the JCPC, one hopes that the CCJ can receive input via *amici curiae* from such jurisdictions. After all, the better the input the better the output, and so the bolder can be the CCJ. The sooner all CARICOM jurisdictions implement their international obligations (in the above 2001 Agreement) so as to have the CCJ as their final appellate court, the better for developing a strong indigenous law applying alike to all CARICOM jurisdictions, with all jurisdictions providing input as a matter of course in cases with legally binding repercussions for themselves.

²³ See scope in CCJ (Appellate Jurisdiction) Rules 2005, rules 1.3, 1.4 and 8.1(2)(i)