(立法會秘書處譯本，只供參考用)

立法會CB(2)2644/03-04(01)號文件

致　：香港中環
雪廠街10號
新顯利大廈116室
吳靄儀議員

檔號：SBCR 1/2/5691/89

吳議員：

本人衷心希望閣下細閱此份就條例草案提交的意見書。

據條例草案所載，本人得悉除了訂定經修訂的機制，以便裁定有關囚犯須服的最低刑期，以及訂明由原訟法庭法官行使的權力外，政府當局亦建議訂定新的條文，賦予原訟法庭法官酌情決定權，以便在獲得有關囚犯的同意下，就12名(包括本人在內)被拘留等候行政酌情決定的囚犯，以及兩名因為在未滿18歲時觸犯謀殺罪而正在服強制性終身監禁刑罰的囚犯，判處確定限期的刑罰以代替裁定其須服的最低刑期。

毫無疑問，拘留等候女皇發落，是一項由聯合王國移植至當時屬於其殖民地的香港的刑罰。等候女皇發落既非固定刑期刑罰，亦非酌情性或強制性終身監禁刑罰，而是特別為了處理該等被裁定觸犯謀殺罪，而在犯罪時未滿18歲的犯人的特殊情況而設的一項作出無限期拘留的判刑。等候女皇發落此項刑罰的獨特之處，顯然在於它是一項授權對少年犯作出無限期拘留的刑罰，而所持的唯一理據是有需要保障市民。當犯人不再對公眾構成危險時，將之繼續拘留的理據亦再不成立。因此，按此項刑罰繼續拘留有關犯人所蘊涵的是一種明確的*願景*，而非訂明的約束。它所授權作出的無限期拘留，只涉及為了達到既定目標(包括作出懲處，但主要是為了進行感化及防止再犯)而需要的拘留期。法官據以判處本人被拘留以等候女皇發落的《刑事訴訟程序條例》(第221章)第70條的用辭，令人產生終有一天會獲釋的聯想和期望，亦即當總督裁定再沒有理由繼續將犯人拘留之時將之釋放。

首先，本人認為在法律上，等候女皇發落的囚犯，與因為在未滿18歲時犯罪而正在服強制性終身監禁刑罰的囚犯不同。

其次，倘實施上述的法定機制，就等候女皇發落的囚犯判處最低刑期並不能達到任何目的，而只是逐步偏離他們原來獲判等候女皇發落的刑罰背後的理據，並因為判處較重刑罰而違反《香港人權法案條例》第十二條的規定。本人認為在等候女皇發落的個案中，"最高刑期"是用以代替最低刑期。最高刑期概念有別於確定限期刑罰。最高

刑期與最低刑期一樣，依然是沒有限期，但在其後繼續拘留犯人的唯一理據是防止他們對社會構成危險。

儘管最低刑期或最高刑期將由司法機構釐定，但被拘留等候行政酌情決定的概念背後的最大錯誤，是導致有關囚犯須等候行政判刑，這是違反《基本法》分權而立規定的做法。因此，本人謹擬建議，在新訂法例中最好以"等候法庭發落"("the Court's pleasure")取代"拘留等候行政酌情決定"(在此方面可參考DDP of Jamaica v Mollison [2003] 2 WLR 1160 (PC)一案，當中有一項相若條文被裁定違憲)，並訂定詳細的機制，規定原訟法庭法官須在公開聆訊中覆檢每宗個案的個別情況，以決定有關囚犯已服的拘押期是否已經足夠，而應在最高刑期屆滿前及屆滿後立即獲得釋放。

謹謝垂注。

附樞密院案例：
Director of Public Prosecutions of Jamaica v Mollison [2003] 2 WLR 1160

黎鴻偉

2004年5月10日

Privy Council

# Director of Public Prosecutions of Jamaica *v* Mollison

[2003] UKPC 6

2002 Nov 26, 27;
2003 Jan 22

Lord Bingham of Cornhill, Lord Slynn of Hadley, Lord Clyde, Lord Hutton and Lord Walker of Gestingthorpe

*Jamaica — Constitution — Human rights and fundamental freedoms — Deprivation of liberty otherwise than in execution of sentence or order of court — Juvenile convicted of murder — Sentence of detention during Governor General's pleasure — Legality of sentence — Whether contrary to Constitution — Juveniles Act 1951, s 29 — Jamaica (Constitution) Order in Council 1962 (SI 1962/1550), s 4(1)*

The respondent was convicted for a murder committed when he was 16 years old and was sentenced to be detained during the Governor General's pleasure in accordance with section 29 of the Juveniles Act 1951[1]. On his appeal against sentence the Court of Appeal of Jamaica by a majority ruled that the sentence was unconstitutional, that section 29 should be modified in accordance with section 4(1) of the Jamaica (Constitution) Order in Council 1962[2] to provide for detention at the court's pleasure, and that the respondent's sentence should be replaced with one of life imprisonment.

On appeal by the Director of Public Prosecutions and cross-appeal by the respondent—

*Held*, (1) dismissing the appeal, that by giving the Governor General as an officer of the executive the power to determine the measure of an offender's punishment section 29 of the 1951 Act infringed the principle of the separation of powers implicit in all constitutions on the Westminster model, including that of Jamaica; that section 4(1) of the 1962 Order, when given the generous and purposive interpretation appropriate for constitutional provisions relating to human rights, clearly empowered the court to modify and adapt existing laws so as to bring them into conformity with the Constitution; and that, accordingly, section 29 of the 1951 Act ought to be modified throughout by substituting the words "the court" for "Her Majesty" or "the Governor General" (post, paras 13–17).

(2) Allowing the cross-appeal, that a sentence of imprisonment for life was of a different nature from a sentence of indefinite detention specifically designed to address the special circumstances of those convicted of murders committed under the age of 18; that the court's modification of section 29 of the 1951 Act should not lead to a disadvantageous change in the punishment imposed on the respondent; and that, accordingly, the sentence of life imprisonment would be quashed and one of detention during the court's pleasure substituted (post, paras 20, 21).

*Hinds v The Queen* [1977] AC 195, PC and *Browne v The Queen* [2000] 1 AC 45, PC applied.

Decision of the Court of Appeal of Jamaica varied.

The following cases are referred to in the judgment of their Lordships:

*Baker v The Queen* [1975] AC 774; [1975] 3 WLR 113; [1975] 3 All ER 55, PC
*Browne v The Queen* [2000] 1 AC 45; [1999] 3 WLR 1158, PC
*Hinds v The Queen* [1977] AC 195; [1976] 2 WLR 366; [1976] 1 All ER 353, PC
*Kanda v Government of Malaya* [1962] AC 322; [1962] 2 WLR 1153, PC

[1] Juveniles Act 1951, s 29: see post, para 3.
[2] Jamaica (Constitution) Order in Council 1962, s 4(1): see post, para 10.



*Liyanage v The Queen* [1967] 1 AC 259; [1966] 2 WLR 682; [1966] 1 All ER 650, PC
*R v Hughes* [2002] UKPC 12; [2002] 1 AC 259; [2002] 2 WLR 1058, PC
*R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407; [1997] 3 WLR 23; [1997] 3 All ER 97, HL(E)
*R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2002] 3 WLR 1800; [2002] 4 All ER 1089, HL(E)
*Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235; [2002] 2 WLR 1034, PC
*Roodal v The State* (unreported) 17 July 2002, CA Trinidad and Tobago
*San Jose Farmers' Co-operative Society Ltd v Attorney General* (1991) 43 WIR 63
*State, The v O'Brien* [1973] IR 50
*V v United Kingdom* (1999) 30 EHRR 121
*Vasquez v The Queen* [1994] 1 WLR 1304; [1994] 3 All ER 674, PC

The following additional cases were cited in argument:

*Attorney General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637; [1980] 2 WLR 171; [1979] 3 All ER 129, PC
*Boodram v Baptiste* [1999] 1 WLR 1709, PC
*Deaton v Attorney General* [1963] IR 170
*Director of Public Prosecutions v Nasralla* [1967] 2 AC 238; [1967] 3 WLR 13; [1967] 2 All ER 161, PC
*Hussain v United Kingdom* (1996) 22 EHRR 1
*Melendez v The Queen* Criminal Appeal No 9 of 1994 (unreported), CA Belize
*Pinder v The Queen* [2002] UKPC 46; [2003] 1 AC 620; [2002] 3 WLR 1443, PC
*R v Whitely* (1986) 23 JLR 354
*R v Wilson* (1994) 31 JLR 554

APPEAL from the Court of Appeal of Jamaica

The Director of Public Prosecutions of Jamaica appealed from the majority decision of the Court of Appeal of Jamaica (Downer and Bingham JJA; Walker JA dissenting) on 29 May 2000 to set aside on constitutional grounds a sentence of detention during the Governor General's pleasure imposed on the respondent, Kurt Mollison, following his conviction before Langrin J and a jury on 21 April 1997 for a murder committed on 16 March 1994, when he was aged 16. Leave to appeal was granted by the Court of Appeal on 30 July 2001. The respondent cross-appealed with special leave against the substitution by the Court of Appeal of a sentence of life imprisonment.

Leave to intervene in the proceedings was granted to seven additional parties, Gibson Bunting, Troy Gilbert, Whyette Gordon, Andrew Hunter, Garfield Peart, Elvis Thomas and Patrick Whiteley, each of whom had been convicted for a murder committed while a minor and sentenced either to be detained during the Governor General's pleasure or to life imprisonment.

The facts are stated in the judgment of their Lordships.

*Kent Pantry* QC, Director of Public Prosecutions for Jamaica, *Michael Hylton* QC, S-G, Jamaica, and *Ingrid Mangatal*, Deputy S-G, Jamaica, for the appellant.

*Edward Fitzgerald* QC and *Phillippa Kaufmann* for the respondent.

*Lloyd Barnett* (of the Jamaican Bar) for the interveners.

*Cur adv vult*

22 January 2003. The judgment of their Lordships was delivered by LORD BINGHAM OF CORNHILL.

1 On 16 March 1994, when he was aged 16, Kurt Mollison (the respondent) murdered Leila Brown in the course or furtherance of a robbery. This was a capital murder under the law of Jamaica. He stood trial before Langrin J and a jury, was convicted on 21 April 1997 (aged 19) and on 25 April 1997 was sentenced under section 29(1) of the Juveniles Act 1951 as amended to be detained during the Governor General's pleasure. On 16 February 2000, the Court of Appeal refused his application for leave to appeal against conviction, but the court was concerned whether the sentence imposed on the respondent was compatible with the Constitution of Jamaica. That issue was adjourned to a separate hearing, and on 29 May 2000, the Court of Appeal (Downer and Bingham JJA, Walker JA dissenting) allowed the respondent's appeal: the sentence of detention during the Governor General's pleasure was set aside and a sentence of life imprisonment substituted, with a recommendation that the respondent be not considered for parole until he had served a term of 20 years' imprisonment dated from 25 July 1997. The Director of Public Prosecutions appeals to the Board (with leave of the Court of Appeal) against the setting aside of the sentence of detention during the Governor General's pleasure. The respondent seeks to uphold that order, but cross-appeals against the sentence of life imprisonment which was substituted. At the heart of the appeal lie two main issues (subdivided below): whether the sentence of detention during the Governor General's pleasure authorised by section 29(1), conferring on the Governor General as an officer of the executive the power to determine the measure of punishment to be inflicted on an offender, is compatible with the Constitution; and, if it is not, whether the terms of the Constitution protect it against effective challenge.

2 Without objection by the Director, leave to intervene was given by the Board to seven additional parties with a direct interest in the outcome of these proceedings. Each of these parties, when aged between 14 and 17, committed a crime of capital murder on a date between September 1980 (at the earliest) and November 1996 (at the latest). They were convicted on dates between January 1982 and March 2000. Each of them was sentenced (either at trial or on appeal) to be detained during the Governor General's pleasure, save in the latest of the cases (that of Andrew Hunter) who was sentenced to life imprisonment. All the intervening parties are now confined in adult correctional centres. Four of the intervening parties have applied to the Supreme Court of Jamaica for writs of habeas corpus; the applications have been adjourned pending the outcome of this appeal.

*Section 29 of the Juveniles Act 1951*

3 Section 3 of the Offences against the Person Act 1864, as amended by section 3 of the Offences against the Person (Amendment) Act 1992, provides that every person convicted of capital murder shall be sentenced to death. But special provision has been made for those who commit this crime when aged under 18. Following a number of amendments made pursuant to section 4 of the Jamaica (Constitution) Order in Council 1962, section 29 of the Juveniles Act 1951 now provides, so far as material to the main issue in this appeal:



"(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Law, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody."

"(4) The Governor General may release on licence any person detained under subsection (1) or (3) of this section. Such licence shall be in such form and contain such conditions as the Governor General may direct, and may at any time be revoked or varied by the Governor General. Where such licence is revoked the person to whom it relates shall return forthwith to such place as the Governor General may direct, and if he fails to do so may be arrested by any constable without warrant and taken to such place."

4 Section 29 as originally enacted was amended in 1964 to substitute "Minister" for "Governor" in subsection (1) and "Governor General" for "Governor" in each of the four references originally made to the Governor in subsection (4). In 1975 subsection (1) was further amended to make plain, reversing the effect of *Baker v The Queen* [1975] AC 774, that the statutory prohibition on pronouncement of the death sentence applied to those appearing to be aged under 18 at the time when they had committed the offence, not at the time of sentence. In 1985, the reference to "an adult correctional centre" was substituted for the previous reference to "a prison". The enacted reference to "Her Majesty's pleasure" has not, however, been amended, no doubt because section 68(2) of the Constitution of Jamaica provides that the executive authority of Jamaica may be exercised on behalf of Her Majesty by the Governor General. In recognition of this constitutional reality, it appears to be the practice where section 29(1) applies, as was done in this case, to call the sentence one of detention during the Governor General's pleasure, and in this opinion that usage will be adopted.

5 The sentence of detention during Her Majesty's pleasure originated in the United Kingdom for reasons which are not in doubt. In the course of time it came to be seen as inhumane to punish as if they were adults those who had, when committing their crimes, been children or young persons, not (in the eyes of the law) fully mature adults. The nature of the sentence also is not open to doubt. It has, of course, a punitive purpose, appropriately enough where a person above the age of criminal responsibility has been convicted of a very grave crime committed with the intent necessary to support conviction of murder. But a punitive purpose would usually be served by a determinate term of confinement, whether longer or shorter, and a key feature of this sentence is its indeterminacy: because the sentence is indeterminate, account may be taken of the youthful detainee's progress and development as he or she matures, by means of periodic reviews, and regard may be paid not only to retribution, deterrence and risk but also to the welfare of the young offender. If authority be needed for these uncontroversial observations it may be found in *The State v O'Brien* [1973]

IR 50, 72, *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 498–500, 519–524, 530–532, *Browne v The Queen* [2000] 1 AC 45, 47–49 and *V v United Kingdom* (1999) 30 EHRR 121, 186, para 110. It was a sentence of this character which was transplanted from the United Kingdom to Jamaica, and there is nothing to suggest that the amendments made to section 29 as originally enacted on the effective substitution of the Governor General for Her Majesty were intended to alter the character of the sentence.

6 It is also a key feature of this sentence in Jamaica (although no longer in the United Kingdom) that the decision on release is entrusted to the Governor General as a member of the executive. Section 29(4) of the Juveniles Act as amended has that express effect. This feature also has been clearly recognised: see *The State v O'Brien* [1973] IR 50, 59–60, 64, 71–72, *R v Secretary of State, Ex p Venables* [1998] AC 407, 498–499, 519–524, 530–532, *Browne v the Queen* [2000] 1 AC 45, 48 and *V v United Kingdom* 30 EHRR 121, 186, paras 110–111. Thus while, in a case falling within section 29(1), the judge sitting in court passes sentence, it falls to the executive to determine the measure of punishment which an individual detainee will undergo: *Hinds v The Queen* [1977] AC 195, 227–228. It is clear that such determination is for all legal and practical purposes a sentencing exercise: see *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800, 1812, 1822–1823, 1830, paras 24, 52, 74 and the authorities there cited.

*The Constitution*

7 On 6 August 1962 Jamaica became an independent state within the Commonwealth upon the coming into force of the Constitution scheduled to the Jamaica (Constitution) Order in Council 1962. Jamaica thereupon became subject to a new legal order. Section 2 of the Constitution summarised its effect:

> "Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Thus, subject to its terms, the Constitution was to be the supreme law of Jamaica. Section 49 lays down long and detailed conditions for the amendment of the Constitution. Section 50 lays down conditions, although less exacting conditions, for the amendment of sections 13 to 26 inclusive of the Constitution, being the sections which make up Chapter III.

8 It is unnecessary to repeat the detailed commentary on the Constitution given by Lord Diplock in *Hinds v The Queen* [1977] AC 195, 211–214. The Constitution is divided into chapters, several of these governing the composition, powers and operation of different organs of government. Among these are Chapter IV, "The Governor General"; Chapter V, "Parliament"; Chapter VI, "Executive powers"; Chapter VII, "The judicature"; Chapter IX, "The public service". The content of Chapter III is different. It is headed "Fundamental rights and freedoms" and lists a number of rights and freedoms to be enjoyed by every person in Jamaica. The list is loosely based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), which had



applied to Jamaica while it remained a British colony, although the provisions are differently ordered and to some extent differently expressed.

9 Section 15(1) of the Constitution provides:

> "No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law . . . (b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted."

Section 20(1) provides:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Chapter III ends, in section 26, with two subsections relevant to this appeal:

> "(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.
>
> "(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of—(a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council 1962, or (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

It will be noted that section 26(8) is general in its application to "any law" in force before independence and to "any of the provisions of this Chapter". But some sections contain their own specific saving provision. An example is section 17, which in subsection (1) provides that no one shall be subjected to torture or to inhuman or degrading punishment or other treatment and in subsection (2) continues:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

10 Section 4 of the Jamaica (Constitution) Order in Council 1962, to which reference is made in section 26(9)(a) of the Constitution, quoted above, was designed to facilitate and legitimise the transition from the former colonial to the new independent legal order. Section 4(1) provides:

> "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, [illegible]ordance with any provision in that

behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

There follows a series of subsections providing that references to old office-holders and institutions shall be understood as references to the new office-holders and institutions and then, in subsection (5)(a), a general although time-limited power is conferred on the Governor General:

"The Governor General may, by Order made at any time within a period of two years commencing with the appointed day and published in the *Gazette*, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order."

It seems clear that section 4 had two complementary objects: to ensure that existing laws did not cease to have force on the coming into effect of the new legal order; and to provide a means by which existing laws could be modified or adapted to ensure their conformity with the Constitution and preclude successful challenge on grounds of constitutional incompatibility.

*The first question: is section 29 compatible with the Constitution of Jamaica?*

11 Both the Director and the Solicitor General, who appeared with him, accepted at the hearing that, subject to their argument based on section 26(8) of the Constitution, section 29 of the Juveniles Act 1951 infringes the rights guaranteed by, and so is inconsistent with, sections 15(1)(b) and 20(1) of the Constitution. Given this concession, rightly made, it is unnecessary to do more than note the reason for it. A person detained during the Governor General's pleasure is deprived of his personal liberty not in execution of the sentence or order of a court but at the discretion of the executive. Such a person is not afforded a fair hearing by an independent and impartial court, because the sentencing of a criminal defendant is part of the hearing and in cases such as the present sentence is effectively passed by the executive and not by a court independent of the executive.

12 No doubt mindful of the obstacle presented by section 26(8), Mr Fitzgerald for the respondent (with the able support of Dr Barnett for the intervening parties) based his primary attack on section 29 not on its incompatibility with the specific rights guaranteed by sections 15(1)(b) and 20(1) of Chapter III but on its incompatibility with the separation of judicial from executive power which was, as he contended, a fundamental principle upon which the Constitution was built. This might at first sight seem an ambitious contention, but Mr Fitzgerald supported it by reference to the judgment of the Board, delivered by Lord Diplock, in *Hinds v The Queen* [1977] AC 195. The main issue in that case concerned the constitutionality of a new court established by the Parliament of Jamaica under a post-independence statute to try those accused of firearms offences. There was however a subsidiary issue concerning the constitutionality of two sections



of the statute, one of which prescribed a mandatory penalty of detention at hard labour during the Governor General's pleasure on conviction of certain offences, the other of which provided for release only by the Governor General on the advice of a largely non-judicial review board. In his exposition of the principles underlying what he called "the Westminster model" of constitution, Lord Diplock referred, at p 212, to "the basic concept of separation of legislative, executive and judicial power", and observed: "It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government." He went on to observe, at p 213:

"What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v The Queen* [1967] 1 AC 259, 287–288."

(In the cited case the Board, construing the Constitution of Ceylon and in particular Part 6 relating to "The judicature", regarded the contents of that Part as "inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature": [1967] 1 AC 259, 287.) In considering the constitutionality of the sentencing provisions under challenge in the *Hinds* case [1977] AC 195, 225–227, Lord Diplock recognised the power of Parliament to prescribe maximum and minimum sentences by statute but then continued:

"What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. Whilst none would suggest that a Review Board composed as is provided in section 22 of the Gun Court Act 1974 would not perform its duties responsibly and impartially, the fact remains that the majority of its members are not persons qualified by the Constitution to exercise judicial powers. A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law. If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the executive in the whole field of criminal law. In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton v Attorney General* [1963] IR 170, 182–183, a case which concerned a law in which the choice of alternative penalties was left to the executive. 'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a

particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case . . . The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts . . . the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive . . .' This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case: *Liyanage v The Queen* [1967] 1 AC 259."

Reference was then made to *The State v O'Brien* [1973] IR 50, in which a somewhat similar provision had been held to be unconstitutional. It was held [1977] AC 195, 227–228, that the Jamaican provisions were inconsistent with the provisions of the Constitution relating to the separation of powers and so void by virtue of section 2 of the Constitution.

13 The Court of Appeal majority relied heavily on the decision and reasoning in the *Hinds* case [1977] AC 195 when resolving his appeal in the respondent's favour: see Downer JA, at pp 6–13, and Bingham JA, at pp 41–46, in their respective judgments. It does indeed appear that the sentencing provisions under challenge in the *Hinds* case were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded. There appears to be no reason why (subject to the other arguments considered below) the reasoning in the *Hinds* case does not apply to the present case. It would no doubt be open to the Board to reject that reasoning, but it would be reluctant to depart from a decision which has stood unchallenged for 25 years, the more so since the decision gives effect to a very important and salutary principle. Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800, 1821–1822, para 50. In the opinion of the Board, Mr Fitzgerald has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive.

*The second question: is section 29 immune from constitutional challenge?*

14 The Director contended, in reliance on section 26(8) of the Constitution, that since section 29 was a law in force immediately before independence it could not be held to be inconsistent with any of the provisions of Chapter III of the Constitution, including sections 15(1)(b) and 20(1). The validity of section 29 could not therefore be impugned, even



though it was inconsistent with those subsections. Subject to the argument considered in paragraphs 18 to 19 below, that submission is plainly correct and explains the respondent's reliance on the general separation of powers challenge considered above.

15 Since the respondent's challenge did not depend primarily on incompatibility with any provision of Chapter III of the Constitution, section 26(8) could not be relied on by the Director to defeat it. Instead he relied on section 4(1) of the Jamaica (Constitution) Order in Council 1962 (see paragraph 10 above) and on a passage of the Board's judgment in *Hinds v The Queen* [1977] AC 195, 228 where Lord Diplock said:

> "Section 29(1) of the Juveniles Law and section 49 of the Criminal Justice (Administration) Law are of no assistance to the respondents' argument. They were passed before the law-making powers exercisable by members of the legislature of Jamaica by an ordinary majority of votes were subject to the restrictions imposed upon them by the Constitution—though they were subject to other restrictions imposed by the Colonial Laws Validity Act 1865. The validity of these two laws is preserved by section 4 of the Jamaica (Constitution) Order in Council. No law in force immediately before 6 August 1962 can be held to be inconsistent with the Constitution; and under section 26(8) of the Constitution nothing done in execution of a sentence authorised by such a law can be held to be inconsistent with any of the provisions of Chapter III of the Constitution. The constitutional restrictions upon the exercise of legislative powers apply only to new laws made by the Parliament established under Chapter V of the Constitution. They are not retrospective."

The Board finds this a puzzling passage. It does not appear from the summary of the respondents' argument in the *Hinds* case as reported that they placed reliance on section 29(1) of the Juveniles Act which, as a pre-independence law, was obviously distinguishable from the post-independence statute in issue. More significantly, the effect of section 4 of the 1962 Order is not to preserve the validity of existing laws. As already pointed out in paragraph 10 above, its effect is to continue existing laws in force, for reasons there given. Far from protecting existing laws against constitutional challenge, section 4 recognises that existing laws may be susceptible to constitutional challenge and accordingly confers power on the courts and the Governor General (among others) to modify and adapt existing laws so as "to bring them into conformity with the provisions of this Order". It was not suggested that "this Order" did not include the Constitution scheduled to it. Further, the Board cannot accept as accurate the statement "No law in force immediately before 6 August 1962 can be held to be inconsistent with the Constitution". Nowhere in the Order or the Constitution is there to be found so comprehensive a saving provision, which would indeed undermine the effect of section 2 of the Constitution. Section 26(8), as already noted, applies only to the provisions of Chapter III. Since the Board in the *Hinds* case was dealing with a post-independence statute, Lord Diplock's observations on the saving clauses in the Order and the Constitution were obiter, and in the opinion of the Board they cannot be supported. Section 4(1) of the Order cannot be relied on to defeat the defendant's challenge based on the separation of powers.

*The third question: may the court modify or adapt section 29 and, if it may, should it do so and to what effect?*

16 If the court has power to modify or adapt section 29 so as to make it conform with the Constitution, such power can only derive from section 4(1) of the Order. The terms of section 4, read in isolation, would leave room for an argument that the section is directed to the correction of descriptions and nomenclature and not to more far-reaching adaptations and modifications. But such an argument would encounter two difficulties. First, it is now well established that constitutional provisions relating to human rights should be given a generous and purposive interpretation, bearing in mind that a constitution is not trapped in a time-warp but must evolve organically over time to reflect the developing needs of society: see *Reyes v The Queen* [2002] 2 AC 235, 245–246, paras 25–26 and the authorities there cited. Secondly, it is plain from authority that provisions similar to section 4(1) have not in practice been applied in a narrow and restricted way.

17 Five authorities call for brief mention. In *Kanda v Government of Malaya* [1962] AC 322 the Board applied article 162(1) of the Constitution of Malaya, which was in terms similar although not identical to those of section 4(1), to rectify an inconsistency between an existing law and the Constitution concerning the power to dismiss police officers. The clause of the Constitution of Belize which the Court of Appeal of Belize was called upon to consider in *San Jose Farmers' Co-operative Society Ltd v Attorney General* (1991) 43 WIR 63 was more elaborate than section 4(1) in referring to "qualifications, and exceptions" as well as "modifications" and "adaptations", but it was to similar effect. Section 21 of the Belize Constitution provided blanket protection for existing laws, limited to a period of five years. In an appeal concerning compulsory acquisition and compensation, Henry P said, at p 70:

> "[Section 21] does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law 'with such modifications, adaptations, qualifications, and exceptions as may be necessary' to bring it into conformity with the Constitution. At the same time the modifications, etc, must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution."

Liverpool JA spoke to similar effect, at p 86:

> "Section 134(1) of the Constitution is explicit in its requirement that existing laws must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution; and it is acknowledged that the Land Acquisition (Public Purposes) Act is an existing law. In my view, the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction."

In *Vasquez v The Queen* [1994] 1 WLR 1304, finding an inconsistency between the Criminal Code and the Constitution of Belize relating to the



burden of proving or disproving provocation, the Board relied on section 134(1) to rectify the anomaly. The issue in *Browne v The Queen* [2000] 1 AC 45 was very similar to that in the present case. The Saint Christopher and Nevis Constitution Order 1983 (SI 1983/881) contained, in paragraph 1(1) of Schedule 2, a provision similar in effect to section 134(1) of the Belize Constitution. Section 3(1) of the Offences against the Person Act (cap 56) 1873, as amended, provided that a person convicted of committing a murder, if aged under 18 when committing the offence, should be sentenced to detention during the Governor General's pleasure. The Board held that sentencing provision to be incompatible with the Constitution, as infringing the separation of powers, and, in the absence of any general provision saving the validity of existing laws, exercised the power conferred by paragraph 2(1) to hold, at p 50, that the sentence which the appellant "should have received was detention during the court's pleasure". Reference should finally be made to *Roodal v The State* (unreported) 17 July 2002 (Cr App No 64 of 99), a case before the Court of Appeal of Trinidad and Tobago concerning the constitutionality of the mandatory death penalty, although, since leave to appeal against the Court of Appeal's decision has been granted, the Board would not wish to be understood to express any view on the decision itself. Section 5(1) of the Constitution of the Republic of Trinidad and Tobago Act 1976 was in terms somewhat similar to section 4(1) and other comparable provisions considered above, and, in a judgment of the court, de la Bastide CJ reviewed all the authorities mentioned above (and others), giving a summary which fully merits quotation:

> "Having made this review of the authorities, we are now in a position to assess the purport and effect of section 5(1) of the 1976 Act. The first thing we can say about that section is that though it speaks of existing laws being 'construed', the type of 'construing' which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent, nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing laws under this section, goes far beyond what is normally meant by 'construing'. It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law. Mr Daly's submission that the section should be regarded as conferring very limited powers is, I am afraid, a brave but unavailing attempt to turn the clock back."

In the light of this authority the Board concludes, in agreement with the majority of the Court of Appeal of Jamaica, that section 4(1) of the Jamaica (Constitution) Order in Council 1962 gives the court power to modify section 29 of the Juveniles Act so as to bring it into conformity with the constitution. This is not a case (and the Director did not contend that it was) in which no modification could be made which would produce an acceptable and workable solution or which, as was held to be the case in *Roodal v The State*, would amount to an inappropriate exercise of legislative authority in a field offering several policy choices. The nature and purpose of the sentence

of detention during the Governor General's pleasure are clear, as explained above. The only question is who should decide on the measure of punishment the detainee should suffer. Since the vice of section 29 is to entrust this decision to the executive instead of the judiciary, the necessary modification to ensure conformity with the Constitution is (as in *Browne v The Queen* [2000] 1 AC 45) to substitute "the court's" for "Her Majesty's" in subsection (1) and "the court" for each reference to "the Governor General" in subsection (4).

18 As a fall-back argument, in case his submission on the separation of powers was not accepted, Mr Fitzgerald contended that section 4(1) could be relied on to modify section 29 even if the only ground of challenge rested on that section's incompatibility with sections 15(1)(b) and 20(1) of the Constitution. He contended that it was first necessary to identify an inconsistency with the Constitution, which would not involve "holding" any provision to be inconsistent. It might then be possible to modify the existing law by application of section 4(1) so as to preserve its substantial effect while removing the inconsistency. Section 26(8) would only apply when the existing law could not be modified so as to be brought into conformity with the Constitution. This approach, it was suggested, was consistent with section 26(9)(a) (quoted in paragraph 9 above), which envisaged that section 26(8) might have effect after "any adaptations or modifications" made to an existing law under section 4(1). Thus no attack could be based on the requirement in section 29 that a defendant convicted of a murder committed when under the age of 18 should be sentenced to an indeterminate term of detention, which might potentially be lifelong; but the court could be substituted for the Governor General without undermining the essential nature and purpose of the sentence. If this amendment were first made to ensure conformity with the Constitution, section 26(8) would not stand in the defendant's way.

19 The Board has given anxious consideration to this ingenious argument. The thrust of section 2 of the Constitution is to invalidate laws inconsistent with the Constitution. The rights guaranteed by the sections in Chapter III were intended to be enjoyed by the people of Jamaica. Provisions derogating from such rights should receive a strict and narrow rather than a broad construction: *R v Hughes* [2002] 2 AC 259, 277, para 35. A modification which preserves the essential purpose of the challenged provision while achieving conformity with the Constitution is one that it would be legally desirable to make. The Board would not wish to reject this argument, in which it sees very considerable force, but since it is unnecessary for the respondent to succeed on it in order to resist the appeal no final view need be expressed.

*The fourth question: should the sentence of life imprisonment stand?*

20 Having ruled that "the court's pleasure" should be substituted for "the Governor General's pleasure", the Court of Appeal majority ruled that the respondent be imprisoned for life and that he be not considered for parole until he had served a term of 20 years' imprisonment. This is the subject of the respondent's cross-appeal. His point is a short one. A sentence of imprisonment for life is a sentence of a different nature from a sentence of indefinite detention specifically designed to address the special circumstances of those convicted of murders committed under the age of 18.



Substitution of the court for the Governor General should not lead to a change, and a change disadvantageous to the detainee, in the punishment imposed.

21 The Board did not understand the Director to resist this argument, to which there is, in the opinion of the Board, no answer. The cross-appeal therefore succeeds. The sentence of life imprisonment must be quashed and a sentence of detention during the court's pleasure substituted. It is not for the Board to prescribe how that sentence should be administered in order to give effect not only to the requirement that the offender be punished but also to the requirement that the offender's progress and development in custody be periodically reviewed so as to judge when, having regard to the safety of the public and also the welfare of the offender, release on licence may properly be ordered. The Director considered that a suitable regime could be devised without undue difficulty, and the Board shares his confidence.

*Section 29(3) of the Juveniles Act 1951*

22 In the closing stages of argument, reference was made to section 29(3) of the Juveniles Act 1951 which, although not applicable to the respondent, calls for brief comment. As amended, the subsection reads:

> "Where a young person is convicted of an offence specified in the Third Schedule and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence. Where such a sentence has been passed the young person shall, during that period notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including an adult correctional centre) and on such conditions as the Minister may direct and while so detained shall be deemed to be in legal custody."

The terms of this subsection are closely modelled on, but are not identical to, those of section 53(2) of the (British) Children and Young Persons Act 1933 as originally enacted. For purposes of both subsections "young person" was defined to mean a person who has attained the age of 14 years and was under the age of 17: section 107(1) of the 1933 Act, section 2 of the 1951 Act. Under each statute it is the age at date of conviction which is relevant; the amendment made to section 29(1) following *Baker v The Queen* [1975] AC 774 was not made to section 29(3). But there is one significant difference between the two subsections. Section 53(2) was inapplicable to any offence the sentence of which was fixed by law. By contrast, section 29(3) was expressed to apply to any offence specified in the Third Schedule to the Act. One of the offences so specified was murder, for which section 29(1) would appear, unless qualified by section 29(3), to require imposition of a sentence of detention during Her Majesty's pleasure, a sentence fixed by law. Since the respondent was aged 19 when sentenced, section 29(3) cannot apply to him, and in the absence of full argument the Board is unwilling to express a final conclusion. It would however appear that if a defendant is convicted of murder and is aged 14 to 16 at the time of conviction, the trial judge may either impose a sentence of detention during the court's pleasure under section 29(1) or a sentence of detention for a specified period under section 29(3). This was the construction put upon section 29(3) by Downer JA, at p 34 in his judgment. It would not seem that this choice was

available in the case of any of the intervening parties, all of whom the Board understands to have been over 17 at the date of conviction.

23 The Board will humbly advise Her Majesty that this appeal should be dismissed, that the cross-appeal should be allowed, that the sentence of life imprisonment be quashed, that a sentence of detention during the court's pleasure be substituted and that the release of the respondent be determined by the court in accordance with section 29(4) of the Juveniles Act 1951 as modified in accordance with this opinion.

*Solicitors: Charles Russell; Simons Muirhead & Burton.*

P M M

---

House of Lords

## Bellinger *v* Bellinger (Lord Chancellor intervening)

[2003] UKHL 21

2003 Jan 20, 21; April 10

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

*Husband and wife — Nullity — Capacity to marry — Wife correctly registered as male at birth — Thereafter living as female and undergoing gender reassignment surgery — Wife seeking declaration of validity of marriage — Whether female or male for purposes of marriage — Whether violations of right to respect for private and family life and right to marry — Matrimonial Causes Act 1973 (c 18), s 11(c) — Human Rights Act 1998 (c 42), s 4, Sch 1, Pt I, arts 8, 12*

The petitioner was a transsexual female born in 1946 who had been correctly classified and registered at birth as male but had undergone gender reassignment surgery and treatment. In 1981 she went through a Ceremony of Marriage with a man who supported her petition for a declaration that the marriage was valid at its inception and subsisting. The judge refused to grant the declaration on the ground that "male" and "female" in section 11(c) of the Matrimonial Causes Act 1973[1] were to be determined by reference to biological criteria and that the petitioner was a male and not a woman for the purposes of marriage. The Court of Appeal dismissed the petitioner's appeal.

On the petitioner's appeal, claiming alternatively a declaration that section 11(c) was incompatible with articles 8 and 12 of Schedule 1 Part I to the Human Rights Act 1998[2]—

*Held*, (1) dismissing the appeal, that "male" and "female" in section 11(c) of the 1973 Act were to be given their ordinary meaning and referred to a person's

[1] Matrimonial Causes Act 1973, s 11(c): "A marriage . . . shall be void on the following grounds only, that is to say . . . that the parties are not respectively male and female . . ."

[2] Human Rights Act 1998, Sch 1, Pt I, art 8: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence."

Art 12: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."



biological gender as determined at birth, so that, for the purposes of marriage, a person born with one sex could not later become a person of the opposite sex; that therefore English law did not recognise a marriage between two people who were of the same gender at birth, even if one of them had undergone gender reassignment treatment which altered the anatomical features of the body to give the appearance of those of the opposite gender; that any other conclusion would amount to a major change in the law and would also create anomalies and uncertainties due to the lack of objective criteria by which gender reassignment treatment could be assessed; that such a fundamental change in the law, which would interfere with the traditional concept of marriage and give rise to complex and sensitive issues, should be made only by Parliament after careful deliberation and not by judicial intervention; and that, accordingly, the petitioner having been born male could not be regarded as female as a result of gender reassignment treatment, and therefore the marriage was not valid as the parties were not respectively male and female within the meaning of section 11(c) (post, paras 36–49, 56–58, 62–65, 71, 77, 80–83).

*Corbett v Corbett (orse Ashley)* [1971] P 83 considered.

(2) That since there was no provision for the recognition of gender reassignment for the purposes of marriage, section 11(c) was a continuing obstacle to the petitioner entering into a valid marriage with a man and was therefore incompatible with the petitioner's right to respect for her private and family life and with her right to marry pursuant to articles 8 and 12 respectively, and a declaration would be granted to that effect (post, paras 52, 55, 68–71, 79, 80, 81).

*Goodwin v United Kingdom* (2002) 35 EHRR 447 considered.

Decision of the Court of Appeal [2001] EWCA Civ 1140; [2002] Fam 150; [2002] 2 WLR 411; [2002] 1 All ER 311 affirmed.

The following cases are referred to in the judgments:

*Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603
*Corbett v Corbett (orse Ashley)* [1971] P 83; [1970] 2 WLR 1306; [1970] 2 All ER 33
*Cossey v United Kingdom* (1990) 13 EHRR 622
*Goodwin v United Kingdom* (2002) 35 EHRR 447
*I v United Kingdom* (Application No 25680/94) (unreported) 11 July 2002, ECHR
*Kevin, In re (Validity of Marriage of Transsexual)* [2001] Fam CA 1074; Appeal No EA 97/2001; (unreported) 21 February 2003, Family Court of Australia
*Marckx v Belgium* (1979) 2 EHRR 330
*M v M* (1984) 42 RFL (2d) 55
*R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
*R v Kansal (No 2)* [2001] UKHL 62 [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
*R v Lambert* [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
*R v Lyons* [2002] UKHL 44 [2002] 3 WLR 1562; [2002] 4 All ER 1028, HL(E)
*R v Tan* [1983] QB 1053; [1983] 3 WLR 361; [1983] 2 All ER 12, CA
*Rees v United Kingdom* (1986) 9 EHRR 56
*S (Minors) (Care Order: Implementation of Care Plan), In re* [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)
*S-T (formerly J) v J* [1998] Fam 103; [1997] 3 WLR 1287; [1998] 1 All ER 431, CA
*Secretary, Department of Social Security v SRA* (1993) 118 ALR 467
*Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163
*W v W* (1976) (2) SA 308
*W v W (Physical Inter-sex)* [2001] Fam 111; [2001] 2 WLR 674
*Walden v Lichtenstein* (Application No 33916/96) (unreported) 16 March 2000, ECHR