

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE ANGUILLA CIRCUIT

(CIVIL)

A.O. 2009

CLAIM NO. AXAHCV2009/0052

BETWEEN:

IN THE MATTER of Section 6 of the Anguilla Constitution Order S.I. No. 334 as amended

AND

IN THE MATTER OF Section 186, 188 and 37(2) of the Criminal Code R.S. A. c. 140 of the Laws of Anguilla

AND

IN THE MATTER OF a certain conviction of the Claimant by a jury on 4th May 2009 for the offence of Murder

AND

IN THE MATTER of the Mandatory Life Sentence passed upon the Claimant by the Court pursuant to the aforesaid section of the Criminal Code

ABRAHAM HARRIGAN

Claimant

AND

THE ATTORNEY GENERAL OF ANGUILLA

Defendant

Appearances:

Mr. Thomas Astaphan of Astaphan's Chambers for the Claimant

Mr. Ivor Greene instructed by the Attorney General for the Defendant

27th July 2009

14th April 2010

JUDGMENT

[1] **SMALL DAVIS J [Ag]:** The Claimant was convicted on 4th May 2009 of the murder of his common law wife after a three week jury trial. The sentencing immediately followed the verdict. At that time, the trial judge invited the Claimant's counsel to make a speech in mitigation. Learned counsel declined, on the basis that a mitigation plea would be of no value given that Section 37(2) of the **Criminal Code RSA c C140 of the Laws of Anguilla** mandated the sentence of life imprisonment. The trial judge then inquired of the Claimant himself whether there was anything that he wished to say. The Claimant spoke at length, mainly denying that he was culpable for the deceased death, gave a version of account of how she came to her death and expressed that he would never do anything to hurt her. Thereafter, the trial judge passed a sentence of life imprisonment on the Claimant using the words

"I have heard what you've had to say, Mr. Harrigan, and I know that you have expressed your innocence and the fact that you did not do it. Unfortunately, this jury has found you guilty of the offence with which you have been charged. And despite what you have said, I have no choice under the statutes and the laws of this country but to sentence you to life imprisonment and so that is the sentence of this Court."¹

[2] The Claimant filed an Originating Motion under CPR 56 seeking an administration order as to the constitutionality of section 37(2) of the Criminal Code. The Claimant's argument is that the mandatory imposition of a sentence of life imprisonment on a person convicted of murder under section 188 breaches his fundamental right not to be subjected to torture or inhuman or degrading punishment and the right to a fair hearing. These fundamental rights are guaranteed in sections 6 and 9 of the Anguilla Constitution Order.

¹ Transcript 4th May 2009, page 7

[3] The precise relief sought by the Claimant in the Originating Motion is:

(a) A declaration that section 37(2) of the Criminal Code RSA c C140 of the Laws of Anguilla, is unconstitutional, null, void and of no effect in that the said section 37(2) contravenes:

(i) the Claimant's right not to be subjected to torture or to inhuman or degrading punishment or other treatment, as guaranteed by section 6 of the Anguilla Constitution Order 1982, Statutory instrument 1982 No.334, as amended; and

(ii) the Claimant's right to a fair hearing by an independent court established by law as guaranteed by section 9 (1) of the Anguilla Constitution;

(b) All consequential Orders, and for such further and/or other relief as the Court thinks is just.

The Legislation

[4] Section 188 of the Criminal Code prescribes the penalty for murder using the following words: "Any person who is convicted of murder is liable to imprisonment for life." Section 43 (1) of the **Interpretation and General Clauses Act** provides:

"Whenever in any law a penalty is provided for an offence against that law,

such provision shall, unless the contrary intention appears, be construed as fixing the maximum penalty for that offence, and the offender, on being found guilty, shall be liable to any penalty not exceeding the prescribed penalty, and it shall not be necessary on the law prescribing the penalty to use the expressions "not exceeding», " a term not exceeding», "on conviction thereon or any similar expressions."

[5] Section 37(2) of the Criminal Code provides:

"A person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of section 188.,"

[6] There was no challenge to the position that the provision of section 188 in combination with section 37(2) of the Criminal Code creates a mandatory sentence. Section 188, interpreted in isolation, and applying the principle of interpretation as laid down in the **Interpretation and General Clauses Act**, would in accordance with established construction principles simply yield a construction of "liable" as prescribing the maximum penalty for the offence of murder. However, section 37(2), by excepting section 188 from the exercise of the court's discretion to impose a lesser sentence, made the sentence for murder, not just the maximum, but the only sentence that could be imposed on a person convicted of murder. Section 37(2) expressed the contrary intention referred to in section 43(1) of the **Interpretation and General Clauses Act** with the effect that the sentence for murder is fixed at life imprisonment.

The Case for the Claimant

[7] Mr. Astaphan launched his first salvo at the mandatory nature of the penalty to be imposed upon conviction for murder by reference to section 6 - that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. He relied on the cardinal principle that punishment must be proportionate to the offence, and further, that the mandatory imposition of a life sentence deprives the sentencer of the ability to make a distinction between different offenders, even of the same type of offence, failing to recognise the *"well known disparity between the culpability of different murderers, even where an intention to kill is a necessary ingredient of the offence."* 2 As a result, the sentence becomes arbitrary and in being arbitrary, it is therefore cruel and inhuman treatment of the individual.

[8] Mr. Astaphan forcefully argued that the mandatory life sentence, indeed any mandatory sentence, offends the principle of proportionality in that it is applied automatically to all persons convicted of the offence without permitting the court to take into account the individual circumstance of each offence and offender and to determine whether any mitigating factors exist, which would make it

proper that some other lesser sentence be imposed. Such a sentence would not be proportionate to the offence committed and individualised to the offender's own circumstances.

[9] Mr. Astaphan relied on the dictum of Byron CJ in **Peter Hughes v The Queen**³ noting that although the pronouncements were made in the context of a challenge to the mandatory death sentence upon conviction for murder, the principle remains the same and equally applicable to the life sentence:

"The issue here is whether it is inhuman to impose the sentence of death without considering mitigating circumstances of the commission of the offence and the offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to

2 De Boucherville v State of Mauritius (2008) UKPC 37, para. 18

3 60WIR 156

mitigate; whether the lawful punishment of death should only be imposed after there is judicial consideration of mitigating factors relative to the offence itself and the offender.

I am satisfied that the requirement of humanity in our Constitution does impose a duty for consideration for the individual circumstances of the offence and the offender before a sentence of death could be imposed in accordance with its provisions."

[10] The Court of Appeal's decision was upheld by the Privy Council and the dictum of Byron CJ was expressly approved⁴.

[11] The other mainstay of the Claimant's arguments was the judgment of the Privy Council in **Reyes v The Queen** ⁵, in which the constitutionality of the mandatory death penalty as provided by the penal laws of Belize was considered. The issue was also considered in **Berthill Fox v The Queen** ⁶. The Claimant cited a great many authorities emanating from the Privy Council which have consistently held since 2002 that the mandatory death sentence is inhuman and degrading punishment and therefore breaches the relevant constitutional provision⁷.

[12] The Claimant made the argument that the principle extends to the mandatory life sentence: the need for proportionality and individualised sentencing is not confined to capital cases and referred to **R v Smith (Edward Dewey)**⁸ a case which concerned the compatibility of a statute imposing a minimum sentence of seven years imprisonment on conviction of importing any narcotic into Canada with section 12 of the Canadian Charter. Even though the Supreme Court of Canada recognised that in some cases seven years imprisonment for such an offence would be appropriate, it held the provision to be incompatible with section 12 because it would in some cases be grossly disproportionate to the gravity of the offence. Smith's case was referred to by Lord Bingham of Cornhill in **Reyes v Rat** paragraph 37.

4 R v Hughes (2001) 60 WIR 156; [2002] 2 A.C. 259

560 WIR 42; [2002] 2 AC 235

6 61 WIR 169; [2002] 2 A.C. 284

7 *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, *Watson v R* [2005] 1 AC 472, *Bernard Coard and others v the Attorney General of Grenada* [2007] UKPC 7

8 [1987] 1 SCR 1045

[13] The strength of the Claimant's argument that the mandatory life sentence is just as unconstitutional as the mandatory death sentence reached its pinnacle with Mr. Astaphan's discussion of ***de Boucherville v The State of Mauritius***⁹ and ***Ralston Wellington v The Secretary of State for the Home Department***¹⁰, two cases which addressed the question of whether a life sentence meant life in prison.

[14] Mr. Astaphan expanded his argument that the mandatory life sentence for murder is repugnant to the Constitution to its fullest extent - in addition to not allowing for individualisation of sentence, it means that a convict must remain in prison for the rest of his life, and as such it constituted of almost all of the vices held to be inherent in the mandatory death sentence. According to Mr. Astaphan, as correctly construed, the life sentence mandated by section 188 of the Criminal Code operated as a whole life tariff, and meant that the convict was sentenced to spend the rest of his days in prison. Mr. Astaphan submitted that the life sentence in the form of the whole life tariff, results in the supposed inalienable value of the prisoner's life is reduced merely, to his survival: "*to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances.*"¹¹, the result of which is not the protection of the right to life, but mere lip-service to that fundamental freedom.

[15] Mr. Astaphan rested his case with the submission that section 37(2) of the Criminal Code deprived the Claimant from being heard in mitigation, since regardless of what could be said in mitigation, the trial judge has no choice but to impose the mandatory life sentence. As he put it, "the judge being unable to fashion a sentence to meet the facts and circumstances before the Court renders the hearing, at the point of sentencing, as not being a fair hearing", thereby making it in breach of section 9 of the Constitution. Mr. Astaphan relied on ***Halstead v Commissioner of Police***¹² to establish that the sentencing aspect of a trial was part of the hearing and that the requirement for a fair hearing began from a preliminary enquiry right through to the conclusion of a trial at the sentencing phase.

[16] Mr. Astaphan rejected the proposition that the mechanically imposed mandatory life sentence is ameliorated by the possibility of the prisoner being granted a pardon by the Governor in exercise of the prerogative of mercy with which he is imbued by Section 76 of the Constitution.

9 (2008) UKPC 37

10 [2007] EWHC 1109

11 *Ralston Wellington v The Secretary of State for the Home Department* (2007) EWHC 1109, para 39

12 (1978) 25 WIR 522

According to Mr. Astaphan's thinking, the Governor is under no obligation to even consider a case for pardon, and accordingly, no convicted person could truly be said to have a realistic hope of receiving release by virtue of a pardon. According to Mr. Astaphan, the prerogative of mercy has not been exercised in Anguilla in at least 23 years, a fact that supports the conclusion that there is no realistic prospect of a prisoner being pardoned and hence be saved from living out all his days behind bars.

The Defendant's Arguments

[17] In his written submissions, learned counsel on behalf of the Defendant, strove to persuade the court that the fixing of a mandatory sentence by the legislature does not infringe the principle of separation of powers by imposing or encroaching upon the duties and function of the judiciary. Mr. Greene quoted the following passage from Lord Diplock's opinion in **Hinds v R 13** :

"In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offence-, as for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum of severity, either with or,

as is more common, without a minimum, leaving it to the Court by which the

individual is to be tried to determine what punishment falling within the range prescribed by Parliament is appropriate in particular circumstances of his case."

[18] Heavy reliance was also placed on the decision of the Irish High Court in **Whelan and Another v Attorney General of Ireland 14**, which held that the mandatory life sentence did not amount to an interference by the legislature with the role of the judiciary in relation to sentencing and did not offend the doctrine of separation of powers.

[19] The Defendant's remaining written arguments in opposition to the claim were that (a) the mandatory life sentence is not arbitrary or disproportionate, and was the settled will of Parliament which the court is obliged to carry out, (see again **Whelan and Another v Attorney General of Ireland**) and (b) that there is a mechanism in place that prevents the sentence from being effectively one of a whole life sentence.

13 [1976] 2 W.L.R. 366

14 [2007] IEHC 374

[20] By the time that oral arguments were heard, learned counsel for the Defendant conceded the argument that the mandatory life sentence was offensive to the principle of proportionality but argued that section 188 is saved from unconstitutionality by the hope of release by virtue of the Governor's exercise of the prerogative of mercy.

[21] Mr. Greene argued that the prisoner upon whom the mandatory life sentence has been passed has some hope of release because he may apply to the Governor for a pardon and cited at least once instance in recent history where the Governor has pardoned a person convicted of murder.

Analysis

Is the mandatory imposition of the life sentence unconstitutional Separation of Powers

[22] In **Hinds v R** the issue before the Privy Council concerned the mandatory sentence of detention at hard labour during the Governor General's pleasure upon conviction in Jamaica's newly established Gun Court for certain specified offences related to the unlawful possession, acquisition or disposal of firearms or ammunitions. The convicted person could be discharged at the direction of the Governor General acting on the advice of a five member Review Board, a non judicial body established by the Gun Court Act. The Board accepted the argument that the legislature cannot prescribe the sentence to

be imposed in an individual citizen's case and quoted the Supreme Court of Ireland in **Deaton v Attorney General and The Revenue Commissioner**¹⁵ with approval: "*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...*" The Board held that the mandatory sentence was inconsistent with the provisions of the Jamaican Constitution relating to the separation of powers and were therefore held to be void.

[23] The principle that a mandatory sentence fixed by the legislature is not inconsistent with the independence of the judiciary was also more recently stated by the Eastern Caribbean Supreme Court in **Newton Spence v the Queen**¹⁶

¹⁵ [1963] I.R. 170, at page 182-183

¹⁶ ECCA Criminal Appeal No. 20 of 1998, unreported, 2 April 2001

[24] In **Roger de Boucherville v The State of Mauritius**, per Lord Bingham of Cornhill, the Privy Council approved the Mauritian Supreme Court's rejection of the argument that any mandatory or mandatory minimum penalty prescribed by legislation breached the constitutional principle of the separation of powers, as an encroachment by the legislature on judicial power and its acceptance of the argument that any particular mandatory sentence might be found by the court to be unconstitutional as breaching the requirement of proportionality.

[25] The weight of the authorities makes it clear that the mandatory life sentence is not unconstitutional for breaching the doctrine of separation of powers. I shall now turn to the other aspects of potential unconstitutionality.

What is inhuman and degrading punishment?

[26] I am guided by the restatement of the principle of constitutional interpretation in **Reyes v R**¹⁷, that the court's duty is to approach the task with careful consideration of the language used in the Constitution and that a generous and purposive interpretation is to be given to constitutional provisions protecting human rights. It requires consideration of the substance of the fundamental right at issue and that care is taken to ensure "*contemporary protection of that right in light of evolving standards of decency that mark the progress of a maturing society.*"¹⁸

[27] The development of the legal protection of every human's fundamental rights and freedoms began with the Universal Declaration of Human Rights 1948. It was declared, among other things, that everyone has the right to life, liberty and security of person, that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.¹⁹

[28] Then came the American Declaration of the Rights and Duties of Man 1948 followed shortly thereafter by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Historians record that it is the European Convention that is largely responsible for the Constitutions of newly independent nations guaranteeing protection of these fundamental human rights. This is the case for the Anguilla Constitution.

¹⁷ (2002) 60 WIR 42; (2002) 2 AC 235

18 At paragraph 26

19 Articles 3, 5 and 10

129] In **Watson v The Queen**²⁰ where it was held that the mandatory death penalty is incompatible with the right not to be subjected to inhuman and degrading treatment in that it precludes any consideration of the humanity of condemning him to death, Lord Hope of Craighead said: "To

deny a person the opportunity before sentence is passed, of persuading that in all the

circumstances to condemn him to death would be disproportionate and inappropriate was to treat him as no human being should be treated and deny his basic humanity which was the core right that the section seeks to protect."

130) Inhuman and degrading punishment means punishment that is grossly disproportionate to what would have been appropriate. In other words, to condemn a man to life in prison without giving him the opportunity to persuade the court that this would, in his case be disproportionate and inappropriate is to treat him in a way in which no human should be treated. If the court does not have the discretion to take into account the individual circumstances of an individual offender and offence in determining sentence, then it means the mandatory sentence is liable to be disproportionate. As said by Saunders JA as he then was in **Hughes v R**: "The dignity of human life is reduced by a law that compels a court to impose life indiscriminately upon all those who are convicted of murder."²¹

The principle of proportionality

131] It has always been a fundamental principle of sentencing that the time must fit the crime; that criminal penalties must be proportionate to the gravity of the offence. That rudimentary axiom can be traced back to the Magna Charta. The time when the death penalty was thought the appropriate sentence for the crime of murder has long passed, since the development and observance of human rights being accorded to every person. In the **Royal Commission on Capital Punishment**²²:

"Yet there is perhaps no single class of offence that varies so widely both in character and culpability as the class comprising those which may fall within the comprehensive common law definition of murder.

... The circumstances in which murder is committed varies infinitely."

20 (2004) 64 WIR 241; [2005] 1 AC 472

21 At paragraph 215

22 Cmsd 8932, September 1953

(32] In a trio of cases argued contemporaneously, the Privy Council dealt with the issue of mandatory death sentence as provided by the legislation in St. Lucia and St. Vincent and the Grenadines, St. Kitts and Nevis, and Belize. **Newton Spence and Hughes v The Queen**²³ was argued first in time, followed by **Berthill Foxx v The Queen (No. 2)**²⁴, and then **Reyes v The Queen**²⁵. All three cases were argued before the same panel of law lords and judgment in each was delivered on the same day.

(33] In **Hughes**, the Eastern Caribbean Court of Appeal held that the mandatory death sentence constituted inhuman and degrading punishment. Per Byron CJ:

"The experience of domestic jurisdictions, and the international obligations of our states, therefore suggest that a court must have the discretion to take into account the individual circumstances of an individual offender and offence in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.

In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualised sentencing in implementing the death penalty."²⁶

[34] On appeal by the Crown, it was argued that the mandatory death penalty was not open to a constitutional challenge because of the savings clause contained in the Constitution of St. Lucia. It was also argued that the Constitution itself provided a specific mechanism for the individuation of the sentence passed on a murder convict - the Prerogative of Mercy Committee. Similar arguments were made in **Reyes**²⁷.

23 (2002) 60 WIR 156; [2002] UKPC 12

24 (2002) 61 WIR 169; [2002] UKPC 13

25 (2002) 60 WIR 42' [2002] 2 AC 235

26 Para 43-44

27 Belize has an Advisory Council who advises on the exercise of the prerogative of mercy.

(35) The Board accepted that the death penalty is an authorised punishment in St. Lucia. However, the Board rejected the argument that the mandatory nature of the death penalty was immune from challenge and found that as the law requires a judge to impose the death sentence and there is therefore no room for mitigation or consideration of individual circumstances of the defendant or of the murder, the section is inconsistent with the right protected by the Constitution not to be subjected to inhuman and degrading treatment. The offending section was construed as modified so as not to include the words "other than death", the effect being to make the section no longer inconsistent with the Constitution and thereby making it open to the court to either impose the death sentence or to impose a lesser punishment, having regard to all the relevant circumstances.

[36] In the mandatory death penalty cases, the finality of the nature of the sentence was central to the discussion of its constitutionality. In answering the question whether the same principle applies to the mandatory life sentence, it was held in **de Boucherville v The State of Mauritius**-

"Such a sentence, mandatorily imposed, was subject to almost all the vices held to be inherent in the mandatory death sentence itself. It permitted no distinction to be drawn between one offence of murder and another, despite the great and well-known disparity between the culpability of different murderers, even where an intention to kill is a necessary ingredient of the offence. It allowed no account to be taken of the youth, age, vulnerability or circumstances of the individual offender. It gave the defendant no opportunity to plead for a lesser penalty before being deprived of everything worth living for, save life itself. It permitted no account to be taken of a defendant's remorse or the prospects of his rehabilitation. A hearing which gave the court no scope to mitigate such a sentence

was not a fair hearing, and a penalty so inflicted was inhuman and degrading punishment or other treatment.

[37] Every offender is entitled to have his particular circumstances considered. Its mandatory nature means that the sentence is passed without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender. It cannot meet the test of justice if a person who commits the worst kind of murder, whatever that may be perceived to be, (say, after the torture of a child over a number of days) should be sentenced to exactly the same punishment as one who may have been driven to murder after long years of abuse at the hand of the deceased. It therefore means that the sentence may be wholly disproportionate to the defendant's criminal culpability.

[38] As is readily evident from one of the cases relied on by the Claimant, **R (on the application of Wellington) v The Secretary of State for the Home Department 28**, the oppressiveness of the mandatory life sentence could operate in an equally arbitrary and disproportionate manner as the abolished death penalty ever did, where such a sentence is not accompanied by a mechanism by which the sentence, although fixed by statute, could in fact be adjusted to meet the particular facts.

[39] In **Wellington v The Secretary of State** the applicant sought to review a decision to extradite him to the state of Missouri, United States of America where, if convicted of murder in the first degree he would be subject to a mandatory life sentence. In expressing the position in England on mandatory life sentence, the state of the law was set out as follows:

(1) A mandatory life sentence will not constitute violation of the right not to be subject to inhuman or degrading treatment if it is accompanied by a mechanism or mechanisms by which the sentence, though strictly fixed by prior rule, may in fact be tailored to meet the circumstances and justice of the case:

(2) Such a mechanism may be found in the judicial determination of a term of years within the life sentence that is a tariff to reflect the requirement of retributive punishment in the particular case, together with a parole system which will secure the prisoner's release on the tariffs expiry unless consideration of public safety required his further detention. In cases of extreme gravity the tariff itself may be whole life;

(3) Without such a mechanism however, a mandatory life sentence would be arbitrary and disproportionate.

[40] Every offender is entitled to have his particular circumstances considered. In practice in Anguilla, and in the Claimant's case, the sentence is passed without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender. It cannot meet the test of justice if a person who commits the worst kind of murder, whatever that may be perceived to be, whether after the torture of a child over a number of days should be

28 [2008] 3 All ER 248

sentenced to exactly the same punishment as one who may have been driven to murder after long years of abuse at the hand of the deceased. It therefore means that the sentence may be wholly disproportionate to the defendant's criminal culpability.

The Whole Life Tariff

[41] The classical principles of sentencing have been stated to be retribution, deterrence, prevention and rehabilitation. See **R v Sargeant**²⁹ • These objectives have been explained in **Desmond Baptiste et al v The Queen** ³⁰ as:

- (a) retribution - to reflect society's intolerance of criminal conduct;
- (b) deterrence - to deter potential offenders and the offender himself from recidivism.
- (c) prevention - aimed at protecting society through incarceration of the offender; and
- (e) rehabilitation - to assist the offender to reform his ways so as to become a contributing member of society.

[42] A sentence must satisfy a valid penological purpose and the term of a sentence is meant to represent the punitive detention of the convict. If the convicted person is being detained beyond a period which represents either punitive or preventative objectives, the sentence is disproportionate and constitutes inhuman treatment where there is no longer any danger to the society: **R v Smith (Edward Dewey)**³¹

[43] **R v Lichniak**³² involved an appeal to the House of Lords against a mandatory sentence of life imprisonment as being arbitrary, excessive and disproportionate, contrary to Articles 3 and 5 of the European Convention for Protection of Human Rights and Fundamental Freedoms. The trial judge considered the appellant unlikely to present a danger to the public if released and the Secretary of State set a tariff period to be served for punitive purposes which reflected the judge's view. The House of Lords expressed the view that the mandatory life sentence represents the settled will of parliament and that a certain level of mistreatment was required before mistreatment contravened Article 3.

²⁹ 60 Cr . App. R. 74

³⁰ ECCA, SVG, Criminal Appeal No. 8 of 2003, 6 December 2004

³¹ (1987) 1 SCR 1045

³² [2002] 4 All ER 1122

[44] The following is an extract from the opinion of Lord Bingham of Cornhill, which, though it was obiter dicta, I find highly instructive:

- If the House had concluded that on imposition of a mandatory life sentence

for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights ("the Convention") as being arbitrary and disproportionate. But *Anderson*, following earlier authority, makes plain that such is not the effect of the sentence. It is a sentence partly punitive, partly preventative. The punitive element is represented by the tariff term, imposed as punishment for the serious crime which the convicted murderer has committed. The preventative element is represented by the power to continue to detain the convicted murderer in prison unless and until the Parole Board, an independent body, considers it safe to release him, and also by the power to recall to prison a convicted murderer who

has been released if it is judged necessary to recall him for the protection of the public. It is a sentence so characterised that the appellants must attack if their appeals are to succeed. "33

[45] In dismissing the Appellant's submissions, the law lords had this to say (with apologies for the length, however, these passages have given invaluable guidance):

"First, sitting judicially, the House is concerned to decide not whether the mandatory life sentence for murder is desirable or necessary but whether it is lawful. Unless the sentence is shown to be unlawful, the appeals must fail. Secondly, the House must note that section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 represents the settled will of Parliament. Criticism of the subsection has been voiced in many expert and authoritative quarters over

the years, and there have been numerous occasions on which Parliament could have amended it had it wished, but there has never been a majority of both Houses in favour of amendment. The fact that section 1(1) represents the settled will of a democratic assembly is not a conclusive reason for

33 This reasoning applied in *de Boucherville* by same judge

upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled: see Brown v Stott [2003] 1 AC 681, 703c-d, 711a, 834-835, 842; R (Mahmood) v Secretary of

State for the Home Department [2001] 1 WLR 840, 854-855, 856, paras 33 and 38. It may be accepted that the mandatory life penalty for murder has a denunciatory value, expressing society's view of a crime which has long been regarded with peculiar abhorrence.

Fourthly, and very importantly, I do not consider that the appellants' complaints are of sufficient gravity to engage articles 3 and 5(1) of the Convention. Those articles protect very important rights: article 3 the right not to be subjected to torture or to inhuman or degrading treatment or punishment, article 5(1) the

right not to be deprived of liberty save in accordance with a procedure

prescribed by law and save in a number of specified cases, of which the first is lawful detention after conviction by a competent court. But the Convention is concerned to prevent significant, not minor, breaches. It has been held that mistreatment must attain a certain level of severity to breach article 3: Tyrer v United Kingdom (1978) 2 EHRR 1, at para 30; Costello-Roberts v United

Kingdom (1993) EHRR 112, paras 30-32. With reference to article 5, in determining the arbitrariness of any detention regard must be had to the legitimacy of the aim of detention and the proportionality of the detention in relation to that aim. So the significance of the appellants' complaints must be

viewed in the context of their treatment as a whole. It is relevant to note, first of all, that each of the appellants was sentenced to a tariff term which reflected the judges' views of the bracket within which the term should fall."

(46] Lord Hutton,:

"...a mandatory sentence of life imprisonment consists at the outset of a period of years, the tariff period, which is served for retribution and deterrence and after this period has expired, there may be

a second period during which the prisoner continues to be held in prison if his or her release would constitute a danger to the public.

[47) The rigidity of the mandatory life sentence was adjudged to be relieved by the tariff system. Although the life sentence under section 1(1) of the 1965 Act was mandatory, whole life did not necessarily represent the tariff fixed for purposes of retribution and deterrence, which was set to reflect "the judge's" views of the bracket within which the term should fall". The uncertainty of the prisoner's potential release date, which would only be determined at the end of the tariff period, was not considered to constitute inhuman treatment of such severity that made the sentence of life imprisonment arbitrary.

[48) In **Ralston Wellington v The Secretary of State for the Home Department** 3 t 4 the Court had this to say:

"The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value.

Yet a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is Jex talionis. But its notional or actual symmetry with the crime for which it is visited on the prisoner (the only virtue of the lex talionis) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate - the very vice which is condemned on Article 3 grounds - unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip-service to the value of life; not to vouchsafe it."

[49) From a reading of the authorities, it is clear that whole life tariff is not necessarily unconstitutional, that is, breaching the inhuman and degrading treatment protection. The case

34 [2007] EWHC 1109

of **R v Secretary of State for the Home Department Ex p Hindley** 35 , is authority for the proposition that there can be cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence. However, what is required is that there should be an exercise of judicial discretion in setting the appropriate tariff that represents the length of time required to be served by the prisoner as punishment.

[50) The issues in this case now turns on:

(a) where no determinate period representing the penological purpose of the sentence has been set, can the provisions relating to the Governor's exercise of the prerogative of mercy fulfil that purpose; and

(b) the broader question of whether there are any mechanisms within the statutory framework and practice and procedure as employed in this case.

[51] It raises the question - should the period of imprisonment to be served by a mandatory life sentence prisoner as punishment should be determined by the executive or the judiciary?

The Governor's power of pardon

[52] Mr. Greene relied on **Wellington v The Secretary of State** to support his argument that there is no incompatibility between the mandatory sentence of life imprisonment and sections 6 and 9 of the Anguilla Constitution. Mr. Greene argued that the Governor's power to pardon gives the prisoner some hope of release is an equivalent mechanism to that of earned release on parole.

[53] The existence of a right to seek a pardon or commutation of sentence is a discretion exercised by the Governor and is subject to a wide range of other considerations as compared to a judicial review of all the aspects of the case during a sentencing hearing: **Reyes v The Queen**³⁶. In **Reyes**, the Board's opinion was that that is not a sufficient protection of the right to life because the Advisory Council, as set up under the Constitution of Belize, is not an independent and impartial court within the meaning of section 6(2) of the Constitution. Section 9 of the Anguilla Constitution guarantees a fair hearing by an independent and impartial court established by law.

35 [1998] QB 751

36 *ibid*

[54] Section 76 of the Anguilla Constitution provides that:

"Subject to any Instructions given to him by Her Majesty under Her Sign Manual and Signet, the Governor may, in Her Majesty's name and on Her behalf-

(a) grant to any person concerned in the commission of any offence for which he may be tried in Anguilla, or to any person convicted of any offence under any law in force in Anguilla, a pardon, either free or subject to lawful conditions;

(b) grant to any person so convicted a respite, either indefinite or for a specified period, of the execution of any sentence passed on him in respect of any conviction;

(c) substitute a less severe form of punishment for that imposed on any such person by any such sentence; or

(d) remit the whole or any part of any such sentence or of any penalty of forfeiture due to Her Majesty by reason of the conviction."

[55] Section 22 of the Constitution provides that the executive authority of Anguilla shall be vested in the Queen and that the Queen's executive authority may be exercised on her behalf by the Governor. Section 28 removes the general obligation of the Governor to consult with the Executive Council in the exercise of powers conferred upon him by the Constitution where the power is to be exercised in his discretion or in pursuance of instructions given to him by the Queen. The Anguilla Constitution does not provide and it appears there is no established procedure for seeking the Governor's clemency.

[56] In **Kafkaris v Cyprus** **European Court of Human Rights** 37, it was held that the applicant had not been sentenced to an irreducible life sentence with no possibility of early release because there was an appropriate safeguard whereby the President of the Republic, with the concurrence of the

Attorney General, could remit, reduce, suspend or commute any sentence passed. The Attorney General was an independent officer of high standing. Mr. Greene submitted that the Governor's power to pardon is analogous to the Cypriot safeguard exercisable by its president.

37 decision 12 February 2008 - ECHR

[57] In **de Boucherville v Mauritius** 38 the Privy Council reviewed the decision of the Supreme Court of Mauritius that a life sentence meant that the convict was to remain in prison for the rest of his life. The opinion of the Board was that if the life sentence condemns a prisoner to penal servitude for the rest of his life, then it is unconstitutional as breaching the prohibition against inhuman and degrading punishment. The Privy Council distinguished **Kafkaris** and found that there were no similar safeguards in Mauritius, whose constitution provided that a committee, appointed by the President would advise on the prerogative of mercy. Further, the provisions relating to parole and remission depend on the serving of a specified fraction of a determinate sentence before they come into effect and therefore where a prisoner is subject to a lifelong incarceration (as the Supreme Court held) the sentence so interpreted is manifestly disproportionate and arbitrary.

[58] The exercise of the prerogative of mercy is not a legal right. It is a discretion exercised by the Governor, in an executive power, after the sentence has been passed. The pardon is really an executive indulgence.

[59] It is well established that sentencing is a judicial discretionary determination exercised at the time of conviction by a judge having heard and taken into account all relevant factors of the offence, the offender, any mitigating circumstances, aggravating matters and an assessment of the appropriate term that a prisoner ought to be lawfully detained as punishment for the crime. It has been said "*The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime.*" 39

[60] The Governor, in exercising his power to pardon, acts to remit a sentence, not to set one and the opportunity that may be available to a prisoner to seek mercy cannot cure a constitutional defect in the sentencing process. The Governor's act is one of clemency, granted to persons and in circumstances that he himself or acting on the instructions of the Queen finds worthy. Back in 1953, the Royal Commissioners expressed the view that the prerogative of mercy "should be an exceptional measure, interfering with the due process of law only in those rare cases which cannot be foreseen and provided for by the law itself." 40

38 [2008] UKPC 37

39 *Reyes v The Queen*

40 Report of the Royal Commission on Capital Punishment 1949-53 (Cmd 8932)

[61] I found the learning in **R (on the application of Anderson) v The Secretary of State for the Home Department**-4 1 to be highly valuable in its guidance. On Anderson's conviction for murder, the trial judge passed the mandatory life sentence as required by the Murder (Abolition of Death Penalty) Act 1965 and recommended that he serve a period of 15 years to meet the requirement of retribution and general deterrence. The Secretary of State set the period before Anderson would be considered for release at 20 years. By law, the discretion to release a prisoner serving a mandatory life sentence was given to the Secretary of State acting upon the recommendation of the Parole Board and after advice given to him by the trial judge and the Chief Justice. The practice had developed whereby the trial judge would make a recommendation on the appropriate punitive term of imprisonment. In

determining the appropriate measure of punishment, the trial judge would have taken into account all the traditional factors applicable to sentencing. This became known as "setting the tariff period". As the prisoner approached the end of the tariff period, his case was referred to the Parole Board who then considered whether in the interest of the public, his detention should continue. The Parole Board's recommendation was given to the Secretary of State who then had the discretion whether to release the prisoner on licence. If the Parole Board recommended release and the Secretary of State ordered the prisoner's release on licence, it was not an absolute release but was a licence that endured for the rest of his life and accordingly, could be revoked.

[621] Anderson made an application for judicial review, challenging the legality of the Secretary of State, not being an independent and impartial tribunal, carrying out a judicial function in setting the tariff period. As is well known, the United Kingdom does not have a written constitution. It is however bound by the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, which was domesticated by the Human Rights Act, 1998, which guarantees a criminal defendant the right to a fair hearing before an independent and impartial tribunal established by law.

[63] The House of Lords rejected the argument that the Secretary of State's function in fixing the tariff was merely administrative, the court having already passed the mandatory sentence of life imprisonment. The House reiterated that the sentence of life imprisonment is not a whole life tariff, unless the court determined that it should be so, having considered all the circumstances

41 [2002] 4 All ER 1089

of the case. The ratio decidendi of the case is set out this way - "The complete functional separation of the judiciary from the executive is fundamental since the rule of law depended on it, and thus as the imposition of sentence was part of a trial for the purposes of ensuring a fair hearing by an independent and impartial tribunal guaranteed by Article 6 and the fixing of the tariff was required to be set by such a tribunal, and the Secretary of State was neither independent of the executive nor a tribunal, he should play no part in fixing the appellant's tariff".

[64] In **Reyes v R** the following statement succinctly compares and contrasts the relativity of the exercise of mercy and the sentencing function:

"In reaching this decision the Board is mindful of the constitutional provisions,

*summarised above, governing the exercise of mercy by the Governor General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the Constitution. Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore, the provisions governing the Advisory Council appear in Part V of the Constitution, dealing with the executive. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions. Such was the effect of the decisions in *Hinds v The Queen* [1977] AC 195 at 226d, *R v Mollison* (No. 2) (unreported) (Supreme*

Court Criminal Appeal No 61/97) and *Nicholas v The Queen* (1998) 193 CLR 173, 186, 206-207, 219-220, paras 16, 68, 110, 112. *The opportunity to seek mercy from a body such as*

the Advisory Council cannot cure a constitutional defect in the sentencing

process: see Edwards v The Bahamas, paras 167-168, Report No 41/00, paras 224-226 and *Baptiste v Grenada*, paras 117-119."42

[65] It is my opinion that the opportunity that a prisoner has to make an appeal to the Governor for an act of clemency does not satisfy the absolute requirement that there must be a judicial determination of the appropriate period to satisfy the principal purpose of sentencing as a punishment. It is not an acceptable answer to the complaint that the court has not determined a sentence that is tailored to meet the circumstances and justice of the case.

Conclusion

[66] From my study of the case law I draw the following conclusions as the proper statement of the legal principles:

- (a) It is a fundamental principle of sentencing that the punishment imposed on a convicted person should be proportionate to the crime;
- (b) Under the Constitution, judgment on the measure of punishment which a convicted person must serve is to be determined by the judiciary and not the executive branch of government;
- (c) The mandatory life sentence may constitute inhuman and degrading treatment if it is imposed indeterminately whenever someone is convicted of murder and removes judicial consideration of the humanity of the penological sentence taking into account the offence and the offender;
- (d) It offends the right to a fair hearing if it is to be imposed by the judge without giving the convicted person any opportunity to advance any mitigating factors because in that way the sentence is fixed by the legislature and not the judiciary. A fair hearing involves the judge's exercise of discretion and consideration of every circumstance that can benefit the individual ;
- (e) A law which fails to respect or which denies the convicted person an opportunity to mitigate is incompatible with the right to be treated humanely or to respect his humanity;
- (The imposition of an indeterminate sentence is not in and of itself disproportionate or arbitrary. It is no different to imposition of detention during Her Majesty's pleasure. However, there must be a judicial determination of the appropriate period to satisfy the punitive aspect of sentencing. After expiration of the period sufficient for punishment and

42 Per lord Bingham of Cornhill at para. 44

general deterrence, then there should be an assessment of the requirement for continued detention in the public interest.

[67] Section 37(2) of the Criminal Code is unconstitutional to the extent that it provides for a substantial mandatory prison sentence automatically to be passed on a person convicted of murder by reason of its arbitrariness and breach of the requirement of proportionality in sentencing and whereby there is no exercise of discretion by a judicial officer in setting the punitive term of the sentence. In

this case, the Claimant's right not to be subjected to inhuman and degrading treatment has been breached.

[68] I am guided by Lord Hobhouse of Woodborough who in **Browne v R**⁴³ said:

"In their lordships' judgment the answer to this part of the case is to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights. So far as the first part of this exercise is concerned, the relevant element is apparent from what has already been said. It is the fact that the decision on the length of the sentence is entrusted to the executive not to the judiciary. It follows from this, that what is required to make the provision comply with the Constitution is that the decision should be made by a court. If this is done the only objectionable part of the sentencing process is removed."

[69] Should the words "except in the case of a sentence passed in pursuance of section 188" at the end of Section 37(2) of the Criminal Code be struck down as unconstitutional and Section 188 of the Criminal Code shall be read in such a way that upon conviction an offender would be liable to a sentence in the discretion of the court up to a maximum of life? I am convinced that a mandatory life sentence is not in and of itself unconstitutional, but I am troubled by the fact that there are no safeguards or mechanism present in the law of Anguilla, as there is for instance in the United Kingdom, where, though the sentence of life imprisonment is mandatory for convicted murderers, the trial judge, after consideration of the circumstances of the case, sets a tariff period to identify the appropriate time to satisfy the retribution and deterrence

43 (1999) 54 WIR 213

requirement of the sentence. Upon expiration of the tariff period, the Parole Board considers whether, if released, the prisoner would present a risk or danger to the public.

[70] Anguilla has no parole legislation, although the court was informed that such legislation is intended. I would venture to say that it is imperative that the legislature acts to put in place the appropriate mechanisms to ameliorate the mandatory life sentence so as to ensure that it is imposed in a manner that conforms with the constitutionally guaranteed rights and freedoms.

[71] In the meantime however, to produce an acceptable and workable solution, if the sentencing procedure as promoted in **The Queen v Spence & Hughes** is followed, which would allow the court to take into account mitigating factors and to individualise the sentence to be meted out to persons convicted of murder by defining the period which ought to be served in retribution and deterrence of the crime, after which consideration is given to the need for the prisoner's continued detention, the offending section may be exercised in conformity with the Constitution. The procedure set out in **Hughes v R** by Chief Justice Byron, with appropriate modification, given the nature of the exercise being somewhat different in that the court's objective is to set a tariff period for retribution and deterrence should be adopted. Unless and until a parole board is established in Anguilla, the exercise of reviewing the prisoner's record and assessing whether he ought to continue to be detained in the interest of public safety should be conducted by an impartial and independent tribunal. **The Director of Public Prosecutions v Kurt Mollison**⁴⁴ and **Peter Solomon v The Queen**⁴⁵ provide precedent for a court driven mechanism to enable review of a prisoner's detention to achieve compatibility with the Constitutions of Jamaica and St. Lucia.

[72] Where a sentence of life imprisonment is passed without giving the convicted person an opportunity to make a case as to why some lesser sentence ought to be passed upon him, that would

be in breach of his right to a fair hearing, which he is guaranteed by section 9 of the Anguilla Constitution. In the present case, the Claimant's lawyer was invited to make submissions in mitigation of the sentence, which he declined to do. The trial judge did however, hear from the Claimant himself. From the words used by the trial judge in passing sentence, it appears that neither the Claimant's statement nor the particular circumstances of the offence

44 64 WIR 140

45ECCA, unreported, SLUHCRA2005/004, 18 June 2007

and the offender were taken into account. The Claimant was therefore not afforded a fair hearing in the sentencing phase of his trial.

[73] I am not called upon nor could I grant any relief as it pertains to the sentence passed on the Claimant other than a declaration as to the constitutionality of sections 37 and 188 of the Criminal Code. Therefore, it is the duty of the court to construe sections 37 and 188 of the Criminal Code as necessary to bring them into conformity with the Constitution. This may be achieved by consideration by a court for the sentence to be passed with an appropriate tariff period representing the punitive and deterrence penalty upon a review of the factors which in the court's expert judgment are relevant to the just sentencing of the defendant. It therefore follows, that the sentence that was passed on the Claimant is contrary to sections 6 and 9 of the Anguilla Constitution.

[74] On the matter of costs, at the conclusion of the hearing the parties agreed between themselves that the general rule that costs should follow the event should apply. In deference to that agreement, the Claimant having been successful, shall have his costs as agreed between the parties at US\$9,600. -
--- J'-- _

Tana'ania Small Davis

High Court Judge [Ag]