

He subsequently appealed to the Court of Appeal in Jamaica and on July 31, 1995, his appeal was dismissed. He further petitioned the Judicial Committee of the Privy Council for special leave to appeal and on May 2, 1996, his petition was dismissed.

Having exhausted all his domestic remedies, he turned his attention to the International Human Rights Bodies, to which Jamaica is a signatory, seeking relief for breach of his constitutional rights. He first moved the United Nations Human Rights Committee in May 1996 alleging violations of Articles 9 and 10, inter alia, of the International Covenant on Civil and Political Rights which articles, inter alia, entitle an arrested person to trial with a reasonable time or to release.

This Body, in July 1997, having considered the matter, found that there had been violation of Articles 9(3) 10(1)(20(a) of the International Convention. In particular, they found that the plaintiff had not been afforded a trial within a reasonable time, and that he was entitled to an effective remedy, including compensation.

The Government of Jamaica, was obviously not of the same mind as the international body and so did not accede to its recommendation.

The plaintiff thereupon turned to the Inter-American Commission on Human Rights, seeking relief.

The nature of the complaint requires me to set out a chronological sequence of events from then until the date of this application.

1. On August 7, 1997, His Excellency, the Governor General caused to be issued a notice in the Jamaica Gazette Extraordinary setting out the time periods which should apply to and the procedure for applications from or on behalf of prisoners under sentence of death to the United Nations Human Rights Committee and the Inter-American Commission on Human Rights where a petition or an appeal to the Judicial Committee of Privy Council has been refused, abandoned, withdrawn or dismissed.
2. On September 12, 1997, Messrs. S. J. Berwin & Co. by letter advised His Excellency the Governor General that a Communication was submitted to the Inter-American Commission of Human Rights on behalf of the Plaintiff.
3. On September 15, 1997, the Governor General's Secretary replied to Messrs. S. J. Berwin & Co. requiring them to submit proof of having filed a petition to the Inter-American Commission on Human Rights, by October 6, 1997, failing which steps might very well be taken to give effect to the sentence.
4. On October 2, the Plaintiff petitioned the Inter-American Commission on Human Rights.
5. On October 31, 1997, the Commission advised the Government of Jamaica of the plaintiff's petition and requested a response from the Government.
6. On December 2, 1997, the Government responded as requested.

7. On January 5, 1998, the plaintiff submitted comments on the Government's response.
8. On February 10, 1998, the Government submitted its reply to the Plaintiff's comments.
9. On May 25 and 29, 1998, Messrs. S. J. Berwin & Company, wrote to the Governor General's Secretary requesting an assurance that no steps would be taken to execute the plaintiff before the final determination of his petition by the Commission.
10. On June 2, 1998, the Governor General's Secretary responded that no such assurance could be given having regard to the instructions published by the Governor General on August 7, 1997 and further advised that the deadline for the Commission to finally determine the plaintiff's petition was August 10, 1998.
11. On July 29, the Commission advised the plaintiff's London Solicitors that it had advised the Jamaican Government of the request for a stay of execution pending a determination of the petition at the Regular Session to be held between September 28 and October 16.
12. On August 10, 1998, the letter of July 29 was sent by facsimile to the Governor General's Secretary and requested an undertaking that the Governor General in Privy Council would not exercise any of its function under sections 90 and 91 of the Jamaica Constitution until the Commission had the opportunity to consider the Plaintiff's petition.

13. On August 10, 1998, the Governor General's Secretary replied by facsimile advising that the undertaking sought could not be given having regard to the Instructions which had been published on August 7, 1997.
14. On Friday, August 14, the death warrant was read to the Plaintiff signifying that he would be executed on August 27, 1998. He was removed to the condemned cells on the said day.

Arising out of the issue of the death warrant the plaintiff commenced proceedings on the 20th day of August, 1998, claiming under section 25 of the Jamaica Constitution that his rights under sections 13, 14, 17 and/or 24 of the said Constitution have been, are being and/or likely to be contravened by the issue of the death warrant.

The following reliefs are claimed.

- (i) An order rescinding the decision of the Governor General to approve and promulgate instructions for dealing with applications to the Inter-American Commission on Human Rights ("The Commission) and the United Nations Human Rights committee by or on behalf of prisoners under sentence of death.
- (ii) Further or alternatively a declaration that the said instructions dated August 6, 1997 are unlawful, void and of no effect as contravening sections 13, 14 and 17 and/or 24 of the said Constitution.

- (iii) An order rescinding the death warrant issued on/or about the 14th instant for the Plaintiff's execution on the 27th instant.
- (iv) A declaration that the issue of the said death warrant while the plaintiff's application is pending before Inter American Commission on Human Rights for violation of the Plaintiff's rights under the American Convention on Human Rights, the plaintiff's rights to equality before the law and the protection of the law guaranteed by sections 13, 14, 17 and/or 24 of the said Constitution, is null and void.
- (v) An order staying the Execution of the Plaintiff.
- (vi) A declaration that the plaintiff's right not to be subjected to torture and inhuman or degrading punishment or treatment is being or is likely to be violated.
- (vii) An interim order staying the execution of the sentence of death on the plaintiff or alternatively, a conservatory order directing the defendants not to carry out the execution of the plaintiff pending the determination of the plaintiff's application to the Inter American Commission on Human Rights and/or pending the hearing and determination of this suit or any resultant appeals therefrom.
- (viii) All such orders, writs and directions as may be necessary or appropriate to secure redress by the plaintiff for the contravention

of his fundamental rights and freedoms which are guaranteed to the plaintiff by the Constitution of Jamaica.

It is common ground that the Jamaica Government signed and ratified the American Convention on Human Rights on the 8th day of July 1978.

In so doing the Government gave rights to citizens to make complaints and denunciations to the Inter-American Commission on Human Rights. Article 44 of the Convention states:

"any person or group of persons, or any non-governmental entity legally recognize in one or more member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

It is however important at the outset to take cognizance of PART 1 of the Convention titled - "STATE OBLIGATIONS AND RIGHTS PROTECTED"

Chapter 1 Article 1 stipulates:

"1. The States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

Article 2 titled Domestic Legal Effects states:

"When the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as

may be necessary to give effect to those rights or freedoms."

The above article is, in my view, a recognition by the Commission that the provisions of the Convention become justiciable only if they are enacted in the Domestic Law of the States Parties. It is common ground that the Convention has not been adopted into the domestic law of Jamaica. *H. Lauterpacht in Oppenheim's International Law Vol. 1 (8th Edn. 1955)* in dealing with the theory of how international law and national law interact states:

"If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be per se a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If according to the Municipal Law of an individual state the Law of Nations as a body or in parts is considered to be part of the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of the Nations have by adoption become at the same time rules of Municipal Law.

Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International Law, because it has, per se, no power over municipal courts. And if it happens that a rule of Municipal Law is in indubitable conflict with a rule of the Law of Nations, Municipal courts must apply the former."

(emphasis mine)

The principle enunciated above applies to conventions and international treaties. Therefore, Jamaica not having incorporated the Convention into its

domestic Law breaches of the Convention are not justiciable in the Courts of Jamaica.

Mr. Daley, Q.C. submitted that the instructions issued by the Governor General and published in the Jamaica Gazette Extraordinary of August 7, 1997, were in breach of the Convention, in that the Jamaica Government could not seek to stipulate the time frame in which the Commission should conduct business.

He contended that their Lordships Board, in Pratt and Morgan, having stipulated a period of eighteen (18) months as a reasonable period in which a petition to the UNHRC should be disposed of, the Governor General could not seek to abridge that time frame by issuing a notice requiring the IACHR to dispose of petitions within 6 months of submission.

It is useful to set out what their Lordships' Board said:

"It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the committee to dispose of them with reasonable dispatch and at most within 18 months."

It is clear that their Lordships were not saying that the Government of Jamaica had to afford the Commission a period of 18 months to consider the petition. Jamaica, if it desires to speed up the process can require that the Commission complete the consideration within six (6) months.

Jamaica, a sovereign state, has the right to determine under what circumstances it will allow its citizens the right to have petitions heard by international bodies. This has to be so to ensure the good governance of the Jamaican people.

Further the rules and procedures contained in the Convention and the Regulations made thereunder are not binding upon Jamaica in so far as they have not been incorporated in the Domestic Law of Jamaica.

The issuance of the Instructions by the Governor General cannot, in my view be impeached. To hold otherwise would be to forfeit the sovereignty of an Independent Nation.

LEGITIMATE EXPECTATION

It was submitted that when Jamaica entered upon the convention every citizen was entitled to expect that the Government would afford them the opportunity to pursue their remedy before the Commission in the event of a violation of any of the guaranteed rights under the convention.

Further, having regard to the time constraint suggested in Pratt and Morgan, the plaintiff had and was entitled to have a reasonable belief and legitimate expectation that he would be allowed to pursue his petition to the IACHR within the Pratt and Morgan time frame.

Mr. Daley argued that it was unreasonable for the Government of Jamaica to seek to rigidly enforce the instructions issued by the Governor General when the Pratt and Morgan time frame is not in danger of being breached.

In Minister of State for Immigration and Ethnic affairs v. AH HIN TEOH

F.C. (1995) 69 AL JR 423 the majority of the Court held that -

"Ratification of a convention was a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies would act in accordance with the CRC and, as such, was an adequate foundation for a legitimate expectation."

McHugh J, dissenting:

"The ratification of a treaty was not a statement to the national community. It was, by its very nature, a statement to the international community. If the result of ratifying an international convention was to give rise to a legitimate expectation that the convention would be applied in Australia, the executive government would have effectively amended the law of this country."

Carey JA, in Trevor Nathaniel Fisher v Attorney General and Others,

Commonwealth of Bahamas, Court of Appeal, civil side No. 27/98 subscribed to the view that an appellant may justifiably have a legitimate expectation that the Government will enable him to address his petition to the IACHR and will respond to requests for information and consider any report or recommendations of that body provided they are received in a timely manner.

Mason, CJ in Teoh's Case (supra) opined:

"the existence of a legitimate expectation that a decision maker would act in a particular way did not necessarily compel him or her to act in that way. that was the difference between a legitimate expectation and a binding rule of law. But if a decision-maker proposed to make a decision inconsistent with a legitimate expectation, procedural fairness required that the person affected be given

notice and an adequate opportunity of presenting a case against the taking of such a course."

Their Lordships' Board in *Fisher v The Minister of Public Safety and Immigration and others P.C.* Appeal No. 35 of 1998, delivered on October 5, 1998 approved the dictum of Mason CJ in Teoh's case (supra) and stated that even if the appellant had a legitimate expectation that he would not be executed while his petition was pending the expectation could not survive the Government's letters of 2nd and 30th January, 1998, in which it informed the appellant's solicitors in unequivocal terms that it would wait no longer than 15th February, 1998.

I shall now apply the principle established by their Lordships' Board to the instant case.

The legitimate expectation asserted by the plaintiff is two fold, viz:

"(1)(1) that the Government would not seek to execute him whilst his petition is still pending before the IACHR and (2) before the period of 18 months designated by the Privy Council in Pratt and Morgan as a reasonable period to allow the IACHR to consider the petition."

I have already expressed the view that the 18 months period is not a mandatory period.

Against the history of the IACHR taking inordinately long periods to consider and advise the government of its findings, the decision maker, the Governor General of a sovereign nation issued instructions which were

published in the Jamaica Gazette Extraordinary of Thursday, August 7, 1997,
stating that -

"10. Where within the period of six months after the response to the Second International Human Rights Body by the Government of Jamaica -

- (a) a communication has been received by the Government as to the outcome of the prisoner's application, the Government of Jamaica shall advise the Clerk to the Privy Council of the outcome of the application. The matter shall then be considered by the Privy Council, who shall advise the Governor-General. Unless the prerogative of mercy is exercised in favour of the prisoner, the execution will not be further postponed;**
- (b) no such communication has been received, the execution will not be further postponed."**

These instructions constitute in my view clear notice that the decision maker intends to act in a manner inconsistent with the legitimate expectation. That he will not sit and wait patiently whilst the IACHR fiddles. Unlike the Emperor Nero, the Governor General of Jamaica is not prepared to fiddle whilst Jamaica "burns".

In addition to these gazetted instructions, which have the force of law in Jamaica, numerous communications followed between the Clerk to the Privy Council and Secretary to the Governor General and the Legal Representatives of the Plaintiff, as also the Commission. In these communications it was made plain that the Government of Jamaica could give no assurance that if the time

frame stipulated in the instructions of August 1997, was not adhered to, a further stay would be granted.

Like their Lordships' of the Privy Council, I am of the firm view that even if the plaintiff had a legitimate expectation, it could not survive the instructions of August 1997, and the letters of the Clerk to the Privy Council which expressed in unequivocal terms that the Government was not prepared to wait beyond the period stipulated in the instructions.

The plea of legitimate expectation therefore fails.

Alternatively, it was argued, that if the plea of legitimate expectation failed the issuing of the instructions by the Governor General and the reliance upon them in the circumstances of this was unreasonable having no relationship with the time frame stipulated in Pratt and Morgan nor any relationship with the rules and procedures of the IACHR and in that context the issuing of the death warrant was in breach of the plaintiff's constitutional rights under sections 14 (right to life), 17 (freedom from inhuman and degrading treatment) and 20 (due process).

The dictum of their Lordships' Board in Fisher's case (*supra*) appropriately addresses the above contention.

"The alternative public law ground is that the decision to read the warrant of execution on 26th March was Wednesday unreasonable. Sir Godfrey pointed out, correctly, that this is not the same as the question whether reasonable time had expired by 26th March 1998. The question here is not whether, in the Board's view, it would have been reasonable to wait longer, but whether the decision by the Government not to wait longer was irrational in the Wednesday sense. Their

Lordships are unable to take that view. Their were weighty factors pointing in favour of an immediate decision, not the least the need to maintain public confidence in the criminal justice system in the Bahamas, and the requirement on humanitarian grounds that in countries which retain the death penalty lawful death sentences should be carried out as swiftly as practicable. As at 26th March, 1998, there appeared to be no immediate prospect of the Commission reaching a decision, and subsequent events have shown this to be the case. Even now it is not known when the Commission will report. Nor as, Mr. Davis conceded, is there any provision in the Constitution requiring the Advisory committee or the designated Minister to comply with any report; see *Reckley v. Minister of Public Safety and Immigration* [1996] A.C. 527. In all these circumstances, it would be quite wrong for their Lordships to regard the decision to read the warrant of execution on 26th March, 1998 at being *Wednesbury* unreasonable."

All the circumstances referred to by their Lordships which led them to arrive at their decision are present in the instant case:

- (i) There has been a public outcry in Jamaica at the failure of the Government to carry out the sentence of the Court in respect of persons convicted of Capital Murder. This failure has led to serious questions being asked about the efficacy of the criminal justice system.
- (ii) Notwithstanding the instructions of August 1997, to date the Commission has given no indication as to when its report will be received. The instructions issued by the sovereign State of Jamaica have been treated with the utmost of contempt.

- (iii) There is nothing in the Constitution which requires the Jamaica Privy Council or the Governor General to comply with any report from the Commission.

For the above reasons the plea of unreasonableness fails.

CONDITIONS IN PRISONS

It was submitted that the treatment of the plaintiff in custody both before and after his conviction constituted inhuman and degrading treatment and the cumulative effect of the conditions violates the constitutional rights of the plaintiff. In such circumstances the issuance of the warrant constitutes an infringement of the plaintiff's constitutional rights.

Mr. Daley, Q.C., for the plaintiff relied upon the dissenting Judgment of Lord Steyn in Fisher's case (supra). It must be noted that in Fisher's case the burden of Lord Steyn's Judgment was delay. In the instant case delay is not a complaint. On the contrary the complaint is that the Government is acting hastily in reading the death warrant of the Plaintiff. The plaintiff is complaining about the physical conditions under which he has been detained.

The plaintiff's Writ of summons which was generally endorsed, claimed at paragraph 9 thereof "a declaration that the plaintiff's right not to be subjected to torture and inhuman or degrading punishment or treatment is being or is likely to be violated". This writ was filed on August 21, 1998.

An affidavit of even date filed in support of Constitutional redress pursuant to section 25 of the Constitution of Jamaica is remarkable for its silence

as to the conditions which amount "to torture and inhuman or degrading punishment".

Worthy of note also is that the Statement of Claim filed on the same date, August 21, 1998, gives no particulars as to the alleged conditions which would evidence torture and inhuman or degrading punishment.

The amended Statement of Claim filed on September 21, 1998, at paragraph 10 alleges the following:

"Since the plaintiff's conviction on or about the 14th of October, 1994, the plaintiff has been imprisoned in a cell in Saint Catherine District Prison on 'death-row' in circumstances which it is contended are and/or continue to be inhuman and degrading in breach of section 17(1) of the Constitution including assaults on the plaintiff by warders and/or the malicious and wanton destruction of all personal possessions which the plaintiff was allowed to have on 'death row'."

On October 14, 1998, the plaintiff filed a further affidavit in which he sets out in detail the conditions under which he has been incarcerated and if the averments contained therein are true, then indeed one would be constrained to conclude that he was being held under conditions which are inhuman and degrading.

However, Simeon Bromfield, a public health inspector employed in the St. Catherine Health Department and the supervisor for Zone 2 into which zone the St. Catherine Adult Correctional Centre falls, has filed an affidavit dated November 11, 1998, in which he seriously challenges the averments of the plaintiff's affidavit.

Zepheniah Page, an overseer at the St. Catherine Adult Correctional Centre who has been assigned to that institution for over twenty-four years, also denies the averments in the plaintiff's affidavits as to the circumstances under which he is incarcerated.

Melbourne Jones, the Superintendent of the institution and an affiant, also traverses the plaintiff's allegations.

Raymoth Notice, a medical practitioner of ten years experience and a medical officer employed to the Correctional Service, assigned to the St. Catherine Adult Correctional Centre, in an affidavit dated November 26, 1998, has given a detailed account of the medical facilities available to inmates at the institution. More particularly, he has detailed the occasions on which the plaintiff was seen by him and has explained the circumstances under which blood was taken from the inmates.

I refuse to believe that all these public officers have conspired together to traverse the affidavit evidence of the plaintiff.

In 1992, as Chairman of the National Task Force on Crime, I visited the St. Catherine District Prison and in my report I alluded to the appalling conditions which existed then and made recommendations for the improvement of those conditions and was the member of a Committee set up to see to the implementation of the recommendations. I prefer the affidavit evidence of the persons named herein to that of the plaintiff and I am satisfied that the conditions which exist do not constitute inhuman and degrading treatment.

I have examined the United Nations Standard Minimum Rules for the Treatment of Prisoners adopted August 30, 1955, by the first United Nations congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex 1 and most of the provisions mentioned therein are being observed at the St. Catherine District Prison.

I hold that the Plaintiff has failed to satisfy me on a balance of probabilities that his rights under sections 13, 14, 17 and/or 24 of the Jamaica Constitution have been, are being, and/or are likely to be contravened by the issue of a death warrant by the Governor General which was read to the plaintiff on the 27th August, 1998. I would therefore order the action to be dismissed and refuse the reliefs claimed.

Cooke J.:

Paragraph 25 of the amended statement of claim avers that:

While the Jamaican Government recognizes the jurisdiction of the Inter-American Commission on Human Rights to hear complaints by Jamaican citizens as to violations or infringements by the government of the American Convention on Human Rights the Plaintiff has a reasonable belief and legitimate expectation that the Governor General will not issue a death warrant for his execution while he has such a complaint pending before the Commission.

The Jamaican Government on the 19th July 1978 signed the American Convention on Human Rights. Article 44 of this Convention states that:

Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Thus, from the time the Jamaican Government became a signatory to the Convention, our citizens were entitled to access to that body. Their petitions could be heard and determined by the Inter-American Commission on Human Rights [the Commission]. On the 2nd October 1997, the plaintiff lodged a complaint with the Commission. The events leading to this stage may be summarized as follows:

- 1) The plaintiff was on the 14th of October 1994 convicted of capital murder.
- 2) On the 31st July 1995 the Court of Appeal dismissed his appeal against conviction.

- 3) On the 2nd May 1996 the plaintiff's petition for special leave to appeal against conviction was dismissed by the Judicial Committee of the Privy Council.
- 4) On the 24th May 1996 the plaintiff petitioned the United Nations Human Rights Committee [the Committee].
- 5) On the 17th July 1997 the Committee came to the view that the unsatisfactory conditions in which the plaintiff was incarcerated were such that he was entitled "to an effective remedy including compensation".
- 6) On the 9th September 1997, the Jamaican Privy Council considered the views of the Committee and determined that the Prerogative of Mercy should not be exercised in favour of the plaintiff.
- 7) On the 11th September 1997 a warrant was issued for the execution of the plaintiff on the 25th of September 1997.
- 8) On the 12th September 1997 S J Berwin and Co. [the lawyers] wrote to the Governor General of Jamaica outlining the views of the Committee and stated *inter alia*

"As Jamaica is a signatory to the American Convention of [*sic*] Human Rights, our client also has a right of appeal to the Inter American Commission of [*sic*] Human Rights. Accordingly, we are now submitting a Communication to that international tribunal on Neville Lewis's behalf and we respectfully request that you grant a stay of Neville Lewis's execution pending their decision."

- 9) On the 15th September 1997 a directive was issued that the execution of the plaintiff scheduled to take place on the 25th September 1997 should be "stood down" and the warrant returned. This directive under the hand of the Governor

General's Secretary was addressed to the Commissioner of Corrections.

10] On the 15th September the letter from the lawyers was acknowledged and the lawyers were asked to furnish proof by October 6, 1997 that an application to the Commission had been filed.

Attention is now turned to the events subsequent to the lodging of the complaint to the Commission.

11] On the 20th November 1997 the Commission wrote to the Government of Jamaica setting out allegations made on the plaintiff's behalf and stating *inter alia*:

"The Commission hereby issues precautionary measures pursuant to article 29.2 of its Regulations in respect of Mr. Neville Lewis and requests that the State of Jamaica stay the imminent execution of Mr. Neville Lewis until it has had the opportunity to fully investigate the claims raised in this case."

The article 29.2 on which the Commission bases its authority to issue its precautionary measures is in these terms:

In urgent cases, when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage in cases *where the denounced facts are true*. [Emphasis mine.]

It does seem somewhat illogical for the Commission to seek an opportunity to "fully investigate the claims" and at the same time taking action which can only arise "where the denounced facts are true".

- 12) On the 27th November 1997 the Government of Jamaica transmitted its response to the letter of the 20th November [11 *supra*].
- 13) On the 16th January 1998 the Commission transmitted to the Government observations by the lawyers in response to Jamaica's position.
- 14) On the 10th February 1998, the Government transmitted to the Commission a message that it would not offer any comments on the submissions of Neville Lewis' counsel at this stage and that
- "The Ministry awaits the decision of the Commission."
- 15) On the 25th May 1998, the lawyers wrote a letter to the Governor General's Secretary. In this letter the lawyers stated that it was not anticipated that the Commission would determine the matter before the 2nd June 1998. There was a request that the plaintiff would not be executed "while his petition is pending before the Commission".
- 16) On the 2nd June 1998, the Governor General's Secretary wrote to the lawyers confirming that the Government had made a response to the Commission on the 10th February 1998 and there would be no further extension of time. This reference to extension of time is as regards the Instructions of the Governor General dated August 7, 1997. This will be dealt with subsequently.
- 17) On the 17th July 1998 the Commission wrote to the Government stating that precautionary measures had been issued [11 *supra*]. This letter further said:

"The Commission wishes to inform your Excellency's Government that Mr. Lewis' case will be considered by the Commission at its next Regular Session which will be held from September 28 to October 16, 1998 and hereby reiterates its request for a stay of execution of Mr. Lewis pending its determination."

- 18) On the 29th July 1998 the Commission again wrote to the Government in terms similar to those of the 17th July 1998.
- 19) On the 10th August 1998 the lawyers wrote to the Governor General's Secretary requesting an undertaking that the plaintiff would not be executed until the Commission had considered the petition of the plaintiff.
- 20) On the 10th August 1998 the Governor General's Secretary informed the lawyers that having regard to the Governor General's Instruction, no undertaking as requested could be given.
- 21) On the 11th August 1998 the Commissioner of Corrections was given a warrant of execution of the plaintiff on the 27th August 1998.
- 22) On the 17th August 1998 the Commission wrote to the Government requesting a stay of the execution of the plaintiff pending its determination of the matter.
- 23) With no favourable response from the Government, the plaintiff initiated court proceedings seeking constitutional redress.

Despite an urgent request from the Government, the Commission has yet to deliver its report of the plaintiff's petition if in fact such petition has been heard and determined.

In *Pratt and another v Attorney General for Jamaica and another* [1993] 4

All ER 769, the opinion of the Board was delivered on the 2nd November 1993. On p. 786 it is stated:

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

The essence of this passage is that "if capital punishment is to be retained it must be carried out with all possible expedition". [p. 787 - Pratt's case.] Expedition, however, must be subject to circumstances in which it cannot be said that the condemned man is unjustifiably denied or curtailed in pursuing an avenue which may be beneficial to his cause - to save his life. It is essential that all entities in Jamaica concerned with any process affecting the efforts of the condemned man should not bear the taint of dilatoriness. The chronology of events subsequent to the 2nd of October 1997 [the date on which the plaintiff petitioned the Commission] demonstrates that at all times the concerned Jamaican entities acted with dispatch. There can be no criticism in this regard. Further, the condemned man should be aware of any limiting factor(s) which could adversely affect his cause. In this case there is. It is the Governor

General's Instructions which were published in the *Jamaica Gazette* dated 7th August 1997. It is unnecessary to deal with these Instructions at any length. It is sufficient to say that if there was no communication from the Commission within six months of the response of the Government "the execution will not be further postponed". It is to be noted that these Instructions were published prior to the petitioning of the Commission by the plaintiff. The plaintiff was aware of these Instructions. In fact, in the letter of May 25, 1998 [15 *supra*] the lawyers reported that on the 10th of October 1997 there was a hearing of a general nature before the Commission wherein the plaintiff and others invited the Commission to recommend to the Jamaican Government "to revoke or substantially amend the Instructions". It was further reported that the Commission had reserved its judgment.

Further, from the chronology of events, it can be seen that as the respective six-month periods were to end there was a flurry of letter writing by the lawyers to the Governor General's Secretary. There were two six-month periods. The first began with the response of the Government on the 27th November [12 *supra*]. The other period began on the 10th February 1998 [14 *supra*]. Of course, despite the unequivocal Instructions of the Governor General and the clear understanding of those

Instructions by the plaintiff, the issue as to whether the plaintiff can rely on his "reasonable belief and legitimate expectation that the Governor General will not issue a death warrant for his execution while he has such a complaint pending before the Commission" remains to be decided. This assertion will be examined to determine if these Instructions unjustifiably curtailed the efforts of the plaintiff. Before this is done, it would, perhaps, be useful to advert to the functioning of the Commission.

Article 15 of the Regulations of the Inter-American Commission on Human Rights deals with Sessions. It states:

The Commission shall meet for a period not to exceed a total of eight weeks a year, divided into however many regular meetings the Commission may decide, without prejudice to the fact that it may convoke special sessions at the decision of its Chairman, or at the request of an absolute majority of its members.

It cannot be said that eight weeks per year is a long time. It would appear that the convening of the Commission is not informed by any objective criteria. There is no such phenomenon as "setting down a case" for a particular date. The Commission, apparently without reference to interested parties, decides when it meets and presumably which petitions it will hear. By virtue of Articles 34.5 and 7 and Article 44.3 of the Regulations, the Commission should in three hundred and thirty days complete its task in respect of any petitioner and prepare its decision.

This calculation begins from the time that the affected government is requested to provide information [response]. It does not bear any relationship to the time when the petition is received. The prepared decision is incorporated in a report [Article 46 of the Regulations]. This report is to be "transmitted to the interested State" - Article 47.6. However, there is no time schedule within which such report should be transmitted.

In Pratt's case, the Board concluded on p. 788 that:

"... in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'."

This pronouncement sounded a clarion call for expedition as regards death penalty cases. To avoid "the death row phenomenon" deprecated in Pratt's case there must not only be dispatch but the mechanism whereby such dispatch is cultivated. The Government was of the view that there was a want of urgency in the manner in which the Commission conducted its affairs as regards petitions from Jamaican nationals. In an effort to speed up hearings, the Jamaican Government on the 20th September 1996 sent a note to the Commission. In this note the Government expressed its deep concern over the length of time taken by the Commission to consider and give its views on petitions from prisoners

under a sentence of death in Jamaica. This note concluded with the stance the Government intended to adopt. This is set out hereunder.

"In order to ensure that the process is expedited, the Government of Jamaica wishes to inform the Inter-American Commission on Human Rights of the following arrangements with regard to communications/petitions for Jamaican prisoners:

1. When the Inter-American Commission on Human Rights is considering a communication/petition from a person under the sentence of death, the sentence of the court, subject to paragraph 2 below, will be carried out if the Inter-American Commission on Human Rights does not give its findings within six (6) months of the response by the Government of Jamaica.
2. If the communication/petition received by the Inter-American Commission on Human Rights in (1) above has already been considered by the United Nations Human Rights Committee, the sentence of the court will be carried out if the Inter-American Commission on Human Rights does not give its findings within six (6) months of the response by the Government of Jamaica.
3. With respect to communications/petitions currently before the Inter-American Commission on Human Rights, if a recommendation is not made within three months following the receipt of this Note, the law will take its course.
4. Each communication/petition filed with the Inter-American Commission on Human Rights must be notified to the Government of Jamaica within one month of its filing."

This stance was the precursor to the Instructions of the Governor General of 7th August 1997. Thus the Commission was informed of the disquiet which the Government entertained. The Commission was also aware of

the Governor General's Instructions. The validity of those Instructions was argued before it. Again, when the six-month period as per the Governor General's Instructions approached its termination, the Commission became quite active in writing about the plaintiff's case [17 and 18 *supra*].

The hoped for catalytic effect of the note of 20th September 1996 and the Governor General's Instructions in expediting the hearing of petitions of Jamaican nationals did not materialize. *En passant*, the Commission **did** hold a hearing as to the validity of the Governor General's Instructions within approximately three months of the publication of those Instructions.

The claim based on "legitimate expectation" will now be examined. Let it be said at the outset that the fact that Jamaica is a signatory to the American Convention on Human Rights does not confer any individual rights to the plaintiff vis-à-vis that Convention. This is because this Convention has not been incorporated into the municipal law of Jamaica. The Governor General's Instructions were published on the 7th August 1997. The plaintiff's petition was filed on the 2nd October 1997. Therefore at the time when the petition was filed the plaintiff and the lawyers well knew of the time constraint imposed by those Instructions. It is therefore incomprehensible to understand how in these circumstances there could be any assertion that after the six-month period prescribed in

the Instructions there would be a further waiting period pending the decision of the Commission. On this view there is no merit in this claim. The plaintiff has not said when he first possessed the "reasonable belief and legitimate expectation" of which he speaks. Let it be postulated that it was before the publication of the Instructions. Then the question arises as to whether such legitimate expectation cannot be disturbed. The answer to this question is given in the opinion of the Privy Council in *Trevor Nathaniel Pennerman Fisher v Minister of Public Safety and Immigration et al* (Privy Council Appeal No. 35 of 1998). On page 9 of the Advance

Copy the Board said:

"But legitimate expectations do not create binding rules of law. As Mason C. J. made clear at page 291 a decision-maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that."

[This passage is in reference to the judgment of Mason C. J. in the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] 183 C. L. R. 273]. Accordingly, the expectation of the plaintiff could not survive the Instructions of 7th August 1997.

The plaintiff seeks an order rescinding the decision of the Governor General to promulgate his Instructions of the 7th August 1997. It is said that these Instructions "are in direct conflict with the rules and

procedures contained in the Convention and Regulations". The short answer to this claim is that the plaintiff seems to have overlooked the critical factor that there has been no incorporation of the Convention or Regulations into our municipal law. In the alternative it was argued that the issuance of the Instructions was unreasonable as "having no relationship to the time frame" stated in Pratt. This was in reference to the comment made by the Board in Pratt's case on p. 788 that "it should be possible for the committee [i.e. Human Rights bodies] to dispose of them with reasonable dispatch and at most within eighteen months". Firstly, the Board was not saying that a state must wait for eighteen months. Secondly, the eighteen months was no more than an outside estimate of a permissible waiting period. Thirdly, the Board in suggesting an eighteen-month period cannot be taken as saying that a decision-maker, a sovereign nation, cannot with justification reduce this period of eighteen months. Fourthly, in the instant case, the time limit prescribed by the Instructions is not inharmonious with the time frame of the Regulations. Article 44.3 of the Regulations states:

Once the investigatory stage has been completed, the case shall be brought for consideration before the Commission, which shall prepare its decision in a period of 180 days.

In the Instructions the six months begins with the response of the Government. Generally speaking, this would be the time when the

investigatory stage would have been completed. It is from that time that the 180 days would start. There is little difference between 6 months and 180 days. Finally, the Government cannot be faulted in seeking to require expedition so that the law of the land is carried out. It cannot be said that there is any unreasonableness in the publication of the Governor General's Instructions.

The plaintiff seeks a declaration that:

The plaintiff's right not to be subjected to "torture and inhuman or degrading punishment or treatment" is being or is likely to be violated.

This relief is founded on Section 17[1] of our Constitution which states that:

No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

The plaintiff contends that since his confinement he has had to suffer conditions, which amount to "inhuman or degrading treatment". This claim appears to be distinct from the issue of whether the law should take its course resulting in the carrying out of the sentence of the court. The arguments addressed to the court did not seek to arrive at this conclusion. The pleadings did not suggest that there was any nexus

between the two issues. The supplementary affidavit of the plaintiff which grounds his case for the declaration sought does not make the link.

The prison conditions about which the plaintiff complains are centered on that which obtains for him at the St. Catherine Adult Correctional Centre [St. Catherine District Prison]. The main areas of complaint are:

- a) His cell is 9 feet by 6 feet in which there is no electric light and only a narrow slit to allow the entry of natural light thus precluding any reading by him.
- b) He is only allowed out of his cell for 38 minutes - each time at very short intervals for his "tea", lunch and dinner and to empty his slop pail, wash his clothes and get water for his personal use.
- c) He is denied exercise.
- d) His cell is infested with cockroaches, flies and maggots. This cell carries a foul odour.
- e) He is in poor health and suffers from a sinus condition. Despite this, he has only been able to see a doctor twice in 6 years. He has never had a medical examination and "my requests to see the prison doctor when he attends once or twice a month are generally denied".
- f) He was forced to undergo a blood test in the prison surgery.
- g) He was beaten by warders on 5th March 1997 when some prisoners attempted to escape and those warders "burnt and destroyed all my belongings including legal documents, letters, clothes, shoes, mattress, toilet paper, tooth paste and even my artwork".

- h) His family was not informed by prison authorities that he was to be executed and only learned of it by means of a message sent by a fellow death row inmate.

These factors have resulted in the plaintiff being deeply distressed by the experience and has had frequent nightmares about it since then.

Zepheniah Page is an overseer at the St. Catherine Adult Correctional Centre. He agrees with the dimensions of the cell as stated by the plaintiff and added that it was ten feet high. He said:

"There are very bright fluorescent lamps in the ceiling all along the corridor. The light from these lamps reflect (*sic*) inside all the cells. These lights are never turned off. Each cell has a socket on the outside of the wall. Some inmates place wires inside the sockets to light bulbs inside their cells and others attach wires to hot plates which they use for cooking."

In particular, it is his evidence that the plaintiff had a light bulb in his cell. Page asserts that there is no rigid enforcement of any rules regarding the time that an inmate on death row spends on activities outside his cell. Football is played on a regular basis in an open area. After breakfast inmates are allowed to exercise in the open area and to do their toilet. An inmate is allowed to see the doctor, attend at the administrative office, and see his Attorney-at-law, religious advisor or any other visitor. The time spent on these activities, says Page, varies according to the circumstances.

Page categorically denied that the plaintiff's cell was infested with maggots and flies. Each inmate cleans his cell daily under the supervision of a warder. This entails wiping the floor clean with a sponge or cloth. A disinfectant is used. When the inmate empties his slop pail, he washes the pail using a disinfectant. The cells are sprayed periodically. Page admits "there are a few cockroaches which may be seen in the cells but no more than is found generally in any household in Jamaica". It is denied that there is a foul odour in the cells.

Page further denied that the plaintiff was beaten and that articles belonging to him were burnt. As regards the plaintiff's complaint that his family was not informed of the date of his execution, Page exhibited copies of three telegrams sent by the plaintiff. One was to a Clive Thomas, another to Anneata Clarke and the third to the Jamaica Council for Human Rights.

Melbourne Jones is the Superintendent of the St. Catherine District Prison. He supported the evidence of Page. He spoke of a procedure for dealing with complaints from inmates. He said:

"There is a senior officer at the Centre [prison] who communicates with prisoners on a daily basis to take note of any complaints which they may have and to assess the general condition of the cells and working areas. He reports to me daily. This process is carried out

not only to ensure that prisoners are properly taken care of but to ensure that warders are performing their duties."

The Superintendent has never received any complaints from the plaintiff.

He also spoke of a visiting committee. He said:

"Since my return to the Centre [prison] in 1997 the Visiting Committee was reactivated. This committee comprises prominent citizens in the parish of St. Catherine and is chaired by Sonia Ebanks who is a Sociologist. This committee visits the Centre whenever they deem it fit. They observe the general condition of the centre and take prisoners' complaints. They have access to all records of prisoners including their medical records. I have never received any adverse reports from the committee."

Simeon Bromfield is a Public Health Inspector. His last inspections of the St. Catherine Adult Correctional Centre were carried out on the 13th and 21st October 1998. He visited the plaintiff's cell. He saw no cockroaches, flies or maggots inside that cell. He said there was no unpleasant odour in the cell occupied by the plaintiff. As regards lighting to the plaintiff's cell, he had this to say:

"I visited Neville Lewis' cell and I saw a wire connected to the socket above his cell door. This wire led into his cell and at the end of the wire was a light bulb. I spoke with Neville Lewis. He told me he occupied that cell since he was sentenced. He also told me that he used the light bulb to read and do craft work inside his cell but at that time the bulb was blown."

Dr. Raymoth Notice, a medical doctor, is employed by the Correctional Service and is assigned to the St. Catherine Adult Correctional Centre. He

outlined the medical services provided to inmates and in particular to the plaintiff. He said:

4. At the St. Catherine Adult Correctional Centre (hereinafter called "the Centre") there is a general health delivery area (surgery) and a hospital. These medical facilities are staffed by myself a general practitioner, a Psychiatrist, a dentist, a Registered Nurse, and approximately 20 medical orderlies. The medical orderlies are specially trained to deal with emergency cases and to assist in the delivery of general medical care. They work under the supervision of the doctors. There is also a medical social worker assigned to the Centre. The medical team at the Centre works in close collaboration with the Spanish Town Public General Hospital and the St. Jago Park Health Centre which are located near to the Centre. Specialist treatment for inmates is obtained from the University Hospital and the Kingston Public Hospital.
5. I attend the medical facilities at the Centre on a daily basis. The Psychiatrist and the dentist attend the Centre three times each week. I am on a 24 hour call at the Centre.
6. The St. Catherine Health Department and the Epidemiology Unit of the Ministry of Health play a vital role in addressing public health issues, such as sanitation, at the Centre.
9. All death row inmates have access to the health care service at the Centre. They are allowed to see me and I attend to their medical needs whenever they make a request and if no request is made I send for them to ensure that their medical needs are met. The inmates on death row are always given priority.
10. As regards paragraph 11 of Neville Lewis' Affidavit it is untrue that he was not given adequate health care. His medical records show that he was seen by me as follows:-

<u>DATE</u>	<u>COMPLAINT</u>
February 10, 1995	Arthritis of the right knee secondary to previous injury three (3) years earlier. Gastritis.
March 6, 1996	Requesting special diet (an inmate may request a special diet to supplement his regular diet for

	various reasons including his inability to tolerate regular meals or the lack of food items usually supplied by relatives]
August 4, 1996	Requesting special diet.
June 20, 1997	Gastritis
July 14, 1997	Allergic dermatitis
August 28, 1998	Sinusitis

I visited him twice in August, 1998 when he was at the condemned cell. There are numerous other times when Neville Lewis was treated for simple ailments by the medical orderlies. On all the occasions I saw him he was given medication or the requested diet supplied. He is healthy and appears physically fit. Like all other inmates he has always been treated with respect and the greatest human dignity.

11. In 1996 I took the decision to assess the medical status of all inmates at the Centre. Assessment was done for Hypertension, Diabetes, Colour Blindness, Syphilis and HIV; weight and height were also measured. I was assisted by the medical orderlies, a team from the Epidemiology Unit in the Ministry of Health, warders and inmates who measured height and weight. The assessment was done with the consent of all inmates. No inmate was forced to undergo a blood test or any test at all.

In reply to the affidavit of Dr. Notice, which is the only affidavit to which the plaintiff replied, he challenged the veracity of the doctor.

All the evidence pertaining to the conditions of confinement of the plaintiff was by way of affidavits. The court did not have the benefit of cross-examination. Nor was there the opportunity of any assessment based on a view of the demeanour of the persons who presented affidavits. It is clear that the plaintiff cannot be believed as regards two of his complaints.

Firstly, there was a sufficiency of lighting in his cell. How else would he have been able to produce the artwork which he says was burnt? It will be recalled that Bromfield said that the plaintiff told him that he used the light bulb to read and do craft work. The exhibited copies of the telegram sent by the plaintiff through the authorities at the institution about his imminent execution demonstrate that he was not truthful when he swore that there was no direct communication of his plight to his family. The plaintiff would seek to give the impression that he was denied the facility to communicate outside of the walls of his confinement. He has failed to so do. In view of these findings, the credibility of the plaintiff is brought into question. Can he be believed in anything he says? It is appreciated that the plaintiff faced with his predicament will be inclined to overstate his case. It is therefore necessary to subject the evidence which has been adduced in refutation of his assertions to the closest scrutiny. This involves not only an evaluation of the global picture painted by the evidence presented by the defendants but an examination of the constituent parts of that picture. The procedures and the facilities provided by the St. Catherine Adult Correctional Centre, if true, are all against the despicable conditions described by the plaintiff. The regime to ensure cleanliness has not been controverted by the plaintiff. That being so, the presence of maggots and flies cannot be accepted. That there is a visiting committee has not been challenged. That there is a complaints procedure stands uncontradicted.

That there is the provision of opportunity for physical exercise has not been rebutted. As regards the medical facilities and the staffing thereof, the plaintiff takes exception only that there was no Registered Nurse and that the orderlies only act as ushers. Dr. Notice is a professional. It is to be expected, unless there is reason to the contrary, that he speaks with the tongue of integrity. In this case there is nothing to the contrary. The only conclusion must be that there is a palpable lack of sincerity on the part of the plaintiff in his fruitless endeavour to establish that he was a victim of "inhuman and degrading treatment".

For the reasons set out herein, I would order that the action be dismissed.

HARRISON J

Introduction

The plaintiff was arrested on or about the 11th November, 1992 for the murder of Victor Higgs on or about the 18th October 1992 and was held in custody awaiting trial. He was tried and convicted for the offence of capital murder and was sentenced to death on the 14th October 1994. His appeal against conviction was dismissed by the Court of Appeal and the Judicial Committee of the Privy Council but there has been a stay of his execution. Following the dismissal of his appeal to the Privy Council, the Plaintiff petitioned the United Nations Human Rights Committee on or about the 24th May 1996 alleging violations of his rights. He has also petitioned the Inter-American Commission on Human Rights and in the meantime, he has filed this action in the Constitutional Court against the Attorney General for Jamaica and the Superintendent of the St. Catherine District Prison.

The Plaintiff's Claim and Defence

The Statement of Claim and affidavits in support have set out the allegations upon which he relies, and he is seeking the following reliefs:

- "1. An order rescinding the decision of the Governor General to approve and promulgate instructions for dealing with applications to the Inter-American Commission on Human Rights ("The Commission") and the United Nations Human Rights Committee by or on behalf of prisoners under sentence of death.
2. Further or alternatively a declaration that the said instructions dated August 6, 1997 are unlawful, void and of no effect as contravening sections 13, 14, 17 and/or 24 of the said Constitution.
3. An order rescinding the death warrant issued on/or about the 14th instant for the plaintiff's execution on the 27th instant.
4. A declaration that the issue of the said death warrant while the plaintiff's application is pending before the Inter-American Commission on Human Rights for violation of the plaintiff's rights under the American Convention on Human Rights, the plaintiff's equality before the law and the protection of the law guaranteed by sections 13, 14, 17 and/or 24 of the said Constitution is null and void.

5. An order staying the execution of the plaintiff.
6. A declaration that the plaintiff's right not to be subjected to torture and inhuman or degrading punishment or treatment is being or is likely to be violated.
7. An interim order staying the execution of the sentence of death on the plaintiff or alternatively, a conservatory order directing the defendants not to carry out the execution of the plaintiff pending the determination of the plaintiff's application to the Inter-American Commission on Human Rights and/or pending the hearing and determination of this suit or any resultant appeals therefrom.
8. All such orders, writs and directions as may be necessary or appropriate to secure redress by the plaintiff for the contravention of his fundamental rights and freedoms which are guaranteed to the plaintiff by the Constitution of Jamaica."

The Defence has denied the allegations and affidavits in support were also filed.

The issues

Two major issues were argued before this Court. They can be categorised as follows:

1. The legitimate expectation of the plaintiff and,
2. Conditions and treatment in prison prior to the plaintiff's trial and after his conviction.

LEGITIMATE EXPECTATION

Its concept and development

At common law the courts were concerned with the concept of basic fairness but a further refinement and extension of that philosophy helped to open the door to the development of the concept of legitimate expectation. In **Bramwell v A.G of Guyana et al** Civil Appeal No. 84 of 1991, Bishop C.J stated that the doctrine "lends itself readily also for application to written constitutional provisions which embody the fundamental and organic law." In **A. G of Trinidad and Tobago v K C Confectionery Ltd** (1985) 34 W I R 387 Persaud

J. A expressed himself as follows:

"The word 'legitimate' is not confined to mean 'legal' but means 'reasonable'. In *Attorney General of Hong Kong v Ng. Yuen Shiu* [1983] 2 All E. R 346 at 350, Lord Fraser opined that the words 'legitimate expectation' were capable of including expectations which go beyond enforceable legal rights, provided they have a reasonable basis...."

In *Attorney General of Hong Kong v Ng. Yuen Shiu* (supra) the Privy Council conceded also that legitimate expectations may be based on some statement or undertaking by, or on behalf of the public authority which has the duty of making the decision. That case also held that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

The general principle derived from the cases show that the courts as a matter of policy proceed on the assumption that public policy requires that undertakings given by the State ought to be honoured. They may be changed however, but only after giving the public reasonable notice. (See **Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh** [1995] 183 C.L.R 273; **Trevor Nathaniel Fisher v The Minister of Public Safety and Immigration and Others** Privy Council Appeal Appeal No. 35 of 1998 delivered on the 5th October 1998.)

A lot depends on the circumstances of each case. The authorities clearly indicate that the decision-maker may act inconsistently with regard to the legitimate expectation. In the Australian case of **Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh** (supra) Mason C.J said:

"The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the

back door.....

But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.....”

The Chronology of events

Set out hereunder is the chronology of material facts:

1. The plaintiff was arrested on or about the 11th November, 1992 for the murder of Victor Higgs on or about the 18th October 1992 and was held in custody awaiting trial until October 1994 when he was tried and convicted for the offence of capital murder along with one Peter Blaine and sentenced to death on the 14th day of October, 1994.
2. His appeal against conviction was dismissed by the Court of Appeal on the 31st July 1995 and on the 2nd May 1996 his petition for special leave to appeal against conviction was dismissed by the Judicial Committee of the Privy Council.
3. The plaintiff petitioned the United Nations Human Rights Committee (The UNHRC) on or about the 24th May, 1996 alleging violations of Articles 9 and 10 of the International Covenant on Civil and Political Rights which Articles, inter alia, entitle an arrested person to trial within a reasonable time or to release.
4. On or about the 17th July, 1997 the UNHRC found that there were violations in respect of the above-mentioned articles and held that the plaintiff was entitled to an effective remedy, including compensation.
5. On the 7th August 1997 the Governor General in Privy Council published in the Jamaica Gazette Instructions with respect to prisoners under sentence of death who apply to International Human Rights Bodies alleging violation of their human rights.
6. On the 12th September, 1997 the plaintiff's solicitors in London wrote to the Governor General advising that the plaintiff would be applying to the Inter-American Commission

on Human Rights ("The IACHR") the second international human rights body.

7. On the 12th September 1997, a warrant was issued for the execution of the plaintiff on the 25th September, 1997. The execution was subsequently stayed.
8. On the 2nd October, 1997 the plaintiff petitioned the IACHR .
9. On the 31st October, 1997 the IACHR advised the Government of Jamaica of the plaintiff's petition and requested a response.
10. On or about the 20th November 1997 the IACHR requested the Government of Jamaica to stay the execution of the plaintiff until it had the opportunity to investigate the claims raised in the case.
11. On the 2nd December, 1997 the Government responded.
12. On the 5th January, 1998 the plaintiff submitted to the IACHR comments on the Government's response.
13. On the 10th February, 1998 the Government submitted its reply to the plaintiff's comments.
14. On the 25th and 29th May, 1998 the plaintiff's solicitors in London wrote the Governor General's Secretary requesting an assurance that steps would not be taken to execute the plaintiff before the final determination of his petition before the IACHR.
15. On the 2nd June 1998 the Governor General's Secretary replied that under the Instructions published by the Governor General the deadline for the IACHR to finally determine the plaintiff's petition would be 10th August, 1998.
16. On the 29th July 1998 the IACHR advised the plaintiff's Solicitors in London that the plaintiff's case would be heard in the Regular Session held from September 28, to October 16, 1998.
17. On the 10th August, 1998 the plaintiff's solicitors wrote to the Secretary to the Governor

General requesting an undertaking that the Governor General in Privy Council would not perform any of its functions under the Constitution until the IACHR had the opportunity to consider the plaintiff's petition.

18. On the 10th August, 1998 the Governor General's Secretary replied that he was unable to give such an undertaking having regard to the Governor General's Instructions.
19. On the 14th August the death warrant was read to the plaintiff that he would be executed on the 27th August, 1998.

The Pleadings and submissions

The plaintiff alleges inter alia, in his statement of claim:

.....

11. The Jamaican Government signed and ratified the American Convention on Human Rights ("the Convention") on or about the 19th July, 1978 and pursuant to Article 1 of the Convention the said Government is under an obligation to ensure to the plaintiff the free and full exercise of his rights under the Convention.

12. By Article 44 of the Convention the plaintiff has the right to lodge a petition with the Commission containing denunciations or complaints of violation of his rights and freedoms under the Convention.

...."

At paragraph 14 of his affidavit in support sworn to on the 20th August 1998 he deposes:

" 14. All the time, expecting that Jamaica would respect its international obligations and commitments, I reasonably believed and legitimately expected that the Government of Jamaica would abide by the request of the Commission not to carry out my execution until it had made its final decision on my case. I also reasonably believed and expected that the Jamaican Privy Council and/or the Governor General would not proceed to issue a warrant for my execution until after the Commission had an opportunity to

make a final decision on my case, and would take into account any decisions or recommendations in my favour in deciding whether to issue a warrant for my execution.”

In his further affidavit sworn to on the 21st August, 1998 he states as follows:

“1. My expectation referred to in paragraph 14 of my previous affidavit herein, that Jamaica would respect its international obligations and commitments and would not execute me while my petition was being considered by the Commission, was based on my knowledge and understanding that the Jamaican Government had previously always acceded to the Commission’s requests for stays of execution while petitions were pending before it as was also true with the United Nations Human Rights Committee before Jamaica denounced the first optional protocol.”

Mr. Dennis Daly Q. C for the plaintiff, made submissions before this Court and prayed in aid the undermentioned provisions of the American Convention on Human Rights :

Article 1 - Obligations to Respect Rights

“1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.”

Article 4 - Right to Life

“1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception, no one shall be arbitrarily deprived of his life.”

Article 24 - Right to Equal Protection

“ All persons are equal before the law. Consequently, they are entitled without discrimination to equal protection of the law.”

Article 29 - Restrictions regarding interpretation

"No provision of this Convention shall be interpreted as :

- a) permitting any State party, group or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided herein..."

Article 38 - Deadline for the Presentation of Petitions

1. The Commission shall refrain from taking up those petitions that are lodged after the six-month period following the date on which the party whose rights have allegedly been violated has been notified of the final ruling in cases where the remedies under domestic law have been exhausted.

2. In the circumstances set forth in Article 34 (2) of these Regulations, the deadline for presentation of a petition to the Commission shall be within a reasonable period of time, in the Commission's judgment, as from the date on which the alleged violation of rights has occurred, considering the circumstances of each specific case.

Article 34 (2) states:

" 2. In serious or urgent cases or when it is believed that the life, personal integrity or health of a person is in imminent danger, the Commission shall request the promptest reply from the Government, using for this purpose the means it considers expeditious."

The undermentioned provisions of the Constitution of Jamaica were also prayed in aid by Mr. Daly:

Fundamental rights and freedoms of the individual

"13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to

each and all of the following, namely -

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

....”

Protection of right to life

“ 14 - (1) No person shall intentionally be deprived of his life save in execution of the sentence of the court in respect of a criminal offence of which he has been convicted.

.....”

Mr. Daly Q.C submitted that having regard to the time limits allowed by **Pratt and Morgan v The Attorney General for Jamaica** [1994] 2 A. C 1 the plaintiff had and was entitled to have a reasonable belief and legitimate expectation that he would be allowed to pursue his Petition before the Inter-American Commission on Human Rights within the time constraint required by the decision of Pratt & Morgan (supra) and that the Government of Jamaica would not seek to rigidly enforce the Jamaica Privy Council instructions while the time allowed by Pratt & Morgan was not in danger of being exceeded. In that case Lord Griffiths said at page 35:

“...It therefore appears to their Lordships that provided there is in the future no unacceptable delay in the domestic proceedings complaints to the U.N.H.R.C from Jamaica should be infrequent and when they do occur it should be possible for the committee to dispose of them within reasonable dispatch and at most 18 months.” (Emphasis supplied)

Mr Daly also referred to and relied upon the decision of **Tavita v Minister of Immigration** 2 NZLR 257. That case was decided by the New Zealand Court of Appeal and it held inter alia:

“.....since New Zealand’s accession to the Optional Protocol, the United Nations Human Rights Committee is in a sense part of this country’s judicial structure, in that individuals subject to

New Zealand jurisdiction have direct rights of recourse to it. A failure to give effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could also extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them....”

He further submitted that should the Court find that the plaintiff was not entitled to rely upon legitimate expectation, the issuing of and reliance upon the instructions in the circumstances of this case were un-reasonable as it has no relationship to the time frame stated in Pratt & Morgan (supra) nor any relationship with the Rules and Procedures of the Inter-American Human Rights Commission. He submitted that in this context the issuing of the warrant for the execution of the plaintiff was in breach of the plaintiff's constitutional rights under sections 14, 17 and 20 respectively of the Constitution of Jamaica. Section 14 deals with the protection of the right to life; section 17- the protection from inhuman treatment and section 20 - securing protection of the law.

Mr Daly finally submitted that the Court should accept and follow the dissenting opinion of their Lordships in the Judicial Committee of the Privy Council in the case of **Trevor Nathaniel Fisher v The Minister of Public Safety and Immigration and Others** (supra) which state inter alia:

“...The issue which lies at the heart of this constitutional motion is not an easy one to resolve. It requires a balance to be struck between two powerful and competing interests. On the one hand there are the interests of the Government, whose responsibility it is to uphold the law and to enforce the death penalty. On the other there are the interests of the condemned man. He is entitled to have his sentence carried out without any unreasonable delay. The Government for its part also wishes to avoid any such delay. To this extent the competing interests coincide. But the condemned man has one other overriding interest. He wishes and is entitled to obtain the views on his case of the Inter-American Commission on Human Rights (the I.A.C.H.R.)

He also wishes to have those views considered by the Advisory Committee on the Prerogative of Mercy and by the Governor-General before a final decision is taken as to whether or not he should be executed. But the Government is not willing to wait any longer. So the issue is whether the condemned man has a right under the Constitution to insist that his execution should be stayed to give effect to that request.....”

At p. 21 their Lordships concluded:

“.....it would, in our opinion, be a misuse of the decision in *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 A.C 1 for the Government to insist upon Fisher’s execution, within the five-year period, while he was still seeking the views of the I. A. C. H. R on his case.....”

Mr. Campbell submitted on the other hand, that even if the instructions issued by the Governor General conflicted with any time frame pursuant to the Convention , that would not give the plaintiff any entitlement to launch his claim for legitimate expectation since the Convention was not incorporated into domestic law. The State he said, could not be estopped from changing its administrative course. He argued that at the very highest the person expecting this right must be given notice of change. He submitted that the conduct of the Government of Jamaica prior to the issuance of the instructions were such as to indicate that they were anxious to follow the dictates of *Pratt & Morgan* (supra) and in so doing would seem to circumscribe the period within which the views of International Bodies would be entertained. Furthermore, he submitted that a sovereign nation has the right to take such steps as it considers expedient to safeguard the due administration of justice.

On the question of notice, Mr. Campbell argued that the plaintiff’s solicitors were aware from the 2nd October 1997 of the Instructions. The letter dated 26th May 1998 Exhibit GM 10 from S. J Berwin & Co English Solicitors for and on behalf of the plaintiff states inter alia:

“ We act for Neville Lewis, a prisoner on death row at St. Catherine’s Prison, Jamaica. We are aware of the Instructions approved by His Excellency, the Governor General of Jamaica, on 6 August 1997 (“the Instructions”). We set out below the

progress in Mr. Lewis' application to the Inter-American Commission of Human Rights ("the Commission") and notwithstanding the Instructions, hereby request an undertaking that no steps will be taken to carry out Mr. Lewis' sentence while his Petition is pending before the Commission.

.....

We submitted a Petition on Mr. Lewis' behalf to the Commission on 2 October 1997....."

Mr. Campbell also referred to Exhibit GM 11 which is a letter dated 2nd June 1998 from the Governor General's Secretary to Ms. Catherine Bailey of S. J Berwin & Co. It states inter alia:

"I am replying to your lettersdated 25th and 29th May, 1998 concerning NEVILLE LEWIS, and confirm our telephone conversation in which I said that as soon as I had confirmed in our records that Jamaica had made a second response on 10th February, 1998 then I would advise that the deadline would be set at 10th August, 1998.

My records show that a response was made on 10th February 1998 so I will give that confirmation.

There will be no further extension of time."

Mr Campbell argued that there was consultation between the Government of Jamaica and International Bodies regarding the fixing of time limits. This fixing of time limits he said, was in conformity with the decision of Pratt & Morgan (supra). Paragraph 6 of the Supplemental Affidavit of Geoffrey Madden sworn to on the 11th November 1998 states as follows:

" 6. Before the Governor General's instructions were promulgated on the 6th August 1997 there were consultations between the Government of Jamaica, the United Nations Human Rights Committee and the Inter-American Commission on Human Rights concerning the fixing of time limits for the

resolution of applications by the said bodies.”

He also relied on the further Supplemental Affidavit of Geoffrey Madden sworn to on the 27th November 1998. Paragraph 3 of that affidavit states as follows:

“3. I have been informed by Roland Pryce of the Permanent Mission of Jamaica to the Organization of American States and verily believe that on the 9th day of November 1998, following the 100th session of the Inter-American Commission on Human Rights which was held from September 28, 1998 to October 16, 1998, the Government of Jamaica wrote to the Commission requesting their report (views) in Neville Lewis’ case; I was further informed by Roland Pryce that notwithstanding the Government’s request the Commission has not transmitted its views to the Government of Jamaica.....”

Finally, Mr. Campbell submitted that the evidence adduced by the defendants demonstrate that the plaintiff was provided with adequate notice of the intention of the Government of Jamaica to act expeditiously within the terms of the instructions. He submitted that even if there was a legitimate expectation it could not survive Mr. Madden’s letter of the 2nd June 1998 (referred to above) and the instructions gazetted the 7th August 1997. He relied upon the dicta of Lord Lloyd of Berwick who delivered the majority judgment in the case of **Trevor Nathaniel Fisher v The Minister of Public Safety and Immigration and Others** (supra) where he said inter alia, at page 9:

“... However Mr. Davies relied on the decision of the High Court of Australia in **Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh** [1995] 183 C. L. R 273. It was held in that case that the ratification of the united Nations Convention on the Rights of the Child by the Commonwealth Executive in 1990 gave rise to a legitimate expectation that the Minister would act in conformity with the Convention, and treat the best interests of the applicant’s children as a primary consideration in deciding whether or not he should be deported. But legitimate expectations do not create binding rules of law. As Mason C.J made clear at page 291, a decision-maker can act inconsistently with a legitimate expectation which he has created,

provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that. Even if therefore the appellant had a legitimate expectation that he would not be executed while his petition was pending his expectation could not survive the Government's letters of 2nd and 30th January 1998 in which it informed the appellant's solicitors in unequivocal terms that it would wait no longer than 15th February 1998. (Emphasis supplied.)

It is also a principle in public law that the provisions of an international treaty to which the State is a party do not form part of domestic law unless those provisions have been validly incorporated into its municipal law by statute. Counsel for the plaintiff in the instant case has agreed that the American Convention on Human Rights has not been incorporated into domestic law. But, the fact that the Convention has not been incorporated into municipal law does not mean that its ratification holds no significance for the State.

The critical question therefore, to be resolved in this matter, is whether Jamaica's ratification of the Convention can give rise to a legitimate expectation that the State will exercise its discretion in conformity with the terms of the Convention. Should the Government of Jamaica in light of its ratification of the Convention await the views of the IACHR?

Mr. Daly submitted that the Government of Jamaica should not seek to rigidly enforce the Jamaica Privy Council instructions while the time allowed by Pratt and Morgan (*supra*) was not in danger of being exceeded. Their Lordships in the majority judgment of Fisher's case were of the view however that a decision-maker who proposes to make a decision inconsistent with a legitimate expectation, should give notice of any changes to those persons affected. There is authority therefore, for the State to act inconsistent with one's legitimate expectation.

The question then, is whether reasonable notice was given to the plaintiff before the 14th day of August 1998, that is, the date when the warrant of execution was read to the plaintiff and, if not, whether the law provides the plaintiff with a remedy by way of constitutional redress or otherwise? Lord Lloyd of Berwick stated in Fisher (*supra*) that "what is a reasonable time in the circumstances of a particular case is a question of fact. Mr Daley

submitted that 18 months as recommended by Pratt and Morgan (*supra*) commencing from the date of the Petition to the Inter American Commission on Human Rights, would be reasonable.

On the question of reasonableness of time let me turn to paragraphs 7 – 10 inclusive of the instructions to see if there has been conformity with the provisions as they relate to the petition to the IACHR. Paragraph 7 sets out a time frame of 3 weeks within which proof must be filed by the plaintiff that he has filed his petition with the IACHR. On the 2nd October 1997 he petitioned the IACHR and on the 31st October 1997 the IACHR advised the Government of the plaintiff's petition and requested a response.

Paragraph 9 of the instructions provide for a response by the Government within one month of the request from the IACHR. On the 2nd December 1997, the Government responded. On the 5th January 1998, the plaintiff submitted comments on the Government's response and on the 10th February, 1998, the Government submitted its reply to the plaintiff's comments.

Paragraph 10 reads as follows:

10. Where within the period of six months after the response to the second International Human Rights body by the Government of Jamaica-

(a) a communication has been received by the Government as to the outcome of the prisoner's application the Government of Jamaica shall advise the Clerk to the Privy Council of the outcome of the application. The matter shall then be considered by the Privy Council who shall advise the Governor General. Unless the prerogative of mercy is exercised in favour of the prisoner, the execution will not be further postponed;

(b) no such communication has been received, the execution will not be further postponed."

It is also useful to examine the provisions relating to the timetable set out by the IACHR in dealing with petitions. Its Regulations state *inter alia*:

"1. The Commission shall meet for a period not to exceed a total of eight

weeks a year, divided into however many regular meetings the Commission may decide, without prejudice to the fact that it may convoke special sessions at the decision of its Chairman, or at the request of an absolute majority of its members”.

The facts of the instant case reveal that the plaintiff had petitioned the IACHR on the 2nd October 1997. The latest information regarding this petition is set out in the supplemental affidavit of Geoffrey Madden, Secretary of the Governor General, sworn to on the 27th November 1998. He has deposed that the Government of Jamaica has requested the IACHR to submit its report (views) on the plaintiff's petition which should have been dealt with during the session September 28, 1998 to October 16, 1998. Notwithstanding the Government's request, the IACHR has not submitted its views and Mr. Daley was unable to say what transpired at that session. It is therefore correct to say at this point in time, that it is not known when the report will be submitted. Ironically, Article 34(2) of the Convention provide for the “the promptest reply from Government in urgent and serious cases” but there seems to be no reciprocity in responses on petitions to the IACHR.

The facts further reveal that the plaintiff's petition has been under consideration by the IACHR for some ten months before the warrant for execution was read a second time. Regulation 1 (supra) sets no time limit for the handing down of views or reports of the IACHR. Could this mean that that body can deliberate at its own pace thereby disregarding the Sovereign State's timetable which the Commission is quite aware of? The plaintiff through his solicitors in London have been aware of the Governor General's instructions since they were issued in August of 1997. They were also aware of the State's intention having been advised by letter dated the 2nd June 1998 that a deadline for a response by the IACHR was set for the 10th August 1998. But, even before the instructions were published, there were consultations between the Government of Jamaica and the International Human Rights Bodies (including the IACHR) concerning the fixing of time limits for the resolution of applications before those bodies.

It is my considered view therefore, and I so hold, that the Governor General in Privy Council acted legally and quite properly within the law to have issued the instructions published on the 7th August 1997. I further hold that the plaintiff has been provided with adequate notice of the intention of the Government of Jamaica to act within the terms of the instructions and even if there was legitimate expectation on the part of the plaintiff it

could not survive the aforesaid instructions and the letter of the 2nd June 1998 from Mr. Madden, Secretary to the Governor General. I further hold that the instructions are not unlawful or void as they do not contravene sections 13, 14, 17 and/or 24 of the Constitution of Jamaica. Neither, is the issuing of the death warrant whilst the plaintiff's application is pending before the IACHR null and void.

In the circumstances, the order and declarations sought at (i) (ii) and (iv) of the plaintiff's statement of claim are refused.

PRISON CONDITIONS AND TREATMENT

I turn now to consider the treatment of the plaintiff in prison and the conditions under which he was kept.

Submissions

Mr. Daly submitted that the treatment of the plaintiff both before and after conviction constitute inhuman and degrading treatment and/or punishment. He further submitted that the cumulative effect of conditions and the manner in which the death warrant was issued constitute an infringement of the plaintiff's rights under sections 14, 17 and 20 of the Constitution of Jamaica and this ought to cause the quashing of the death warrant with the substitution of life imprisonment.

Mr. Campbell submitted on the other hand that the evidence in no way meets the standard that is required to constitute a breach of the Constitution. Furthermore, the plaintiff's credibility was seriously shaken and he ought not to be believed.

The Affidavit evidence

I am quite aware of the dicta of Lord Goff in the Privy Council decision of **Thomas Reckley v The Minister of Public Safety and Ors** (NO. 2) 1 A. C 527 where he stressed the importance of raising the issue of prison conditions in the court of first instance where there are allegations of inhuman and degrading treatment and/or punishment. This court is now asked to decide that such conditions should cause the death sentence to be commuted to life imprisonment.

Let me now turn to the affidavit evidence. The plaintiff in his further additional affidavit sworn to on the 29th September 1998 deposes as follows:

"2. When I was first detained on the 11th of November, 1997 I spent seven (7) days in a cell in the Central Police Station lock-up with seven other prisoners. The cell was dark, and infested with roaches and mosquitoes and only one bucket for all prisoners to pass excrement.

3. The cell also only had a single concrete bunk, which was just wide enough for one person to sleep on, the rest of us having to sleep on the floor on cardboard or newspapers if we could get any.

4. After being charged I was moved to a room in St. Catherine District Prison about 15 feet by nine feet which housed about twenty and sometimes as much as twenty-six prisoners and in which I often had to sleep standing up. I spent fourteen months in this room.

5. I also spent about eight to nine months in the General Penitentiary in a small cell with about five other prisoners in similar conditions as those in the cell at the Central lock-up.

6. Since my conviction I have been held on death row in the Gibraltar Cell block of the St. Catherine District Prison and occupy by myself, a cell which measures approximately 9 feet by 6 feet. There is no electric light in my cell and the only means of entry of natural light is through a narrow slit in one of the walls of the cell, so that for most of the time it is too dark to read by. My bed is a concrete bunk on which I had placed a piece of foam rubber given to me by my girl friend.

7. I am locked down daily at 3:30 p:m until 9:00 a:m the next morning. Between 9:00 a:m and 3:30 p:m each day I am allowed out of my cell for a total of 38 minutes which are made up as follows: ten minutes at 9:00 a:m I am given to empty my slop pail, wash my clothes and catch water to take to my cell. Shortly after, I am allowed to collect my tea for breakfast which takes about four minutes. Later I am allowed ten minutes to take a bath. I am also allowed another four minutes to collect my lunch and ten minutes to collect my dinner. These times are frequently reduced or

curtailed by warders as a form of punishment for the most minor infraction, real or imagined.

8. I am not allowed any exercise time out of my cell and am allowed only two to five minutes to see visitors when I have them, depending on the warder on duty.

9. There are no toilet facilities in my cell other than a single slop bucket which I am only allowed out of my cell to empty at 9:00 a:m each day, as a result of which my cell smells foul overnight attracting cockroaches and flies.

10. My cell is generally infested with cockroaches, flies and maggots, the last of which crawl from a sanitation pit about 30 feet from my cell. My cell is sprayed by insect spray about every three months but this is usually done while I am locked in the cell and the insect spray affects my eyes and sinuses, sometimes severely.

11. Although I am in poor health and suffer from a sinus condition I have only been allowed to see the doctor twice in the six years that I have been in custody. I have never had a medical examination and my requests to see the prison doctor when he attends once or twice a month are generally denied.

12. During last year(1997) I was forced to undergo what appears to me to be a blood test in the prison surgery. Against my wishes and despite my protests, two vials of blood were taken from me by a doctor whom I did not know and no one would tell me why my blood was being taken.

13. I am regularly threatened by warders and live in constant fear of being beaten without apparent cause. On the 5th of March, 1997 a group of prisoners made an attempt to escape. Despite the fact that it was obvious that I was not involved in the attempted escape, I was given a severe beating by a group of warders using batons, who also burnt and destroyed all my belongings including legal documents, letters, clothes, shoes, mattress, toilet paper, toothpaste and even my art work.

14. On the 12th September, 1997 a warrant for my execution on the 25th of September, 1997 was read to me and I was removed from death row and taken to the condemned cells which is an isolated area adjacent to the area which houses

the gallows.

15. In the condemned cells I was kept under continual observation as there are four guards present and the three cells one of which I occupied, are positioned in the middle of an open space with one side of the cell having only bars to allow unrestricted observation of their interior.

16. I spent five anxious days in the condemned cells being removed on the 16th of September 1997 during which time I was not allowed to leave the cell except to relieve myself in a nearby area where I could be observed by the guards. While there I could hear the gallows being tested in the adjoining area.

17. My family was not informed by the prison authorities that I was to be executed on the 25th of September 1997 and only learned of it by means of a message sent by a fellow death row inmate.

18. I have been deeply distressed by the experience and have had frequent nightmares about it, since then. Despite my requests I have not been allowed to see the prison doctor about the nervous condition which I have experienced ever since then..."

The defendants filed affidavits in response and they have denied the above allegations. Counsel for the defendants submitted that save and except for the response by the plaintiff to Dr. Notice's affidavit new issues raised in the defendants' responses have not been challenged.

Simeon Bromfield, a Public Health Inspector, has deposed on behalf of the defendants. In his affidavit of the 11th November 1998 he has stated that there is general improvement in the overall status of the St. Catherine District Prison. There are some areas however, which he says will have to be addressed before the institution can be considered to have a satisfactory status. He recommended the following:

1. All sewer lines should be connected to the new sewerage disposal system.
2. Chlorination of effluent leaving the sewerage system.
3. Repairs to defective pipes and fixtures.

4. Replacement of lockers.
5. Arrangement for garbage collection on a more regular basis.
6. Re-painting the canteen roof and providing hot water.
7. Bushing around the gallows and condemned cell areas.

His evidence also revealed the following :

1. The cell which the plaintiff occupies like others, is approximately 10 feet long by 6 feet wide and 10 feet high and has steel bars for ventilation.
2. Natural light is poor at the inner section of the cell, however, there is electric lighting in the corridor outside the cells. There is a female socket on the outside above each cell door. Connections are made by inmates to the socket so they have current for electric lighting and the playing of radios. When he visited the plaintiff's cell he observed that there was connection for lighting in his cell and he was told by the plaintiff that he used the light bulb for reading and doing craft work in his cell.
3. A mattress was in the cell and it was in fairly good condition.
4. No maggots, cockroaches nor flies were seen in the cell occupied by the plaintiff. Neither was there any sign of other insects or rodents.
5. The cell in which he saw the plaintiff was about some 120 feet away from a pit where slop pails are emptied. There was no unpleasant odour in the cell occupied by the plaintiff.

Zepheniah Page is an Overseer at the St. Catherine District Prison and he has deposed as to the general lay-out of cells, the personal needs of prisoners and how they are taken care of, and the general conditions which prevail in that institution. His evidence further reveal the following:

1. There is adequate electric lighting in the corridors of the cells.
2. The ventilation in the cells is very good as air flows freely through the doors into the cells. In addition there is a vent at the back of each cell which is 4 feet by 1 foot

in size.

3. Each prisoner cleans his cell daily and he is supplied with disinfectant.

4. The slop pail used by the prisoner has a cover and is emptied daily. The pail is washed by the prisoner and is also disinfected.

5. The institution has a Hospital and Medical Centre which is staffed by a registered Dentist and two registered Medical Practitioners – one is a general practitioner and the other a psychiatrist. Other members of staff include a registered nurse, a qualified social worker and several medical orderlies. The general practitioner attends at the medical facilities daily and when he is not on duty he is on call. The Dentist attends three days per week and the Psychiatrist attends every week. The plaintiff was seen by the doctor in 1995 and 1998 and no complaints of poor health were received from him.

6. After breakfast the prisoner is allowed to exercise in an open area and then take a bath. He receives lunch later in the day and in the afternoon he is taken again to the open area again for exercise.

7. The cells are not foul smelling, there are no maggots nor flies, however, there are a few cockroaches. The cells are sprayed periodically but this was not done whilst the prisoner was in his cell. In addition the prison facilities are inspected by the Health Authorities.

Melbourne Jones, Superintendent of the St. Catherine Adult Correctional Centre has stated that:

1. He has never received any complaint from the plaintiff concerning any physical abuse or illness or of him being refused permission to see a doctor.

2. Since his return to the Centre in 1997, the Visiting Committee was reactivated. The Committee comprises prominent citizens and is chaired by a sociologist. The members of the Committee visit the institution regularly, observe general conditions and take prisoners' complaints. They have access to all records of prisoners including their medical

records and he has never received any adverse reports from the Committee.

3. The cells and compound are kept fairly clean. There are no cockroaches, maggots and flies in the cells. However, the sanitation pits are generally in poor condition. There has been vast improvements now since the construction of a sewerage disposal system has commenced.

Raymoth Notice, is the Medical Officer assigned to the St. Catherine Adult Correctional Centre. He deposed as to the composition of staff mentioned at 5 (supra) in the affidavit evidence of Page. He deposed further that the medical team at the Centre works in close collaboration with the Spanish Town Public General Hospital and the St. Jago Park Health Centre which are located near the Centre. Specialist treatment for the inmates is obtained from the University Hospital and the Kingston Public Hospital. He attends the Centre on a daily basis and is on a 24 hour call. He then states :

"6. The St. Catherine Health department and the Epidemiology Unit of the Ministry of Health play a vital role in addressing public health issues, such as sanitation, at the Centre.

7. The Pan American Health Organization, the United States Agency for International Development, the Embassy of the Netherlands and "Food for the Poor" contribute to the rehabilitation programme and the promotion of health initiatives of inmates at the Centre.

8. I know Neville Lewis who is an inmate on death row at the Centre....

9. All death row inmates have access to the health care service at the Centre. They are allowed to see me and I attend to their medical needs whenever they make a request and if no request is made I send for them to ensure that their medical needs are met. The inmates on death row are always given priority."

Dr. Notice denied that the plaintiff was not given adequate health care and has set out the dates and nature of his complaints when he visited him. The plaintiff had complained of arthritis of the right knee which was secondary to a previous injury some three years before 1995, gastritis, sinusitis and allergic dermatitis. He requested and was placed on a special

diet. The Doctor finally deposes:

"10....I visited him in August, 1998 when he was in the condemned cell. There were numerous other times when Neville Lewis was treated for simple ailments by the medical orderlies. On all the occasions I saw him he was given medication or the requested diet supplied. He is healthy and appears physically fit. Like all other inmates he has always been treated with respect and the greatest human dignity.

11. In 1996 I took the decision to assess the medical status of all inmates at the Centre. Assessment was done for Hypertension, Diabetes, Colour Blindness, Syphilis and H.I.V; weight and height were also measured. I was assisted by the medical orderlies, a team from the Epidemiology Unit in the Ministry of Health, warders and inmates who measured height and weight. The assessment was done with the consent of all inmates. No inmate was forced to undergo a blood test or any test at all."

In response to the affidavit evidence of Dr. Notice the plaintiff has stated inter alia, in a further affidavit sworn to on the 3rd December 1998:

"1. I deny that I have seen Dr. Notice six(6) times as he alleges. Although I have requested to see the doctor in excess of ten(10) times for my sinusitis. I have only seen the doctor twice for this complaint.

2. It is correct and I now recall that Dr. Notice has seen me on two other occasions when he placed me on a special diet of crackers, milk powder and sugar for severe stomach complaints.

3 One of the occasions listed by Dr. Notice as having seen me was after my return from the condemned cell.

4.The medical orderlies referred to by Dr. Notice cannot treat complaints of any sort and do not dispense medication. They are inmates themselves, and their main function, as I understand them, is to keep the surgery clean and act as ushers. They have never treated me for any ailment.

5. Dr. Notice was not present when blood was taken from me. I was not requested to give blood and when I attempted to protest I was told by a warder who had a baton to shut up and do as I was told.

6. I am not aware that there is a registered nurse in attendance at the Doctor's surgery."

Pleadings in respect of prison conditions

The plaintiff pleads inter alia, as follows:

"9. – During the pre-trial incarceration of the plaintiff, he was subjected to inhuman and degrading treatment and/or punishment contrary to section 17(1) of the Constitution by virtue of the conditions of his incarceration.

10. Since the plaintiff's conviction on or about the 14th of October, 1994 the plaintiff has been imprisoned in a cell in Saint Catherine District Prison "death row" in circumstances which it is contended are and/or continue to be inhuman and degrading in breach of section 17(1) of the Constitution including assaults on the plaintiff by warders and/or the malicious and wanton destruction of all the personal possessions which the plaintiff was allowed to have on "death row".

In his prayer he claims:

(vi) A declaration that the plaintiff's right not to be subjected to torture and inhuman or degrading punishment or treatment is being or is likely to be violated."

The above paragraphs represent the sole pleadings relating to treatment and conditions of incarceration. These paragraphs and the relief sought were denied by the defendants.

Findings

No application was made to the Court for the cross-examination of the deponents and at the end of the day, there was unchallenged evidence on a number of issues presented on behalf of the defendants.

Now, credibility is most crucial, so I will have to determine the true facts from the affidavit evidence. Mr. Campbell had submitted that the credibility of the plaintiff was shaken and in demonstrating this, he asked the Court to examine in particular paragraph 17 of the plaintiff's affidavit sworn to on the 29th September, 1998 and the response to that paragraph at paragraph 28 of Page's affidavit sworn to on the 11th November, 1998. Paragraph 17 states as follows:

"17 – My family was not informed by the prison authorities that I was to be executed on the 25th of September 1997 and only learned of it by means of a message sent by a fellow death row inmate."

Paragraph 28 in response, states inter alia:

"28the practice is that a prisoner is always removed to the condemned cell in the evening after the entire prison population have been locked away in their cells. The warrant is read to him and he is asked who he wishes to be advised, that is, his Attorney at Law, religious adviser or members of his family etc... These persons are then advised by telegram the following morning. On Friday the 12th September 1997 a warrant for execution was read to Neville Lewis and on Monday the 15th September, 1997 telegrams were sent to his relatives as directed by him. The telegrams were sent on Monday because the post office is closed on Saturdays and Sundays. The telegrams were returned unclaimed."

Copies of the telegrams were exhibited in Page's affidavit.

No issue was joined in respect of Page's response hence the facts contained in that paragraph are deemed to be accepted by the plaintiff. The inescapable conclusion to draw from this therefore, is that the plaintiff has not stated the truth under oath in paragraph 17 of his affidavit. What else has he not spoken the truth about? His response to Dr. Notice's affidavit, also shows lack of frankness and failure on his part to state the truth. At paragraph 11 of his affidavit sworn to on the 29th September 1998 he states

" I have never had a medical examination and my request to see the prison doctor when he attends once or twice a month are generally denied."

His affidavit in response to Dr. Notice's affidavit says that he saw the doctor twice for his sinusitis and he also saw him on two other occasions when he was placed on a special diet. It is my considered view that his credibility has indeed been shattered. I find him most untruthful. I accept the evidence presented on behalf of the defendants. Albeit conditions in the prisons are not fully satisfactory, they do not amount in my view to inhuman and degrading forms of treatment and/or punishment. Even if I am wrong about this and the conditions were unsatisfactory while awaiting trial and the carrying out of the death sentence, he is not entitled in my view, to a commutation of his sentence. It is my considered view also that the affidavit evidence presented on behalf of the defendants on conditions and treatment of prisoners in the St. Catherine Adult Correctional Centre fits fairly well within the guidelines issued by the "United Nations Standard Minimum Rules for the Treatment of Prisoners".

The claim seeking a declaration that the plaintiff should not be subjected to torture and inhuman or degrading punishment or treatment is also dismissed. He has also failed to satisfy this Court that he is entitled to any of the other declarations and/or orders that he has sought. I conclude therefore, that his action should be dismissed.

ORDER OF THE COURT

The Court hereby orders that the action stands dismissed.

The Honourable Chief Justice

The Honourable Mr. Justice Cooke

The Honourable Mr. Justice Harrison