[2012] UKPC 4
Privy Council Appeal No 0017 of 2010

JUDGMENT

Ian Seepersad and Roodal Panchoo (Appellant) *v* The Attorney General of Trinidad and Tobago (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hope
Lord Walker
Lady Hale
Lord Brown
Lord Wilson

JUDGMENT DELIVERED BY LORD HOPE ON

15 February 2012

Heard on 7 December 2011

Appellant

Alan Newman QC
Mark Seepersad

(Instructed by Herbert Smith LLP)

Respondent
Howard Stevens

(Instructed by Charles Russell LLP)

LORD HOPE:

1. On 21 July 1986 the appellants Ian Seepersad and Roodal Panchoo were convicted of the murders of Sumintra Seepersad, who was in her sixties, and her 90 year old mother Roopwah Seepersad. The incident took place on 7 and 8 March 1981 at the deceaseds' home in Piparo. Sumintra Seepersad was a market vendor at the San Fernando Market. The appellants sometimes worked for her there by helping her to load and unload her goods. They had gone to her house in search of something of value that they could steal. On finding Roopwah Seepersad in the house they gagged and killed her before searching it. Having found nothing of value, they waited until Sumintra Seepersad came home from the market. As she entered the house she was strangled by Panchoo with a piece of cloth and struck on the head by Seepersad. Panchoo then cut her throat with a knife. They took about $94 in one-dollar notes and coins and two pairs of gold bracelets from her body, and then left the scene. They were arrested on 15 March 1981 and taken into custody.

2. At the time of the murders the appellants were both under the age of 18 years. Ian Seepersad was born on 19 March 1963. He was just 12 days short of his eighteenth birthday. Roodal Panchoo was born on 24 May 1964. He was 16 years old when the murders took place. In view of their ages the appellants were not subject to the death penalty, which would have been mandatory upon their conviction of murder had they been of full age. On 21 July 1986 they were sentenced by the trial judge, Ibrahim J, under section 79 of the Children Act to be detained at the State's pleasure. Under section 81 of the Children Act the State had a discretionary power at any time to discharge a detainee on licence. But no provision was made by the statute for any period to be laid down by the court which the detainee had to serve before being considered for release by the State or for the periodic review of the detainee's detention. In the case of the appellant Seepersad the warrant of commitment to prison stated that it was the court's wish that he should remain in prison for as long as possible.

3. The appellants did not appeal against their sentences of detention, and they took no steps to object to their terms or the way in which they were being administered until 2003. They then brought constitutional proceedings in which they challenged the sentences and the manner of their execution on two grounds. The first was that the sentences offended against the constitutional principle of the separation of powers. This was because section 79 provided that they were to be detained at the pleasure of the State, and not for a term to be determined by the High Court. This argument was presented with reference both to the common law and to sections 4 and 5 of the Constitution of Trinidad and Tobago with which

they said sections 79 and 81 were incompatible. The second was that the manner of the execution of the sentences was in breach of sections 4 and 5 of the Constitution. This was because, contrary to their nature and character, they were not being reviewed periodically by the court.

4. When the appellants first raised these objections they were still in custody, where they had been since they were arrested on 15 March 1981. Their main aim at that stage was to secure their release on a date to be determined by the court and not by the State. They also sought constitutional relief by way of damages. As will be clear from the following narrative, they were successful in securing their release from custody. They were released on 26 July 2006 in pursuance of orders made by the High Court on 24 and 26 June 2006. So their main aim now is to obtain an award of damages. To be in a position to obtain such an award they must first establish their second objection, which is that the manner of the execution of their sentences was a breach of their rights under sections 4(a) and (b) and 5(2)(h) of the Constitution. They must also meet the Attorney General's argument that, unless and until the relevant sections of the Children Act were modified to meet the objection that they offended against the doctrine of the separation of powers, they were detained at the pleasure of the State. This, says the Attorney General, was of the very essence of the sentence provided for by the statute regardless of its lawfulness. There was therefore no place for their periodic review by the court until the sections were modified.

5. Section 79 of the Children Act provides as follows:

> "Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years; but in lieu thereof the Court shall sentence him to be detained during the State's pleasure, and, if so sentenced, he shall be liable to be detained in such place and under such conditions as the Minister may direct, and whilst so detained shall be deemed to be in legal custody."

Section 80 made provision for a sentence of detention in the case of children or young persons convicted on indictment of an attempt to murder, of manslaughter or of wounding with intent to do grievous bodily harm. Section 81 is in these terms:

> "(1) A person in detention pursuant to the directions of the Minister under sections 79 and 80 may, at any time, be discharged by the Minister on licence.

> (2) A licence may be in such form and may contain such conditions as the Minister may direct.
>
> (3) A licence may at any time be revoked or varied by the Minister, and, where a licence has been revoked, the person to whom the licence related shall return to such place as the Minister may direct, and if he fails to do so may be apprehended without warrant and taken to that place."

The proceedings

6. This case has a complicated history. The proceedings themselves have been long drawn out. And they have taken place against a backcloth of a series of contemporary decisions by the Board, not all of which were at first sight entirely consistent with each other. In order to set the scene for the issues that the Board has to decide in this case it is necessary to set the history out in some detail.

7. On 1 October 2003 the appellants instituted separate but identical proceedings under section 14 of the Constitution of Trinidad and Tobago 1976 in which, in a conspicuously over-elaborate presentation of their case, they sought no fewer than 52 items of relief. Reduced to its essentials, it could have been presented more clearly and simply under a few distinct headings encapsulating the issues referred to above: see para 3. In summary, the propositions that were relied on were as follows: (1) that the appellants' sentences of detention at the pleasure of the State were inconsistent with the common law doctrine of the separation of powers; (2) that for this reason their sentences were also inconsistent with their rights under sections 4(a) and (b) and 5(2)(h) of the Constitution; (3) that sections 79 and 81 of the Children Act required modification under section 5(1) of the Constitution of the Republic of Trinidad and Tobago Act 1976 to bring them into conformity with the Constitution, to ensure that the lawfulness of their detention was determined by an appropriate judicial authority; (4) that it was an essential characteristic of a sentence of detention under sections 79 and 81 that the detention should be kept under periodic review by the court; and (5) that they had been deprived of their constitutional rights in that respect too, as there had been no review of their sentences of detention by the court during the entire period while they remained in custody. The appellants also sought an order for their immediate discharge and an award of damages.

8. Shortly after the proceedings were instituted the issues as to whether the sentences provided for by sections 79 and 81 of the Children Act were inconsistent with the separation of powers and whether persons detained under those provisions were entitled to a review of their detention by the judiciary came before Mendonca

J on a constitutional motion presented by another applicant: *Chuck Attin v Attorney General of Trinidad and Tobago* (unreported) HCA No 2175 of 2003. The applicant in that case was 16 years old at the time of the murder of which he was convicted. In a judgment delivered on 11 November 2003 Mendonca J held that the applicant's sentence of detention at the State's pleasure was illegal as it offended against the principle of the separation of powers which was enshrined in the Constitution. He ordered that for the words "the State's pleasure" in section 79 there should be substituted the words "the court's pleasure", and that for the word "Minister" wherever it appeared in sections 79 and 81 there should be substituted the word "court". He varied the sentence passed by the trial judge so that it read and had the effect that the applicant be detained during the court's pleasure. He declared that the applicant was entitled to have his sentence reviewed by the court periodically and that he be brought before the court for that purpose on a date to be fixed by the Registrar.

9. The judge made it clear in his judgment that, in reaching that decision, he was following and applying the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407 and those of the Board in *Hinds v The Queen* [1977] AC 195, *Browne v The Queen* [2000] 1 AC 45 and *Director of Public Prosecutions of Jamaica v Mollison* [2003] UKPC 6, [2003] 2 AC 411. He also relied on the Board's approval in *Mollison*, para 17 of de la Bastide CJ's review of the authorities in *Roodal v The State* (unreported) 17 July 2002 (Cr App No 64 of 99) as to the function of the court in construing existing laws so as to bring them into conformity with the constitution.

10. These cases establish the following propositions:

> (1) The wording of a sentence of detention during the State's pleasure indicates that the progress and development of the detainee, as well as the requirements of punishment, must be kept under continuous review throughout the sentence. The continuing review must extend to the duration of the detention as well as to the place where and the conditions under which the detainee is being kept, even if a minimum term for the detention has been set by the judiciary.
>
> (2) The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot, consistently with that principle, transfer from the judiciary to an executive body which is not qualified to exercise judicial powers a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle.

(3) An indeterminate sentence of detention which is at the pleasure of the State and not in the hands of the court violates the common law constitutional principle. To bring the sentence into conformity with the principle, the determination of its duration must be transferred into the hands of the court from those of the executive.

(4) This can only be done if the Constitution itself, which is the supreme law and preserves the existing law from being invalidated, permits the statutory provisions which violate the common law constitutional principle to be modified so as to bring them into conformity with it.

11. The appellants' constitutional motions came before Madam Justice Dean-Armorer for a first hearing on 2 February 2004: *Seepersad v Attorney General of Trinidad and Tobago* (unreported) HCA No 2658 of 2003. On the first day of the hearing the attorneys for both sides presented the court with an agreed draft order that the sentence of Ibrahim J be quashed and the appellants be detained during the court's pleasure. Their agreement was based on their understanding of the cases referred to in *Chuck Attin* by Mendonca J. The only outstanding issues at that stage were whether there had been a breach of the appellants' fundamental rights under sections 4(a) and (b) and 5(2)(h) of the Constitution, and whether the periodic review of the appellants' detention should be conducted by a judge sitting in the criminal jurisdiction or by the judge who heard the constitutional motion. On 4 February 2004 the judge ruled, on the authority of *Chuck Attin*, that periodic reviews were part of the sentencing process and that they should be determined by a judge in the criminal jurisdiction. She reserved her decision on the issue as to whether there had been a breach of the appellants' fundamental rights until she had heard further argument.

12. In November 2004 the Attorney General sought to have the order in whose creation he had participated set aside on the ground that an order in these terms would be inconsistent with the decision in *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433 which was delivered by the Board on 7 July 2004. In that case the Board declined to follow its earlier decision in *Roodal v State of Trinidad and Tobago* [2003] UKPC 78, [2005] 1 AC 328 where, relying on section 5(1) of the Constitution of the Republic of Trinidad and Tobago Act 1976, it held that section 6(1)(a) of the Constitution comes into operation to preclude the invalidation of an existing law only if the law proves to be irremediable by resort to modification. In *Matthew* the Board held that, as the minority in *Roodal* put it in para 85, this was to set off from the wrong place. The Constitution itself was the supreme law. As section 4 of the Offences against the Person Act which prescribes the mandatory death penalty for murder was an existing law, it was preserved from constitutional challenge by section 6(1)(a) and the power to modify under section 5(1) of the Act was not available. The Attorney General also relied on *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 in which, in a decision that was delivered on the same date, the Board held that section 2 of the Offences against the Person Act in Barbados too was an existing

law that could not be challenged by a constitutional motion. Madam Justice Dean-Armorer gave leave for the presentation of further argument on this issue.

13. There then followed the Board's decision in *Griffith v The Queen* [2004] UKPC 58, [2005] 2 AC 235, which was delivered on 16 December 2004. In that case, applying section 4(1) of the Barbados Independence Order 1966, the Board construed section 14 of the Juvenile Offenders Act, which is in similar terms to section 79 of the Children Act, as providing that the court was to sentence the offender to be detained until the court directed his release. As Lord Rodger of Earlsferry explained in para 24, counsel for the respondent accepted that a sentence the length of which fell to be determined by the executive violated the general constitutional principle of the separation of powers which is embedded in the structure of the Constitution. To remedy that situation the words of the statute were to be construed so that the determination of the length of the sentence was placed in the hands of the court. Although the word "construed" was used, it is reasonably clear that what the Board decided to do, albeit sotto voce, was to exercise the power to modify similar to that under section 5(1) of the Constitution Act of 1976. It was, of course, aware of the decisions in *Matthew* and *Boyce*. But it took its guidance on the effect of the constitutional principle in this context from the decisions in *Hinds* and *Mollison*. In *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 AC 159 the House of Lords reaffirmed the principle that was followed in *Mollison*. It held that it was an intrinsic feature of a sentence of detention at Her Majesty's pleasure that there be a continuing review of the minimum term even if the term had been set by the judiciary: para 11, per Lord Bingham of Cornhill.

14. By the time she gave her judgment on 4 August 2005, therefore, Madam Justice Dean-Armorer had the benefit of the Board's decision in *Griffith*. She acknowledged that her orders founded on a declaration that sections 79 and 81 of the Children Act were unconstitutional would have to be regarded, in the light of *Matthew* and *Boyce*, as clearly wrong. She found some support however for the approach that was taken to the power of modification in *Griffith* in the observations that were made about the scope of this power in the judgment of the majority in *Matthew*, paras 21-23. Although she had some difficulty in reconciling these two decisions, she held that she had power to modify sections 79 and 81 so as to place the indeterminate sentence in the power of the court. So she made orders to that effect. She also held, following *Chuck Attin*, that the appellants' rights under sections 4(a) and (b) and 5(2)(h) of the Constitution had been infringed, in so far as they had been deprived of the periodic review by the Court of the circumstances of their sentences. She ordered that the sentences passed by Ibrahim J on 21 July 1986 should be quashed, that the appellants be detained during the Court's pleasure, that the respective terms of their detention should be determined by the High Court and that damages, if any, be assessed by a judge of the High Court.

15. On 14 October 2005 the Court of Appeal (Sharma CJ, Warner and John JJA) in *Attin (Chuck) v The State* (2005) 67 WIR 276 reviewed the developments of the law summarised in the preceding paragraphs. The decisions in *Browne*, *Mollison*, *Griffith* and *Smith* were referred to in support of the propositions that an indeterminate sentence of detention which fell to be reckoned by the executive violated the constitutional principle of the separation of powers and that a sentence of that kind required that the court review that question of the detainee's release at appropriate intervals. Reference was also made to the directions issued in *Scantlebury (Mormon) v The Queen* (unreported) 13 April 2005, (criminal appeal 34 of 2002), Barbados CA by Sir David Simmons CJ as a result of the Board's decision in *Griffith*, which the Chief Justice then applied in *Griffith v The Queen (No 2)* (2005) (unreported) 10 August 2005, Barbados CA. Following those directions in principle, the Court of Appeal then set out a series of directions of its own for the courts in Trinidad and Tobago to follow as to the passing of sentences of detention during the court's pleasure on persons convicted of murder who were under 18 at the date of the offence and for the periodic review of such sentences.

16. 13 January 2006, sitting as a judge in the criminal jurisdiction of the High Court, Madam Justice Alice Yorke Soo-Hon applied the directions that had been set out by the Court of Appeal. She took account of the circumstances of the murders, which she described as carefully planned, brutal and premeditated. After considering all the other relevant factors she held that the minimum sentence that both appellants should serve was 30 years, to commence from the date of conviction. The effect of her judgment was that, after remission, the appellants would have served the minimum period of 30 years on 21 July 2006. At the end of her judgment she observed that, as the appellants' minimum period would soon expire, they were due for an immediate review and such other reviews at intervals as the Court was to determine. In the event, following a review of their detention, orders were made for their release on 24 and 26 June 2006. They were both released on 26 July 2006.

17. The Attorney General then appealed against Madam Justice Dean-Armorer's judgment of 4 August 2005. On 14 December 2009 the Court of Appeal (Archie CJ, Jamadar and Yorke Soo-Hon JJA) dismissed the appeal. The judgment of the court was delivered by Madam Justice Yorke Soo-Hon. She held that the judgments in *Matthew* and *Boyce* did not have the effect of overruling the principles enunciated in *Mollison*. Applying those principles, she said that sections 79 and 81 of the Children Act were unconstitutional as they infringed the doctrine of the separation of powers: para 49. She also said that the ruling by the Board in *Griffith* strengthened her conclusion that the principles in *Mollison* had not been overruled: paras 69-70. Applying section 5(1) of the Constitution Act 1976, and following the decisions in *Browne*, *Mollison*, *Attin* and *Griffith*, she held that the judge had been right to order that sections 79 and 81 should be modified and that the appellants be detained at the court's pleasure. Recognising that it was an intrinsic feature of a sentence of detention at the Court's pleasure that there be

continuing review of the minimum term she endorsed the procedure for review that had been described by the Court of Appeal in *Attin*: para 78. Thus far the rulings were all in the appellants' favour, and the Attorney General has not sought to challenge them in this appeal.

18. The appellants lost on only one point. This was on the question whether there had been a breach of their fundamental rights in relation to the failure to conduct periodic reviews of their detention. In paras 55-57 Madam Justice Yorke Soo-Hon rejected the appellants' challenges to their sentences on the basis of incompatibility with sections 4 and 5 of the Constitution. At the end of her summary of the Court's conclusions in para 79 she said:

> "(vi) Even though the respondents were entitled to a periodic review the savings clause at section 6(1) precludes them from mounting a challenge based on sections 4 and 5 of the Constitution that the appellant failed to make provision for their periodic review."

The Court's holdings are set out in para 80, at the end of which it is stated:

> "(5) There was no breach of the respondents' rights under sections 4(a) and (b) and 5(2)(h) of the Constitution and accordingly the question of damages does not arise."

She had noted in para 17 that counsel for the appellants in this appeal accepted that the Children Act was a pre-existing law as defined by section 6 of the Constitution.

19. On 15 November 2010 the appellants were granted special leave to appeal by the Judicial Committee on the following ground of appeal:

> "The Court of Appeal erred in law in finding that the section 6 saving provision in the Constitution was effective to preclude the appellant challenging the manner of the execution of his detention on the ground that the failure to review the sentence and detention of the appellant resulted in a breach of the appellant's fundamental rights under section 4(a) and (b) and section 5(2)(h) of the Constitution."

The Constitution

20. The provisions of the Constitution that are relevant to this ground of appeal are to be found in sections 2, 4, 5 6, and 14. Section 2 provides that the Constitution shall be the supreme law of Trinidad and Tobago and that any other law shall be void to the extent of the inconsistency. Section 4 declares that there have existed and shall continue to exist, among others, the right to liberty and the right to the protection of the law: paras (a) and (b). Section 5(2)(h) says that Parliament may not deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the rights and freedoms set out in that section. They include the person's right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. Section 6(1) provides:

> " Nothing in sections 4 and 5 shall invalidate –
>
> (a) an existing law".

Section 6(3) provides that in that section "existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution.

21. Section 14, so far as relevant, provides:

> "(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.
>
> (2) The High Court shall have original jurisdiction
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1),
>
> …

> and may … make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled."

22. Section 3 of the 1976 Constitution Act provides that on the appointed day all the provisions of the former Constitution of 1962 were repealed and that thereupon the Constitution of 1976 was to have effect as the supreme law of the state in place of the former constitution. Section 5(1) states that the existing laws "shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

The issues in this appeal

23. The Children Act was enacted in 1925. Section 79, which abolished the death sentence in the case of persons under the age of eighteen years, was inserted into that Act by the Criminal Law Act No 6 of 1953. It is plain, and not disputed, that sections 79 and 81 were both existing law at the time when the Constitution came into force.

24. It follows that, as they are preserved from challenge by section 6(1)(a) of the Constitution, sections 79 and 81 cannot be invalidated by anything in sections 4 and 5 of the Constitution: *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, para 14. It was for this reason that the Court of Appeal rejected the appellants' complaint that they had been deprived of their constitutional rights because there had been no effective review of their sentences of detention while they remained in custody: see para 79 (vi) of its judgment, in which Madam Justice Yorke Soo-Hon said that section 6(1) precluded them from mounting a challenge based on sections 4 and 5 of the Constitution. The first issue, therefore, is whether the appellants' claim that their rights under sections 4(a) and (b) and 5(2)(h) were breached because of the way their sentences of detention were executed is precluded by section 6(1) of the Constitution.

25. Mr Newman QC for the appellants submits that the Court of Appeal misconstrued his complaint. It was based not on a challenge to the statute itself but on the State's failure to execute the indeterminate sentences in a manner which accorded with their fundamental nature which required periodic review. He said that he was not seeking to invalidate any law at all. His challenge was to what was done under the authority of that law. This was not precluded by section 6(1), as it did not extend to acts or omissions done under the authority of the law which contravened any of the provisions in sections 4 and 5. Furthermore, there was a

pre-existing common law right to a review of the appellants' detention which was protected by sections 4(a) and (b) and 5(2)(h) of the Constitution. There had therefore been a breach of the appellants' rights under those provisions which entitled them to a remedy under section 14.

26. Mr Stevens said that there had been no breach of sections 4 and 5. The essence of the sentence of detention under sections 79 and 81 of the Children Act was that it was at the pleasure of the State – in other words, of the executive. There was no provision for the review of the detention by a court. It was not until the proceedings first came before Madam Justice Dean-Armorer in February 2004 that it became clear that, if a review by an independent tribunal was to take place, the sections would require to be modified in the manner contemplated by the Board in *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411. That the sections required modification did not entitle the appellants to constitutional relief, and no question of periodical review could arise until August 2005 when the sections were modified. The only complaint that could be made until then was that the sentence infringed the doctrine of separation of powers. The decision that the appellants' sentences did infringe this doctrine should not be given retroactive effect. The remedy for the common law right of review was judicial review, and this remedy could have been asserted from the inception of the sentences in 1986. Alternatively the lawfulness of the sentences could have been challenged by an appeal. The fact that these remedies were available was sufficient to satisfy the constitutional right to due process.

27. The second issue is directed to the appellants' claim for damages. The Court of Appeal said that the question of damages did not arise as there was no breach of the appellants' constitutional rights: para 80. It does however become a live issue if the appellants succeed on the first issue. In that event two questions arise. The first is whether, as Mr Stevens submits, the order that was pronounced by Madam Justice Yorke Soo-Hon in the High Court on 13 January 2006, the subsequent review of the appellants' detention, their release on 26 July 2006 and the declaratory relief that was provided by the order of the Court of Appeal of 14 December 2009 provide the appellants with adequate redress in all the circumstances, so that it would not be appropriate as well to make an award of damages. The second arises if the appellants are not to be limited to the reliefs already given and the question of damages remains open. Mr Mark Seepersad for the appellants asked the Board to give guidance on how damages should be assessed in a case such as this. The question is how the Board should respond to this invitation.

Discussion

(a) the first issue – is there a right to a constitutional remedy?

28. The key to a proper understanding of this issue lies in an appreciation of what it is that is protected from challenge by section 6(1)(a) of the 1976 Constitution Act. The protection extends to everything that falls within the description of an existing law. A law which had effect as part of the law of Trinidad and Tobago immediately before the commencement of the 1976 Constitution falls within its protection: section 6(3). Sections 79 and 81 of the Children Act, of course, answer to that description. But they do so only with respect to what they say and what is to be taken to be the effect of the words used in them. Mr Newman says that he has no quarrel with what they provide, subject to the modification that substitutes the word "court" for "Minister" which is no longer in dispute. His point is that there is a lacuna in the statute, as it does not provide for a periodic review of the detention which is an intrinsic feature of the sentence: *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, pp 496-498, 532-535; *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159, para 11. As the statute is silent on this point, the right to a review is to be found in the common law principle. This common law right was already part of the bundle of rights protected by sections 4 and 5 of the Constitution when it took effect. Section 6(1) does not preclude a challenge based on rights enshrined in those sections which is directed to a failure to do what the common law requires.

29. The Board accepts the essence of Mr Newman's argument. Far from asking for an existing law to be invalidated, he is seeking to secure the application of a common law principle as part of the existing law to the sentencing regime laid down by the statute. The appellants are entitled to claim that the absence of periodic review of their sentences of detention was a breach of their right not to be deprived of their liberty except by due process of law (in section 4(a)), their right to the protection of the law (in section 4(b)) and their right not to be deprived of the right to such procedural protections as are necessary for the purpose of giving effect and protection to those rights and freedoms (in section 5(2(h)).

30. The background to the enactment of the Children Act in Trinidad and Tobago in 1925 and of the amendment in 1953 which introduced section 79 in its present form is to be found in the rationale for the enactment of the equivalent legislation in England and Wales in Part V of the Children Act 1908, on which all subsequent legislation dealing with child offenders was based, and Part III of the Children and Young Persons Act 1933, in which section 53(1) which provided for detention during Her Majesty's pleasure appeared. As was made clear in *Venables*, these provisions showed that a different policy was to be adopted

towards child or young offenders from that adopted towards adults when they were given a sentence of indefinite duration. Protection and welfare lie at the heart of these provisions. Regard must be had throughout to the welfare of the child or young offender. This is to be found both in the leniency of the sentence itself because of its non-capital nature, and in its working out in the future by keeping the detainee's progress and development as he matures throughout the period of his detention under review. Sections 79 and 81 of the Children Act must be taken to have been enacted to give effect to the same policy.

31. Mr Stevens for the respondent did not dispute the fact that, when the issue was first raised in 2003, a modification was required to remove the objection to the sentence as being in conflict with the doctrine of the separation of powers. And he accepted that, if there was room to construe section 79 as directing that the offender was to be detained at the court's pleasure, there would have been a case for a constitutional breach. His point was that section 6(1) of the Constitution saved the system that section 79 laid down. Until the modification was made the essence of the sentence was that it was detention at the pleasure of the State, not that of the court. No question of periodic review by the court could arise so long as that remained the position.

32. The submissions which Mr Stevens advanced overlook the fact that a court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. That is the normal effect of a judicial decision, and the Board sees no reason to depart from it in this case. The modification that was made by the court to the sentence of detention in *Chuck Attin v Attorney General of Trinidad and Tobago*, HCA No 2175 of 2003, must be taken to have affected not only his case and any detentions under section 79 that were to come afterwards, but the cases of others who had been sentenced earlier too. The sentences that were passed on the appellants must be taken, for the purposes of any remedy by way of constitutional relief, to have been sentences of detention at the court's pleasure from the outset. The decision of the House of Lords in *Venables* was not given until 12 June 1997, eleven years after the appellants were sentenced. But the ruling that it contains as to the effect of a sentence of detention at Her Majesty's pleasure was based on an analysis of the rationale for a sentence of that kind that was inherent in the sentence itself from its introduction in 1933. It must be taken to have been declaratory of what the law always was from the moment when the appellants were sentenced.

33. There remains Mr Stevens's point that a constitutional remedy was not open to the appellants in this case because they could have availed themselves of the remedy of judicial review. That, he said, would have satisfied the right of due process. Moreover, if the sentence of detention at the State's pleasure was to be regarded as an unlawful sentence, that point could have been taken by way of an appeal against the sentence at the outset. The Board regards the suggestion that

the challenge to the sentences that has now been made could have been made by way of an appeal against sentence in 1986 as wholly unrealistic. The profound changes to the law that opened up the possibility of such a challenge happened long after the time when an appeal could have been brought.

34. The suggestion that the complaint that the sentences were not being reviewed could have been taken by way of judicial review has, perhaps, more to commend it. In *Attorney General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522, 531 Lord Diplock said that the existence of a right of access to the courts of justice to declare that an Act of Parliament was invalid was sufficient to preserve the constitutional right to the protection of the law to which all individuals are entitled under section 4(b) of the Constitution. But the Board is not persuaded that the availability of the remedy of judicial review renders the present proceedings an abuse of process or otherwise unsustainable.

35. In *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268, Lord Diplock said, with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962, that the notion that wherever there was a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entailed the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution was fallacious:

> "The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

He made observations to the same effect in Maharaj v Attorney General of Trinidad and Tobago (No 2) [1979] AC 385 and Attorney General of Trinidad and Tobago v_McLeod [1984] 1 WLR 522, 530. In Hinds v Attorney General of Barbados [2001] UKPC 56, [2002] 1 AC 854, para 24 Lord Bingham of Cornhill said that Lord Diplock's salutary warning remains pertinent. In Jaroo v Attorney General of Trinidad and Tobago [2002] UKPC 5, [2002] 1 AC 871 the Board held that where a parallel remedy existed the right to apply for redress under section 14(1) of the Constitution was to be exercised only in exceptional circumstances.

36. In this case, however, the issues that the appellants raised were truly issues of a constitutional nature. The argument that the sentences themselves offended against the constitutional principle of the separation of powers was certainly of that character. That in itself provided grounds for thinking that an application for constitutional relief was the appropriate remedy. No objection was raised in *Chuck Attin v Attorney General of Trinidad and Tobago*, HCA No 2175 of 2003, to the fact that a remedy was sought by way of a constitutional motion in that case. Nor was any objection taken to the proceedings in this case, either before Madam Justice Dean-Armorer or before the Court of Appeal, on the ground that they were an abuse of process, as an alternative remedy by way of judicial review would have been available. It is true that Mr Newman's argument before the Board that the common law entitled the appellants to a remedy could have been presented by way of an application for judicial review. But this case is quite unlike *Jaroo*, where the appellant was seeking a declaration that he was entitled to the return of a motor vehicle. The history of these proceedings as a whole shows that it could not reasonably be said that the court's constitutional jurisdiction was being invoked for the purpose of avoiding the need to apply for judicial review in the normal way. The argument that they are open to this objection must be rejected.

37. For all these reasons the Board holds that the Court of Appeal erred in law in finding that section 6(1)(a) of the Constitution precluded the appellants from challenging the manner of the execution of their detention on the ground that the failure to review the sentence and detention resulted in a breach of their rights under sections 4(a) and (b) and 5(2)(h). The appellants are entitled to a declaration that their constitutional rights were breached by the failure to conduct such reviews.

(b) the second issue – are the appellants entitled to damages?

38. It is well established that the power to give redress under section 14 of the Constitution for a contravention of the applicant's constitutional rights is discretionary: *Surratt v Attorney General of Trinidad and Tobago* [2008] UKPC 38, para 13, per Lord Brown of Eaton-under Heywood. The rights protected by

section 4 are, as Lord Bingham of Cornhill said in the first stage of the appeal before the Board in that case, at least in most instances, not absolute: *Surratt v Attorney General of Trinidad and Tobago* [2007] UKPC 55, [2008] AC 655, para 33. There is no constitutional right to damages. In some cases a declaration that there has been a violation of the constitutional right may be sufficient satisfaction for what has happened: *Inniss v Attorney General of St Christopher and Nevis* [2008] UKPC 42, para 21; *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23, para 37. In others it will be enough for the court to make a mandatory order of the kind that was made in this case, when Madam Dean-Armorer ordered that the terms of the appellants' detention should be determined by the High Court. As Lord Kerr said in *James v Attorney General of Trinidad and Tobago*, para 36, to treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by section 14. It will all depend on the circumstances.

39. In this case, having been held on remand for five years before their case came to trial, the appellants were denied a review of their detention by a judge for more than 19 years. It was said that their detention was reviewed from time to time under rule 281 of the Prison Rules, which requires that the case of every prisoner serving a life sentence be reviewed at four yearly intervals. The Board was shown a fourth year confidential report on the appellant Seepersad dated 21 November 1997 in which it was said that his eighth year confidential report would become due on 28 July 2001. It was also shown a confidential report on the appellant Panchoo dated 3 May 1994 in which it was said that his fourth year report would become due on 28 July 1997. While it appears that the requirements of rule 281 were adhered to, it is equally clear that they fell well short of the kind of review that was regarded in *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407 and *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159 as an intrinsic feature of the sentence provided for by section 79 of the Children Act. There is no indication in the reports that the Board has been shown that any consideration was being given to the question as to how long it would be appropriate for the appellants to be detained or to their progress and development while they were in custody. They were given no reason to think that their detention was not to continue indefinitely. The possibility that this breach of their constitutional rights had a significant effect on them cannot be entirely ruled out. There is, therefore, something to be said for the view that an award of damages might be appropriate.

40. On the other hand these murders were, as Madam Justice Yorke Soo-Hon observed when determining the length of the appellants' detention in January 2006, brutal and premeditated. So the punishment element in their sentence was bound to be substantial as they were well beyond the age when they could be regarded as mere children when the crimes were committed. 19 years after their commencement, the judge fixed the minimum period that the appellants were to be

required to serve at 30 years. Their sentences were reviewed and orders then made for the appellants' release as soon as was practicable after that direction was given. It seems unlikely that, even if their sentences had been kept under continuous review judicially from the date when they were first sentenced, that they would have been released any earlier. But the Board is not to be taken as having arrived at a final conclusion on this point. That would require a more careful examination of the facts than it has been able to carry out. In the consent order which was before Madam Justice Dean-Armorer in February 2004 it was agreed that damages, if any, should be assessed by a judge of the High Court, and this was one of the paragraphs that she made part of her final order on 4 August 2005. It is sufficient for the disposal of these appeals to say that it is not obvious that the redress afforded by the appellants' release in July 2006 and by the declarations made by the Court of Appeal and to be made by the Board on the first issue are sufficient to exclude altogether the possibility of an award of damages to ensure that their rights under the Constitution are fully vindicated.

41. As for the request to give guidance to the courts in Trinidad and Tobago about the assessment of damages in cases where persons were sentenced under section 79 of the Children Act, the Board does not think that it would be right for it to attempt to formulate guidelines. This is pre-eminently a matter for the Court of Appeal in Trinidad and Tobago in the light of its knowledge of local conditions and the needs of its own judiciary for guidance of this kind, and its appreciation of the way any such guidance should be expressed. Regard may already be had to the existing jurisprudence of both the Court of Appeal and the Board on the question whether and for what purpose an award of damages in such cases is appropriate. The Board is confident that the Court of Appeal will, on request, provide such further guidance as may be needed on this issue. It does not think that this process would be assisted by anything of a general nature that the Board might wish to say about it.

Conclusion

42. The appeal against the finding by the Court of Appeal that there was no breach of the appellants' rights under sections 4(a) and (b) and 5(2)(h) of the Constitution is allowed and that part of its order of 14 December 2009 is set aside. The Board finds that the appellants' rights under those provisions were breached by the failure to review their sentences and detention during the period while they were in custody. The order of Madam Justice Dean-Armorer of 4 August 2005 that damages, if any, be assessed by a judge of the High Court will be restored. The respondent must pay the appellants' costs of their appeal to the Board.