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Mr. J.W.A. Thornely

The Journal records with regret the death on 10 August 2000 of Mr. J.W.A. Thornely, who was Book Review Editor from 1960 to 1984 and a member of the Editorial Committee for many years. He gave to the Journal unstintingly of his time, and he will be remembered with affection and gratitude by his many pupils and friends in both branches of the legal profession as well as by many readers of the Journal and by his friends and colleagues in the Faculty of Law at Cambridge.

CASE AND COMMENT

PREROGATIVE AND PRECEDENT: THE PRIVY COUNCIL ON DEATH ROW

As a result of previous appeals to the Privy Council from death row, many Caribbean States are in a difficult position. If they proceed to execution before the applicant has exhausted all possible avenues for seeking clemency, they may violate due process rights; if they delay the death penalty for too long, execution will constitute inhuman treatment. The latest and most significant of the recent decisions is *Lewis & others* v. *Attorney-General of Jamaica* [2000] 3 W.L.R. 1785.

All the applicants had been sentenced to death for murders committed in Jamaica. After exhausting their domestic remedies, they petitioned the United Nations Human Rights Committee (UNHRC) and, subsequently, the Inter-American Commission on Human Rights (IACHR). Before these bodies had delivered their opinions (and in accordance with the Governor-General's policy),

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the respondent Attorney-General proposed that the applicants should be executed. Under the Constitution of Jamaica the prerogative of mercy is exercised by the Governor-General, but the latter is required to follow the recommendation of the Jamaican Privy Council (the JPC). The applicants alleged before the Privy Council in London that the Attorney's decision, and the process which led to it, violated their procedural and substantive rights.

Logically, the first question was whether the Board could review the exercise of the prerogative at all. Two previous Privy Council decisions had held that the prerogative of mercy was a personal and non-justiciable discretion (*de Freitas* v. *Benny* [1976] A.C. 239 and *Reckley* v. *Minister of Public Safety and Immigration (No. 2)* [1996] 1 A.C. 527 (noted at (1996) 55 C.L.J. 401)). For the majority, Lord Slynn of Hadley required "strong grounds" to justify any departure from fully-reasoned decisions of the Board, but found such grounds in the importance of the issue for the condemned man and in the absence of any sound arguments to the contrary.

The applicants' first actual challenge related to the procedure adopted by the JPC. The JPC considered whether to recommend the exercise of the prerogative on the basis of a report from the trial judge and such other information as they might require from the Governor-General, but without disclosing this material to the applicants or soliciting their representations. Indeed, in general applicants were not even informed when their cases would be considered. While emphasising that the ultimate decision on the merits remained that of the Governor-General, Lord Slynn held that both common law and the right to "the protection of the law" under Article 13 of the Jamaican Constitution required that the condemned man should have sufficient notice of when the JPC would consider his case to permit his advisers to prepare representations, and that he should see all the documents which would be before it. In addition, the JPC was required to take account of the condemned man's written representations along with the reports on the case of any international human rights bodies, and to provide reasons if they departed from the recommendations contained in such reports.

The protection of the law under Article 13 was also held to be relevant to the second claim. The applicants argued that to execute them before the UNHRC and the IACHR had considered their cases would violate Article 13. The Board began by attaching the same meaning to the term "protection of the law" as it had applied to provisions requiring due process in other Constitutions. Lord Slynn then accepted that unincorporated treaties do not normally

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create individual rights which can be enforced before domestic courts. However, his Lordship proceeded to hold that from the time that Jamaica allowed individual petitions to the UNHRC and the IACHR, the applicants became entitled under Article 13 and at common law to complete the petition procedure and to obtain the reports of the relevant bodies before their case for mercy was determined by the JPC. This aspect of the decision marks a significant departure from previous understandings of the relationship between municipal and international law. It is all the more surprising since the orthodox position had been affirmed in two recent Privy Council decisions which the Board in this case declined to follow (*Fisher* v. *Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 and *Higgs* v. *Minister of National Security* [2000] 2 A.C. 228).

The Board also broke new ground in its decision on the relevance of prison conditions to the enforcement of the death penalty. Previous Privy Council authority (*Thomas* v. *Baptiste* [2000] 2 A.C. 1 and *Higgs*, above) had made it clear that even detention in conditions which were unlawful would not render the subsequent execution unconstitutional unless the conditions objectively aggravated the death sentence and were different from the treatment endured by other prisoners. Moreover, earlier Boards had held that there were more suitable remedies than commutation of sentence to deal with the often appalling conditions in Caribbean prisons. The majority of the Board in *Lewis* rejected this line and stated themselves to be disturbed that the applicants' challenges on this point had not been adequately investigated by the lower courts. While paying lip-service to the approach in *Thomas* and *Higgs*, the majority appeared to favour the view (previously articulated in powerful dissents by Lord Steyn in those decisions) that because of the prohibition on inhuman and degrading treatment in Article 17 of the Constitution, the State can forfeit its right to carry out the death sentence through its treatment of death row prisoners. In any event, since five years or more would have elapsed between the imposition of the death penalty and the lawful determination of their applications by the JPC, the Board commuted all the sentences to life imprisonment.

Lewis is revealed as an exceptionally important case which immensely enhances both the procedural and substantive rights of death row inmates and demonstrates an unusual willingness to depart from existing authority. The method by which this has been achieved is, however, extremely controversial. Few are likely to lament the demise of *Reckley (No. 2)*, which was an unjustified perpetuation of pre-*GCHQ* thought on the reviewability of the

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prerogative. But the Privy Council has also produced a significant modification of dualist concepts of sovereignty. For the first time, the Board has clearly accepted that the content of domestic legal rights can be altered by the exercise of the prerogative involved in treaty ratification or, to put it another way, that "due process of law ... can convert the base metal of executive action into the gold of legislative power" (*per* Lord Hoffmann, in dissent). This question has also arisen before other leading courts. A majority of the Supreme Court of Canada has recently held that the values reflected in international human rights law may inform the contextual approach to statutory interpretation and judicial review (*Baker* v. *Canada (MCI)* (1999) 174 D.L.R. (4th) 193). This result was described by Iacobucci J. (in dissent) as giving "force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament". If that result is considered objectionable in relation to statutory provisions, how much more so where it affects the content of the Constitution?

IVAN HARE

EC DIRECTIVES AND MISFEASANCE IN PUBLIC OFFICE

IN *Three Rivers District Council and others* v. *Bank of England* [2000] 2 W.L.R. 1220, the House of Lords answered two questions. What are the defining conditions of the tort of misfeasance in public office? What was the potential liability of the Bank of England under an EC directive relating to the exercise of its supervision over a credit institution? The questions had been raised as preliminary legal questions before further trial of the issues arising in the proceedings.

The proceedings related to the collapse of the Bank of Credit and Commerce International (BCCI) in 1991, the principal cause of that collapse being fraud by persons at a senior level in BCCI. The plaintiffs, depositors with UK branches of BCCI, claimed that, since the Bank of England could have known of the true situation in BCCI, the Bank and certain of its senior officials had committed the tort of misfeasance in public office, and had been in breach of EC law, by acting in bad faith in licensing BCCI in 1979 as a deposit-taking institution, by failing to revoke that licence, and, in general, by failing to exercise appropriate supervision over BCCI.

This was the first occasion on which the House of Lords has had to determine the requirements of the tort of misfeasance in

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