The Queens' Distinguished Lecture in Law

Wednesday 21 February 2024

Queens' College, Cambridge

An Evolving Institution: The work of the Judicial Committee of the Privy Council

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Introduction

1. The Judicial Committee of The Privy Council, commonly referred to as the JCPC or "the Board", has been described in its modern form as "a unique body", "akin to an international court", "a court that nobody starting afresh would design", "a relic of empire" and a valuable selling point for the jurisdictions it covers.[2] I would describe it, for the purposes of this evening's lecture, as an evolving institution generating important case law. The breadth of JCPC case law is wide; from a dispute about the letting of a church pew in Montreal in 1877[3] to a stone mason's employment rights in Hong Kong in 1990[4] – each JCPC case comes with its own local flavour. This evening I hope to provide you with an insight into the recent work of the JCPC, a sense of some of the issues that it deals with and an awareness of the influence of its jurisprudence.

The JCPC

2. Some of you may be asking yourselves what exactly is the JCPC and how did it come to be? It is the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to His Majesty in Council or, in the case of Republics, to the Judicial Committee itself. The JCPC used to be housed in 9 Downing Street but today it shares a home with the UK Supreme Court in the Middlesex Guildhall on Parliament Square in London. And

[1] I am very grateful to my judicial assistants Nigel Patel and Sam Dayan for their invaluable assistance in preparing this lecture.

[2] Daniel Clarry, 'Institutional Judicial Independence and the Privy Council' Cambridge Journal of International and Comparative Law 2014, 3(1), 46-76.

[3] *Minister and Trustees of St Andrews Church Montreal v James Johnston* [1877] UKPC 48 (10 December 1877).

[4] *Lee Ting Sang v Chung Chi-Keung (Hong Kong)* [1990] UKPC 9 (8 March 1990).

of course, it shares more than that, because the same Justices who are appointed to the Supreme Court also sit as judges on the Judicial Committee.

3. The Privy Councillors are a body of the great and the good, now numbering over 700. There are some public roles which bring appointment to the Privy Council as a matter of convention, such as being appointed a cabinet minister or being Leader of the Opposition. Being a Court of Appeal judge in this jurisdiction is one of those roles. Appointment involves a visit to the Palace and a ceremony which takes place as part of one of the regular meetings of the Privy Council with the Monarch. I attended my meeting in March 2019. I swore the Privy Councillors' oath, knelt before the late Queen and kissed her hand. This means that every judge who is appointed to sit in the Court of Appeal of England and Wales is also qualified to sit on the Board. So also are senior judges in Scotland and Northern Ireland[5] and we often invite them to sit as a judge on one of the JCPC cases.

4. It used to be that senior judges from New Zealand and India and other JCPC jurisdictions sat on the JCPC when those countries had the JCPC as their highest court of appeal. For example, Sir Shadi Lal who, in 1920, became the first Indian to become Chief Justice of Lahore was appointed to the JCPC in 1934 and served for four years. For the current JCPC jurisdictions, due to changes in the law, that is presently not possible. However, the government is considering a proposal that the judges from the jurisdictions of the JCPC could be made Privy Councillors so that the legislation could then be put in place to enable them to hear cases with us.

5. In its origins, the JCPC's power to resolve legal disputes flows from the notion that "the King is the fountain of all justice throughout his dominions and exercises jurisdiction in his Council, which acts in an advisory capacity to the Crown".[6] The JCPC was then formally created as a statutory body in 1833 when Parliament enacted the Judicial Committee Act. The powers of the JCPC are largely limited to making a report or recommendations to His Majesty in Council – we humbly advise His Majesty either to allow or dismiss the appeal and the King subsequently makes the

[5] See section 1(4) of the Judicial Committee Act 1833 and section 60(2) of the Constitutional Reform Act 2005.
[6] N. Bentwich, *The Practice of the Privy Council in Judicial Matters* (3rd edn, London: Sweet and Maxwell, 1937).

appropriate order at a later Privy Council meeting. This is the position except in the overseas territories that still use the JCPC but which do not have the King as the Head of State. These Republics are Mauritius, Trinidad and Tobago and Kiribati.

6. In the 1930s the JCPC was said to be the final court of appeal for more than a quarter of the world. Over the last century there has been an inevitable decrease in the extent of the JCPC's jurisdiction with many jurisdictions establishing their own apex courts. Appeals from Canada and India were ended in 1949, with Australia, Hong Kong and New Zealand following in 1986, 1997 and 2003, respectively.

7. The last Canadian case heard by the Privy Council was in 1960,[7] despite appeals being ended in 1949. This was because cases which were being heard prior to the legislation abolishing appeals to the JCPC were allowed to proceed to appeal. The last case concerned an oil drilling project. The Statement of Claim in the matter had been issued on 5 December 1949. The Act making the Canadian Supreme Court the exclusive final appeal court for Canada was proclaimed on 23 December, just eighteen days later. Having got in just under the wire the appellants were able, 10 years later, to bring their appeal to London. The account of the hearing by the Canadian barristers instructed describes the "rather tweedy business suits" worn by their Lordships at the hearing. One of the barristers - rather ungraciously I think - described the lunch they were served as one of the worst meals of his life because of the inclusion of Brussels sprouts.

8. It is worth noting from the outset that the history of the JCPC is one that is tied up with the empire. And so it is entirely legitimate to ask the question whether it should exist as the final appellate court for jurisdictions outside the United Kingdom. Some Commonwealth countries keep the JCPC as their apex court even though they have become independent republics. Ultimately it is of course entirely a matter for each country to decide if it wishes to use the JCPC. St Lucia agreed with the UK Government last year that it will no longer send its appeals to the Privy Council.

9. The JCPC does continue to hear appeals in both civil and criminal matters from Commonwealth countries like Antigua and Barbuda or Jamaica, from Crown

[7] *Ponoka-Calmar Oils Ltd. and another v Earl F. Wakefield Co. and others* [1959] UKPC 20.

Dependencies such as the Channel Islands and the Isle of Man and from overseas territories such as the Cayman Islands, Gibraltar, and the Turks and Caicos Islands. And they keep us busier than you might think. In 2023, the JCPC delivered 44 judgments in 47 cases (the discrepancy arises as some of the judgments were delivered for conjoined cases). For comparison, the number of UK Supreme Court judgments delivered in 2023 was 52, so last year we delivered nearly the same number of Privy Council judgments as Supreme Court judgments. The appeals are not evenly distributed among the different jurisdictions. Last year almost nearly a third of the cases heard were from a single jurisdiction, Trinidad and Tobago.[8] Others such as the Pitcairn Islands or St Helena only send cases to us very occasionally.

10. For the Commonwealth countries which use the JCPC, the right of appeal to the JCPC is regulated by the constitution and legislation of the country in question. In most appeals involving Commonwealth countries, appeals come "as of right" from citizens; that means they do not need to obtain permission to appeal from the lower court whose decision they are appealing or from the Privy Council. Sometimes the right is dependent on the value of the claim but the money figure has not kept pace with inflation. According to section 110(a) of the Jamaican Constitution you would have an appeal as of right from decisions of the Jamaican Court of Appeal where the matter in dispute is of the value of 1,000 Jamaican dollars or upwards - that's currently just over £5 sterling. Where no "as of right" appeal exists from the country, the JCPC considers whether to grant permission to appeal. For civil appeals, the test is really the same as the test for applications to appeal to the Supreme Court; that is whether the appeal raises an arguable point of law of public importance which ought to be considered by the JCPC at that time.[9] For criminal appeals, the test is whether there is a risk that a serious miscarriage of justice has occurred.[10]

[8] These Commonwealth countries that use the JCPC as their highest court of appeal at the time of writing are: Antigua and Barbuda, The Bahamas, Cook Islands and Niue, Grenada, Jamaica, Kiribati, Mauritius, St Christopher and Nevis, Saint Vincent and the Grenadines, Trinidad and Tobago and Tuvalu. The Crown dependencies that use the JCPC as their highest court of appeal are: Guernsey, Isle of Man and Jersey. The UK Overseas Territories that use the JCPC as their highest court of appeal are: Anguilla Ascension, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Monserrat, Pitcairn Islands, St Helena, Tristan da Cunha and Turks and Caicos Islands. Appeals are also heard from two sovereign base areas in Cyprus, these are: Akrotiri and Dhekelia.
[9] Practice Direction 3.3.3(a) of the JCPC Rules and Practice Directions.
[10] Practice Direction 3.3.3(b) of the JCPC Rules and Practice Directions.

11. The cases the JCPC hears cover a huge range of topics. Some from jurisdictions which operate as tax shelters raise important issues about trusts or insolvency law. Other appeals raise questions of constitutional significance. Constitutional cases often require us to grapple with complex issues including the death penalty,[11] LGBTQ+ rights[12] and most recently the constitutionality of anti-money laundering legislation.[13] But there is a steady stream of smaller cases, such as land disputes between neighbours as well as many criminal appeals.

12. Let me turn to some of the cases that we have heard recently to illustrate how varied the topics are. Some involve fact patterns that are far removed from anything we are likely to encounter in our Supreme Court work whereas others sound all too familiar. Even in cases where the fact patterns have a familiar ring and could have arisen in our own towns and villages, it is important that the JCPC recognises that it is dealing with local conditions that are often very different from those that pertain here. Often, even if a decision is not one that we might have taken here, we will defer to the expertise and local knowledge of the judges in the courts below as to how their society works and what their priorities are. I'll touch on a few of those as well.

13. One of the most interesting JCPC cases I have sat on was a few months after I had been sworn in as a Justice: *Framhein v The Attorney General of the Cook Islands*.[14] That was an appeal from the Cook Islands which is a small group of islands in the South Pacific about three hours flying time east of New Zealand. It was a judicial review challenge to a decision by the Fishing Minister setting the annual quota for how many tonnes of tuna fish could be caught off the coast of the Cook Islands by both local and international fishing vessels. The case had two main themes. The first was all about the international regime for managing fish stocks particularly for fishing for tuna which, as I learned, count as highly migratory fish, swimming over hundreds of nautical miles. This involved an analysis of the different tiers of treaty obligations starting with Part V of the UN Convention on the Law of the Sea and every nation's

[11] *Chandler v The State No 2* (Trinidad and Tobago) [2022] UKPC 19.
[12] *Attorney General for Bermuda (Appellant) v Ferguson and others* (Bermuda) [2022] UKPC 5 and *Day and another v The Government of the Cayman Islands and another* (Cayman Islands) [2022] UKPC 6.
[13] *The Attorney General and another (Appellants) v The Jamaican Bar Association* (Respondent) (Jamaica) [2023] UKPC 6.
[14] *Framhein v The Attorney General of the Cook Islands* [2022] UKPC 4.

right to fish in the waters that make up its exclusive economic zone as well as the allocation of fishing rights on the high seas. This is just one illustration of the great value of JCPC case law, it covers all sorts of very abstruse areas of the legal world.

14. The second theme of the case was the relevance of the customary law of the Cook Islanders under their Constitution. Article 66A of the Cook Islands Constitution provides that the custom and usage of the indigenous Cook Islanders has the force of law unless it has been overridden by statute. Further, Article 66A says that the opinion of the Aronga Mana is conclusive about what that custom and usage is and their opinion shall not be questioned in any court of law. Who are the Aronga Mana for this purpose? They are the collective of the chiefs and elders of the different islands and districts of the Cook Islands. Each district is known as a vaka which is also the Maori word for the 'canoe' in which Cook Islanders traditionally voyaged across the Pacific Ocean.

15. In the hearing bundle before the Board we had many affidavits from Cook Islanders who were members of the Aronga Mana for their particular vaka. They asserted that they had a right under Cook Islands customary law to be consulted about anything to do with fishing rights. They challenged the decisions of the Ministry setting the tuna fishing quota because they had not been consulted before the Government decided on the amount of tuna that could be caught off their coast. The Cook Islanders refer to the Pacific Ocean by a Maori term which I shall not attempt to pronounce but which translates as "huge ocean of blue".[15] The Aronga Mana are the tiaki or guardians of the land and the sea and hence of all the food in the sea called kai moana.

16. The evidence of the Aronga Mana showed that they were very concerned at what they thought was the overfishing of tuna, depleting the stocks of fish that were left available to be caught by the artisanal Maori fishermen off the coral reefs. As one of the tribal chiefs put it movingly in her affidavit:

> "… our children and grandchildren are heirs to the ocean and all that is in it, just as much as to our land. They should be able to set out confidently on the

[15] Moana Nui O Kiva.

vaka of our ancestors upon an ocean that is filled with the fish that I have seen with my own eyes, be able to catch that fish as we have caught it. … I fear for them having to sail out over an ocean emptied of fish - our waters deserted of the rich life that has been our heritage for hundreds of years."

17. In the judgment which I drafted, we acknowledged the genuineness of their concerns, but also found that it was clear, even accepting the evidence from the Aronga Mana, in full, that they had not shown that there was a custom that they should be consulted generally about fishing. They only had a right to be consulted about imposing controls on overfishing. But their role in controlling fishing had been overtaken by the legislation that implemented all the international treaties and the decisions of the consultative bodies of which the Cook Islands were members. So, whilst paying, I hope, due respect to the Aronga Mana we had to dismiss their claim that they had a customary right to be consulted.

18. This case was a good example of the evolution of the JCPC because we had to be very flexible about the time of day at which the case was heard. Both sides wanted to use counsel based in New Zealand. The problem was that although they are quite close geographically, New Zealand and the Cook Islands fall on different sides of the international date line so they have a time difference of 22 hours. We arranged a two-hour online hearing which took place between 7 and 9 pm on Wednesday evening in London where the justices were sitting – that two-hour slot was 10 am to noon on the Wednesday morning in the Cook Islands where the clients were all watching online but 8 to 10 am on the following Thursday morning in New Zealand where counsel were based. Increasing our capability to hold remote and hybrid hearings in the JCPC has given much greater flexibility to counsel, who have been able to take part in appeals from within their jurisdiction. This has helped to ensure that we can continue to deliver access to justice at a reasonable cost in ever changing circumstances.

19. The Cook Islands is of course a great tourist destination for those in Australia and New Zealand wishing to relax on coral sand beaches under gently waving palm trees. In recent years we have heard a number of cases which have come up to the Privy Council where local people are objecting to the development of luxury resorts or condominiums along the beautiful coastlines of these paradisial islands. In these

appeals, it is often the case that the local Government on the island tends to favour the grant of permits to build resorts as it provides much needed employment both during the construction phase of the project and more permanently. It also brings in foreign investment which is useful for general spending. But it comes at a price for the environment and also sometimes for the continued accessibility of the beautiful beaches and the sea for the local people.

20. One recent interesting case was a Privy Council appeal case from the Bahamas, *Responsible Development for Abaco (RDA) Ltd v The Rt Hon Perry Christie*.[16] Perry Christie was the Prime Minister of the Bahamas at the relevant time. Abaco is a tiny island off the coast of the Bahamas with a beautiful little harbour called Little Harbour. There was already a golf course and smart resort there and the company which owned it wanted to include additional parking not just for more cars but by building a marina out into the harbour for 44 private yachts. There was a petition signed by local residents objecting to the development. They described Little Harbour as a remote, off the grid community where they have all worked hard to have as little impact on the environment as possible. All homeowners use solar energy, collect rainwater, and are careful with the environment they cherish.

21. This case raised a point about costs which, although on its face rather technical, required the Board to address some important issues about public interest litigation involving the environment. This can be highly relevant in similar environmental challenges in England and Wales. If a defendant on the receiving end of a legal claim is concerned that the claimant will not have enough money to pay its costs if the claim fails, it can apply to the court for an order for security for costs. If security for costs is granted, the claimant can only proceed with the claim if it first produces a certain amount of money up front paid into the court's bank account to cover any potential costs order made against it at the end of the case. If the claimant ultimately wins the case, then of course it gets that money back. But if it loses, that money is then available to cover the winning defendant's costs. The problem is that an order to give security for costs if set too high is likely to stifle the claim. If it prevents the claimant being able to bring the claim at all, then that raises access to justice issues.

[16] *Responsible Development for Abaco (RDA) Ltd v The Rt Hon Perry Christie* [2023] UKPC 2.

22. So, the claimant in this *Abaco* case was a Bahamian company which was challenging the Government grant of permits for the development of the marina in Little Harbour. The company alleged that the consultation that had been held with the local population had been inadequate. The local High Court directed that if the claimant company wanted to pursue this claim it had to pay into court $350,000 Bahamian dollars – that is about £300,000, for security to cover the costs that the Government and the resort developers would likely spend in defending the claim.

23. The case came up to the JCPC and, as often happens, permission to intervene was given to international bodies – in this case the Open Society Justice Initiative and the Environmental Law Alliance Worldwide. They provided the Board with written submissions to offer a broader insight into the financial barriers facing public interest litigants.

24. The claimant company Abaco said that they could not afford to put up that amount of money as security so if the order stood, they would be forced to drop the claim. They said that the company was funded only by sales of bumper stickers, tee shirts and a crowd funding website but that did not raise nearly enough money. They said the order would stifle the claim and so interfered with their constitutional and common law right of access to the courts.

25. The difficulty with Abaco's claim was that the ownership of the little company was very opaque. The Government pointed out that there were indications that the company was in fact owned by some local people who already had their own nice houses next door to the proposed development. The Government suggested that their motivation in bringing the challenge might not be entirely to do with protecting green turtles, manatees, and piping plovers as they claimed but in protecting the value of their own properties. If these local businesspeople had clubbed together as individuals to bring the legal claim in their own names, of course, their own money would be at risk if they lost and were ordered to pay the Government's costs. The Government argued that it was not right that these homeowners should set up this separate company which had no assets so that they could shelter behind that and put the whole risk of the litigation on the public purse.

26. In the judgment, the Board established some useful principles about how security for costs applications should be approached in the context of public interest litigation like this. First, the Board overruled the decision of the Bahamas court in ordering security for the project developers' costs in addition to the costs of the Government. The Board said it will only be in very rare cases that the developers will be entitled to security for costs over and above any security ordered for the benefit of the public authority which is the more direct defendant.

27. As for the security ordered for the Government's costs, the English case law says that if an impecunious claimant wants to avoid giving security for costs, then it has to be open and candid with the court - in particular about why it could not raise the money it needs from third parties who are going to benefit from the litigation. The Board accepted that, particularly in environmental matters, there is sometimes no individual or group of people with a private interest to justify bringing proceedings themselves. And the manatees and piping plovers do not have access to the court themselves so someone has to step up on their behalf. The problem was that Abaco had not established that that was the position here.

28. As the Board said, in judicial review proceedings there is always a general public interest to uphold the rule of law and ensure that public bodies comply with their obligations under public law. But there is also a public interest in making sure that the Government's limited resources should not be unduly depleted in meeting claims which it turns out have no merit. So the result was that the security for costs order was quashed so far as it benefited the developers but upheld in so far as it protected the Government. This is an example of a JCPC judgment making a valuable contribution to the law more generally.

29. As a short digression let me say something about why all those studying and working in the legal field in the UK should be aware of the JCPC's work. JCPC decisions are not only binding precedents for the courts from which the appeals come. They also have precedential value in the UK legal system. The question of the precedential value of JCPC decisions was considered in the 2016 UK Supreme Court decision in

Willers v Joyce.[17] Lord Neuberger gave the judgment of a 9-judge court. He noted that the JCPC is not a court of any part of the UK and so its judgments cannot be binding on any judge in a court of England and Wales. But the Privy Council often applies the common law or local law that is based on UK legislation. Also, either all or at least four of the five judges sitting on any appeal will be justices of the Supreme Court. Lord Neuberger said that unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to follow a decision of the JCPC. But a court should not, at least normally, follow a decision of the JCPC, if it is inconsistent with the decision of another English court which would otherwise be binding on it according to the normal rules of seniority.

30. However, when the JCPC is hearing an appeal that involves an issue of English law and the appeal involves a challenge to a previous decision of the House of Lords, Supreme Court or of the Court of Appeal, the judges sitting on the JCPC case can, if they think it appropriate, not only decide that the previous decision was wrong, but also can expressly direct in their judgment that domestic courts should treat the judgment that they are giving as representing the law of England and Wales even though it is actually a decision of the JCPC. I am not aware of that having happened but it is there up our sleeve if needed.

31. The cases from the Caribbean do not all concern high end resorts and parking for private yachts. We also get an insight sadly into the violence that mars their communities just as it mars some of ours. One case recently read like a Sherlock Holmes mystery of the body in a locked room genre. The appellant had been convicted of shooting his wife at point blank range through the head. His case was that she had committed suicide. There was no apparent reason either for him to murder her or for her to kill herself. The case turned on two points: whether the supposed suicide note found in the bedroom had been written by the deceased woman or whether actually it was the accused who had written it – and secondly whether it was physically possible for him to have killed her. Her body was found in the bathroom seated with her back leaning against the inside of the bathroom door. The

[17] *Willers v Joyce and another (in substitution for and in their capacity as executors of Albert Gubay (deceased))* (2) [2016] UKSC 44.

forensic evidence was that given the position of her body it was impossible for him to have shot her in the bathroom, then left the bathroom through the only door and for him to have run into the sitting room a few seconds after the shot was heard without the people in the sitting room seeing any blood on his clothes. We overturned the conviction and held that there had been a serious miscarriage of justice both in the way the forensic evidence about the handwriting of the note had been analysed and because of new evidence about ballistics and the blood spatter.[18]

32. A criminal case which gave rise to an interesting human rights issue was an appeal by a 16 year old youth who had been sentenced to 15 years imprisonment for a robbery where he shot and wounded his victim when robbing him of his mobile phone in a street crime. The case raised the issue whether the mandatory minimum sentence of 15 years imprisonment for wounding with a gun which the Jamaican statute imposed on anyone over the age of 14 was consistent with the provisions of the UN Convention on the Rights of the Child which had been ratified by Jamaica. The Board held, noting the damage that the use of guns by young people has caused Jamaican society, that the legislature was entitled to enact a stringent minimum sentence provision.

Constitutional law

33. Let me now turn to a couple of cases which raise issues that might well arise and in some cases have arisen in our own domestic law and see whether we have dealt with them in the same way or differently.

34. The JCPC jurisdictions, like every legal system in the world, had to respond quickly to the threat and then the actuality of the Covid pandemic. In the UK, of course, we had our own Covid regulations enforcing lockdown and there was a judicial review challenge to the legality of those. In *R (Dolan) v The Secretary of State for Health and Social Care*[19] the English Court of Appeal presided over by the then Lord Chief Justice considered a challenge to the restrictions imposed in "lockdown" in England. The challenge was dismissed by the Court of Appeal and the validity of the regulations was upheld.

[18] *Lescene Edwards v The Queen* [2022] UKPC 11.
[19] *R (oao Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605.

35. The JCPC more recently heard a similar challenge to the Covid regulations that were introduced in Trinidad & Tobago.[20] In March and June 2020, the Minister for Health in Trinidad & Tobago used his powers under a Public Health Ordinance which had been adopted way back in 1940 to deal with epidemics and other health emergencies. One of the restrictions imposed in response to Covid was to prohibit gatherings of more than 5 people without reasonable justification unless the gathering was associated with a list of specified services set out in the regulation. The regulations also prohibited gatherings of more than 10 people for religious worship unless they complied with guidelines issued by the Ministry.

36. In *Suraj v Attorney General of Trinidad and Tobago*, Mr Suraj challenged these laws under which he was prosecuted for being at a party where there were more than five people. Another claimant, Mr Maharaj, was a Hindu Pundit and he challenged the limit imposed of 10 people attending religious gatherings. Because of the provisions of the Trinidad & Tobago Constitution the case was not as straight forward as the English equivalent challenge in *Dolan.* This is because some of the most difficult JCPC cases are those that concern laws which predate the adoption of the country's written Constitution which sets out its constitutional guarantees of fundamental human rights. Often these Constitutions have a savings clause which says that although the fundamental rights set out there override over any *later* incompatible legislation, all existing legislation in place before the Constitution was adopted is protected from challenge. In *Suraj*, there was an issue about the saving of existing law as the regulations imposing the lock down restrictions were made using the power conferred in the Ordinance from the 1940s and the Constitution was adopted in 1962. But the Board held that although the old Ordinance could not be challenged itself, the regulations made now - using powers conferred by the old Ordinance - did not count as "existing law" and so the savings clause in the Constitution did not cover them.

37. A line of cases where we have come to a very different answer from the answer that prevails in this jurisdiction are in the death penalty cases. Since the start of this century, the Board has heard a number of appeals relating to the imposition of the death penalty in some of these jurisdictions. Clearly the death penalty was set for

[20] *Suraj and others v Attorney General of Trinidad & Tobago* [2022] UKPC 26.

murder in these countries long before their constitutions were adopted so it is usually saved from human rights challenge because of the saving in the Constitution for existing law.

38. The Board has been called upon to consider a number of issues arising from this. These developments were reviewed in 2022 in *Chandler v The State (No 2)*[21] in which it was held that the mandatory sentence of death is lawful under the Constitution of Trinidad & Tobago. This was so, even though the Crown in *Chandler* accepted that the mandatory death penalty amounted to cruel and unusual punishment which would be outlawed by their Constitution if it had been contained in legislation adopted after the Constitution came into force.

39. Other aspects of the death penalty have, however, been mitigated by decisions of the Board. It has long been the case that where a prisoner is held on death row for longer than five years, there will be strong grounds for believing that the delay in execution would be such as to constitute inhuman and degrading treatment. That was decided in *Pratt and Morgan* in 1994.[22] That case concerned two appellants who were sentenced to death in January 1979. As the Board explained in its judgment delivered in 1993, since 1979 they had been held on death row in a prison in Jamaica. On three occasions the death warrant had been read to them and they had been removed to the condemned cells immediately adjacent to the gallows only then to be reprieved. As Lord Griffiths said: "The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows."

40. More recently the Board has considered the question of what is the appropriate sentence to pass when the execution has been delayed for too long and cannot now lawfully be carried out. It was thought that the commuted sentence had to be life imprisonment. But in *Boodram v AG of Trinidad & Tobago*[23] heard two years ago, the Board held that it should not automatically be a sentence of life imprisonment. The

[21] *Chandler v The State (No 2) (Trinidad and Tobago)* [2022] JCPC 19.
[22] *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1.
[23] *Boodram v AG of Trinidad & Tobago* [2022] UKPC 20.

sentencing court has power to impose any other lawful penalty other than sentence of death.

Conclusion

41. So where does that leave us? One hundred years ago Viscount Haldane described the function of the JCPC as:

> "… not to claim any fresh rights to interfere, but to act as statesmen should, being willing to help if called in, but not pressing assistance where assistance is not desired".[24]

Looking at the balance of my own case load since I joined the Court in 2021, I see that we are still being called in to help in a large number of cases. In deciding these cases the JCPC continues to evolve and contribute to the development of the law across the globe on questions of considerable contemporary importance.

[24] Viscount Haldane, `The Work for the Empire of the Judicial Committee of the Privy Council' (1922) 1 CLJ 143.