

## Legal Commentary

23 March 2017

### Lester Pitman and Neil Hernandez v The State (Trinidad and Tobago) [2017] UKPC 6

***Execution of the intellectually disabled is unconstitutional in Trinidad says Privy Council, but it is for the President to give respite.***

On 23<sup>rd</sup> March the Judicial Committee of the Privy Council gave long awaited judgments in the cases of Lester Pitman and Neil Hernandez, after hearing appeals from both men against the mandatory death sentences that had been imposed upon them in Trinidad and Tobago. The men had pleaded that their severe intellectual disabilities meant the penalty was a cruel and unusual one and those sentences were both prohibited by the common law and breached fundamental rights under the Trinidad constitution.

#### **Judgment**

The Board ruled that execution of a person with severe mental impairment would indeed be a cruel and unusual punishment, but because of Trinidad's statutory mandatory death penalty (which has been constitutionally preserved), a court has no choice but to *impose* a sentence of death on an offender if the statutory defence to murder on grounds of "diminished responsibility" had not been shown.

Lord Justice Hughes, delivering the judgment of the Board, said that any common law prohibition against executing persons with mental disorder in Trinidad "*must be measured by, and geared to, its own constitutional and legislative choices*". As they stand, these did not give the court the power to impose an alternative sentence, unless diminished responsibility had been made out.

However, Lord Hughes went on to say, that the very introduction of the defence of diminished responsibility showed that Trinidad had intended to mitigate the harshness of the mandatory death penalty for those whose responsibility was reduced due to some form of mental abnormality. By extension, that meant Trinidad had recognized, as a principle, that the *execution* of a person with mental disability would be unconstitutional, even if the defence had not been raised or had not passed the diminished responsibility test.

Lord Hughes also found that developments in medical understanding of intellectual disability meant that a person with a significant learning disability, like Pitman and Hernandez, might both be examples of "*someone whose mental functioning is significantly impaired and therefore entitled to constitutional protection from the infliction of the death penalty.*"

But it is up to the President to grant them mercy and commute their death sentences. In that regard, the Board held that mercy should not be restricted only to those who would have been

rerieved historically under common law, but must be exercised in a way which takes proper account of the developing understanding of mental disability.

### **Comment**

Whilst the Board's acceptance that execution of a person with severe mental disability is unconstitutional is to be welcomed, the decision makes the position uncertain for offenders, like Pitman and Hernandez, who have not met or have not raised the diminished responsibility defence. Since they have no legal power to challenge their sentences, but must rely on the President to prevent the carrying out of the sentence, prisoners with severe mental impairment could still end up on death row for lengthy periods of time.

In Trinidad, the presence of mental disability remains often undiscovered until the appellate process, if it is unearthed during the legal proceedings at all. Yet the exercise of clemency by the President is wholly discretionary and, whilst the procedure is regulated, the Board has previously ruled that the merits of the President's decision are not reviewable.

This means that, although it is now clear that in Trinidad, absent a partial defence, the imposition of death penalty on persons with intellectual disability is permitted and clear that their execution is prohibited, how effective the State will be at avoiding execution of intellectually disabled prisoners and the time those prisoners must first remain under sentence of death before they are granted reprieve, remains to be seen.