[2014] UKPC 12
Privy Council Appeal Nos 0034, 0035, 0036, 0037 and 0059 of 2011

JUDGMENT

Gordon Newbold (Appellant) v The Commissioner of Police (Respondent)

Shanto Curry (Appellant) v The Commissioner of Police (Respondent)

Sheldon Moore (Appellant) v The Commissioner of Police (Respondent)

Trevor Roberts and Devroy Moss (Appellants) v The Attorney General of the Commonwealth of the Bahamas and the Government of the United States of America (Respondents)

Melvin Maycock Senior (Appellant) *v* The United States of America and another (Respondents)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Mance
Lord Sumption
Lord Hughes

Lord Toulson
Lord Hodge

JUDGMENT DELIVERED BY

Lord Mance

ON

16 April 2014

Heard on 12 and 13 February 2014

Maycock

Edward Fitzgerald QC
Ruth Brander
Maurice O Glinton
Paul Moss
(Instructed by Simons Muirhead & Burton)

Newbold, Curry, Moore, Roberts and Moss
Maurice O Glinton

The Commissioner of Police, the Attorney General of the Commonwealth of the Bahamas and the United States of America
Howard Stevens QC
Navjot Atwal

(Instructed by Charles Russell LLP)

LORD MANCE:

1. The appellants are the subject of extradition requests by the United States of America on suspicion of having committed drug trafficking offences. Extradition proceedings were commenced against them by the United States and the Attorney General ("the respondents") as long ago as nine years. During such proceedings before Magistrate Mrs Carolita Bethell, the respondents sought to adduce evidence obtained by the interception by the Bahamian police of the appellants' telephone conversations. The present appeal concerns the legitimacy and, now, constitutionality of their so doing.

2. In intercepting the appellants' conversations, the respondents relied upon authorisations issued by the Commissioner of Police in purported compliance with section 5(2)(a) of the Listening Devices Act 1972 (the "LDA"). The LDA makes it an offence for any person to use a listening device "to hear, listen to or record a private conversation to which he is not a party" other than unintentionally or "where the person using the listening device does so in accordance with an authorisation given to him under section 5 of this Act". Section 2(1) contains these definitions:

> ""listening device" means any instrument, apparatus, equipment or device capable of being used to hear, listen to or record a private conversation while it is taking place;
>
> "private conversation" means any words spoken by one person to another in circumstances indicating that those persons or either of them desire the words to be heard or listened to only by themselves or by themselves and some other person, but does not include a conversation made in circumstances under which the parties to the conversation ought reasonably to expect the conversation to be overheard."

3. Section 5 contains inter alia these subsections:

> "(2) Where the Commissioner of Police after consultation with the Attorney-General is satisfied –
>
> (a) that for the purpose of the conduct by a police officer of an investigation into an offence that has

> been committed or that the Commissioner believes to have been committed, the use of a listening device is necessary; or
>
> (b) that an offence is about to be, or is reasonably likely to be, committed and that, for the purpose of enabling a police officer to obtain evidence of the commission of the offence or the identity of the offender, the use of a listening device is necessary,
>
> the Commissioner after consultation with the Attorney-General, may in writing authorise the use by a police officer of a listening device for that purpose in such manner and for such period (not exceeding fourteen days) as may be specified in the authorisation. …..
>
> (4) A record of the particulars of every authorisation given by any person under this section shall be kept by him."

4. The LDA contains various further provisions regulating, and sanctioning misuse of, listening devices or information obtained by their means. These include in section 3 a provision making it an offence (punishable under section 9 by fine of up to $2000 or imprisonment for up to six months, or both) for any person to use "a listening device to hear, listen to or record a private conversation to which he is not a party" save "where the person using the listening device does so in accordance with an authorisation given to him under section 5 of this Act" and save in the case of "the unintentional hearing of a private conversation over a telephone". Section 7 provides that:

> "Where any record is made, whether in writing or otherwise, of information obtained by the use of a listening device pursuant to an authorisation given by any person under section 5 of this Act, that person shall, as soon as possible after that record has been made, cause to be destroyed so much of the record as does not relate directly or indirectly to the purpose for which the authorisation was given."

Section 10(1) provides that:

> "Where a private conversation has come to the knowledge of person (sic) as a result, direct or indirect, of the use of a

listening device used in contravention of section 3 of this Act, evidence of that conversation may not be given by that person in any civil or criminal proceedings."

5. In the present case, each of the authorisations was in like form:

"**AUTHORIZATION PURSUANT TO THE**

LISTENING DEVICES ACT, CHAPTER 83

I Paul H. FARQUHARSON, Commissioner of Police, Royal Bahamas Police Force. after consultation with the Honourable Attorney General, Mr. Alfred SEARS, am satisfied that it is necessary for listening devices to be used to enable the conduct of an investigation by the Officer-In-Charge of the Drug Enforcement Unit and any subordinate officers into the commission of illegal drug trafficking crimes. Accordingly for that purpose, I authorize the use of listening devices for a period of fourteen (14) days with effect from [DATE], 2003.

CELLULAR AND HARD LINE NUMBERS

[NUMBERS]

[SIGNATURE]

Paul H. Farquharson

Commissioner of Police"

Each authorisation listed a series of between eight and twenty-four numbers, all of them in fact cellular (mobile) telephone numbers. In many cases, the authorisations for later fourteen day periods covered at least some numbers included in one or more of the earlier authorisations.

6. Various objections have been raised and have contributed to the extreme length of the extradition proceedings. The present appeal concerns objections to the validity of the LDA and/or of seventeen authorisations issued under it. The Magistrate in this

respect referred six questions to the Supreme Court, and this led to judgments given by Isaacs J on 9 October 2008 and by the Court of Appeal on 28 January 2010. The appeal to the Privy Council was originally listed to be heard in the summer of 2012, but even then the record was not complete, and it had to be relisted.

7. The six questions referred by the Magistrate were as follows:

> "1. Whether to pass the test of constitutionality, a document purporting to be an Authorization given by the Commissioner of Police to the police officer to use a listening device in accordance with section 5 (2) of the Listening Devices Act must in order to authenticate itself in law in manner and form provide or specify the following particulars:
>
> > (a) the identity of the person authorized to use a listening device to conduct an investigation into an offence that has been committed;
> >
> > (b) the date as from when such authorized use of a listening device was given;
> >
> > (c) the offence that has been committed or that is about to be, or is reasonably likely to be committed, it being the very reason for the authorized use of a listening device in the police officer's conduct of the investigation.
>
> 2. If the answer to question (1) is in the affirmative, whether the Authorizations comply in such manner and form as required by law.
>
> 3. If the answer to question (2) is in the affirmative, whether the use now known to have been made of the Authorizations as given is lawful.
>
> 4. Whether to pass the test of constitutionality, the power to authorize the use of a listening device to "here [sic], listen and record" a private conversation in accordance with section 5(2) of the Listening Devices Act, may lawfully

> avail any authority or person for its or his (or her) use or purpose at their absolute discretion (as in the instance of the Commissioner of Police under the section) or for any use or purpose without prior judicial supervision.
>
> 5. Whether the law as represented and regulated by the provision of the Listening Devices Act, particularly by section 5 (2) therefore [sic], satisfies a qualitative test in that it provides essential safeguards and protections consistent with the rule of law in a democratic society.
>
> 6. Whether the powers and discretion availing the Commissioner of Police under section 5 (2) of the LDA violate Article 23 of the Constitution."

8. The first three questions therefore go to the requirements of the LDA and the lawfulness of the authorisations and of their use under its terms. The remaining three go to more fundamental questions regarding the constitutionality of the LDA itself. Isaacs J answered question 1 as follows: (a) Yes; (b) No, but the period during which the Authorisation is to operate must be stated in the Authorisation; and (c) Yes. As regards (b) his judgment proceeded on the misapprehension that the authorisations did not specify a period. It appears, however, that, following previous first instance authority, he treated the requirement that an authorisation specify a period as merely directory. He was more troubled by what he saw as a failure to specify the manner in which the listening devices were to be used, but felt bound to regard the authorisations as valid by the Court of Appeal authorities of *Butterfield v Commissioner of Police* (Crim App No 55 of 2001) and *Major and Major v Superintendent of Her Majesty's Prison* (Const/Civ App Nos 14 and 15 of 2005). On this basis the negative answer that he gave to question (2) was presumably a slip. But it led to him treating question (3) as not arising. Logically, if the authorisations were valid, then the answer to question (3) must also be affirmative, provided that the police acted in accordance with the terms of the authorisations.

9. Turning to the remaining constitutional questions, Isaacs J made clear his own grave concerns about the constitutionality of the arrangements in place for the interception of private communications, having regard to (a) the absence of any impartial authority issuing or supervising the issue of authorisations, (b) the failure "to provide adequate means of testing the evidence collected since it allows the police to decide what evidence should be destroyed and what should be retained", (c) the absence of any way to determine whether the use of a listening device was proportionate and (d) the absence of any "way for an individual to challenge these intrusions into his rights as he would have absolutely no knowledge of such intrusions unless he is charged with an offence and evidence derived from the use of a listening device is adduced at his

trial". He would himself have held that section 5(2) of the LDA was inconsistent with both Sections 21 and 23 of the Constitution. But in each respect he held that he was bound by the Court of Appeal decision in *Major and Major* to reach a contrary conclusion, and so answered questions 4, 5 and 6: Yes; Yes and No, respectively.

10. The Court of Appeal (Sawyer P, Longley and Blackman JJA) dealt with the matter differently. In a judgment given by the President, the court considered that the appeals could have been disposed of on the simple basis that the judge's decision was not final and so no right of appeal existed at all. But, understandably, it also felt it necessary to address the substance of the appeals. Before the Board, it is now common ground that the judge's judgment was final, in that it disposed finally of the questions referred. So the Court of Appeal's disposition of the substantive questions is central. The Court of Appeal concluded that there was no evidence that the conversations intercepted were private, or took place in circumstances under which the parties ought reasonably to have expected that their conversation would not be overheard, particularly if the conversations in question related to criminal activity and, according to the Court of Appeal, employed coded language (paras 7, 27 to 31, 79, 80 and 98). There were at least two strands to its reasoning, one that all mobile telephone users must be aware that it is comparatively simple to intercept the relevant signals, the other that criminal activity can enjoy no right of privacy.

11. The Board cannot agree with the Court of Appeal's approach. First, the technical possibility of intercepting a private conversation cannot mean that the parties are content that it should be intercepted. Were it otherwise, human communication would have to be reduced to surreptitious whispers by the side of a running bath to be private. As to the allegation, for at this stage it is no more, that the intercepted conversations related to or evidenced criminal activity, that reinforces the view that the parties wished them to be private. Those engaging in suspicious activity do not wish or expect to have their conversations intercepted, recorded or used against them. Hence, indeed, quite probably any use of coded language in the present cases. The careful provision in section 5(2) of the LDA enabling authorisation of a listening device in relation to offences committed or believed or about or likely to be committed is there precisely because the legislator accepted and recognised that a conversation about such a subject would fall within the concept of "private conversation" as defined in section 2(1). The questions posed by the magistrate to the Supreme Court were, in the Board's view, correct in proceeding on the basis that the LDA applied according to its terms, and that the issue was whether its terms were constitutional and had been complied with.

12. It is therefore necessary to address the questions referred to the Supreme Court. It is convenient to start with the first three questions, which all relate to compliance with the terms of the LDA, even though these are only critical if the second three questions are answered in a way which preserves the validity of the LDA.

13. Since (contrary to the judge's understanding) the authorisations all clearly identify particular periods not exceeding fourteen days for which they were valid, the remaining question is whether they also specified the "manner" of use of a listening device. During the submissions before the Court of Appeal, counsel for the respondents in fact conceded that the authorisations did not indicate the "manner and form" of use (while maintaining that this was not fatal to their validity), but he did not identify in what respect or what more should have appeared, and the concession has now been withdrawn. The Board must in the circumstances consider the point on its merits. Mr Fitzgerald in his speaking note focused upon the possibility of physical intrusion, submitting that: "the question of whether there has been a trespass to property in order to make the interception is not even confronted, acknowledged or recorded"; and that there must be disclosure whether the interception "is to be by way of wireless interception during transmission; attachment to an individual's property (i.e. his phone); or attachment to a third party's property".

14. In the Board's view, this is to approach the point from the wrong end. No trespass is permitted upon the property of another without clear authority. That has been clear since *Entinck v Carrington* 19 State Tr. 1029; see also *Great Central Railway Co v Bates* [1921] 3 KB 578, 581-582, per Atkin LJ, and *Davis v Lyle* [1936] 2 KB 434. The Board regards it as open to doubt whether section 5 of the LDA is even capable of authorising a trespass, either in relation to the property of one of the parties to a conversation or, a fortiori, in relation to third party property. But, if it is, these warrants would, in order to confer authority for any trespass, have had to specify what was proposed in that regard. They do not, and so impliedly but clearly they exclude any authority in law to trespass. Should it materialise that there was in fact a trespass, it was unauthorised.

15. That disposes of Mr Fitzgerald's principal objection. He also made, though did not really pursue in reply, a submission that the nature and mechanism involved in any use of any listening device should be specified. Since the only authorised interception was of cell telephone conversations, the capture of both sides of a conversation would be likely to require the cooperation of one of the cell telephone providers. Aerial interception of radio waves would on its face only capture one side. But, whichever method was used, the information provided by the authorisations was in the Board's view sufficient. It confined the authorisation to the use of a listening device to capture remotely (and without trespass) telephone conversations conducted by the specified cell telephones. No further purpose could be served in the authorisations by further details of the precise device which or, if feasible, providers who might be involved in any such interception.

16. It is no longer suggested, in so far as it ever was, that the authorisations were defective for failure to specify the identity of the persons authorised to use a listening device (question (1)(a)), the date from which and period not exceeding 14 days for which the authorisations were given (question (1)(b)) or the relevant offence (question

(1)(c)). Accordingly, it follows from all that the Board has already said that the answers to questions (1) and (2) are affirmative. As to question (3), assuming that the Magistrate has not already made findings about this, it is no doubt open to the appellants to seek to investigate further during the extradition proceedings whether the limits of the authorisations were observed. The consequences if it proves that they were not are not dealt with by the LDA. They are a matter of general law, bearing in mind the principles in *R v Sang* [1980] AC 402 and the discretion under section 178 of the Evidence Act (Ch 65) to refuse to allow evidence to be given, if it appears in all the circumstances, including those in which the evidence was obtained, that "its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

17. The three constitutional issues are, in the Board's view, more complex and difficult. The appellants have also raised new issues which they invite the Board to consider, relating to articles 15 and 30(3) of the Constitution. Mr Stevens QC for the respondents did not formally agree to these being raised at this late stage, and drew attention, with justification, to the disadvantage at which the Board is placed, due to the resulting lack of any assistance on such issues from either court below and the shortness of time available for them to be researched. Nevertheless, and after receiving further post-hearing written submissions on the issues, the Board feels able to deal with them and considers it appropriate to permit them to be raised.

18. The three articles of the current 1973 Constitution upon which the appellants now rely are articles 15, 21 and 23. They appear in chapter III of the Constitution (headed "Protection of Fundamental Rights and Freedoms of the Individual") and read as follows:

> "15. Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. …

21. (1) Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision-

(a) which is reasonably required-

(i) in the interests of defence, public safety, public order, public morality, public health…

23. (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this Article the said freedom includes freedom to hold opinions, to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision-

(a) which is reasonably required-

(i) in the interests of defence, public safety, public order, public morality or public health; ….

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

19. The Constitution deals with the effect of constitutional contraventions in Articles 2 and 28:

"2. This Constitution is the supreme law of the Commonwealth of The Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution, shall prevail and the other law shall, to the extent of the inconsistency, be void.

28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution 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 Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction-

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,

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 the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

(3) If, in any proceedings in any court established for The Bahamas other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the provisions of the said Articles 16 to 27 (inclusive), the court in which the question has arisen shall refer the question to the Supreme Court."

20. Mr Fitzgerald submits that the interception of telephone conversations constitutes both a search within article 21(1) and an interference with correspondence within article 23(3). His further reference to article 15 is because both articles 21 and 23 are subject to a further provision, which the respondents submit precludes reliance upon articles 21 and 23. That provision is article 30, which reads:

"30.(1) Subject to paragraph (3) of this Article, nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Articles 16 to 27 (inclusive) of this Constitution to the extent that the law in question-

(a) is a law (in this Article referred to as "an existing law") that was enacted or made before l0th July 1973 and has continued to be part of the law of The Bahamas at all times since that day;

(b) repeals and re-enacts an existing law without alteration; or

(c) alters the existing law and does not thereby render that law inconsistent with any provision of the said Articles 16 to 27 (inclusive) in a manner in which, or to an extent to which, it was not previously so inconsistent. ….

> (3) This Article does not apply to any regulation or other instrument having legislative effect made, or to any executive act done, after 9th July 1973 under the authority of any such law as is mentioned in paragraph (1) of this Article."

21. The LDA is an existing law within article 30. But article 30 does not apply to article 15. Hence, Mr Fitzgerald's wish to invoke article 15 as an independent source of rights. However, this is not the only potential answer which the appellants deploy to Article 30(1). There are two others. One is that all that Article 30(1) preserves is the LDA, as it was properly to be interpreted when passed in 1972 in the light of the 1969 Constitution then in force. This contained in articles 7 and 9 precisely the same language as was in 1973 reproduced in articles 21 and 23 of the current Constitution. The other answer which Mr Fitzgerald advances is that the real problem is not so much the LDA as the executive act in issuing authorisations under the LDA, and/or in failing to introduce a separate administrative code governing the exercise of the powers conferred by section 5 of the LDA, and that any such executive act falls within article 30(3), rather than article 30(1). The suggestion of an executive act within article 30(3) and the attempt to rely on article 15 were not discussed in the judgments under appeal.

22. The Board will start by examining the position in relation to articles 21 and 23, postponing for the moment the potential relevance of the saving of existing law under article 30(1). Taking first article 21, Mr Fitzgerald invokes the reasoning in *Katz v United States* [1967] 389 US 347 in support of a "people and privacy" oriented, rather than a "property" view, of article 21. In *Katz* the United States Supreme Court was concerned with the Fourth Amendment, which states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Supreme Court interpreted the Fourth Amendment as protecting people, not places, and on that basis as precluding the admission in evidence of the petitioner's end of a telephone conversation captured and recorded by a device fitting to the outside of a public telephone box. In *United States v Jones* [2012] 565 US a recent Supreme Court re-emphasised by a majority the Fourth Amendment's original property based focus, while acknowledging that the Fourth Amendment also had the meaning put on it in *Katz*. In considering that meaning, it may however be relevant to bear in mind that the nearest equivalent in the American Constitution to article 23 of the Bahamian Constitution is the First Amendment, which simply provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

23. Mr Fitzgerald also relies on the powerfully expressed judgment of La Forest J in the Canadian Supreme Court in *R v Duarte* (1990) 1 SCR 30. That concerned section 8 of the Canadian Charter of Rights and Freedoms, reading: "Everyone has the right to be secure against unreasonable search or seizure". The Supreme Court of Canada there affirmed that surreptitious electronic surveillance of an individual by a state agency constituted an unreasonable search or seizure under section 8 of the Charter, and held that it made no difference in this respect that one party to a private conversation had agreed to the surveillance. Furthermore, the Board notes that section 2 of the Charter does guarantee "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

24. There is therefore some powerful material to support the view that article 21 of the Bahamian Constitution should be given a generous interpretation. Nevertheless, the Board doubts whether it would be right to treat it as going so far. This is not just because the language of article 21 is confined to "search of … person or …. property" and "entry … on …. premises". It is partly because article 23 in the Board's view covers the present type of interception (see below), and also because the history of article 21 speaks against a broad interpretation. Article 21 reproduces article 7 of the 1969 Constitution. But article 7 marked a radical and unquestionably deliberate change from a broad protection of privacy interests. Article 7(1) of the previous 1963 Constitution read: "Every person shall be entitled to respect for his private and family life and his home". It therefore echoed most of article 8 of the European Convention on Human Rights (the "ECHR"), which had indeed applied in The Bahamas prior to independence in 1963. Two matters are noticeable. First, even article 7(1) of the 1963 Constitution omitted the final words of article 8 ECHR "and his correspondence"; so, although article 8 ECHR clearly covers interception of conversations, it is far from clear that their interception was intended to be covered even by article 7(1) of the 1963 Constitution. Secondly and more importantly, article 7(1) of the 1969 Constitution, now article 21 of the 1973 Constitution, was deliberately restricted to a physical subject matter. The drafters must have determined to move away from the evidently broader protection afforded by article 8 ECHR and its partial homologue in article 7(1) of the 1963 Constitution. (That this was a deliberate intention, formed because the wording of article 7 of the 1963 Constitution was considered "particularly vague and general", is in fact confirmed by the researches into the constitutional drafting process in January 1969, undertaken in The National Archives in Kew by the respondents subsequent to the hearing before the Board.) For these reasons, the Board is not persuaded that it would be right to interpret article 21 as covering interceptions of the type presently in issue.

25. The Board turns to article 23. Some of the arguments favouring a narrow construction of article 21 also have a bearing here. It may be said that the exclusion from article 7(1) of the 1963 Constitution of the words "and his correspondence" and the switch to the physically focused article 7(1) of the 1969 Constitution militate against interpreting article 9(1) of the 1969 Constitution (article 23(1) of the 1973 Constitution) as wide enough to cover interception of either mail or telephone conversation. But it is also possible that the drafters, when framing these limited provisions, were aware that other provisions might occupy some of the ground excluded. Article 23 of the 1973 Constitution is in terms which reproduce exactly wording which was found in article 9 of both the 1969 and before it the 1963 Constitutions. This wording precludes the "hindering" without consent of any person "in the enjoyment of his freedom of expression" and "freedom of expression" includes "freedom …. to receive and impart ideas and information without interference, and freedom from interference with his correspondence". It can be argued that someone whose mail is skilfully opened, read and closed or whose telephone is skilfully tapped, in each case so that he is unaware what has happened, has not been "hindered in the enjoyment of his freedom of expression". At the most the privacy of his communications has been disturbed in a way about which he may subsequently learn and be upset or concerned.

26. The Board does not consider that the boundaries between privacy and freedom of expression can be so neatly drawn. "The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private", as La Forest J said in *R v Duarte*, p.44. But by the same token, human enjoyment of and willingness to exercise our freedom of expression, by receiving and imparting ideas and information, will certainly be hindered and so interfered with if we are conscious that anything we write or say may be the subject of unregulated surveillance. The more difficult to detect that surveillance is at the time, the more inhibiting its effect. Accordingly, the Board considers that interception of telephone conversations falls within the concept of "interference with correspondence" within article 23 and its predecessors.

27. It is convenient next to consider article 15. This is the first article in Chapter III, which is headed "Protection of fundamental rights and freedoms of the individual" and comprises articles 15 to 31 of the Constitution. Article 15 is phrased as a recital, starting with the word "Whereas", proclaiming the entitlement of every person in The Bahamas to fundamental rights and freedoms which it summarises; it continues by saying that "the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of the protection as are contained in those provisions". The fundamental rights and freedoms summarised correspond with the headings and subject-matter of the ensuring articles.

28. In these circumstances, it is no surprise that Jamaican courts up to and including the Board have under the (for relevant purposes identical) provisions of Chapter III of the Jamaican Constitution rejected the argument that the Jamaican equivalent of article

15 conferred separate and independent or freestanding rights that could be relied upon to provide redress not available under the subsequent provisions of Chapter III of the Jamaican Constitution (more particularly the article protecting against deprivation of property): *Campbell-Rodriques v Attorney General of Jamaica* [2007] UKPC 65. There is earlier authority to the same effect on a similarly worded article in the Constitution of Malta: *Olivier v Buttigieg* [1967] 1 AC 115. But Mr Fitzgerald relied upon *Thomas v Baptiste* [2000] 2 AC 1 (an appeal from Trinidad and Tobago), *Neville Lewis v Attorney General of Jamaica* [2001] 2 AC 50 and *Attorney-General v Joseph* [2006] CCJ 3 (AJ) as indicating a different conclusion.

29. All three were cases where the death penalty had been passed and the person sentenced had petitioned the Inter American Commission on Human Rights under the American Convention on Human Rights which the respective countries had ratified at the international level. The Constitution of Trinidad and Tobago was in very different form to that of The Bahamas. The provision invoked in *Thomas v Baptiste* was on any view an enacting provision, section 4, recognising and declaring fundamental rights which included the right not to be deprived of life "except by due process of law". There were no other provisions enacting fundamental rights. The Board (by a majority) reasoned that, by ratifying the American Convention which provided for individual access to the Inter American Commission, the state had made such access part of the domestic appellate process, to which the obligation of "due process of law" applied, so as to require the state to await the disposal of the appellants' petitions before executing them. A stay of execution was ordered accordingly.

30. In *Neville Lewis* the circumstances were similar. The appellants contended that they should not be executed until the Inter American Commission and UN Human Rights Committee had reviewed and reported on their petitions. As already observed, the Jamaican Constitution is however in the same form as the Bahamian, rather than that of Trinidad and Tobago. Nonetheless, the Board, without commenting on this difference, treated "the protection of the law" to which article 13 of the Jamaican Constitution (article 15 of the Bahamian) refers as equivalent to the "due process of law" referred to in the Constitution of Trinidad and Tobago. Lord Hoffmann dissenting, it thus applied the reasoning in *Thomas v Baptiste* to reach a conclusion that execution should be stayed.

31. Finally, in *Attorney-General v Joseph* the Caribbean Court of Justice was also concerned with a constitution, that of Barbados, in materially identical form to the Jamaican and Bahamian Constitutions. In paragraph 58 onwards, the Court accepted that section 11 of the Barbados Constitution, the equivalent of article 15 of the Bahamian Constitution, was basically a preamble, save, it concluded, in relation to the reference to protection of the law. That reference was elucidated only in section 18 (article 20 of the Bahamian Constitution), which on its face dealt only with aspects of the trial process. The Court thought that "the protection of the law" referred to in section 11 (article 15) "would be a very poor thing indeed if it were limited to cases in which

there had been a contravention of the provisions of article 18" (para 60). It did not agree with the Privy Council's conclusion in *Thomas v Baptiste* and *Neville Lewis* that the ratification of the American Convention could make the individual right to petition part of the domestic criminal justice system (para 76). But it considered that, by ratifying the Convention, the state had created a legitimate expectation that the death sentence would not be carried out while a petition to the international bodies was on foot, and that this should be enforced by a stay of execution.

32. The Board does not consider that these three authorities assist the appellants in the present case. They are emphatically not authority for any proposition that article 15 of the Bahamian Constitution operates as and provides a general source of protection of human rights, overlapping with the substance of all the rights provided by the subsequent specific articles. They address a completely different subject-matter to the present, and at best support the view that the concept of "protection of the law" can extend to matters outside the scope of article 18 of the 1973 Constitution. In the present case, the relevant substantive rights are to be found in articles 21 and/or 23 or not at all. Article 15 is in this respect no more than a preamble, as the Board held it to be in *Campbell-Rodriques*. There is a distinction between on the one hand constitutions in the form adopted in The Bahamas, Jamaica and Malta, in which the equivalent of article 15 is wholly or predominantly a preamble, and on the other hand constitutions in the form adopted in Trinidad and Tobago and Mauritius, which contain instead an enacting provision. The distinction was recognised by the Board in *Société United Docks v Government of Mauritius* [1985] 1 AC 585, 600D-G as well as in *Campbell-Rodriques*, paras 9 to 12. In *re Fitzroy Forbes* (no 498 of 1990), Hall J was in the Board's view wrong to conclude that that distinction did not, or did not any longer, exist, and wrong to treat the *Société United Docks* case as an authority applicable on its facts to article 15 of the Bahamian Constitution.

33. In short, Mr Fitzgerald's submission does not only run counter to the natural meaning of article 15. It also ignores the word "Whereas" and the recital in article 15 that it is "the subsequent provisions of this Chapter" which "shall have effect for the purpose of affording protection of the aforesaid rights". Finally, it ignores the clear implication of the restriction of the right of redress under article 28, and the restriction of the saving of existing laws from challenge to cases of alleged contravention of articles 16 to 27. If article 15 had been understood as an independent enacting provision, the constitutional right of redress would have been extended to it. Similarly, to read article 15 as an enacting provision would undermine and make pointless article 30(1), the clear aim of which was that fundamental rights otherwise provided by the Constitution should not prevail over any contrarily expressed "existing law". The Board therefore considers that article 15 has no relevance or application in this case, save as a preamble and introduction to the subsequently conferred rights.

34. The Board will on this basis consider whether the "interference with correspondence" permitted by section 5 of the LDA and constituted by the authorisation

given thereunder was unconstitutional. Article 23(2) provides that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision which is reasonably required in the interests of …. public safety, public order, public morality or public health …. and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society". The appellants do not suggest that a régime authorising secret surveillance is as such impermissible, but they submit that it needs to be accompanied by safeguards against abuse which they submit that the Bahamian régime lacks.

35. In this connection, Mr Fitzgerald submits that the minimum safeguards necessary can be derived from a consideration of the case law of the European Court of Human Rights and Indian Supreme Court as well as codes introduced in countries like Canada and the United Kingdom. The starting point in this connection is the decision in *Klass v Germany* (1979-1980) 2 EHRR 214. Although a decision under article 8 ECHR, the safeguards which the European Court of Human Rights required were based on a rationale of avoiding abuse (para 50). That rationale is also relevant under article 23 of the Bahamian Constitution. In *Klass* the court recognised that "the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy" (para 49); and said that whether the safeguards against abuse were adequate and effective "depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by national law" (para 50). In *Klass* the Court was satisfied that the German safeguards were adequate and effective. Surveillance depended upon factual indications of involvement in certain serious criminal acts, proof of which would otherwise be impossible or considerably more difficult, the application had to be made by the head of certain services or his substitute, and the decision taken by a federal minister (para 51). The measures were limited to three months, there was provision for an officer qualified for judicial office to examine material gathered before its transmission to the relevant service, and further provision limiting the use of material gathered to the purpose for which it was gathered and requiring its destruction when no longer needed for that purpose (para 52). There was provision for review by a Parliamentary Board and a Commission, and for a report by the competent minister every six months (para 53). Although judicial supervision was "in principle desirable", it was not absolutely necessary (para 56).

36. In *Klass* the article 8 ECHR requirement that surveillance be "in accordance with the law" was treated as satisfied by the very existence of the relevant German statute regulating surveillance, and the Court's examination of the adequacy and effectiveness of the safeguards was undertaken by reference to the further requirement that any interference with the article 8 right should be "necessary in a democratic society" in the interests of national security or to prevent disorder or crime (paras 43-44) . In *Malone v United Kingdom* (1984) 7 EHRR 14, the Court switched the emphasis to the

requirement "in accordance with the law", which it said related not merely to the existence, but also "the quality of the law, requiring it to be in accordance with the rule of law" (para 67). It said that the law must be "sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this secret and possibly dangerous interference with the right to respect for private life and correspondence" (para 67). It then continued, discussing the extent to which it is necessary for the safeguards to appear in law, rather than administrative practice:

> "68. There was also some debate in the pleadings as to the extent to which, in order for the Convention to be complied with, the 'law' itself, as opposed to accompanying administrative practice, should define the circumstances in which and the conditions on which a public authority may interfere with the exercise of the protected rights. The above-mentioned judgment in *Silver v United Kingdom* (1990) 5 EHRR 347, which was delivered subsequent to the adoption of the Commission's report in the present case, goes some way to answering the point. In that judgment, the Court held that 'a law which confers a discretion must indicate the scope of that discretion', although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law. The degree of precision required of the 'law' in this connection will depend upon the particular subject matter. Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

37. More recent authorities repeat such statements, but seek also to flesh out "minimum safeguards". Thus, in *Huvig v France* (1990) 12 EHRR 528, although surveillance was done under the judicial control of an investigating magistrate, the court said (para 34):

> "the system does not for the time being afford adequate safeguards against various possible abuses. For example,

> the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court. The information provided by the Government on these various points shows at best the existence of a practice, but a practice lacking the necessary regulatory control in the absence of legislation or case law."

38. The same safeguards are later recited as "minimum safeguards" in *Weber v Germany* (2008) 46 EHRR SE5, 47, para 95, and *Kennedy v United Kingdom* (2011) 52 EHRR 4, para 152. In *Liberty v United Kingdom* (2009) 48 EHRR 1, paras 66-69, the court accepted, in a national security context, that such safeguards might be set out in regulations, manuals and instructions, pursuant to arrangements to be made by the Secretary of State under a statutory power, while holding on the facts that they had not been sufficiently publicised. In *PUCL v State of India* AIR1997SC568, the Indian Supreme Court, acting to give effect to the constitutional equivalent of articles 2 and 5 ECHR, ordered and directed that telephone tapping, permitted under section 5(2) of the Telegraph Act 1885 when necessary or expedient in a public emergency or the interests of public safety, should only occur under similar safeguards. These included a requirement that any order be made by a minister or in an urgent case person of the rank of joint secretary and a further requirement that a high level civil service review committee be established to investigate whether the circumstances fell within section 5(2).

39. The constitutionality of the LDA was challenged before the Court of Appeal in *Major and Major v Superintendent of HM Prisons*, by which Isaacs J held himself bound in the present case. Reliance was placed by counsel on *Malone*. The Court of Appeal rejected the challenge. Its reasons were that:

> "24. We do not find the case of *Malone* to be applicable to the Bahamian situation. Interception of communications in this country is governed by statute which comes within the limitation to the fundamental right relied on. The threshold test in our case is whether the authorisation to listen is

> reasonably justifiable in a democratic society and the burden is on the appellants to show it was not. ….
>
> 25. We are of opinion that there are adequate safeguards in the provision to ensure as far as reasonably possible that an authorisation issued under section 5 (2) would likely be reasonably justifiable in a democratic society. We find the following constraints on the exercise of the power vested in the Commissioner of Police to be of significance; (i) the authorisation can only be issued after consultation with the Attorney General; (ii) it must be in writing; (iii) it is only given where necessary, (iv) it is given for the clearly defined purpose of investigation into an offence that has been committed; or (v) for the purpose of obtaining evidence of an offence or the identity of an offender where an offence is about to be or is reasonably likely to be committed; (vi) the authorisation must prescribe the manner in which it is to be used; (vii) it must be for a limited period as specified, not exceeding fourteen days; and (viii) a record of the particulars of every authorisation must be kept.
>
> 26. These limitations on the power of the Commissioner of Police to authorise the use of a listening device are clearly intended by Parliament to ensure effective control over the use of the procedure. They are also equally designed to instil confidence in the public that the power will be used responsibly for the purpose of bringing to light criminal conduct and the identity of offenders. In our view the exercise of the power in this case was clearly within the rule of law and, Mr. Kemp has been unable to persuade us that its exercise was not reasonably justifiable in a democratic society."

40. The Court of Appeal thus distinguished the ECHR case law on the basis that it is easier under article 21 or 23 to conclude that a provision is "reasonably required", rather than that it is under the ECHR "in accordance with the law" and "necessary in a democratic society", at least where the onus is under articles 21 and 23 placed on the person challenging the provision (or thing done under it) to show that it is (or was) "not …. reasonably justifiable in a democratic society". These differences in language and onus exist, but the Board doubts whether they could or would often, if ever, prove decisive. More significant, in the Board's view, are any differences which exist in attitudes as to what is acceptable at different times and in different societies.

41. Mr Fitzgerald submits that the Court of Appeal erred in accepting the Bahamian scheme as reasonably justifiable and constitutional. In his submission, the scheme falls far short in allowing overbroad and disproportionate surveillance without sufficiently independent oversight and without specifying proper procedures and precautions for the handling and destruction of material. It is appropriate to start consideration of these submissions with some further examination of the safeguards identified by the Court of Appeal in its judgment in *Major and Major*. First, the Commissioner of Police is under section 5(2) of the LDA the decision-maker. His is a key appointment, effected only by the Governor-General acting on the advice of the Prime Minister after consultation with the Leader of the Opposition. Under article 121 of the Constitution, he has significant powers to administer reprimands, and to exercise disciplinary control or even remove from office, according to the rank of the officer affected, subject in the latter two cases to an appeal to the Governor-General. Under the Police Force Act 2009, and presumably its predecessor regime, he is also responsible for the command, superintendence, direction and control of the force, which he may deploy "in such numbers, and to such places and with such numbers" as he sees fit. He is not in practice going to be the person in charge of a particular police investigation into a suspected or actual crime.

42. Second, the Attorney General is a cabinet minister appointed from the House of Assembly or the Senate (articles 72 and 73 of the Constitution), but he also has under article 78 powers to institute, take over and continue or discontinue proceedings. These are powers vested in him to the exclusion of any other person and in the exercise of which he is not to be subject to the direction or control of any other person. Although the consultation prescribed by section 5(2) of the LDA does not literally fall within the scope of section 78, it is clear that Parliament's intention when enacting section 5(2) was that the Attorney General should, when consulted, act in his well-understood independent capacity, balancing the interests of the public and the subject, and so advising accordingly.

43. In the present case, the Court of Appeal referred to an observation by the High Court of Australia in *Grollo v Palmer* 1995 184 CLR 348, made in the context of a power to issue a telecommunications interception warrant. The High Court said that "the power to confer non-judicial functions on judges as designated persons is subject to the conditions that the conferral must be consented to by the judge and the function must not be incompatible either with the judge's performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power". The President of the Court of Appeal commented:

> "89. It seems to me that that last caveat is important in a small jurisdiction such as The Bahamas since the involvement of judicial officers (in which I include Magistrates as well as Registrars of the Supreme Court) at the investigatory stage of suspected criminal activity would

> create serious problems of perception of objectivity at the trial stage of such activity and may well lead to the blurring of the line between executive and judicial functions. It also tends to confuse the continental system in which there are investigating judges/magistrates with a system in which the courts are separate from the executive which has the duty to investigate and prosecute persons for the commission of criminal offences."

The Board accepts the force of this observation, which the Court of Appeal was well-placed to make. In its light no doubt, the main focus of Mr Fitzgerald's submissions as regards the Attorney General's role was that the LDA should have required his consent, rather than simple consultation, as a minimum safeguard.

44. Third, the requirement that the Commissioner be satisfied that the authorisation be "necessary" imports a close review of other possibilities, as well as of the proportionality of the measure in the particular circumstances and for the conduct of the particular investigation under section 5(2)(a) or for the obtaining of the particular evidence under section 5(2)(b). Fourth, as the Court of Appeal stated, each authorisation must be in writing and authorise the use of the listening device for the relevant purpose in such manner and for such period (of at most 14 days) as it specifies, and must be entered in a record kept under section 5(4). But, fifth, in addition, any record made of information obtained by the listening device which does not relate to the relevant purpose must under section 7 of the LDA be destroyed as soon as possible after it is made. Finally, the enforcement of the conditions stated in section 5 is backed not only by the prohibition under section 10 of use in evidence of any private conversation coming to the knowledge of a person as a result of the use of a listening device in contravention of section 3 (i.e. not in accordance with an authorisation given under section 5) but also by the criminal offence created by section 3.

45. The Bahamian scheme is therefore clearly considered, subject to the question of adequate safeguards, and the Board does not consider that it is vulnerable to the criticism that it permits overbroad and disproportionate surveillance. The question which the Board has therefore to address is whether it goes far enough in the safeguards which it includes to comply with article 23 of the Constitution. Two criticisms require particular consideration. The first relates to Mr Fitzgerald's submission that the system wants independent supervision. In particular, the Commissioner is the decision-maker, while the Attorney General is required only to be consulted, not to agree; and there is no process of subsequent independent review in respect of the operation of section 5 of the LDA. The second relates to the absence of any published procedures regulating the handling of records of information obtained by an authorised listening device and their eventual destruction when their purpose is spent.

46. The second criticism has a link with the first, in so far as the effectiveness of any subsequent review depends upon the records which exist to review. It is right that neither in the LDA nor so far as appears elsewhere is there a published procedure regarding the drawing up of internal reports of information obtained, or the preservation or destruction of information obtained. However, section 7 covers any record, whether written or other, of information obtained by use of a listening device, and it requires destruction as soon as possible of so much of that record as does not relate to the purpose of the authorisation. Section 7 must be viewed in the light of the Crown's well-established duty to preserve and disclose any material relevant to either side's case. The combination of that duty and section 7 has the effect that the Crown must destroy any information which it has recorded as and when such information ceases to be required for its original purpose, that is the investigation or prosecution of criminal offending. In law, therefore, there is a known or identifiable procedure for the handling of information obtained and recorded, meaning that the provision made for surveillance is to that extent "reasonably justified". Further, section 5(4) requires a permanent record to be kept of all authorisations issued under section 5.

47. In these circumstances, the only substantial criticism that can, it appears to the Board, be made of the present Bahamian system is of want of independent supervision whether at the stage of initial authorisation by the Commissioner or subsequently in terms of want of arrangements for the independent review of and reports on the operation of section 5 of the LDA. It is necessary to consider where such a criticism might lead. If the problem is viewed as one of potential incompatibility of section 5(2) with the 1973 Constitution, then that route is on the face of it barred to the appellants by the saving for existing laws to be found in section 30(1) of the 1973 Constitution. Mr Fitzgerald's riposte to this, is, as already mentioned, two-fold. First, he submits that the appeal is concerned with executive acts, not existing laws. All that section 30(1) saves is existing laws, i.e. laws enacted or made before 10th July 1973. Nothing saves "any executive act done, after 9th July 1973 under the authority of any such [existing] law". The Board notes, however, that the wording of section 30 is more complex than that. Section 30(1) provides that "nothing contained in or done under the authority of any [existing] law shall be held to be inconsistent with or in contravention of" any of articles 16 to 27. The use in both section 30(1) and section 30(3) of the phrase covering things "done under the authority of" an existing law creates a conundrum regarding the inter-relationship of the two subsections.

48. The Bahamian first instance courts have addressed this conundrum in a series of cases. In *Armbrister v Commissioner of Police* [1977-78] 1 LRB 549, the appellants were convicted of taking part in a public procession without the previous written permission of the Commissioner of Police, contrary to section 230(3) of the Penal Code. The appellants challenged the constitutionality of section 230(3) by reference to articles 2 and 25 of the Constitution. Potter Actg CJ held that, as an existing law, it could not be rendered void, but that the Commissioner's executive act in refusing permission was challengeable, although on the facts he held it reasonable and so the claim failed. He supported this conclusion by the following further reasoning at p554:

> "The effect of art 30 on art 25 in this case is that the content of section 230(3) of the Code cannot be rendered void by arts 2 and 23, but that any 'executive act' on the part of the Commissioner of Police since 9 July 1973 done under the authority of section 230(3) of the Code must fall within the exceptions provided in para (2) of art 25.
>
> The same conclusion may be expressed in another way by saying that the relevant section of the Code is only statutory authority for the executive acts of the Commissioner of Police (since 9 July 1973) in so far as those acts comply with the Constitution.
>
> Where a provision of the existing law is such that no executive act which is constitutionally valid can be performed under its authority, the preservation of that existing law is of no consequence.
>
> It is where the provision of the existing law could be used as the authority for constitutional or unconstitutional executive acts, and the provision is not severable, that art 30 comes into play. It preserves the law despite the Constitution, but only permits its use for constitutional purposes."

49. The reasoning appears to the Board unexceptional up to a point. The Commissioner had to decide whether or not to give permission, and he was clearly obliged to take his decision in accordance with the Constitution. But the reasoning goes further, to suggest that no executive act can be immune from constitutional scrutiny, even if it is required or directly authorised by an existing law. The Board cannot subscribe to that, or therefore to either the full width of the first paragraph or the third paragraph. If an existing law cannot be performed without breaching the Constitution, that appears to the Board a situation in which something "done under the authority of any [existing] law" would be preserved from challenge under article 30(1) of the Constitution. Otherwise, the existing law would itself in effect be void.

50. The next case, *Frederick Smith v Commissioner of Police* (1984) 50 WIR 1, falls into the same category: a police power to erect barriers across roads had to be exercised with due regard to the constitutional right to enjoy freedom of movement (and was held to have been). The third case is *re Fitzroy Forbes* (no 498 of 1990) where Hall J was concerned with a challenge to the Acquisition of Lands Act and the acquisition of lands in Andros. Hall J endorsed Potter Actg CJ's words in *Armbrister*, but this does not

appear to have been central to his decision, which was that the Act and the process of acquisition prescribed under it complied with the Constitution. In *Tynes v Barr* (1994) 45 WIR 7, Sawyer J also referred approvingly to Potter Actg CJ's decision in brief support of an alternative ground of her decision on one of the points before her.

51. *Gladstone McEwan v Bethel* Civil (Const) No. 881 of 2002 is in a different category. Section 59(1)(b) of the Parliamentary Elections Act (no 1 of 1992) required the presiding officer to mark each voter's name and number on a counterfoil. A voter challenged the constitutionality of this requirement. Section 59 replicated section 54 of the Representation of the People Act 1969, and was treated as an existing law within article 30(1). Hall CJ concluded that article 30 was irrelevant, because the right to vote could be found in article 1 of the Constitution (the provision that The Bahamas is to be a "sovereign democratic state"). The Board need not consider or address that point. What matters presently is that he added, citing *Armbrister*, that, even if the only claim was under article 23 (freedom of expression), article 30 was irrelevant, since executive acts are not saved. He then declared section 59(1)(b) void, a conclusion consistent with reliance on a combination of articles 1 and 2, but not consistent with reliance on article 30(3). Hall CJ's reasoning cannot, in the Board's opinion, stand so far as it rested on articles 23 and 30. Section 59(1)(b) was a provision in an existing law, which laid an unequivocal and unavoidable duty on the returning officer, giving him no power or discretion to do anything but mark the voter's number and number on the counterfoil relation. The performance of such a duty must fall within article 30(1), not article 30(3). Otherwise, article 30(1) becomes meaningless.

52. Mr Fitzgerald's alternative submission is that the saving for existing law only takes one back to consider what the position regarding the LDA was when it was enacted under the 1969 Constitution in 1972. That is correct. There was nothing in that Constitution to stop the Board recognising any incompatibility of section 5(2) with section 9 of the 1969 Constitution. Thus, in accordance with the Board's decision in *Bowe v The Queen* [2006] 1 WLR 1623, the Board can and should treat section 5(2) as modified under article 14 of the 1969 Constitution (the equivalent of article 28 of the current Constitution) by reading in any safeguards required. So modified, section 5(2) would comply with article 23 of the current Constitution, but, in Mr Fitzgerald's submission, the authorisations the subject of the present appeals could not and would not comply with section 5(2) as modified. Evidence of the conversations recorded under such authorisations would thus be excluded under section 10 of the LDA.

53. In the light of what the Board has said in paragraphs 47 to 51, it is necessary to determine whether any constitutional objections which may exist with regard to the authorisations are properly to be regarded as objections to executive acts, or are in reality objections to the LDA. Mr Fitzgerald submits, correctly, that the issue of any authorisation is in one sense an executive act, which, if the scheme is unconstitutional, the Commissioner could and should avoid undertaking. But this would mean that, in order to avoid committing an unconstitutional act, the Commissioner should cease

altogether from using the LDA. As already stated, that would make the saving of existing laws meaningless. Just as a duty imposed by an existing law must be capable of performance, so in the Board's view section 30(1) must enable the performance of an existing law which cannot otherwise be performed without contravening the current Constitution. The *Armbrister* principle only properly applies when there are true alternative means of performance, at least one of which complies with the Constitution and must then be adopted.

54. Mr Fitzgerald submits however that the absence of safeguards does not necessarily reflect on the LDA, and that the Commissioner or other authorities could themselves have made good all or some of the necessary safeguards by executive action outside the scope of the LDA. The Board would accept that the second main criticism (that there was "no known or identifiable procedure published regulating the handling of information obtained and recorded by use of an authorised listening device") is one which might have been met by executive act. Assuming (contrary to the Board's view expressed in para 46 above) that this criticism was made good, the Commissioner could have arranged publication of a general scheme of their procedures for the handling of such information. The Board accepts that an executive act can consist in an omission. But the question is what should be the consequence of the executive omission to publish any such scheme. The most that the Board would consider as appropriate would be a declaration that the executive failure exists and should be remedied. Since, by definition, it concerns a failure consisting of an executive act associated with, but nonetheless outside the scope of, section 5(2), the failure could not attract the operation of section 10 of the LDA. The most that it might lead to is an application to the Magistrate to consider, under section 178 of the Evidence Act, excluding evidence obtained by use of a listening device. Although this would be a matter for the Magistrate to consider in the light of all the circumstances, the Board would not find it easy to conceive of the absence of any published procedure as having so adverse effect on the fairness of extradition proceedings as to require exclusion of information obtained by use of a listening device authorised under section 5(2).

55. The Board finds it difficult, however, to see how executive action could have remedied any want of independent supervision that may be established under the first criticism. Assuming for a moment that the first criticism is made good, the Commissioner could not have converted the requirement that he take the decision in consultation with the Attorney General into a requirement that some independent outsider take the decision or that the Attorney General consent, rather than be simply consulted. Nor does the Board see how any arrangements for independent review of and reporting on the operation of section 5 of the LDA could plausibly have been established by mere executive act. Any reviewing body or person would need statutory authority in order to investigate and report effectively and, from a public viewpoint, convincingly. Any want of independent supervision in either respect is therefore a failure integral to the LDA.

56. The key question in relation to the first criticism is therefore whether it is precluded by the saving for existing laws contained in the 1973 Constitution. The Board has already noted (paragraphs 41 and 42) the responsibilities and the status of the Commissioner of Police and the Attorney General in the Bahamian legal system, including the latter's independent capacity when consulted under section 5 of the LDA. As to the submission that there should have been a process of review by an independent supervisor or body, the Board notes that, although there was in fact such a reviewing authority in *Klass* (1979) no reference was made to the need for one in the later case of *Malone* (1984). As is apparent from paras 37 to 38 above, it is in subsequent authorities that more detailed minimum safeguards have been firmly identified, but even they do not insist on particular means of ensuring independence of regulatory control. The Board does not consider that, judged by the standards applicable in the period 1969 to 1973, the absence of any greater degree of independent decision-maker or oversight would or should have been regarded then as unconstitutional. It follows that the LDA is saved by section 30(1) of the 1973 Constitution, even though it also accepts that, under current standards, a further element of independent safeguarding in at least one of these respects would be required.

57. The Board adds that, even if it had concluded that the LDA was by the standards of 1969 to 1973, lacking in sufficient safeguards, the Board would not have considered that the appropriate redress was to write such safeguards into the LDA by amendment of section 5(2). It follows that the appellants would not have been able to invoke section 10 to exclude evidence obtained by the listening devices used under the authorisations. Once again, the most that might have been open to the appellants would be to apply to exclude evidence under section 178 of the Evidence Act, to do which they would have to show that the absence of the relevant safeguards had such an adverse effect on the extradition proceedings that the court should not admit the evidence.

58. The Board is conscious that it is taking a more limited view of the constitutional provision saving existing laws than has been taken in the series of first instance Bahamian cases to which the Board has referred in paragraphs 47 to 51 above. It seems likely therefore that the provision for the saving of existing laws has to date proved of little if any significance in Bahamian law. The Board understands the view taken by Bahamian first instance judges that such a saving strikes a curious note in a modern constitutional state like The Bahamas. It may be that the Bahamian legislature would wish to reconsider whether it remains appropriate in the modern era. Even apart from that, it may in any event be that, in the light of the Board's view that the LDA would not meet current constitutional standards had it been appropriate to apply them, the Bahamian legislature would wish to consider whether the scheme provided by the LDA should now be revisited and revised.

59. In the light of the above, the answers that the Board gives to the questions referred by the Magistrate and set out in paragraph 7 are as follows. Questions (1) and (2) are answered in the affirmative. As to question (3), assuming that the Magistrate has

not already made findings about this, it is open to the appellants to seek to investigate further during the extradition proceedings whether the limits of the authorisations were observed. Questions 4, 5 and 6 are answered in the same sense as Isaacs J, though for different reasons. The Board will humbly advise Her Majesty that the case should be remitted to the Magistrate for the continuation of the extradition proceedings on the basis of this judgment.