



Easter Term
[2026] UKPC 17
Privy Council Appeal No 0040 of 2024

JUDGMENT

Wolda Salamma Gardner (Appellant) v Director of Public Prosecutions and another (Respondents) (Bermuda)

From the Court of Appeal of Bermuda

before

Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
29 April 2026

Heard on 23 July 2025

Appellant

Edward Fitzgerald KC
Amanda Clift-Matthews
(Instructed by Simons Muirhead Burton LLP)

Respondent

Tom Poole KC
Charlotte Pope-Williams
Cindy Clarke
Shakira Dill-Francois
(Instructed by Charles Russell Speechlys LLP (London))

LORD SALES:

1. This appeal is concerned with the effect of an infringement of the right to a fair trial under section 6 of the Constitution of Bermuda (“section 6”) which was identified as a result of another case several years after the trial and an appeal in respect of it had taken place. The particular infringement of section 6 arose from an imbalance between the right of the prosecution and the right of the defence to object to the selection of members of a jury under section 519(2) of the Bermuda Criminal Code (“section 519(2)”). In the case of *Trott v Director of Public Prosecutions* [2020] SC (Bda) 35 Civ that provision was held to be inconsistent with a defendant’s rights under section 6 with the consequence that it was to be treated as inoperative.

2. The appellant in the present case wishes to rely on the ruling in *Trott* in order to challenge the validity of his conviction on constitutional grounds, although he did not rely on his constitutional rights under section 6 during his trial or on appeal. The principal question before the Board is whether he is entitled to do so in these constitutional proceedings brought under section 15 of the Constitution, rather than by seeking to apply to the Court of Appeal in the criminal proceedings against him to reopen the appeal he previously brought against his conviction.

3. In the authorities a distinction has been drawn between cases which are proceeding at trial or by way of a first appeal, and closed cases (ie cases where any ordinary right of appeal has expired). The present case is a closed case in this sense.

Relevant provisions of the Constitution

4. Chapter I of the Constitution is entitled “Protection of Fundamental Rights and Freedoms of the Individual”. It includes section 6, entitled “Provisions to secure protection of law”, subsection (1) of which states:

“If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

5. Section 15 of the Constitution, also in Chapter I, is headed “Enforcement of fundamental rights”. So far as relevant, it provides:

“(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened

in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the 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 subsection (1) of this section; ...

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 foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

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

The Bermuda Criminal Code

6. Section 512 of the Code makes provision for a defendant in criminal proceedings who pleads not guilty to be tried by a jury.

7. Section 519 of the Code is headed “Challenge of jurors”. Section 519(1) provides that a person arraigned on an indictment with an offence which is not punishable by death may “challenge without cause ... not more than three persons, drawn to serve as jurors in connection with his trial”. By contrast, as it stood at the time of the trial of the appellant in 2015, section 519(2) provided that the Crown:

“may apply that a person drawn to serve as a juror shall stand by until such time as his name is called a second time, and in such case the court shall order the juror concerned to stand by and shall order the proper officer of the Supreme Court to draw from and call upon the remaining names of the jurors in the panel”.

The *Trott* decision and amendment of section 519(2)

8. In *Trott*, decided in 2020, Hargun CJ ruled that the jury selection process provided for under section 519(2) was inconsistent with Mr Trott's fundamental right under section 6 to a fair trial by an independent and impartial tribunal, in that it allowed the prosecution to require that an unlimited number of jurors stand by (subject, of course, to the limit created by the number of jurors enlisted for consideration for inclusion in the jury for the trial), whereas the defence was only allowed to challenge three jurors without cause. Hargun CJ held that this imbalance in the right to challenge jurors would lead a fair-minded and informed observer to conclude that there was a real possibility that the jury might be biased in favour of the prosecution (in breach of the implied requirement in section 6(1) that the tribunal should give an appearance of impartiality, as well as being impartial in fact) and that it infringed the principle of equality of arms between prosecution and defence (which was also held to be an implied requirement in section 6(1)).

9. Hargun CJ therefore made a declaration that section 519(2) was inoperative to the extent that it allowed for a disparity between the number of jurors the prosecution could require to stand by and the number of jurors the defence could challenge without cause. He suspended the effect of his ruling for three months to enable Parliament to amend section 519(2) to remove the disparity. Hargun CJ's judgment was not appealed by the Crown.

10. The Criminal Code Amendment (No 2) Act was passed on 24 July 2020. It came into effect on 5 August 2020. It repealed section 519(2) and brought the rights of the prosecution and the defence into alignment by allowing the prosecution to require up to three jurors to stand by (for each defendant) and each defendant to be able to challenge up to three jurors without cause. Section 5 of the Act provided that the method of challenge of jurors under section 519(2) before the Act came into operation was not invalidated and that, accordingly, "no conviction shall be quashed solely on the ground that it resulted from a trial in which the Crown stood by more potential jurors than a defendant, or defendants together, were able to challenge without cause". That provision of ordinary legislation could not override the effect of the Constitution.

The factual background

11. On 21 March 2013 the appellant was charged with the premeditated murder of Malcolm Augustus and possession of a firearm with intent to commit an indictable offence.

12. On 30 and 31 March 2015 a jury was selected for the appellant's trial in the Supreme Court. Pursuant to section 519(2) the prosecution required significantly more

jurors to stand by (about 15 in number) than the three the appellant was entitled to challenge without cause. The trial commenced on 31 March 2015.

13. On 24 April 2015 the appellant was convicted of both offences. On 28 July 2015 he was sentenced to life imprisonment with a minimum term of 20 years for the murder and a concurrent term of 20 years' imprisonment for the firearm offence.

14. The appellant appealed against his conviction to the Court of Appeal. His appeal was dismissed on 30 January 2017. On that date, the Director of Public Prosecutions (the first respondent to the present appeal) appealed in relation to the sentence given to the appellant, on the grounds that it was manifestly inadequate. That appeal was successful, and on 8 March 2017 the appellant's sentence was increased to life imprisonment with a minimum term of 25 years for the murder and a consecutive term of 10 years' imprisonment for the firearm offence.

15. On 2 November 2017 the appellant filed an application to the Board for permission to appeal against his conviction. The Board refused that application on 12 June 2019.

16. On 6 August 2020, shortly after the decision in *Trott* and the amendment of section 519(2), the appellant filed an originating summons in the Supreme Court under section 15 of the Constitution seeking relief including declarations that his trial was unfair ab initio because the jury was empanelled under the unamended provisions of section 519(2) and the jury selection process was unfairly biased in favour of the Crown, and orders quashing his guilty verdict and ordering a retrial.

The judgment in *Roberts*

17. On 11 June 2021, in the case of *Roberts v R* [2021] CA (Bda) 8 Crim, the Court of Appeal dismissed the applications of three individuals to reopen and allow their appeals against conviction on the basis of *Trott*. Before the decision in *Trott* was handed down, the individuals had been convicted and they had previously appealed to the Court of Appeal which had dismissed their appeals. In one of the cases (Brangman) a further appeal to the Judicial Committee of the Privy Council had also been dismissed ([2015] UKPC 40; [2016] AC 314).

18. The Court of Appeal gave leave for the three appeals to be reopened in the light of the decision in *Trott* to allow argument about the effect of that decision. The Court of Appeal held that *Trott* did not provide a foundation to allow the reopened appeals. The principle of finality in criminal proceedings was vitally important, therefore the decision in *Trott* was not to be given retrospective effect such as to disturb the convictions in closed cases of the kind in issue, where it was considered that the cases had no exceptional

feature. The court referred in particular to the decision of the Supreme Court of Ireland in *A v Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 IR 88 and the decisions of the Supreme Court of the United Kingdom in *Cadder v HM Advocate* [2010] UKSC 43; [2010] 1 WLR 2601 and of the Court of Appeal of England and Wales in *R v Bestel* [2013] EWCA Crim 1305; [2014] 1 WLR 457, which both followed the approach in *Arbour Hill*.

19. In *Arbour Hill* the appellant pleaded guilty and was convicted in 2004 of an offence of unlawful carnal knowledge contrary to section 1(1) of the Criminal Law Amendment Act 1935. In 2006 the Supreme Court of Ireland declared that provision to be unconstitutional and invalid. The appellant appealed, relying on that later decision. The High Court accepted his argument but the prosecution appealed successfully to the Supreme Court. Murray CJ said (para 87) that when an Act is declared unconstitutional “a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interest of the common good in an ordered society”. At paras 125–126 he observed:

“125. In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision, is unconstitutional. That is the general principle.

126. I do not exclude ... some extreme feature of an individual case [which] might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts ... be not allowed to stand.”

At para 127 Murray CJ observed that the appellant, like all persons in his position, could have sought to prohibit prosecution on grounds including that the statutory provision was inconsistent with the Irish constitution and that, not having taken that opportunity, he was tried and convicted after due process of law and that once finality was reached in those circumstances the general principle should apply.

20. In *Cadder* the United Kingdom Supreme Court addressed a situation in which it held that, by virtue of a development in the relevant European jurisprudence, the Human Rights Act 1998 had the effect that denial of access to legal assistance in police custody

amounted to a breach of the fair trial requirement under article 6 of the European Convention on Human Rights, as implemented in domestic law. The appellant had been interviewed in police custody in the absence of a lawyer and evidence of the interview was introduced at his trial on criminal charges, resulting in his conviction. He did not object at his trial to the admission of this evidence, but he sought to appeal and at that stage complained of breach of his rights under article 6. His appeal was successful because he introduced the point timeously before his ordinary rights of appeal had expired (ie this was not a closed case), but at the same time the Supreme Court distinguished the position in relation to closed cases and held that the principle of legal certainty required that cases which had been finally determined should not be re-opened, following *Arbour Hill* in that regard: paras 60–62 (Lord Hope of Craighead) and 100–103 (Lord Rodger of Earlsferry).

21. In giving the lead judgment in *Roberts*, Sir Christopher Clarke P said (para 104) that the court had to take account of three sets of interests:

“(a) the interests of the accused; (b) the public interest in good order, finality, certainty and closure; and (c) the interests of the victim’s family and others, who will be understandably disturbed, if not appalled, at the prospect of everything going back, years later to square one”.

He held that the Court of Appeal should adopt the same approach as in *Arbour Hill* and *Cadder*: paras 110–111. He pointed out that the appellants in *Roberts* could have made the submission that section 519(2) was unconstitutional, just as it had been made on the part of Mr Trott in his case, either in the course of their trials or (as in *Trott*) by constitutional proceedings parallel to their trials in such a manner as to affect the method of selection of the jury at the time: para 112. The point could also have been taken on their first appeals, before their cases became closed cases: para 113. As was recognised in *Arbour Hill* (para 126, quoted above), there might be wholly exceptional circumstances in which a subsequent decision as to the unconstitutionality of a statutory provision should be applied so as to allow an appeal in a closed case, but the appeals before the court did not qualify as such exceptional cases: paras 115–116 and 120. An exceptional case might be one in which jurors were stood down in the exercise of the prosecution’s power under section 519(2) in a manner in which, by reference to reasons apparent at the time, or now known, “the proposition that the Crown was fixing the jury in its favour and that, if it had not, the result would probably have been different” carries conviction: paras 189–191. (In the event, one of the appeals in *Roberts* was allowed, but for different reasons).

The proceedings below in the present case

22. On 3 December 2021 Hargun CJ, sitting in the Supreme Court, dismissed the appellant's claim for constitutional relief: [2021] SC (Bda) 96 Civ. He considered that he was bound by *Roberts*, which led to that conclusion. Even if he was not strictly bound by *Roberts* as a matter of its ratio decidendi, Hargun CJ said he would have followed the reasoning in it, which he found persuasive. In particular, Hargun CJ held that, as regards the approach to be adopted, there was no material difference between proceedings to challenge a closed case by way of a reopened appeal out of time, as in *Roberts*, and proceedings by an originating application under section 15(1) of the Constitution seeking to set aside a conviction: para 28. The Court of Appeal in *Roberts* confirmed it has power under section 17(1) of the Court of Appeal Act 1964 ("the 1964 Act") to reopen a closed case and could do so "if (i) the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality; (ii) there is no other effective remedy; and (iii) the accused would suffer substantial injustice if it did not do so", which would be the same test in relation to any application of section 15 of the Constitution in relation to a closed case: para 29.

23. Hargun CJ held that since the Supreme Court and the Court of Appeal were bound to apply the same test in considering the appellant's challenge to his conviction based on breach of section 6, the application to the Supreme Court under section 15 of the Constitution fell to be dismissed by reason of the proviso in section 15(2) (para 5 above), which stipulates that "the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law": para 30. Hargun CJ stated (para 31) that in the ordinary case where an applicant seeks to challenge and set aside a criminal conviction following a trial in the Supreme Court "the appropriate procedural route to make that challenge is by way of an appeal under section 17(1) of the 1964 Act" (in a closed case, this would involve inviting the Court of Appeal to exercise its discretion to give leave to allow an appeal out of time or, as in the present case, to reopen an earlier appeal). The judge was careful to express no view as to the merits or otherwise of any application the appellant might make to the Court of Appeal to reopen his appeal.

24. The appellant appealed to the Court of Appeal. The Court of Appeal (Sir Christopher Clarke P, Sir Maurice Kay and Dame Elizabeth Gloster JJA) dismissed the appeal: [2022] CA (Bda) 22 Civ. The Court of Appeal held that Hargun CJ was right for the reasons he gave: paras 27–33.

25. On 21 July 2023 the Court of Appeal granted the appellant leave to appeal to the Board on four grounds: (1) the Court of Appeal erred when it upheld the decision of the Supreme Court that, relying on *Arbour Hill*, the ruling in *Trott* did not apply to closed cases; (2) the Court of Appeal erred in holding that the test in *Roberts* for reopening a criminal appeal in relation to a breach of section 6 arising from the application of section

519(2) should be applied in relation to the appellant's motion for constitutional redress; (3) alternatively, the test adopted in *Roberts* was erroneous; and (4) the Court of Appeal erred in holding that the appellant had an adequate alternative means of redress by way of an application to reopen his criminal appeal.

The decision of the Board

26. In the Board's view, the proviso to section 15(2) of the Constitution applies and the appeal should be dismissed.

27. The proviso to section 15(2) of the Constitution makes it clear that a constitutional complaint direct to the Supreme Court under section 15(2) will not be entertained if adequate means of redress are or have been available to the appellant under any other law. This reflects the relationship in Bermuda between the rights set out in the Constitution and ordinary law. In large measure, ordinary law will be effective to protect the constitutional rights of citizens. Where that is the case, it is not necessary or appropriate to have recourse to the Supreme Court's original jurisdiction under section 15(2). To do so would be disruptive of ordinary and adequate legal processes and would create legal uncertainty without good reason. The original jurisdiction of the Supreme Court under section 15 was created as a fail-safe to ensure that constitutional rights are protected where there is some inadequacy in ordinary substantive or procedural law; it was not intended that it should be available as a means to destabilise ordinary laws, procedures and judicial determinations across the board where no such inadequacy exists.

28. In *Farrington v The King* [2025] UKPC 21; [2025] 1 WLR 2840 the Board examined the effect of article 28(2) of the Constitution of The Bahamas, which is in identical terms to section 15(2) of the Constitution of Bermuda. Lord Stephens, giving the advice of the Board, referred to *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328, a decision in relation to the Constitution of Trinidad and Tobago under which a court has a discretion to decline to grant constitutional relief on a constitutional motion. It was explained (*Ramanoop*, para 25) that the discretion would be exercised if the ordinary law provided adequate means of redress:

“where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no

means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.”

29. The principle of the exclusion of constitutional relief pursuant to separate proceedings where the ordinary law provides an adequate means of redress is even stronger in jurisdictions like The Bahamas and Bermuda where the Constitution itself imposes a rule, rather than creating a discretion, that such relief shall not be granted in those circumstances. In *Farrington* the Board put it this way (para 81):

“The rationale underpinning the proviso to article 28(2) of the Constitution of The Bahamas is the same rationale that underpins the discretion under the Constitution of Trinidad and Tobago, namely, to prevent ‘misuse, or abuse, of the court's process.’ The proviso to article 28(2) in The Bahamas and the discretion in Trinidad and Tobago are both forms of the abuse of process doctrine. However, in The Bahamas the parameter of the abuse of process doctrine is fixed by the Constitution. The proviso is expressed in mandatory terms so that circumventing another adequate means of redress and instead seeking constitutional redress is an abuse of process.”

The effect of the proviso in section 15(2) of the Constitution of Bermuda is the same.

30. The issue of the interaction of rights under a constitution and ordinary procedures in the area of criminal law has been addressed in the case law of the Board over a long period. In *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106 Lord Diplock referred to his previous statement in *Maharaj v Attorney General of Trinidad and Tobago (No 2)* [1979] AC 385, 399–400, that the proper route to attack a conviction on constitutional grounds is by an appeal rather than by a constitutional motion. In *Chokolingo*, at pp 111–112, Lord Diplock called attention to the unjustified disruption of ordinary legal procedures, and the effect that would have of undermining the rule of law, if such an attack on a conviction were to be permitted to be mounted by constitutional motion:

“Acceptance of the applicant's argument [that such an attack is permitted] would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution [of Trinidad and Tobago, which was in similar

terms to section 15(1) of the Constitution of Bermuda] to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) is stated to be ‘without prejudice to any other action with respect to the same matter which is lawfully available.’ The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships’ view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.”

The right under section 15(1) of the Constitution of Bermuda to apply to the Supreme Court is also stated to be “without prejudice to any other action with respect to the same matter which is lawfully available”; and it cannot be doubted that the principle of the rule of law is as strong a feature of that Constitution as of the Constitution of Trinidad and Tobago.

31. *Hinds v Attorney General of Barbados* [2001] UKPC 56; [2002] 1 AC 854 concerned section 24 of the Constitution of Barbados, which is in similar terms to section 15 of the Constitution of Bermuda. Section 24(2) contains a proviso in identical terms to that in section 15(2) of the Constitution of Bermuda. The appellant had been convicted of an offence after a trial at which he had not been provided with legal aid. On his appeal against conviction he maintained that this had been in breach of his constitutional right to a fair hearing. That appeal was dismissed, with the Court of Appeal holding that there had not been any breach of his constitutional right. The appellant then made a constitutional application to the High Court of Barbados under section 24, to complain once more that there had been a breach of his constitutional right. The judge dismissed the application on the ground that the Court of Appeal had determined the point and the appellant was not entitled to raise it again. His appeal to the Court of Appeal in the constitutional proceedings was dismissed on the ground that the proviso to section 24(2) applied, since adequate alternative means of redress had been available to him. His appeal to the Board in those proceedings was dismissed. In the Board’s view, although it was unclear on the facts whether the denial of legal aid had violated the appellant’s constitutional right, it had been open to him to raise that point on his appeal against conviction, with the possibility of a further appeal to the Board. Therefore the Board held (para 19), that “[t]he ordinary processes of appeal offered the applicant an adequate opportunity to vindicate his constitutional right”.

32. Lord Bingham of Cornhill, giving the advice of the Board, also considered the objection of the Attorney General regarding the form of the proceedings in which the appellant sought to raise this issue and the Attorney General's submission that the appellant was "making what amounted to a collateral attack on his criminal conviction on constitutional grounds", whereas if he wished to attack his conviction on such grounds "the proper route was by an appeal against his conviction when all such grounds were open to him", with a further appeal to the Board in respect of those appeal proceedings (para 22). The Board held (para 24) that on the facts of the case there was no answer to that objection; and whilst observing that it would be undesirable to inhibit the grant of constitutional relief in cases where such relief is unavailable or not readily available through the ordinary avenue of appeal, it affirmed that "Lord Diplock's salutary warning [in *Chokolingo*] remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected". In substance, therefore, the Board found that the separate constitutional claim which the appellant sought to bring was (in the language used in the later cases) an abuse of process.

33. In the context of the present case, as Mr Tom Poole KC submitted on behalf of the respondents, the dismissal of the appellant's constitutional motion prevented a collateral attack being mounted in respect of a conviction in a closed case, thereby preserving the integrity of Bermuda's appellate framework and preventing constitutional litigation from being used to circumvent established procedures. The ruling by Hargun CJ and the decision of the Court of Appeal do not prevent the appellant from seeking to reopen his appeal against conviction, albeit that would involve him in (i) having to satisfy the test indicated in *Roberts* to show that his was a special case deserving of relief in respect of a past infringement of his constitutional right which he did not raise timeously at his trial or on his first appeal or (ii) persuading the Court of Appeal to modify that test in a way favourable to himself. If he failed to do either of those things, he could seek to appeal onwards to the Board in those criminal proceedings (subject to satisfying the usual filters regarding such appeals).

34. The important point is that adequate means of redress are available to the appellant, so the proviso to section 15(2) of the Constitution falls to be applied. There are no good grounds for any suggestion that the legal test to be applied in the circumstances of his case should be any different in the context of a constitutional motion as opposed to the context of an application to reopen his appeal in the criminal proceedings which resulted in his conviction. As mentioned, if he wishes to argue that he meets the test in *Roberts* or if he wishes to contend that that test should be modified, both those possibilities can be pursued in those criminal proceedings. It is nothing to the point that the applicable substantive law may make it difficult for the appellant to succeed in such arguments, since the same substantive law would apply and that same difficulty would confront him if he were permitted to bring a constitutional claim. It is also nothing to the point that the appellant would have to persuade the Court of Appeal that he had a reasonably arguable case in order to reopen his criminal appeal, since it is legitimate for procedures to be in

place to enable courts to ensure that their limited resources are properly deployed in dealing with reasonably arguable cases (rather than cases with no realistic prospect of success). The existence of such a filter does not prevent a litigant from having “adequate means of redress” (in the language of the proviso to section 15(2)) in ordinary circumstances, such as those which arise here; and it would be possible to seek to challenge any decision to refuse to reopen the appeal by an appeal to the Board.

35. The principle of the rule of law and the importance of maintaining procedural coherence in the application of the law in Bermuda, as underwritten by the proviso to section 15(2), require that the proviso should be applied. It is unnecessary, and would not be appropriate, for the Board to consider either of the arguments referred to above in the present appeal in the constitutional proceedings brought by the appellant.

36. In the light of this analysis, the Board can address the appellant’s four grounds of appeal (para 25 above) in succinct terms. As Mr Poole submitted, and as explained above, it is the issue arising under ground (4) which is dispositive in this appeal.

37. As regards ground (2), there is no basis to suggest that the relevant test in seeking redress in respect of the appellant’s constitutional right under section 6 in the circumstances of his case would be any different in constitutional proceedings than in a criminal appeal: see para 34 above. The substantive issue to be addressed would be the same and the substantive law to be applied would be the same.

38. Grounds (1) and (3) both seek to raise issues regarding the substantive law which falls to be applied in the appellant’s case. There are other adequate means of redress available to the appellant in respect of those issues, since they are capable of being considered properly and without prejudice to the appellant in the criminal proceedings. It is those proceedings which are the proper forum in which they should be raised. Therefore those grounds of appeal do not indicate that this is a case in which the proviso to section 15(2) should not be applied.

Conclusion

39. For the reasons given above, the Board will humbly advise His Majesty that the appeal should be dismissed.