Easter Term
[2021] UKPC 10
Privy Council Appeal No 0028 of 2019

JUDGMENT

Hinds and others (Appellants) *v* Director of Public Prosecutions (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lord Stephens
Lady Dorrian

JUDGMENT GIVEN ON

19 April 2021

Heard on 1 March 2021

Appellants	*Respondent*
Alexis Robinson	Peter Knox QC
(Instructed by Myers, Fletcher & Gordon (London))	(Instructed by Charles Russell Speechlys LLP (London))

LADY DORRIAN:

Summary of the legal issues

1. This appeal arises from procedure in Jamaica consequent upon a request by the Kingdom of the Netherlands for mutual legal assistance under the Mutual Assistance (Criminal Matters) Act 1995 ("MACMA"), asking for evidence to be taken from the appellants on oath, and by a judge in court. The taking of such evidence was authorised under section 20 of MACMA. Section 16(3) of the Constitution of Jamaica provides that "All proceedings of every court" shall be held in public. In an agreed statement of facts and issues, the parties stated that determination of the issues arising in the case required the Board to address the following questions:

> 1. Are section 20 proceedings under MACMA "proceedings" within the meaning of section 16(3) of the Constitution of Jamaica?
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> 2. In any event, even if they are not, are such "proceedings" subject to the common law "open justice" principle referred to by the Court of Appeal?
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> 3. Did the judge have a discretion to decide that the taking of evidence from the appellants should be conducted in public?
>
> 4. If so (re (above 3)), did the Court of Appeal err in law or otherwise go materially wrong in upholding the judge's exercise of his discretion?

Background

2. The second to fourth appellants were all members, and office holders, of the People's National Party ("PNP") which formed the Government of Jamaica in October 2006. They also held public office respectively as: a member of the House of Representatives and minister of Government; member of the Senate and minister of Government; member of the House of Representatives and Minister of Government; and Prime Minister. The first appellant is said to be a businessman with sympathy for the PNP. The respondent, the Director of Public Prosecutions ("DPP"), is the designated Central Authority in Jamaica under MACMA.

3. On 23 October 2006, the then Leader of the Parliamentary Opposition of Jamaica, Bruce Golding MP, wrote to the National Investigation Unit ("NIU") of the

Netherlands asking it to investigate and to determine whether a payment of Euros €466,000 made in September 2006 by a Dutch entity named Trafigura Beheer BV Amsterdam ("Trafigura") to a Jamaican company called "CCOC Association" ("CCOC"), contravened: the Dutch Penal Code in relation to contributions to political parties and the offences of false accounting, falsification of documents and bribery; the Organisation for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997); and the OECD Guidelines for Multinational Enterprises (2003). The letter explained in detail the basis upon which it was said that an investigation was required.

4. As at the date of Mr Golding's letter to the NIU, the Netherlands was not one of the designated foreign states to which MACMA applied. However, on 9 November 2007, following a change of government under which Mr Golding had become Prime Minister, the provisions of MACMA were made applicable to the Netherlands. On 3 December 2007, the National Public Prosecutor's Office of the NPPO ("the NPP") sent a request for legal assistance in respect of an investigation underway in the Netherlands relating to alleged breaches by Trafigura of sections of the Dutch Criminal Code which related *inter alia* to offences otherwise known as bribery of public officials. The letter set out the facts alleged, and asked the Jamaican authorities to carry out various investigations focusing on a number of issues associated with the payment made by Trafigura, and its subsequent disbursement. The assistance sought included the interviewing of various witnesses including the appellants, under audio recorded conditions. The request was approved by the respondent in her capacity as the Central Authority. The first letter of request was followed by a series of supplementary letters of request, asking for additional assistance in investigating further aspects of the case.

5. In the fifth supplementary letter, dated 24 January 2008, it was explained that the proposed interviews had not been carried out, and that scheduled dates for interview with the appellants had been postponed by their lawyer. The respondent was thus asked, *inter alia*, to invite the appellants to attend for interview at the offices of their attorney on 4 and 5 March 2008. The letter further requested that if the witnesses did not wish to co-operate with an interview, that the respondent should proceed:

> "… on the basis of the Jamaican Mutual Assistance (Criminal Matters) Act, section 20 to request the Judge of the Supreme Court or the Resident Magistrate to order the witnesses to attend the proceeding and to give evidence or to produce any document or other articles at that proceedings."

6. The eighth supplementary letter of request dated 14 April 2009, reported that the appellants had attended for interview as requested and had been asked a number of questions, to which they all responded: "If my assistance is requested in an investigation of bribery I cannot be of any assistance because I do not know anything about that".

The NPP accordingly requested that summonses be issued to the appellants pursuant to section 20 of MACMA, to appear before a judge of the Supreme Court or a Resident Magistrate to give evidence or produce documents or other articles in connection with the investigation. The request was headed "request for judicial summons of the witnesses", and asked that the judge or resident magistrate order the witnesses:

> "to attend the proceedings and to give evidence or to produce any documents or other articles at that proceedings [sic]."

7. Following a request from the respondent for further information required to ensure compliance with the formalities attaching to such a request, a ninth supplementary letter of request, dated 25 May 2009 was sent itemising that information. The request asked that the witnesses give evidence on oath or affirmation, and stated:

> "We wish the evidence to be taken by hearing conducted by a judge in court."

8. It is not disputed that the request complies with the formalities of MACMA and relates to a request legitimately made thereunder.

Court hearings

9. By order pronounced 17 November 2010 the appellants were ordered to appear before a judge of the Supreme Court during a specified period in order to give evidence on oath in answer to the questions which had been proposed in the ninth supplementary letter of request. This order was not appealed.

10. On 9 November 2011, the appellants issued a fixed date claim form applying for an order from the Full Court of the Supreme Court that the taking of their evidence in open court would contravene their rights under the Constitution, on the basis that section 16(3) of the Constitution, which requires "proceedings" to be in open court, did not apply to the taking of evidence under MACMA.

First instance decision

11. At the beginning of the hearing at which their evidence was to be taken, the appellants sought an order that the matter be heard in chambers. The essence of the arguments advanced was simply that there was no procedure in Jamaica under which questioning of witnesses such as the appellants would take place in open court; investigative evidence gathering should be done in private, in accordance with Jamaican

law. It was implicit in this argument, although it does not seem to have been positively asserted, that section 16(3) of the Constitution had no application in the circumstances. The appellants also sought a stay of proceedings pending the hearing of their constitutional motion before the Full Court. The judge, Campbell J, refused both motions in an *ex tempore* decision. He refused the application to hear the evidence in private on the basis of the principles of open justice. He noted that even when a matter was heard in chambers the judicial process remained an essentially public function (*Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056).

12. Before the taking of evidence had commenced, a stay was granted by the Full Court. Meanwhile, an appeal was lodged against the decision of Campbell J who prepared a written judgment for the benefit of the appeal court in which he elaborated on the reasons for his decision.

Decision of the Court of Appeal

13. It was now overtly argued for the appellants that section 16(3) had no application to the procedure under section 20 of MACMA. The procedure was a purely investigative one and according to Jamaican practice the questioning should take place in private.

14. The court's decision emphasised the vital role of the principle of open justice as an aspect of the rule of law, under reference to *Scott v Scott* [1913] AC 417. That principle found expression in section 16(3) of the Constitution, where the width of the language used was apt to cover MACMA procedure. The open justice principle could be departed from where that was necessary in the interests of justice. Thus there was, as had been found by the Full Court in the constitutional case, a discretion inherent in the operation of section 16(3). Upon examination of the circumstances the appeal was dismissed.

Constitutional motion

15. The appellants' constitutional motion was dismissed by the Full Court of the Supreme Court in September 2013. The court rejected the contention that the decision to conduct the MACMA proceedings in open court breached the appellants' constitutional rights to due process and a fair hearing. An appeal filed against this decision was subsequently withdrawn. There has thus been no appeal from that decision, which is not within the scope of the present proceedings.

Appeal to the Privy Council

16. On 8 June 2018, the Court of Appeal granted conditional leave to appeal to the Privy Council:

> (1) As of right, the matter relating to final determination of a question as to the interpretation of the Constitution; and
>
> (2) "against the backcloth of the unusual provisions of MACMA", on the issue "whether proceedings under the legislation are proceedings under section 16(3) of the Constitution, and thereby compelling persons to give testimony publicly, bearing in mind the fact that there are no regulations promulgated under it [ie MACMA], and with particular regard to the taking of evidence under section 20 of MACMA, whether a citizen can be compelled to give a witness statement in public under that legislation".

17. Final leave to appeal was granted on 29 January 2019.

Legislative instruments and treaties

The Constitution

18. The provisions of the Constitution of Jamaica to which this appeal relates were originally passed in 1962 as a schedule to the Jamaica (Constitution) Order in Council 1962 (S1 1962/1550). They were passed again in identical terms in the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.

19. The relevant part of section 16 provides:

> "(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public."

Certain limited exceptions, none of which were relied upon in the present case, are provided for in section 16(4).

International Treaties

20. Jamaica is a signatory to two treaties under which it has agreed to provide mutual legal assistance to foreign states. These are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988) and the UN Convention against Transnational Organized Crime (Palermo, 2000), both of which provide for the widest measures of mutual legal assistance in investigations, prosecutions and judicial proceedings between signatory states.

The Mutual Assistance (Criminal Matters) Act 1995 ("MACMA")

21. The Act is the instrument by which Jamaica implements its treaty obligations to render mutual legal assistance to foreign states. It was applied to requests by the Netherlands by the Mutual Assistance (Criminal Matters) (Foreign States) Order 2007. The following extracts represent the terms of the MACMA at the time when the relevant request for mutual legal assistance ("MLA") was made. Part III of the MACMA relates to requests made by foreign states. Relevant provisions included:

> "**Section 15**
>
> (1) Assistance may be provided toa foreign state, on request, in accordance with this Part.
>
> (2) Assistance provided under this Part shall be in respect of investigations and proceedings in relation to a criminal matter and such assistance may be provided as aforesaid -
>
> > (a) to the foreign state which makes a request for the purposes only of the criminal law enforcement authorities in that state; and
> >
> > (b) only if criminal proceedings have been instituted in that state or if there is reasonable cause to believe that an offence in respect of which such proceedings could be instituted, has been or is likely to be committed.
>
> (3) Assistance under this Part may be provided in relation to...

(b) the examination and taking of testimony of witnesses…

Section 19

(1) Subject to the provisions of this Act, requests to Jamaica shall be executed in accordance with the relevant laws in force in Jamaica and the procedures applicable under those laws.

(2) Where a requst contains particulars of procedure to be followed in the execution of a request, those procedures shall be followed to the extent possible under the relevant laws in force in Jamaica.

Section 20

(1) Subject to the provisions of this Act, where a request is made to Jamaica for -

(a) the taking of evidence; …

the Central Authority may, in its discretion, in writing authorize the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the relevant foreign state.

(2) Where the Central Authority authorizes the taking of evidence or the production of documents or other articles under subsection (1), a Judge of the Supreme Court or a Resident Magistrate[1] -

(a) in the case of a request for the taking of evidence, may take the evidence on oath of each witness appearing before the Judge or Resident Magistrate to give evidence in relation to the matter; …

[1] The section now refers to "a Judge of the Supreme Court or Parish Court Judge."

(3) The Judge of the Supreme Court or the Resident Magistrate conducting a proceeding under subsection (2) -

(a) may, subject to section 22, order any person to attend the proceeding and to give evidence or to produce any documents or other articles at that proceeding; ...

Section 21

No person shall be compelled, in relation to a request referred to in section 20, to give evidence or to produce documents or other articles which he could not be compelled to give or produce in criminal proceedings in Jamaica or in the relevant foreign state."

Submissions of the parties

Preliminary issue

22. The submissions in the appellants' written case were advanced under reference to the agreed issues. Permission was sought to advance additional arguments not made before the courts below. These were:

1. That section 20 proceedings were not subject to section 16(3) of the Constitution as they were not the "proceedings" of a Jamaican court.

2. The taking of the evidence in public contravened section 19 of MACMA.

23. The first of these issues had been addressed in the constitutional case under reference to section 16(2) of the Constitution, whereas the present arguments related to section 16(3). It was not entirely easy to grasp the alleged subtleties which were said to differentiate the two arguments, but in the absence of objection the Board was content to deal with both additional arguments on their merits.

24. Permission was sought to advance a further argument, namely

3. That the letters of request ("LORs") from the Dutch authorities were confidential and should not be the subject of a public proceeding.

The Board allowed the argument to be advanced de bene esse.

Submissions for the appellants

The open justice principle

25. The appellants submitted that the open justice principle was a means to an end not an end in itself - it did not apply to pre-trial proceedings (*Hodgson v Imperial Tobacco Ltd*, p 1069), or those "not in the ordinary course of litigation" (*Hogan v Hinch* [2011] HCA 4; 243 CLR 506, para 20). The present circumstances fell within both exceptions and were simply investigatory. Scrutiny of the proper administration of justice was at the core of the principle. Here there was no "administration of justice" in Jamaica. There was no dispute between contesting parties, no trial of any action, and no local proceeding.

Whether the section 20 procedure constitutes "proceedings of a court" for the purpose of section 16(3)

26. The word "proceeding" in section 20 did not have the same meaning as the word "proceedings" in section 16(3) of the Constitution. In MACMA it referred only to (i) criminal proceedings; or (ii) a proceeding of the foreign state, and not to applications made in local courts. Under the legislation the judge, not the court, was given the authority to take the evidence. Unusually, the authorisation came from the DPP, in a procedure similar to a grant of jurisdiction for investigative purposes only, which was not within the contemplation of section 16(3) of the Constitution (*Meerabux v Attorney General of Belize* [2005] UKPC 12; [2005] 2 AC513).

Request not executed in accordance with the relevant laws and procedures of Jamaica

27. Section 19 of MACMA required requests to be executed in accordance with Jamaican law and procedures. Investigative stages of an inquiry, for example in the form of Question & Answer, or under section 35 of the Justices of the Peace Jurisdiction Act, were carried out in private. The Preliminary Enquiry procedure referred to by Campbell J had been abolished, although such proceedings had been conducted in open court and under oath. In proceedings under the Extradition Act, arguably closest in object and purpose to MACMA, statements were never taken in public. Section 19 required a witness to be treated as if giving evidence at the investigative stage in Jamaica, in private.

Confidentiality of the letters of request

28. The request was made under the United Nations Convention against Transnational Organized Crime, which identified confidentiality as a right of the requesting state to ensure that its investigation and/or proceedings were not prejudiced. In the UK, LORs were confidential (*ZXC v Bloomberg LP* [2019] EWHC 970 (QB)). In Jamaica the DPP's Guidelines on MACMA recognised that it was customary for "every request for assistance to be confidential". In light of the confidentiality attaching to LORs, the order for a public hearing should not stand. The request would become the subject of open debate and taint the process, possibly leading to unfair trial arguments by Trafigura.

Improper exercise of discretion

29. In the event that the Board found that the judge was entitled to exercise a discretion, it was submitted that the discretion was exercised improperly. The judge's comment that a public hearing would "end speculation and put to rest unfounded allegations" might have been relevant in a substantive hearing, but had no application given the purely investigatory nature of the function being exercised.

30. In seeking to weigh the conflicting public interests involved, the judge took no account of interests other than those in favour of a public hearing. No consideration was given to the numerous arguments advanced in support of a private hearing. The Court of Appeal said that it "might have given less weight to factors relating to the appellants' status" but gave inadequate reasons to support the conclusion that this was not a decisive factor. The court failed to take into account the extent to which the "character of the proceedings and the nature of the functions conferred upon the court" might justify a private hearing: *Hogan v Hinch*, French CJ, para 21; *Clarke v Bank of Nova Scotia Jamaica Ltd* [2013] JMCA App 9, para 59. The allegations against Trafigura, if proven, were likely to result in the five appellants facing allegations under Jamaican law, but the absence of safeguards which would usually be provided to suspects in an investigation, and the potential effect on subsequent proceedings, were not recognised. Without taking these factors into account, the decision to hold a public hearing was an irrational one.

31. Counsel for the appellants also submitted that a court in Jamaica had no power to compel a witness to give evidence or to answer questions. It could impose no sanction where a witness under oath refused to answer a question legitimately put. *Williams v Comr of the Independent Commission of Investigations* [2012] JMFC Full 1, was said to be authority for that rather extraordinary proposition.

Submissions for the respondent

Was there a discretion to allow the hearing to take place in open court?

32. The respondent contended that the issues with which this appeal was concerned had to be put into context, namely the treaties of mutual assistance which MACMA was designed to implement. These required Jamaica to give the widest measures of mutual assistance to relevant foreign states to assist the fight against international crime. A further factor of relevance was that the request for assistance in the form of evidence being taken on oath before a judge in court was made only after other attempts to gather the evidence had failed, through lack of co-operation by the appellants.

33. Section 15 of MACMA provided without distinction for assistance to be given whether proceedings had commenced in the foreign state or whether the matter was at the stage of a criminal investigation. There was no basis for differentiating between these situations, which required section 20 to be applied in the same way to each circumstance.

34. The capitalisation of "Judge" and "Resident Magistrate" in section 20 showed that the intention was to refer to these judges in their official capacity. The manifest purpose of MACMA was to give the judge an effective power to order witnesses to answer questions, which implied a power to commit them for contempt of court if they refused. Without such a power, the scheme would be toothless.

35. The Court of Appeal held that both the common law principle of open justice and its iteration in section 16(3) and (4) of the Constitution applied to a case such as this one, albeit they must be tailored to meet the nature of the hearing. This was correct for a number of reasons:

> 1. In taking evidence under section 20 of MACMA the judge was exercising typical judicial functions. The traditional justification for the open justice principle, that of the desirability of, and benefits from, public scrutiny of a judge, applied whenever a judge performed such typical judicial functions (see *Khuja v Times Newspapers Ltd* [2017] UKSC 49; [2019] AC 161, 174, paras 12 and 13).
>
> 2. Furthermore, the judge was carrying out these functions on behalf of the state of Jamaica pursuant to its treaty obligations. The public had a legitimate public interest in seeing the hearing conducted fairly and properly.

3. Whilst the judge was not required to make any final determination on the evidence, the hearing engaged the rights not only of the foreign accused, but also of the witnesses, who were liable to be subjected to court orders with which they might not comply.

4. Witnesses had no special right to privacy which ousted the open justice principle. Preliminary Enquiries were held in public, unless the ends of justice demanded otherwise.

36. A hearing for taking evidence before a judge was plainly a "proceeding" in the natural sense of the word. Section 20(3) referred to the judge "conducting a proceeding" under section 20(2). The words in section 16(3) of the Constitution covered "All proceedings of every court". Section 16 was premised on the assumption that it was advantageous for both the individual accused and all citizens generally that proceedings be held in public so that their respective rights could not be taken away in a secret hearing. Such rights and freedoms were to be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'" - *Minister of Home Affairs v Fisher* [1980] AC 319, 328H.

Requirement that requests are carried out in accordance with Jamaica's laws and procedures

37. The Justices of the Peace Jurisdiction Act was not an Act setting out general rules of procedure for all situations. In fact, sections 34 and 35 illustrated that the open justice principle was the default principle even at the investigatory stage. As observed by the judge, statements were taken in open court from potential witnesses "every day in the Coroners Court and at Preliminary Enquiries".

Did the judge have a discretion to hold the hearing in open court?

38. There could be no doubt that under section 20 the hearing could be held in open court where "criminal proceedings" had begun in the foreign state. Given that there was no basis for discriminating between such a situation and where an investigation was underway, an open hearing was equally valid in the latter situation.

39. Section 24 of MACMA prohibited the Central Authority from requiring confidentiality in the information provided where it was required "for the purpose of any criminal proceedings", and otherwise gave it a discretion over the matter. That was inconsistent with the appellants' notion that the hearing itself must nonetheless be in private.

Did the courts below err in the exercise of their discretion?

40. There was no warrant for interfering with the exercise of discretion. The possibility that the appellants might in due course face charges in Jamaica, was not raised at either stage below. It would not be a material consideration, because any alleged prejudice could be dealt with as a ground for staying the prosecution. Furthermore, the judge was plainly right when he said that "where the investigation is shown to be concerned with issues in the public sphere that will tilt the scales in favour of a public hearing" (see eg *Axon v Ministry of Defence* [2016] EWHC 787 (QB); [2016] EMLR 20, para 64; and *ZXC v Bloomberg LP* [2020] EWCA Civ 611; [2021] QB 28, paras 62 to 69).

41. The judge was right to say that (a) the Netherlands' request was in accordance with the statutory requirements, (b) none of the exceptions in section 16(4) of the Constitution was relied upon, and (c) that the answer to the suggestion that the investigation was all part of a Machiavellian scheme by political rivals was to have the matter aired in public. Given the nature of the allegation against Trafigura, namely bribery of public officials, and the appellants' apparent role in some of the events in question, having the matters aired in public was an entirely sensible conclusion.

New issue (d) the alleged failure to consider the confidentiality of the letters of request

42. This too raised questions of evidence which had not been addressed below. In any event, it was hopeless. The ninth supplementary letter asked for the hearing to be conducted by a judge in court. This necessarily envisaged the possibility that it might be heard in public. Thus even if there had been any confidentiality, it was waived, by the request to take the evidence in court.

Analysis and decision

Proceedings of a court?

43. The appellants' submission that the section 20 procedure for taking evidence did not constitute proceedings of a court in Jamaica must be rejected. In the first place, the procedure is referred to within section 20 itself as a "proceeding". There is no reason to interpret this word other than according to its normal and common usage. The argument that the word "proceeding" must, on a full examination of MACMA, be accorded a different meaning to the word "proceedings" in section 16 of the Constitution must also be rejected. The submission was that within Part III of MACMA the word "proceeding" was "often" used to refer to proceedings within the foreign state. In other words, it was

not being asserted that there was a uniform and consistent usage within Part III which supported the appellants' submission.

44. In fact, the opposite would seem to be the case. Section 20(3) refers to a judge taking evidence under section 20(2) as "conducting a proceeding"; section 20(3)(b) uses the same word to refer to both foreign proceedings (section 20(3)(b)(ii)), in which case it must include proceedings as traditionally understood) and the local proceeding under section 20(2), (section 20(3)(b)(iii)). Section 20(5)(a) allows transmission of a document or article recovered under section 20 procedure to be postponed where the item is required for "any proceeding in Jamaica" - this use of "proceeding" clearly envisages "proceedings" in the traditional sense. It was thus erroneous of counsel for the appellants to submit that "proceeding" in MACMA was never used to refer to local proceedings.

In what capacity is the judge acting under section 20 MACMA?

45. The suggestion that the judge or resident magistrate acting under section 20 was not acting in a formal judicial capacity must also be rejected. There are numerous reasons which indicate that a formal judicial capacity is anticipated by the MACMA. In the first place, the capitalisation in the words "Judge of the Supreme Court" and "Resident Magistrate" are the first indications that a formal judicial capacity is involved. The taking of evidence under section 20 is a formal act of significance, consistent with falling within the concept of judicial proceedings. Section 20(2)(3) provides that the Judge or Resident Magistrate may "order any person to attend the proceeding and to give evidence". It is not to be supposed that the judge in question is to have that power without the appurtenances and ancillary authority required to execute it. A judge or resident magistrate only possesses those powers as a judicial officer of the court.

46. Section 21 provides that an individual cannot be compelled to give evidence which he could not be compelled to give in criminal proceedings in Jamaica. How is the judge to rule on such a matter if he does not possess normal judicial authority? This section clearly anticipates that issues may arise in relation to the privilege against self-incrimination. If the judge had no authority it would be impossible to make a binding ruling on any objection based on this privilege. Other issues of fairness may arise: is it really to be thought that the judge will not be in a position to make a binding ruling about what may or may not legitimately be asked? The First Schedule to the MACMA provides (paragraph 1(f)) that the foreign state may specify any procedure it wishes to be followed in giving effect to the request. Section 19(2) provides that a request to follow particular procedures shall be followed to the extent possible under Jamaican law. Where any such request had been made it would be a matter for the judge to determine whether and to what extent that procedure could legitimately and fairly be followed in procedure. The same applies to the provisions within the first schedule that the request may specify any provisions of the law of the foreign state relating to

privilege or exemption from giving evidence which are relevant to the request (paragraph 3(f)) or such special requirements of the law of the relevant foreign state in relation to the manner of taking evidence as may be relevant to its admissibility in the foreign state (paragraph 3(g)). These clearly anticipate that these factors should be taken into account as far as possible in the taking of the evidence. This again is suggestive of a judicial function.

47. The submission made in reliance of *Williams v Comr of the Independent Commission of Investigations* is misguided. It is clearly stated in para 197 that "a witness cannot lawfully refuse to answer any question put to him unless it would incriminate him".

48. It was argued that a public hearing was not consistent with section 19(1) since that section required that requests to Jamaica "shall be executed in accordance with the relevant laws in force in Jamaica and the procedures applicable under those laws". The appellants have in our view misinterpreted this section. It does not mean that because the evidence requested is sought for the purposes of an investigation, rather than commenced proceedings, that it is necessary to follow any particular procedure which may often, or even usually, be followed in Jamaica at the investigative stages of a criminal inquiry. That would be an interpretation which would seriously hamper the efficacy of MACMA and inhibit Jamaica's ability to meet its international obligations relating to the provision of mutual legal assistance. Rather, the section means simply that whatever type of assistance is requested, the execution thereof shall be of the kind which would follow in Jamaica for that type of request. In other words, where, as here, the request is for evidence to be taken by a judge in court, the procedure to be followed is that which would apply in Jamaica to the taking of evidence by a judge in court, that is, in open court with access to both public and press, and with the judge having the powers and sanctions usually available to him under such a procedure.

49. In any event, the submission does not rest on a sound factual basis. There is no material before us which would enable us to conclude that there is one set procedure to be followed in Jamaica at the investigative stages of an inquiry. Campbell J at para 36 gave examples of procedure at investigative stages which would occur in open court. In respect of one of these, Preliminary Enquiries, it was accepted in the course of submissions that the procedure adopted at the time of the original decision involved depositions being taken under oath in open court. Examination of sections 34 and 35 of the Justices of the Peace Jurisdiction Act does not support the submission of an inveterate practice of gathering evidence in private at the investigation stage.

The rationale for the open justice principle

50. For the appellants, it was submitted that the rationale for the open justice principle did not apply to the circumstances of a section 20 request, there being no "administration of justice" in Jamaica to expose to public scrutiny. We reject this submission. The rationale for the principle has been explained in different ways, but the core of it lies in the benefits to the proper administration of justice arising from public scrutiny of judicial proceedings. In *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 450, Lord Diplock put it this way:

> "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice."

51. It is clear that the benefit of such a safeguard is not confined to the final determination of disputes. It is just as important in ensuring that proceedings are conducted fairly, according to the relevant procedural rules, and in a way which gives due recognition of the rights of any individuals involved in the proceedings, in whatever capacity, including, where relevant, the privilege against self-incrimination.

52. The procedure in question does not involve, or lead to, determination of a substantive dispute in Jamaica, and to that extent may be described as a proceeding "not in the ordinary course of litigation", but it does not follow that the nature of the hearing is one to which the principle of open justice is not applicable. In the taking of the evidence the judge would be exercising traditional judicial functions. As senior counsel for the respondent submitted, the rights of numerous individuals may be affected by rulings the judge makes in the course of the hearing. The judge may rule on whether a question is such as to open the witness to the risk of self-incrimination; and may have to address issues of admissibility; compliance with the terms of specific aspects of the request; or issues of fairness. These are clearly decisions of importance which should properly be the subject of the public scrutiny that comes with a public hearing. There is also a legitimate public interest in exposing MACMA proceedings to public scrutiny to ensure that they are properly and fairly conducted.

The nature of the request

53. The respondent was in our view correct to highlight the nature of the request and the circumstances in which it had developed. The request was made for the witnesses to be examined under oath or affirmation by a judge in court only when other attempts to gather the evidence had failed. The request was specifically for the evidence to be taken by a judge in court, which suggest an ordinary, open court hearing, not a private

or confidential one. It is clear from the first letter of request that the authorities in the Netherlands were fully aware of the extent to which the matter they were investigating was already in the public domain and had been widely reported in the Jamaican press. Yet against that background they did not request a hearing in private.

Confidentiality

54. This is a new argument which was not presented to the court before. It is in any event without merit. The confidentiality referred to by counsel for the appellants as referred to in the DPP Guidelines is clearly in its context confidentiality vested in the foreign state. There is no basis at all for the appellants to seek to assert such a confidentiality when it has not only not been asserted, but has impliedly been waived, by the foreign state.

Section 16(3) of the Constitution, and whether a discretion exists

55. Section 16(3) is expressed in the widest possible terms. It applies the open justice principle to "all proceedings of every court". On the face of it this applies to section 20 procedure. The foregoing analysis of the MACMA procedure shows that such an ex facie reading of section 16(3) is the correct one. The section 20 proceedings are proceedings to which the open justice principle applies. It can hardly be disputed that in such circumstances the court has a discretion to restrict the operation of the principle if that should be necessary for the proper administration of justice. This is clearly provided for in section 16(4)(c) of the Constitution, which accords with the operation of the common law principle (*Attorney General v Leveller Magazine Ltd*; *Khuja v Times Newspapers Ltd*, at paras 12-14 per Lord Sumption). In the course of submissions reference was repeatedly made to the observations by French CJ in *Hogan v Hinch* [2011] HCA 4 that "the character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open court principle". The specific circumstances of a request under MACMA may give rise to the need to qualify the principle. This is anticipated in MACMA by the provisions allowing the foreign state to specify the procedure to be followed. The foreign state may be concerned that in some instances giving publicity to the request may prejudice ongoing investigations, or proceedings. The judge of the Supreme Court and the Court of Appeal were therefore correct in their assessment of the nature of MACMA proceedings, the application of the principle of open justice, and the existence of a discretion thereanent.

The exercise of the discretion

56. In addressing the circumstances in which an appeal court might interfere with the exercise of a first instance discretion, the Court of Appeal asked themselves whether "the judge misunderstood the law or the evidence before him, or that his decision was

‘so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially would have reached it’”. That is a correct statement of the relevant test. In applying that test the court enumerated (para 74) the factors taken into account by the original judge. These may be summarised as follows:

(i) in the light of section 16(3) of the Constitution, the proper administration of justice demanded that the hearing be done in open court to which members of the public and the media had access;

(ii) no reason had been shown why the normal open justice principle should not apply;

(iii) the nature of the Trafigura investigation was in the public domain. The investigation and its eventual outcome were matters in which the public had a legitimate interest. The public had a right to be informed about matters of national importance;

(iv) the appellants were public officials, four of them having been members of the Government;

(v) a public hearing would “serve to dispel rumour and arm the public with facts”; and

(vi) given the general reluctance of persons to assist the police in investigating crime, “it will be a salutary move on behalf of these public officials to demonstrate to the populace at large the necessity of cooperation with law enforcement to achieve the aims of justice”.

57. The Court of Appeal considered that these were all relevant factors, and although the court might have been inclined to give less weight to the appellants’ status as public officials, it was not an irrelevant factor. The court decided that the judge’s exercise of discretion was not such as to warrant interference. We agree.

58. In relation to point (v) it must be noted that it had been submitted that the investigation was politically motivated, that the section 20 proceedings were part of that and that a public hearing would further the asserted “Machiavellian aim”. Against that background the judge was entitled to observe that on the contrary a public hearing would serve to clarify matters, and would enable the public to see that there was a genuine inquiry in respect of which evidence was being gathered in a procedurally appropriate and fair manner. The court was entitled to consider that the public

importance of, and interest in, the investigation, together with the public profile of the witnesses, were relevant to the question whether the proceedings should take place in public. In this respect it is worth noting the comments of Lord Sumption in *Khuja v Times Newspapers Ltd* (para 13) regarding the open justice principle:

> "Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions."

59. The nature of the matter under investigation is one which is capable of affecting the polity of the country. This is highly relevant to whether the evidence should be taken in public and was not a matter given undue weight. There was no material before the court to lead to the conclusion that a public hearing might jeopardise the investigation in the Netherlands, or any subsequent investigation or proceedings which might follow in Jamaica. In any event, should such an investigation or proceedings ensue, that would be a question to be addressed within those proceedings. It should also be recalled that the appellants were given the opportunity to give their evidence in private but did not avail themselves of that opportunity, thus leading to the request made in the ninth supplementary letter. We see no basis for concluding that the discretion was other than properly exercised.

60. For all these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed.