IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2011 HCV 07019

BEFORE: THE HONOURABLE MR. JUSTICE MARSH
THE HONOURABLE MR. JUSTICE PUSEY
THE HONOURABLE MRS. JUSTICE McDONALD-BISHOP

BETWEEN	**THE HON. MRS. PORTIA SIMPSON-MILLER**	**1ST CLAIMANT**
AND	**MR. ROBERT PICKERSGILL**	**2ND CLAIMANT**
AND	**MR. COLLINGTON CAMPBELL**	**3RD CLAIMANT**
AND	**MR. PHILLIP PAULWELL**	**4TH CLAIMANT**
AND	**MR. NORTON HINDS**	**5TH CLAIMANT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

Bert Samuels instructed by Knight, Junor & Samuels for the 1st and 2nd claimants

Ms Deborah Martin and Mrs Sharon Usim instructed by Knight, Junor & Samuels for the 3rd and 4th claimants

Seymour Stewart and Matthieu Beckford instructed by Knight, Junor & Samuels for the 5th claimant

R.N.A. Henriques, QC, Ms. Tana'ania Small and Miguel Palmer instructed by Livingston, Alexander & Levy for the 1st respondent

Mrs. Caroline Hay, Loxly Ricketts and Garcia Kelly for the 2nd respondent.

Heard: 24, 26, 27,28, September & 1 October 2012 & 20 September 2013

CONSTITUTIONAL LAW - FUNDAMENTAL RIGHTS AND FREEDOMS - MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS - REQUEST OF FOREIGN STATE FOR TAKING OF EVIDENCE FROM WITNESSES IN JAMAICA - WITNESSES REFUSING TO CO-OPERATE – APPLICATION OF CENTRAL AUTHORITY FOR ORDER FOR WITNESSES TO GIVE EVIDENCE ON OATH - ORDER GRANTED – WHETHER ORDER AN ABUSE OF PROCESS – WHETHER ORDER BREACHED CONSTITUTIONAL RIGHTS OF WITNESSES - RIGHT TO EQUITABLE AND HUMANE TREATMENT –RIGHT TO BE FREE FROM DISCRIMINATION ON POLITICAL GROUNDS - RIGHT TO FAIR HEARING – RIGHT TO DUE PROCESS - THE MUTUAL ASSISTANCE (CRIMINAL MATTERS) ACT 1995, SS. 6; 9; 16; 20 (1); 20(2); 20(3); 21; 25 (2); 25 (3) - THE MUTUAL ASSISTANCE (CRIMINAL MATTERS) (FOREIGN STATES) ORDER, 2007; THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS (AMENDMENT) ACT, 2011, SS, 13 (3) (H); 13 (3) (H) (I) (II); 16 (2); 16 (3); 19 (1); 19 (3)

MARSH, J

[1] I have had the opportunity to read in draft the judgment of my learned sister, McDonald-Bishop, J. I agree with her reasoning and conclusion and I have nothing to add.

PUSEY, J

[2] I have read in draft the judgment of my learned sister, McDonald-Bishop, J. I agree with her reasoning and conclusion and I have nothing further to add.

McDONALD-BISHOP, J

[3] This claim arises from proceedings concerned with the application of the Mutual Assistance (Criminal Matters) Act, 1995 ("the MACMA") consequent on a request by the Kingdom of the Netherlands made on or around December 3, 2007 for Jamaica's assistance in the investigation of a criminal matter.

[4] The Kingdom of the Netherlands, more specifically, has requested the assistance of Jamaica in the gathering of evidence from some named persons in relation to investigation being conducted by its law enforcement officials into alleged criminal

conduct of a company incorporated in that country, Trafigura Beheer B.V. Amsterdam ("Trafigura").

The background

[5] The occurrences leading to the request by the Kingdom of the Netherlands for assistance under the MACMA emerged with much publicity on Jamaica's political landscape in or around October 2006. At the material time, except for the 5th claimant, all the claimants were members of prominence of the People's National Party ("The PNP") that formed the government of the day as it does today.

[6] At all material times, the Honourable Portia Simpson- Miller, the 1st claimant, was, as she is today, the Prime Minister of Jamaica, Member of Parliament and the President of the PNP. Mr. Robert Pickersgill, the 2nd claimant, was a Member of Parliament, Minister of Government and Chairman of the PNP. The 3rd claimant, Mr. Collington Campbell, was a Member of the Senate, Minister of Government and General Secretary of the PNP. The 4th claimant, Mr. Phillip Paulwell, was a Member of Parliament and a Minister of Government. The 5th claimant, Mr. Norton Hinds, was, as described in the written submissions of the claimants, "a businessman with sympathies for the People's National Party (PNP)".

[7] The leader of the parliamentary opposition, Jamaica Labour Party ('the JLP"), was, then, the Honourable Mr. Bruce Golding.

[8] In or around 2006, Mr. Golding announced in Parliament that Trafigura had made a payment of four hundred and sixty six thousand Euros (€466,000) to CCOC Association, a Jamaican company, of which the 3rd claimant, Mr. Collington Campbell, was a principal.

[9] The JLP raised concerns about the propriety and legality of such payment. It was basically contended by them that it appeared to be an act of corruption in the sense of it being a kick-back or a bribery of the Government. This contention arose from the following factual background provided on the evidence. Trafigura was a contractual party with the Government of Jamaica for oil lifting. The contract expired in 2005. In

2006, Trafigura continued to lift oil by virtue of an interim arrangement with the Government. This interim arrangement was in place although the National Contracts Commission ("NCC") had recommended at the time that Glencore Energy UK Limited be awarded the new contract, it having been successful in its bid for the contract.

[10] It was during the time that the interim arrangement was in place that three payments were made by wire transfer to the CCOC Association's account. Trafigura continued to lift oil after the payments were made. It is alleged that these payments represented an attempt by Trafigura to influence the Jamaican Government's decision to award the contract to them for the continued lifting of oil.

[11] The PNP, at all material times, however, maintained that those payments were made as a donation to its political campaign with no strings attached.

[12] The issue between the political divide was to be infamously labelled 'the Trafigura Scandal'. It received much discussion on political platforms and enjoyed widespread media publicity and attention throughout the island.

[13] Mr. Golding, in his capacity as Leader of the Parliamentary Opposition, and being dissatisfied with the explanation proffered by the PNP officials, wrote a letter to the Kingdom of the National Investigation Unit of the Netherlands (*Rijksrecherche*) requesting that an investigation be carried out into the circumstances in which the payment was made to CCOC. Mr. Golding's reason for requesting the investigation, as declared in his letter, was that *"the explanation for the payment by Trafigura, and that given by the People's National Party (PNP) were clearly contradictory and irreconcilable and raise issues of corruption, kickback and bribery."*

[14] Mr. Golding requested, in particular, an investigation into whether, and the extent to which, the payment made by Trafigura contravenes the Dutch Penal Code, the provisions of the Convention on Combating Bribery of Foreign Public officials and the OECD Guidelines for Multinational Enterprises.

[15] In 2006, when the letter was written by Mr. Golding for a probe into the situation, the Kingdom of the Netherlands had not been declared by the relevant Minister of Justice as a foreign state to which the Act applied for mutual assistance in criminal matters and so it did not fall on the list of countries that could be assisted by Jamaica.

[16] In 2007, there was a change in government following the general election in September of that year. The JLP was to form the government and Mr. Golding became Prime Minister. In or around 9 November 2007, the then Minister of Justice declared the Mutual Assistance (Criminal Matters) (Foreign States) Order 2007 ("The Foreign States Order") making the provisions of the MACMA applicable to the Kingdom of the Netherlands. By this change, the Kingdom of the Netherlands was included in the list of countries that could obtain assistance from Jamaica in the investigation of criminal matters.

[17] In the wake of that change in the law, on 3 December 2007, the request was made by the Kingdom of the Netherlands to the Director of Public Prosecutions ("the DPP"), named as the 2nd respondent in these proceedings, for assistance in the investigation of the Trafigura Affair.

[18] The 2nd respondent, at the material time, was (and still is) designated by the Minister of Justice to be the Central Authority of Jamaica for the purposes of the MACMA. The 2nd respondent is essentially sued in her capacity as the Central Authority under the Act although this is not apparent on the face of the claim form. Part of the Central Authority's prescribed role is to conduct investigation and/or to undertake proceedings here in Jamaica to facilitate requests of prescribed foreign states for assistance in criminal matters where necessary and permissible by the relevant law.

[19] The request of the Kingdom of the Netherlands was made pursuant to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 2001, to which both Jamaica and the Kingdom of the Netherlands are signatories. The request was for assistance to be granted by the 2nd respondent, as the Central Authority of Jamaica, for investigation to be conducted within Jamaica as to alleged breaches of

the Dutch Criminal Code by Trafigura. The offences being investigated concern, basically, the alleged bribery of public officials of a foreign state (that state being Jamaica).

[20] In that first Letter of Request, the law enforcement officials of the Kingdom of the Netherlands posed a number of questions to be put to several persons in Jamaica in order to facilitate their investigation. It was requested that witness statements be obtained from these individuals. The claimants were all included among the list of persons of interest to be interviewed as witnesses. Mr. Golding was also on the list of persons to be interviewed.

[21] By the time of this request in December 2007, the PNP, to which the claimants were all associated, was the parliamentary opposition party with the 1st claimant as its leader.

[22] Effort was made by the 2nd respondent to carry out the requests with Dutch investigators visiting the island for the purpose of interviewing the claimants and the other persons identified as witnesses. Attempts were made for the claimants to be interviewed privately with their legal representatives but those attempts bore no meaningful results.

[23] In a Supplemental Letter of Request dated 14 April 2009, the Dutch authorities requested of the 2nd respondent to seek an order from the court pursuant to the MACMA for the claimants to answer specific questions on oath in the form of witness statements.

[24] The 2nd respondent sought the assistance of the court by proceedings commenced *ex parte* on fixed date claim form numbered 2010HCV05414 dated 11 November 2010 ("the DPP's claim").

[25] On 17 November 2010, the 2nd respondent obtained an order from Roy Anderson, J for the claimants to appear before a Judge of the Supreme Court during the period 27 June to 1 July 2011 to give evidence on oath in answer to the questions set out in the Letter of Request ("the Anderson Order").

[26] The claimants attended court pursuant to the Anderson Order and were bound over to attend court on 14 November 2011 for the commencement of the taking of the evidence. Eventually, the taking of the evidence was scheduled for commencement before Campbell, J.

[27] By the date scheduled for the taking of the claimants' evidence, the claimants had commenced proceedings on fixed date claim form numbered 2011HCV07019, seeking, *inter alia*, constitutional redress and naming the 2nd respondent as a party along with the Attorney-General of Jamaica joined by virtue of the Crown Proceedings Act and named as 1st respondent.

[28] The claimants sought from Campbell, J a stay of execution of the hearing of the DPP's claim pending the determination of their claim and also that the hearing for the taking of evidence be conducted in chambers. Campbell, J refused the application on both limbs. The claimants appealed.

[29] The Court of Appeal granted a stay of the DPP's claim pending the outcome of the claimants' claim that was remitted to this court for hearing. Apart from the grant of stay of the DPP's claim, no other aspect of the claimants' claim was dealt with by the Court of Appeal. It is that claim that stands to be resolved in this proceeding.

The claim

[30] The issues with which this proceeding is now immediately concerned have arisen from the claimants' claim which, by permission of this court, was amended on 24 September 2012 and further amended on 26 September 2012. By that further amended fixed date claim form, the claimants are seeking the following reliefs in the terms as set out by them.

1- A Declaration that the Order granted on the 17th November 2010 under the Mutual Assistance (Criminal Matters) Act 1995 and the Mutual Assistance (Criminal Matters)(Foreign States) Order 2007 in Claim Numbered 2010 HCV 05414 was an abuse of process.

2- A Declaration that the Order granted on the 17th November 2010 under the Mutual Assistance (Criminal Matters) Act 1995 and the Mutual Assistance (Criminal Matters)(Foreign States) Order 2007 in Claim Numbered 2010 HCV 05414 breached Section 13(3)(h) of The Charter of Fundamental Rights and Freedoms contained in the Constitution of Jamaica, in that the 1st, 2nd, 3rd, 4th, and 5th Claimants were deprived of the right to equitable and humane treatment by a public authority in the exercise of any function.

3- A Declaration that the Order granted on the 17th November 2010 under the Mutual Assistance (Criminal Matters) Act 1995 and the Mutual Assistance (Criminal Matters)(Foreign States) Order 2007 in Claim Numbered 2010 HCV 05414 breached Section 13(3)(h)(i)(ii) of The Charter of Fundamental Rights and Freedoms contained in the Constitution of Jamaica, in that the Claimants were deprived of the right to be free from discrimination on the ground of political opinions and/or to be from harassment on the ground of lawful political action.

4- A Declaration that the Order granted on the 17th November 2010 under the Mutual Assistance (Criminal Matters) Act 1995 and the Mutual Assistance (Criminal Matters)(Foreign States) Order 2007 in Claim Numbered 2010 HCV 05414 breached Section 16 of The Charter of Fundamental Rights and Freedoms contained in the Constitution of Jamaica, in that the Claimants were deprived of the right to a fair hearing.

5- A Declaration that the 2nd Respondent has violated and is violating the constitutional rights of the five Claimants abovementioned when she proceeded to seek to compel the said Claimants to testify publicly on oath concerning matters in which she, as the Central Authority of Jamaica (CAJ), on behalf of the Kingdom of the Netherlands allege (sic) criminal conduct in Jamaica by the said Claimants.

6- A Declaration that the 2nd Respondent acted *ex post facto* when she relied on an amendment to the Schedule of the Mutual Assistance (Criminal Matters) Act to include the Kingdom of the Netherlands when such amendment was made subsequent to the request by the Kingdom of the Netherlands for the 2nd Respondent to act as CAJ in the proceedings which is the subject of Claim Numbered 2010 HCV 05414.

7- A Declaration that the Order granted on the 17th November 2010 under the Mutual Assistance (Criminal Matters) Act 1995 and the Mutual Assistance

(Criminal Matters)(Foreign States) Order 2007 in Claim Numbered 2010 HCV 05414 is an abuse of process as it was instigated by political agents and operatives of the Jamaica Labour Party, namely its then leader, The Honourable Orette Bruce Golding and Mr. Harold Brady Attorney-at-Law, for political reasons.

8- That this Honourable Court do grant a stay of execution of all proceedings pursuant to the said Order granted on 17th November 2010 in Claim Numbered 2010 HCV 05414 until the conclusion of the hearing of this matter. A copy of the Order is attached to the affidavit of the 1st Claimant.

9- A Declaration that the procedure adopted by Mr. Justice Campbell pursuant to the Order of Mr. Justice Anderson, to wit, conducting the taking of evidence in open court and refusing to revert to having the matter conducted in Chambers amounted to breach of the Claimant's (sic) Constitutional right to the protection of their right to due process and a fair hearing under Section 16 (2) of the Charter of Rights.

[31] It should be noted at this juncture, that the relief sought under paragraph 8 of the amended fixed date claim form had been granted by the Court of Appeal before this hearing commenced and so that is not part of the claim argued in this proceeding. The claimants, in further amending the claim, had failed to take account of that fact and so paragraph 8 remained as a part of the claim. However, for the purpose of resolving the dispute among the parties, this court is only concerned with the reliefs being sought in paragraphs 1-7 and 9 of the amended fixed date claim form filed on 26 September 2012.

[32] In the light of the case being pursued and the remedies being sought, I have found it necessary to reinforce, what should be an obvious point, that this court is constituted by virtue of section 19 (1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter of Rights") following the remission of the matter by the Court of Appeal for hearing in this forum. This is so albeit that the claimants have not disclosed in their claim the legal basis for the claim or the enactment under which the claim is made as required by the Civil Procedure Rules, 2002 ("the CPR"), r.8.8 (b) and (c).

[33] Section 19 (1) provides:

> *"19. – (1) If any person alleges that any of the 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."*

[34] Subsection (3) of the section then reads:

> *"(3) The Supreme Court shall have original jurisdiction 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 provisions of this Chapter to the protection of which the person is entitled."*

[35] In support of this claim, the claimants filed, more or less, identical affidavits setting out the evidence on which they seek to rely. In so far as the material aspects of the evidence advanced in support of the claim are concerned, it is recognised that there is no need for this court to differentiate the consideration and treatment to be accorded to the evidence of each claimant separately. The case of one is the case of all.

The issues

[36] The broad issue arising for consideration on the claim is whether there is any basis on which it can properly be found that there has been, is being, or is likely to be breaches of the claimants' constitutional rights in the ways and manner alleged by them as a result of the consequential orders made by Anderson and Campbell, JJ that they attend court to publicly answer questions on oath concerning the Trafigura Affair.

[37] The specific issues raised for determination on the parties' pleadings, evidence and arguments have been distilled and are paraphrased thus:

(i) Whether the Anderson Order and the Foreign States Order which gave rise to it were politically motivated and constitute an abuse of process.

(ii) Whether the application of the 2nd respondent resulting in the Anderson Order breached the claimants' constitutional right to equitable and humane treatment by a public authority in the exercise of any function.

(iii) Whether the Anderson Order breached the claimants' constitutional rights to be free from discrimination on the ground of political opinion and/or to be free from harassment on the ground of lawful political action.

(iv) Whether the Anderson Order breached the claimants' constitutional right to a fair hearing.

(v) Whether the 2nd respondent breached the constitutional rights of the claimants by making the application for the court's order for them to give evidence pursuant to the request of the Kingdom of the Netherlands.

(vi) Whether the 2nd respondent acted *ex post facto* in relying on the amendment to the MACMA making the Kingdom of the Netherlands a prescribed foreign state.

(vii) Whether the open court procedure adopted by Campbell, J in taking the evidence of the claimants, in furtherance of the request, breached or is likely to breach the claimants' rights to a fair hearing and due process of law.

The statutory regime

[38] Before any attempt is made to assess the merit of the claimants' claim on these issues, however, it seems to me a matter of necessity for there to be a basic understanding of the relevant provisions of the MACMA. This is required, in my view, to promote a better appreciation of the legislative context within which the claim is being pursued and within which the issues raised ought properly to be considered.

[39] The MACMA has made provisions for participating treaty states to give mutual assistance in the investigation of criminal matters as the need arises in the circumstances stipulated. By operation of the statute, Jamaica can seek assistance from foreign states (to whom the Act applies) in criminal matters and such states can seek assistance from Jamaica.

[40] In so far as a request from a foreign state is concerned, Jamaica's assistance may be provided to that state in several forms as specified in section 15 (3) of the Act. One such form is through the examination and taking of evidence of witnesses on behalf of the requesting state [s. 15 (3) (b)]. That is, primarily, the form of assistance being sought by the Kingdom of the Netherlands with which this proceeding is concerned.

[41] The MACMA also sets out the grounds on which a request for assistance ***must*** be refused as well as, and as distinct from, those on which it ***may*** be refused (emphasis added). In so far as is relevant to the instant matter, a mandatory refusal of request would arise, for instance, where the Central Authority is of the opinion that compliance with the request would contravene the provisions of the Constitution [s. 16 (1)(a) (i)]. Another relevant basis for mandatory refusal is where there are substantial grounds for the Central Authority believing that compliance with the request would facilitate the prosecution or punishment of a person affected by the request on account of the person's race, religion, nationality or political opinions or for any reason that would cause prejudice to such person [s. 16 (1) (a) (ii)].

[42] In the light of the arguments advanced by the claimants, one circumstance of immediate relevance that I have isolated from the others when the Central Authority **may** refuse the request for assistance is where the request relates to conduct which would not constitute an offence under Jamaican law [s. 16 (1) (b) (i)]. It does appear from the absence of mandatory terms in the wording of this provision that the Central Authority has a discretion in granting or refusing a request where the conduct with which the foreign state is concerned would not constitute an offence under any law in

Jamaica. There is thus no strict insistence on adherence by the Central Authority to the principle of dual criminality in deciding whether to grant a request under the MACMA.

[43] It is clear from the relevant provisions of the MACMA that refusal of a request from a foreign state is one exclusively for the Central Authority. So, in the case of the request of the Kingdom of the Netherlands, with which we are concerned, it was in the exclusive domain of the 2nd respondent, as the Central Authority, upon receiving the request, to carry out an evaluation of the terms of and circumstances attendant on that request to see whether Jamaica should grant assistance or not.

[44] From all indication, the 2nd respondent would have already carried out her assessment of all the circumstances and would have formed her judgment that there is no basis, especially a constitutional one, on which Jamaica should refuse assistance to the Kingdom of the Netherlands in the conduct of its investigation into the Trafigura Affair.

[45] The important thing that is noted is that the action of the 2nd respondent in acceding to the request, rather than refusing it, has not been made the subject of an application for judicial review. This is a material fact to be borne in mind given some of the arguments advanced by the claimants. It is the constitutional implications of the order made on the DPP's claim by Anderson, J and, by extension, Campbell, J that are, primarily, put up by the claimants for the scrutiny of this court.

[46] It is seen that having decided to grant the request, the 2nd respondent sought to exercise the power given to her under section 20 (1) of the MACMA. Section 20 deals, generally, with the taking of evidence in Jamaica on behalf of a foreign state. The section provides thus:

> *"20. – (1) Subject to the provisions of this Act, where a request is made to Jamaica for-*
> *(a) the taking of evidence; or*
> *(b) the production of documents (other than judicial or official records referred to in section 22) or other articles,*

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 –

(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; and shall-

(i) cause any evidence so taken to be put in writing and certify that it was so taken; and

(ii) cause the writing so certified to be sent to the Central Authority.

(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;

(b) may permit-

(i) the relevant foreign state;
(ii) the person to whom the proceeding in that state relates; and
(iii) any other person giving evidence or producing documents or other articles at the proceeding,

to have legal representation during the proceeding."

[47] Section 21, then, provides:

> *"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."*

[48] The foregoing provisions serve to demonstrate that there is statutory authority for the action of the 2nd respondent in seeking to have the evidence of persons in Jamaica taken with respect to the investigation of the Trafigura Affair. They show too that there is statutory authority for the action of Anderson, J in making an order that the persons named in the request appear before the court for such evidence to be taken. It was also open to Campbell, J, in the furtherance of the Anderson Order and by virtue of those provisions, to take the evidence on oath and to do such things as set out under the Act in relation to the taking of such evidence.

[49] It is within this statutory framework that the fulfilment of the request of the Kingdom of the Netherlands is being pursued by the 2nd respondent. The claimants are now challenging the constitutionality and propriety of the action of the 2nd respondent and the orders made by the learned judges relative to it. They have raised various grounds of objection that have all been duly considered but which will not be recited in their entirety, or *verbatim*, or, necessarily, in the order in which they were argued. For the sake of convenience and ease of comprehension, the claim and the issues arising on it have been considered under the heading of each relief being sought.

Point taken *in limine*

[50] Before examining the substantive issues raised for resolution in this proceeding, however, I have considered it necessary to dispose of an issue raised on behalf of three of the claimants as a point *in limine.* At the commencement of the hearing, Mr. Samuels, on behalf of the 1st and 2nd claimants, and Ms. Martin, acting on behalf of the 4th claimant, raised as a preliminary issue the changed status of these claimants and the implication of that on the Anderson Order that they be questioned on oath.

[51] It may be useful to be reminded that at the time the Anderson Order was made, these claimants were, by then, members of the opposition PNP, that party having lost the general elections in 2007. After the Anderson Order, there was a general election in December 2011 that resulted in a changing of the guard. The PNP was to once again form the government putting the 1st claimant as Prime Minister and the 2nd and 4th claimants as Ministers of Government as they were in 2006 when the Trafigura Affair arose. There was thus a change in their status since the proceeding began for them to be questioned.

[52] It is this change in status of these claimants that has moved Mr. Samuels and Ms. Martin to raise for this court's consideration the effect of this current state of affairs on the Anderson Order. The argument of Mr. Samuels, as endorsed and adopted by Ms. Martin, and as I understand it to be, is that in the light of the changed status of the three claimants in question, section 21 of the MACMA would apply.

[53] By way of reminder, section 21 provides, in so far as is relevant, that in relation to a request for the taking of evidence on behalf of a foreign state, no person shall be compelled to give evidence which he could not be compelled to give in criminal proceedings in Jamaica or in the relevant foreign state.

[54] The gravamen of counsel's argument on behalf of the three claimants in question is that these claimants would enjoy diplomatic status in the Kingdom of the Netherlands and as such would not be compellable to give evidence in that country. They maintained that given the privilege of diplomatic immunity that these claimants would enjoy from the Kingdom of the Netherlands, it is the duty of the 2nd respondent, as the Central Authority, to advise the Kingdom of the Netherlands so as to ensure that the request does not breach the claimants' diplomatic status.

[55] Without going into any detailed discussion on the law as it pertains to diplomatic immunity, since I do not see that as being warranted in the light of the view I have, ultimately, taken, I must say that the contention lacks merit as a matter of law. Diplomatic immunity is not a privilege assumed by an individual but is one granted or

conferred by states to certain individuals of a foreign state working within their boundaries on the basis of comity and reciprocity in international relations. It is a privilege that is more grounded in international customs and governmental policies rather than one of strict law.

[56] The grant of immunity to these claimants, as witnesses providing statements or appearing in a court of law in the Kingdom of the Netherlands, would be for that state to decide and not for the claimants themselves or for this court to pre-determine. It is the Kingdom of the Netherlands that has asked for them to be questioned. Ultimately, it would be a question for the Netherlands whether immunity should be afforded them as witnesses on the basis of their status, if they were to submit to the jurisdiction of that country. That is not a question of law for this court. In the light of that, there is no evidence adduced and no legal authority shown that on the mere basis of their status as Ministers of Government, the 1st, 2nd and 4th claimants would not have been compellable witnesses in the Kingdom of the Netherlands in the circumstances alleged against Trafigura, if they were to be present in that state.

[57] With respect to Jamaica, the status of the claimants in question, by itself, is not determinative of the question as to whether they could be compelled to give evidence in our courts. In Jamaica, there is no immunity from giving evidence, or non-compellability to give evidence, rooted in the position one holds in government. If there is non-compellability operating in favour of the claimants, then, it would have to be claimed on other grounds established by substantive law but surely not one on the basis of diplomatic immunity or their political standing. These matters have no bearing on them giving evidence in Jamaica.

[58] In any event, I would go further to state, which I am impelled to do, that the issue of compellability is one of substantive law and so if the Anderson Order is alleged to have been made in breach of section 21 of the MACMA, then that would be a question for the Court of Appeal to determine in the absence of any contention that there has been a breach of the claimants' constitutional rights as a result of it. There is no

argument advanced that the change in status would result, or has resulted, in breach of the relevant claimants' constitutional rights due to the operation of section 21.

[59] It is my view, therefore, that this court is not the proper forum for such a point to be raised as to breach of section 21 of the MACMA, even if it were one that could have availed the claimants. Firstly, this court is not constituted as an appellate court to determine whether any error of substantive law or error in procedure had been made by the judge of concurrent jurisdiction. Secondly, if there is a change in circumstances that would serve to render invalid or ineffectual the order of the learned judge, then that would be the subject of a different form of application which would be to set aside the order on the ground of changed circumstances or fresh evidence. It cannot be the subject of a constitutional claim when no breach of the Constitution, based on the change in status of the claimants in question, is alleged.

Ruling

[60] To the extent that the status of the relevant claimants has no bearing on the issues to be properly determined by this court, I concluded that the preliminary point taken cannot avail the claimants in question, in any way, in this proceeding. It is for these reasons that I have formed the view that the argument raised *in limine that* the claimants in question should no longer be made subjects of the Anderson Order *s*hould be rejected. I will now proceed to examine the merits of the substantive claim.

Consideration of the claim: analysis and findings

[61] Most of the declarations being sought by the claimants are in terms that the Anderson Order is an abuse of process and has breached or is likely to breach some specified constitutional rights of the claimants. However, when the reasons set out as the bases of the claim and the arguments put forward for such declarations are considered, then it is borne out that it is not only the results that would flow from the impugned order with which issue has been taken but also the processes leading to the making of the order.

[62] I must indicate that in an effort to fall on the safe side and to avoid the risk of an accusation that there is some misapprehension on the part of this court of the claim

being pursued, I have looked closely at the terms and substance of the claim, including the reliefs being sought as well as the arguments advanced in support of the claim, to see whether the claimants are entitled to each relief claimed. Therefore, the impugned Anderson Order and the processes and matters leading to and resulting from it have been the subject of my scrutiny and analysis.

[63] I will reiterate that in an effort to bring a measure of clarity and coherence in thought to my reasoning, I have seen it convenient to treat with the grouses of the claimants under specific headings that are in keeping with the reliefs being sought. This is in an attempt to better capture their case and to promote a greater appreciation and understanding of the various issues raised by them for the court's determination.

Issue # 1: Whether Anderson Order and Foreign States Order constitute an abuse of process

[64] The first declaration being sought by the claimants is that the Anderson Order, made pursuant to the MACMA and the Foreign States Order, is an abuse of process. This accusation of abuse of process is based on several grounds identified by the claimants which, incidentally, tend to overlap with other complaints which fall under different headings. However, an attempt will be made to deal as sufficiently as possible with each limb of the complaint under this head.

[65] The claimants made several contentions in their affidavit evidence as well as in written and oral submissions made on their behalf, that the Anderson Order is an abuse of process. In so far as this allegation of the Anderson Order being and abuse of process is concerned, the main planks of the claimants' contention are summarised and set out in the ensuing paragraphs as follows:

(1) The Foreign States Order and/or the proceeding on the DPP's claim were motivated by the JLP, and more particularly, Mr. Bruce Golding and Mr. Harold Brady, Attorney-at-Law, for political reasons. As a consequence, there is an abuse of process and a breach of the claimants' constitutional rights.

(2) The Foreign States Order was passed for the sole purpose of giving effect to the political aims of the JLP - led administration as the process had been attempted in 2006 but failed because the Kingdom of the Netherlands was not a foreign state entitled to assistance under the existing laws. The passage of the Foreign States Order and the proceeding brought by the 2nd respondent should not have been permitted because the laws of Jamaica did not so provide. The passing of the Foreign States Order in 2007, to allow the Kingdom of the Netherlands to benefit from the MACMA, after the request was rejected on the basis that that state was not included before, was "undoubtedly an abuse of process."

(3) The passage of the Foreign States Order and the proceedings by the 2nd respondent on her claim were to achieve a specific, politically motivated objective. They were politically motivated by Mr. Golding as head of the JLP and his letter was what instigated the request and so was an abuse of process *ab initio.* The investigation was instigated not for the purpose of the Dutch in maintenance of their laws, but rather for the purpose of a fishing expedition. That fishing expedition was to acquire evidence against the claimants and to use the said evidence to prosecute them in Jamaica, or, at the very least, to score political points by creating a scandal involving the PNP (and a [former] Prime Minister, the 1st claimant).

(4) So, even if there was a legitimate basis upon which the investigation could have taken place, it is clear what the true motives were and these were so 'unfair and wrong'. The investigation is being misused and should not have been allowed to continue because it would have 'offended the court's sense

of justice and propriety'. For these reasons, the proceeding on the DPP's claim should be declared *void ab initio.*

(5) Even if the proceeding on the DPP's claim was not politically motivated *ab initio*, the way in which the proceeding was to be conducted was discriminatory on political ground as the investigation was used as a fishing expedition by the 2nd respondent to determine wrongdoing on the part of the claimants as opposed to focusing on identifying wrongdoing under Dutch law by Trafigura. As such, the 2nd respondent abused the process and the proceedings on the DPP's claim should be declared void and/or struck out.

[66] In an attempt to clearly bring home the point that that there is an abuse of process resulting from the Anderson Order, the claimants placed reliance on several authorities that they argued serve to show what amounts to abuse of process and the different forms such abuse could take. In particular, they rely on dicta from ***Brooks v DPP*** *[1994] 1 AC 568,568;* ***Hui Chi-Ming v R*** [1992] 1 A.C. 34; ***DPP v Meakin*** [2006] EWHC 1067; **R v Horseferry Road Magistrates' Court *ex parte* Bennett** [1993] 3 All ER 138; **R v Birmingham and Others** [1992] Crim. L.R. 117; **R v Walsall Justices *ex parte* W (A Minor)** [1989] 3 All ER 460; **R v Mullen** [1999] Cr App R 143; and **Sharma v Browne *Antoine*** [2006] UKPC 57.

[67] On the basis of the principles they have extracted from the cases, learned counsel for the claimants maintained that the courts have taken, and will take, a wide view on what constitutes an abuse of process. They contended that the cases have demonstrated that what is considered an abuse of process is not merely an abuse within a trial but also abuses which would lead up to a trial. Following on that, they argued that in the present case "when the instigator of the investigation, Mr. Bruce Golding, became Prime Minister, he orchestrated the passing of the Foreign States Order and in so doing further manipulated the process to seek to have things lead up to a trial."

[68] It was further pointed out by counsel on the claimants' behalf that in **Sharma v Browne Antoine**, the Privy Council held that the power to stay criminal proceedings for abuse of process was wide enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence or was motivated politically rather than by an objective review of proper prosecutorial considerations. According to the submission, **Sharma v Browne Antoine** is a very important case as the facts are very close to the present case. So, even if the court is not minded to believe that the instigator was seeking evidence to prosecute the claimants, it is an inescapable conclusion that the investigation was instigated to create a scandal involving the PNP for the purpose of scoring political points. As such, the mere fact that it was politically motivated is an abuse of process according to the Board's opinion in **Sharma v Browne Antoine**.

[69] In seeking to transform the alleged abuse of process into a constitutional breach, it was submitted on the basis of **Earl Pratt v Attorney-General of Jamaica** [1993] 3 W.L.R. 995 that an abuse of process is a breach of one's right to due process of law.

[70] I have paid due regard to all the authorities cited on behalf of the claimants on this limb of their claim but see no need for present purposes to elaborate on their facts and the decisions made with respect to each of them. I think it sufficient to say that I have duly noted the principles enunciated in the various authorities as to what may amount to abuse of process of the court and what conduct would constitute such an abuse. I have been guided accordingly.

The Foreign States Order

[71] In treating with the arguments concerning the passage of the Foreign States Order being an abuse of process, I would first highlight that section 31 of the MACMA empowers the relevant Minister to make orders concerning the applicability of the Act to other countries. Sections 31(2) and 31(3) provide, respectively:

> *"(2) Where any relevant treaty has been made with any foreign state, the Minister may, by order, declare that the provisions of this Act shall apply in respect of such foreign state, subject to each exceptions, adaptations, or modifications, as the Minister, having due regard to the terms of such treaty, may deem expedient to specify in the order for the purposes of implementing such terms.*
>
> *(3) The Minister may from time to time, by order, compile and publish in the Gazette a list of foreign states with which relevant treaties binding on Jamaica are in force; and, without prejudice to any other form of proof of the existence of such a treaty, such a list shall, in any proceedings, be conclusive evidence that a relevant treaty is in force between Jamaica and each foreign state named in the list."*

[72] Section 31 (4) goes on further to provide:

> *"(4) An order made under this section shall be subject to affirmative resolution."*

[73] It was in keeping with these provisions that the Foreign States Order, extending the MACMA to the Kingdom of the Netherlands, was declared by the then Minister of Justice and received the affirmative resolution required for its passing into law. There is no evidence to even remotely suggest that it was not duly passed into law by the necessary procedures.

[74] Learned counsel for the respondents, Mr. Henriques, QC, for the 1st respondent, and Mrs. Hay, for the 2nd respondent, have both, quite correctly, relied on the well-established principle of law that there is, until and unless the contrary is shown, a presumption of validity and constitutionality of the Foreign States Order. As they pointed out, quite correctly, all statutes passed with the requisite observance of parliamentary requirements are cloaked with a presumption of constitutional validity. Therefore, anyone challenging the validity and/or constitutionality of the statutory provisions has the burden of proving it and that burden is a heavy one.

[75] On this subject, this court was reminded, through the submissions made on the respondents' behalf, of dicta from the Privy Council in **Ramesh Dipraj Kumar Mootoo**

v Attorney - General of Trinidad and Tobago (1979) 30 WIR 411, 415 and **Surratt v Attorney-General of Trinidad and Tobago** [2007] 71 WIR 391, 409. I will add, too, that in the combined appeal in **The Jamaican Bar Association and Others v the Attorney - General and Others** S.C.C.A. nos. 96, 102 & 108/2003, delivered 14 December 2007, Panton, JA (as he then was) made it abundantly clear that our Court of Appeal, like the other courts in Australia and the Caribbean, embraces the principle that there is a presumption of the constitutionality of statutes. This court is bound to observe the same principle and is, therefore, guided accordingly.

[76] Having considered the evidence and borne in mind the applicable principles of law as extracted from the authorities, I find that the claimants have failed to present any evidence to establish the unconstitutionality, invalidity and/or impropriety of the statutory instrument that made the Kingdom of the Netherlands a prescribed state. I fail to see how the passing into law of the Foreign States Order amounts to an abuse of process which could translate into any infringement of the constitutional rights of the claimants be it their right to due process or otherwise.

[77] I find, therefore, no legal basis on which the claimants can be held to be entitled to any redress as a result of the passing of the Foreign States Order through which the request of the Kingdom of the Netherlands is being facilitated by the 2nd respondent.

Political motive making the Anderson Order an abuse of process

[78] The claimants have alleged political motive not only behind the passing of the Foreign States Order but also behind the DPP's claim that led to the Anderson Order. They made heavy weather of the fact that it was Mr. Golding who instigated the Dutch investigation into the matter. The case being advanced on this basis is that the DPP's claim was politically motivated and that is what made the Anderson Order an abuse of process. As Ms. Martin puts it: Mr. Golding was the *"initiator of the process… it is politics being channelled through the courts… and the abuse is that the Central Authority is being used to further a political agenda."* The order made by Anderson, J *"is a culmination of this."*

[79] Mrs. Hay, in response, submitted that the claimants' complaint as to motive behind the enactment and conduct of proceedings pursuant to the MACMA is both without legal basis and merit. She prayed in aid dicta from **Allen v Flood** [1989] A.C. 1, in which their Lordships of the House of Lords made the instructive point that once the act complained of was lawful then its motive was irrelevant. Learned counsel also made reference within this context to the case **Regina v Secretary of State for the Home Department and Others *ex parte* Fininvest S.p.A. and Others** [1996] 1 W.L.R. 743. In that case the court dealt, *inter alia*, with the issue as to what constitutes a political offence for the purpose of mutual legal assistance in criminal matters.

[80] In examining this aspect of the claimants' arguments, I have recognised that they have not argued, or attempted to demonstrate by any evidence, that the 2nd respondent acted unlawfully in granting the request in that there are substantial grounds for believing that compliance with the request would facilitate the prosecution or punishment any of them as persons affected by the request on account of their political opinions. (See the MACMA section 16 (1) (a) (ii).)

[81] Similarly, there is no evidence or, indeed, any assertion, that the 2nd respondent's granting of the request was unlawful because the request relates to an offence or proceedings of a political character in the Kingdom of the Netherlands as described under section 16(1) (a) (iv) of the MACMA.

[82] Had the claimants made such averments, supported by credible evidence to show contravention of section 16 (1) of the MACMA, then they would have stood a better chance to, at least, mount a case worthy of serious consideration on this issue of politics behind the request. But this is not so. In **Regina v Secretary of State for the Home Department and Others Ex parte Fininvest S.p.A.,** the point was raised whether the Secretary of State (like the Central Authority of Jamaica) should give consideration to whether an offence was a political offence for the purpose of deciding whether to grant or refuse a request. Their Lordships decided, as the head notes disclose, that the fact that an offence was committed in a political context does not

make it a political offence *per se* and that making payments, whether by bribes or illicit donations, to politicians or political parties, does not constitute political offending.

[83] It could be argued on the basis of that authority that the offence of bribing public officials of a foreign state that is alleged against Trafigura in the case at bar would not constitute a political offence for the purposes of the 2nd respondent deciding whether to provide or refuse the request. It seems safe to say then that the fact that the Dutch enquiry into the Trafigura Affair might have had its genesis in the politics of Jamaica or might have arisen in a political context does not transform the request for assistance into a political request or the action of the 2nd respondent in granting it a political act or one driven by political motives of the JLP and its then leader.

[84] I find, in the absence of evidence from the claimants of a political offence allegedly committed by Trafigura that is being investigated by the Kingdom of the Netherlands, that no argument about political motive influencing the investigation would be relevant to the instant proceeding. Of course, this is not to say that if they had raised those issues, they would properly be for this forum since we are not dealing with a case of judicial review as to the propriety and or legality of the exercise of the 2nd respondent's discretion in agreeing to provide assistance. There is no basis on which it can be said that any political motive behind the investigation has resulted in any constitutional breach involving the fundamental rights and liberties of the claimants.

[85] All this has led me to conclude, therefore, that whatever Mr. Golding's motive and purpose might have been for alerting the Dutch about the payment made by Trafigura and requesting an investigation into the matter, that is, as far as I see it, totally irrelevant to the action of Anderson, J in granting the order. The learned judge acted on the dictates of the statute and acceded to the request of the 2nd respondent for the taking of evidence from the claimants. The judge's duty is to enforce the law, as passed by Parliament or under parliamentary authority, and not to question the motive for its passing except as an aid to its construction when that becomes necessary. The question of motive behind the passing of the Foreign States Order and/or the request was an irrelevant consideration for the learned judge in all the circumstances.

[86] Furthermore, once the Foreign States Order is accepted as being valid and constitutional, which it is presumed to be until the contrary is shown, then any action that was taken by the learned judge pursuant to it falls within the purview of substantive law amenable to review by the appellate court and not by this court unless by his order, he has breached a constitutional or fundamental right. Such a breach, certainly, has not been borne out on the claimants' case.

[87] It is observed too that the claimants have sought a declaration as to abuse of process by the Anderson Order on the basis of political motive without connecting, in their pleadings, the alleged abuse to a specific constitutional right that it has allegedly infringed or is likely to infringe. The breach of a constitutional right is separate and distinct from a mere allegation of abuse of process and it is with the former breach that this court, as constituted, is concerned and not with the latter standing by itself. So, merely to assert that the order of the learned judge amounted to an abuse of process without showing how it impacted on their intrinsic human, fundamental or constitutional rights does not make such a claim justiciable in this court.

[88] What is quite clear beyond question is that there is no evidence that the Dutch authorities are investigating any of the claimants for breaching any Dutch law. Also, on none of the evidentiary material disclosed in this proceeding has any of these claimants been identified as persons of interest likely to face criminal charges in Jamaica or in the Kingdom of the Netherlands. On all the material disclosed, Trafigura alone emerges as the interested party in respect of whom criminal investigation is being pursued. As Mrs. Hay noted, the Kingdom of the Netherlands is seeking to collect information to prove a case against its own citizen. This serves to demonstrate that Mr. Golding's instigation of the Dutch investigation has not led to any allegation of criminality on the part of any of the claimants which is the subject of any investigation with which the DPP's claim is concerned.

[89] I find, therefore, that the argument that the proceedings before Anderson, J, culminating in the order he made, as being one that is an abuse of process because it

was driven by political motive, is devoid of merit. I find that there is no basis on which this court can grant a declaration as sought that the Foreign States Order and the Order of Anderson, J constitute an abuse of the process of the courts for the reasons advanced in support of that aspect of the claim. I would, therefore, refuse to grant the relief in the terms as claimed in paragraph 1 of the fixed date claim form as amended.

Issue # 2: **Whether Anderson Order breached right to equitable and humane treatment**

[90] The second declaration being sought by the claimants is that the Anderson Order has breached the Charter of Rights in that they were deprived of the right to equitable and humane treatment by a public authority (being the 2nd respondent) in the exercise of its function as guaranteed to them under section 13 (3) (h) of the Charter of Rights.

[91] The evidence proffered by the claimants in their respective affidavits, concerning the treatment meted out to them, is that the 2nd respondent procured the Anderson Order to compel them to appear in court and to give evidence on oath. According to them, they are treated as persons accused of a crime rather than as persons being asked questions to further an investigation about breach of Dutch law.

[92] Mr. Samuels, Ms. Martin and Mr. Stewart have all made detailed and thought – provoking submissions on behalf of the claimants. The submissions, when combined, embody some core contentions of the claimants in this regard. I do not propose to individualise the arguments since I have found that whatever was said in respect of one claimant is applicable to all. Furthermore, I do not intend to recite everything that has been said but I will give the assurance that all the arguments submitted have been noted and duly considered. In the interest of time, therefore, an attempt has been made to capture, as best as possible, the kernel of the arguments and a synopsis provided so as to indicate the framework within which my analysis and findings have taken place.

[93] The main planks of the arguments advanced on behalf of the claimants that their right to equitable and humane treatment was breached by the 2nd respondent, as a public authority in the exercise of her function, are paraphrased thus:

(1) The claimants were subject to inequitable and inhumane treatment by the 2nd respondent as a public authority on the basis of the political influence by functionaries of the JLP.

(2) The 2nd respondent embarked on a course in procuring the Anderson Order, supported by affidavit, the contents of which are in contravention of the safeguards laid down under section 13 (3) (h) of the Charter of Rights that provides for the claimants' right to equitable and humane treatment.

(3) The conduct of the 2nd respondent had caused the order to be made that breached the constitutional rights of the claimants. This inequitable and inhumane treatment was manifested in several ways as follows:

(i) The claimants have been referred to as "Defendants" as opposed to the proper term of "Respondents" in the affidavit of the 2nd respondent. They have been treated as persons accused of a crime rather than as persons furthering the course of an investigation.

(ii) The DPP's claim, as filed, indicates to the claimants that there is a criminal investigation concerning bribery of public officials. The reasonable inference would be that investigation would be conducted against them. There are allegations made in the letter of Mr. Golding upon which the claimants could be prosecuted in Jamaica if there was evidence. Although they are designated as witnesses for the purpose of the MACMA, all material disclosed to them make it clear that they fall in the

category of ‘suspects’ for offences if proven in Jamaica and not merely as witnesses.

(iii) They are being classified as witnesses by the respondent and treated in a manner in which no witness would be treated in Jamaica. No witness to the commission of any offence in Jamaica would be taken at an investigative process and put in a public place to give evidence on oath on issues arising in an investigation. There is no rule that permits it to be done in public. If they are witnesses, why then are they being compelled to come into open court to give evidence on oath concerning the transactions?

(iv) The requirement that they give evidence on oath in a public hearing puts them in a category which is different from how other witnesses in Jamaica are treated and placed them in a less favourable and more disadvantageous position than other witnesses in similar position.

(v) What is being sought is an order to interview as witnesses persons who are being investigated for crimes. The Anderson Order is to permit investigators to interview, as witnesses, persons who are suspects on the allegations in Jamaica.

(vi) The 2nd respondent treated them as suspects and the language used makes it clear that there are allegations of a crime. The questions purported to be asked of the claimants demonstrate a clear rejection of all accounts given by the claimants as to how the PNP came to be in receipt of the money.

(vii) The insistence to ask questions of the claimants is reserved for persons being cross-examined in a trial.

(viii) The claimants are also treated in a way that suspects in Jamaica would not be treated. Persons in Jamaica who are viewed as persons of interest would not be brought into a court room open to the public and be questioned by a judge.

[94] In advancing these arguments, counsel relied on several statutory provisions to show that the claimants are being treated inequitably by the conduct of the 2nd respondent in securing the Anderson Order and, by extension, the refusal of Campbell, J to hear the evidence in chambers. They made reference to sections 34 and 35 of the Justices of the Peace Jurisdiction Act that deals with committal proceedings for persons charged with an indictable offence and the taking of the evidence of witnesses in such proceedings.

[95] Section 35 of the Justices of the Peace Jurisdiction Act provides:

> *"35. The room or building in which such Justice or Justices shall take such examinations and statement as aforesaid shall not be deemed an open court for that purpose; and it shall be lawful for such Justice or Justices, in his or her discretion, to order that no person shall have access to, or be or remain in, such room or building, without the consent or permission of such Justice or Justices, if it appear to him or them that the ends of justice will be best answered by so doing."*

[96] Counsel for the claimants regarded the procedure under these provisions as the most analogous they could find to compare with proceedings under section 20 of the MACMA. They invoked these sections to argue strongly that the evidence of the claimants should be taken in chambers and so there are differences in the treatment of the claimants as witnesses in the MACMA proceeding amounting to inequitable treatment by the order of Anderson, J.

[97] Reference was also made by counsel for the claimants to sections 6 and 9 of the MACMA in so far as those provisions relate to how foreign witnesses who are requested to give evidence in Jamaica are treated under the Act. Section 6 states:

> *"6. A person who-*
>
> *(a) pursuant to a request by the Central Authority under this Act, is served with a summons to appear as a witness in Jamaica; and*
>
> *(b) fails to comply with the summons,*
> *shall not, by reason of such failure, be liable to any penalty or measure of compulsion in Jamaica notwithstanding any contrary statement in the summons."*

[98] Section 9 also makes provisions for immunities and privileges of persons who are brought to Jamaica to give evidence in criminal proceedings or to give assistance in relation to an investigation pursuant to a request by the Central Authority of Jamaica.

[99] Section 9 (1) (d) states that such person shall not:

> *"be required, in the proceeding to which the request relates (if any)-*
>
> *(i) to answer any question; or*
>
> *(ii) to produce any document or article,*
> *that the person would not be required to answer or to produce in a proceeding in the relevant foreign state or in Jamaica relating to a criminal matter."*

[100] The argument advanced on behalf of the claimants is basically that these provisions give protection to foreign witnesses requested by Jamaica to assist in criminal matters here and so reciprocity would demand that witnesses in Jamaica who are assisting a foreign state in criminal matters should enjoy the same protection, privileges and immunities. As such, the claimants, in being compelled to give evidence, are treated differently from foreign witnesses who cannot be compelled by virtue of these provisions. That is taken to mean that the claimants, in being compelled to attend court to give evidence, would not be treated equitably.

[101] Reliance was also placed on section 16 (1) (a) (v) of the MACMA which provides that one of the grounds for mandatory refusal of request by the Central Authority is that the steps required to be taken in order to comply with the request cannot be legally taken in Jamaica in request of criminal matters arising in Jamaica.

[102] Within the same context, the court's attention was also directed to section 19 (1) of the MACMA which reads:

> *"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 procedure applicable under these laws."*

[103] The argument advanced on the basis of these provisions is that the procedures under which local investigative authorities would act in procuring a witness statement from witnesses in Jamaica are not those that have been employed in securing witness statements from the claimants.

[104] For all the foregoing reasons, and more not specifically restated here but which have been borne in mind, the claimants are contending that they are being treated as suspects and, in any event, they are being treated differently from other suspects in Jamaica. Also, they are being treated differently from other witnesses in Jamaica thereby resulting in a breach of their constitutional rights to equitable and humane treatment by the 2nd respondent in the exercise of her public function.

[105] One important feature of the claimants' case under this head is that their complaint, although primarily aimed at the order of Anderson, J made on the DPP's claim, has managed to bring into its fold the decision of Campbell, J in refusing to hear the matter in chambers. This inclusion of Campbell, J's decision in the claim, as the records will show, was a late addition as at first the claimants were contending that it was the Anderson Order that had compelled them to attend court to give evidence on oath in public. When it was brought to their attention that the Anderson Order did not specify the mode of hearing, then, the amendment was sought to incorporate Campbell, J's decision.

[106] The orders of both Anderson and Campbell, JJ are, in the end, intertwined in this averment. So, for convenience, I have examined the entire proceeding concerned with the order for the taking of evidence from the claimants under this head of breach of right to equitable and humane treatment. The issue of the hearing in open court is, therefore, connected to the declaration being sought under this head as well as that being sought under paragraph 9 of the fixed date claim form as was further amended.

[107] Of note under this head, is that while the MACMA authorises the taking of evidence for the foreign state upon request, it says nothing how the proceedings should be conducted. The Act, by virtue of sections 32 and 33, has empowered the Minister to make regulations to give effect to the purposes and provisions of the Act as well as to also make Rules of Court to deal with all matters of practice and procedure in proceedings under the Act. To date, there are no specific Rules of Court made to deal with proceedings under the MACMA. The Act is, therefore, without its own procedural regime for its application.

[108] The only general procedural regime governing civil matters in these courts is the CPR and there is no provision under those Rules, specifically, concerning the MACMA proceedings. Similarly, there are no criminal procedural rules or code dealing with this question. It is my view that the specific rules governing proceedings under the MACMA are needed so as to avoid controversy like this in the future. The special procedural regime is imperative because it is not a common occurrence within our jurisdiction that witnesses or potential witnesses in criminal matters are required to give witness statements on oath to a judicial officer. Clear guidance is, therefore, required.

[109] It seems to me that in the absence of the Rules of Court for the conduct of proceedings under the MACMA, resort would have to be had, for the time being, to the existing practice and procedures governing applications to the Supreme Court for court orders coupled with the procedures relative to the taking of evidence from witnesses within the context of the general law of evidence. All this would be subject, of course, to the specific requirements of the MACMA; the discretion of the judge hearing the evidence; and what is ultimately required in the interest of justice. The judge taking the

evidence would have to be guided by his own professional judgment as to what is necessarily required to meet the ends of justice and, at the same time, to fulfil the mandate of the statute to give effect to the intention of Parliament.

[110] Having examined the complaints of the claimants against all the prevailing circumstances, to include the absence of clear rules of procedure, I have made several findings which I will now outline as succinctly as is possible.

Treatment based on political influence

[111] There is no evidence that has been adduced by the claimants that is remotely credible and cogent to satisfy this court that the action of the 2nd respondent in pursuing the Anderson Order for the claimants to give evidence on oath was influenced by political influence of the JLP and its functionaries. This assertion is rejected.

Reference to claimants as defendants

[112] I have failed to see how reference to the claimants as defendants in the affidavit of the 2nd respondent in support of the claim filed in court can amount to inequitable and inhumane treatment for the purpose of alleging a constitutional breach. In my view, nothing of materiality turns on the reference made to the claimants as defendants in the affidavit evidence of the 2nd respondent. The claimants were not designated the term “defendants” in the claim itself. That reference only occurs in the affidavit evidence. I see it as a matter of form or style rather than one of substance going to the legal characteristics and standing of the claimants in the proceedings. The reference was not intended to convey that they are suspects or defendants in the Trafigura investigation, and cannot objectively or, indeed, subjectively, be taken as defining their status in relation to the Trafigura investigation. They were never referred to as defendants in any investigation relating to the request.

[113] In other words, the use of the terms "Defendants" or "Defendant" in the DPP’s statement of case does not import the legal standing of the claimants in relation to the Trafigura investigation but rather their standing as parties in the proceedings brought by the 2nd respondent for the requisite evidence to be taken. This complaint is, therefore,

unwarranted and is without merit in establishing that there is a breach of the claimants' constitutional right to equitable and humane treatment by the 2nd respondent.

[114] It would be convenient to point out at this juncture, also, that there are no facts from which it can be properly concluded that the contents of the 2nd respondent's affidavit that was before Anderson, J point to a contravention of section 13 (3) (h), which is the claimants' right to equitable and humane treatment. I find that the claimants' complaint concerning reference to them as defendants by the 2nd respondent has done nothing to advance their case of breach of constitutional rights.

Treatment as suspects

[115] In terms of the complaint that the claimants are being treated as suspects, again, there is nothing from which I can accept that any of the claimants is being treated as suspects on the DPP's claim in the acceptable meaning of that term, or at all. There was, at the time the Anderson Order was made, and still is, to the best of my information and belief, no investigation being conducted under Jamaican law in relation to the conduct of the claimants or Trafigura, for that matter, for the purpose of bringing criminal proceedings within this jurisdiction. As already indicated, the investigation and request relate to matters concerning the possible/ alleged breaches of Dutch law, as distinct from Jamaican law, with the party of interest (or the suspect) being Trafigura.

[116] In fact, the terms of the letter of Mr. Golding that the claimants contend have triggered this request have made no reference to the alleged commission of any offence or possible offence by any of the claimants to be investigated by the Jamaican authorities. I must concede that in his letter asking for the intervention of the Dutch, Mr. Golding did state that:

> *"Having regard to all the factual circumstances, the issue is raised that Colin Campbell a Minister of Government representing the People's National Party and Government of Jamaica conspired with Trafigura to disguise as a commercial transaction what is a political contribution to the people's National Party of €466,000 or a bribe."*

[117] Apart from Mr. Golding making reference to an issue that, in his view, concerned the conduct of the 3rd claimant acting on behalf of the PNP, there is nothing in that letter stating, categorically, that any offence was committed against Jamaican law or Dutch law by that claimant. Furthermore, even with the alleged involvement of the 3rd claimant, the request of Mr. Golding was for the Dutch to enquire into Trafigura's conduct to see if it contravened Dutch law or international conventions. Nothing was said of any parallel investigation to be undertaken by the Jamaican authorities to see whether the PNP or its functionaries, including the claimants, have contravened any law. To date, no evidence has been adduced to show any circumstances from which it can be concluded that these claimants have attained that status as suspects as a matter of fact and law.

[118] I find it necessary to go on to say that even if the claimants were, or are being, treated as suspects, they have not demonstrated how being ordered to attend court to answer questions on oath, as applied for by the 2nd respondent, could be translated into a breach of their right to equitable and humane treatment by the 2nd respondent. All the 2nd respondent did was to furnish their names to the judge as persons in respect of whom an order should be made for them to attend court for questioning pursuant to the request of a foreign state. The names of the persons to be questioned were not the creation of the 2nd respondent or the Jamaican law enforcement officials but were furnished by the foreign state. Also, there is no evidence that the 2nd respondent was responsible for the formulation and terms of the questions required to be asked of these persons. So, if the claimants were being treated as suspects, it could not have been by the 2nd respondent who was a mere facilitator of a request and who was acting within the ambit of the law in carrying out that request.

[119] Furthermore, in the event (albeit a highly unlikely one) that it could properly be concluded that the claimants are being treated as suspects, there is no law that is brought to our knowledge that prevents the questioning of suspects. The law gives a limited measure of cover to persons who are suspected of the commission of a crime through the privilege against self-incrimination. The right to silence is an off-shoot of this

privilege. This privilege is a common law construct, rather than one created by the Constitution, where suspects are concerned.

[120] On this point, I am deeply indebted to my sister Beswick, J (as she then was) and my brothers, Sykes and F. Williams, JJ for their illuminating judgment on this issue in the case relied on by the respondents, **Gerville Williams and Others v The Commissioner of the Independent Commission of Investigation** JMFC Full 1 delivered 25 May 2012. That Court explored in a comprehensive way these issues raised in this matter as to who in law is a suspect, the treatment of suspects, the right to silence and the privilege against self-incrimination.

[121] In that case, the earlier authorities on these subjects were examined and several relevant principles enunciated that have guided my deliberation on this point. What is abundantly clear from the authorities is that who is a suspect for purposes of the law is not a matter of a subjective evaluation but rather an objective one: See **R. v Osbourn**, **R v Virtue** [1973] Q.B. 678. So, even if one labels someone, or even himself, as a suspect that is not determinative of that person's status for the purposes of the criminal law and procedure.

[122] Even more importantly for immediate purposes, the authorities have also made it clear that there is nothing to stop a suspect from being questioned. As the law is, the gathering of information with respect to a criminal investigation can be gathered from anyone. What is required is that at some point during the gathering of the information when there emerges some evidence which is enough to charge that person for a criminal offence or there is some evidence that mark the beginning of a criminal case against him, then the need to administer the necessary caution, prescribed by the Judges' Rules, would be triggered. This arises from that person's privilege against self-incrimination bestowed on him by common law which does not arise as a right under the Constitution.

[123] It is established, therefore, by strong and long-standing authority, that the safeguard established against the infringement of the privilege against self-

incrimination, where suspects are concerned, is the administering of a caution to them before any answer from them is elicited. So, there is nothing to act as a bar to a person, even a suspect, being asked questions during the course of an investigation but the privilege against self-incrimination protects him in his response to the interrogation.

[124] The Constitution does make extensive provisions to protect the rights of a person charged with a criminal offence under the rubric of a right to due process. In so far as is materially relevant to this point, section 16 (6) (f) of the Charter of Rights provides that such a person is not to be compelled to testify against himself or to make any statement amounting to a confession of guilt. However, the Constitution makes no similar provision for a suspect or a witness being asked questions, as the case may be. There is thus no constitutional right of silence guaranteed to a suspect or any witness. The questioning of witnesses, and even suspects, therefore, would not, without more, amount to inequitable and inhumane treatment in contravention of the Constitution.

[125] I will go further to state that based on the law as it stands, whether these claimants can avail themselves of the protection of the privilege against self-incrimination, and claim a right to silence in the Trafigura investigation, is not for them to decide or even for this court. It is a matter for the judge who will be taking the evidence. Simply put, while the privilege exists, it cannot be claimed outside of the forum of the enquiry and without the objective evaluation of that forum as to whether the privilege should prevail to protect the claimants in responding to the questions posed. In fact, the privilege must be claimed while the witness is on oath.

[126] In **Downie v Coe** EWCA Civ 2648, cited in **Gerville Williams v Indecom** by Sykes, J at paragraph 200, Lord Bingham, CJ reminded that it has always been the practice that if any witness seeks to rely on the privilege against self - incrimination, for whatever reason, he must take the objection on his oath. It is for the court to see from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer: per Cockburn, CJ in **Reg v Boyes** [1861] 1 B & S 311, 329.

[127] The claimants, therefore, would have to attend court and personally claim whatever privilege they feel they are entitled to and do so on oath. It cannot be done by their legal representatives as Sykes, J also indicated in **Gerville Williams v Indecom**.

[128] I would go a bit further to add that under the MACMA proceedings, the examiner on behalf of the foreign state is a judicial officer who is expected to deal with the enquiry within the ambit of established legal principles and in accordance with the laws and procedures of Jamaica. I would expect that he would record the particular claimant's objection to answer on the basis of the privilege against self- incrimination if that is raised. That would have to be done as a matter of record for the benefit of the requesting state. He would have to then determine whether the right to silence should be exercised in relation to each question and to make his ruling in writing accordingly.

[129] I would believe that if the judge were to conclude that the answer would tend to incriminate the person so as to expose him to danger of criminal sanctions, thereby entitling him or her to claim the privilege against self- incrimination, then the judge would make a ruling to that effect and not seek to compel the person to answer in such circumstances. For, one cannot lose sight of the law that a person cannot be compelled to give evidence under the MACMA proceedings for the purpose of a foreign state which he cannot be compelled to give under Jamaican law. In other words, once the person is not compellable in Jamaica, then he cannot be compelled to give the evidence requested by the foreign state. It is my humble view, therefore, that the examining judge cannot, and is not expected to, abdicate his role to ensure fairness to the particular witness and adherence to the rule of law because he is carrying out duties at the behest of a foreign state. However, all these matters, touching and concerning the privilege against self-incrimination and the right to silence, fall to be addressed at the substantive hearing for the taking of the evidence before the examining judge and not during the course of any satellite proceedings such as this.

[130] I say all this to ultimately say that an application made by the 2nd respondent for an order that the claimants attend court to give evidence on oath does not carry with it

any element of inequitable and inhumane treatment. This would be so even if the claimants could properly be regarded as suspects.

Unfair treatment as witnesses

[131] Apart from contending that the claimants are treated unfairly as suspects, learned counsel on their behalf have raised several statutory provisions to bring home the point that the claimants are also not being treated equitably as witnesses. I find that the comparison between the questioning of witnesses under the MACMA and under other circumstances relating to criminal proceedings, such as under the Justices of the Peace Jurisdiction Act, has done nothing to advance the claimants' cause.

[132] While it may be contended, with some force, that in this jurisdiction witness statements are not normally taken on oath by a Judge of the Supreme Court prior to a charge having been laid, the fact is that the MACMA has created this special regime which differs from what usually obtained. So, even if a witness under the MACMA is treated differently from other witnesses in this regard, that is by virtue of the statute passed by Parliament and not by the act of the 2nd respondent as the public authority who is carrying out her functions in accordance with that statute.

[133] The 2nd respondent is merely acting pursuant to the powers conferred on her by section 20 of the MACMA and it is Parliament that has provided that the statement may be taken on oath by a judicial officer upon authorisation by the 2nd respondent. The case of the claimants is not that the provision is incompatible with the Constitution and ought to be struck down. It is the action of the 2nd respondent done pursuant to the statutory provision that is attacked. However, unless and until the statute is struck down as being inconsistent with the Constitution, then the action of the 2nd respondent, indisputably carried out in accordance with that law, cannot be impugned as amounting to an infringement of the claimants' constitutional rights on the basis that they are treated differently from other witnesses. What the 2nd respondent did is exactly what the statute provides for. If there is to be a complaint about the treatment, then, that complaint or criticism must be levelled at Parliament if anyone is to be blamed for the difference in treatment of the MACMA witnesses from other witnesses.

[134] In **The Public Service Appeal Board v Omar Maraj** [2010] UKPC 29, their Lordships, in treating with this subject of the infringement of a constitutional right by an act of Parliament, reminded us that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional (**Grant v The Queen** [2006] UKPC 2 cited). They went further to make the important point that the Constitution must be given a broad and purposive construction (**Minister of Home Affairs v Fisher** [1980] AC 319, 328). It should, therefore, be presumed that Parliament intended to legislate for a purpose which is consistent with the fundamental rights guaranteed by the Constitution and not in violation of them.

[135] Their Lordships, through Lady Hale, stated further at paragraph 31 of the judgment:

> *"But of course these rights are not absolute. As the Board observed in **Panday v Gordon** [2006]1 AC 427, para 22, when rejecting the submission that section 4 (e) of the Constitution conferred an unqualified right to express political views:*
> *"It is for the courts to decide, in a principled and rational way, how the fundamental rights and freedoms listed in the Constitution are to be applied in the multitude of different sets of circumstances which arise in practice. It is for the courts to decide what is the extent of the protection afforded by these constitutional guarantees."*

[136] Citing verbatim from **Surratt v Attorney-General of Trinidad and Tobago** [2008] A.C. 655, her Ladyship, repeating the statement of the Board in that case, continued at paragraph 58:

> *"It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it."*

[137] Against that background of the relevant principles enunciated by the Board in **The Public Service Appeal Board v Omar Maraj**, I make the following observations and findings on this issue. It is section 20 (1) of the MACMA that vests in the 2nd respondent the authority to pursue proceedings before a Judge of the Supreme Court for the taking of evidence of witnesses on oath pursuant to the request of a foreign state. It is the same section (in subsection 2) that had clothed Anderson, J with legitimacy to make the order he made. There is no challenge by the claimants to the constitutionality of section 20 of the MACMA *per se.* So, there is nothing in the circumstances, as presented, to displace the presumption that Parliament intended to legislate for a purpose that is compatible with the constitutional rights of potential witnesses to equitable and humane treatment by the Central Authority in the exercise of its functions under the MACMA.

[138] There is nothing to say that Parliament, in treating witnesses under the MACMA, the way it sought to do, is not pursuing a legitimate aim in doing so and/ or that the treatment is disproportionate to that aim. The constitutionality of the section, therefore, stands as unchallenged and remains intact. The claimants, on whom the burden lies, have not displaced that presumption of constitutionality of section 20 of the MACMA. In the end, they have failed to point to any treatment that would amount to inequitable and inhumane treatment of them by the 2nd respondent in exercising her function pursuant to that section.

[139] In so far as the decision that the hearing takes place in open court goes, it was Campbell, J, the examining judge, and not the 2nd respondent, as the public authority, who made that determination. Campbell, J, in his own judgment, formed the view that an open court hearing was more appropriate. In the light of that, how then can the blame be put on the 2nd respondent that she has treated the parties inequitably by virtue of the mode of the proceeding being in open court? I think such a charge laid against the 2nd respondent is unfair.

[140] I find too that the mere fact that Campbell, J refused to conduct the hearing in chambers does not render his decision one of treating the claimants inequitably so as to

constitute a constitutional breach. The claimants' counsel have all placed reliance on the Justices of the Peace Jurisdiction Act, ss. 34 and 35 in seeking to forcefully bring home this point of unfair treatment of the claimants as witnesses.

[141] As indicated in paragraph 95 above, section 35 provides that the court in which committal proceedings are conducted "shall not be deemed an open court" and so the examining justice has the discretion to exclude whomever he pleases from the room. This regime that provides for the taking of deposition under section 34 of the Justices of the Peace Jurisdiction Act is thus one created by statute and which Parliament, clearly, had no intention to render applicable to proceedings under the MACMA. If that were the case, then it could have simply said so by expressly making the MACMA subject to the Justices of the Peace Jurisdiction Act. So, there is nothing to say that such regime should be imported into proceedings under the MACMA in the absence of legislative provision for that. To draw on what obtains under other legislative regimes to compare with what obtains under the MACMA is really of no legal utility as, in effect, it is like comparing apples with oranges.

[142] I conclude, therefore, that the mere fact that witnesses in committal proceedings are not required to give evidence in open court or that other witnesses in criminal proceedings are not required to give written statements on oath before a judge, does not, in my view, render the learned judges' treatment of the hearing as being unconstitutional on the basis alleged. The judges' decisions are not open to challenge on this limb of alleged infringement of section 13 (3) (h) of the Charter of Rights as amounting to inequitable and inhumane treatment by a public authority in the exercise of its function. In fact, neither judge is a public authority within the meaning of the Constitution and so the section would be wholly inapplicable to his decision.

[143] The claimants have also made reference to sections 6 and 9 of the MACMA that make provisions for the treatment of foreign witnesses who are requested to provide assistance or give evidence in Jamaica. It is observed that it is Parliament that has made stipulations for the treatment of those witnesses and so if there is a difference in treatment, then, again, that must be laid at the feet of Parliament and not at the feet of

the 2nd respondent or the judges who made their orders pursuant to the request. There is no allegation that the provisions concerning witnesses in Jamaica giving witness statements in foreign matters is incompatible with the Charter of Rights.

[144] I must say further that the reliance by the claimants on the cited sections is misplaced. Section 6 deals with the situation where the witness is summoned to be a witness in Jamaica. In this case, the claimants are merely requested to provide information by answering on oath specified questions put to them. They are not summoned by the Kingdom of the Netherlands to appear as witnesses there. The giving of a witness statement is different from attendance as a witness to give evidence in a proceeding. Therefore, the witness for whom section 6 of the MACMA makes provision is not in the same position as the claimants are in this case. The comparison with such witnesses is unhelpful in establishing inequitable and inhumane treatment.

[145] It seems that the claimants have overlooked the provisions of section 25 (2) of the MACMA that states:

> *"(2) Where a proceeding relating to a criminal matter has commenced in a relevant foreign state and-*
>
> *(a) that state requests the attendance at a hearing in connection with the proceeding of a person (other than an inmate) who is in Jamaica;*
>
> *(b) there are reasonable grounds for believing that the person is capable of giving evidence in relevant to the proceeding; and*
>
> *(c) The Central Authority is satisfied that-*
>
> *(i) the person has consented to giving evidence in the relevant state; and*
>
> *(ii) that state has given adequate undertaking in respect of the matters referred to in subsection (3),*
>
> *the Central Authority may, in its discretion, make arrangements for the person to travel to the relevant foreign state and shall notify that state of the arrangement.*

[146] Subsection 3 follows this provision and it sets out the matters in respect of which the foreign state would have to give undertakings with respect to the person to be called as a witness within its jurisdiction. These undertakings include the same immunities and privileges accorded to foreign witnesses summoned for appearance as witnesses in Jamaica. The subsection shows too that before a witness who is requested to attend proceedings in the foreign state can be sent to the foreign state to give evidence, the Central Authority of Jamaica must be satisfied that that person has consented to give evidence in the foreign state. So, in actuality, the consent of a person to give evidence in the foreign state must be first obtained before he can appear in any matter in that jurisdiction as a witness. No one can be taken to the foreign state against his will to be a witness even if summoned to do so.

[147] Also, if that witness were to attend, then the foreign state is required by the law to give several undertakings before the witness leaves Jamaica which include the immunity of the person from detention, prosecution or punishment for any offence against the law of the foreign state that is alleged to have been committed before the person's departure from Jamaica [s. 25 (3) (a) (i)]. Neither can such person be subjected to any civil suit in respect of any act or omission that allegedly occurred before the person's departure from Jamaica [s. 25 (3) (a) (ii)].

[148] The statute, therefore, accords protection to a Jamaican witness assisting a foreign state as it does to a foreign witness assisting in a criminal matter in Jamaica. I can find no basis on which it can properly be found that the claimants are treated differently from foreign witnesses who offer assistance to Jamaica. Similarly, there is nothing on which it could be found that the claimants are, or would be, stripped of protection as witnesses by the Anderson Order for them to give evidence on oath in the matter as required. The MACMA, by its own internal mechanisms, has put in place measures to protect the rights of a witness assisting a foreign state. The fears of the claimants seem not to be well-founded in the light of the statutory regime taken as a whole.

[149] These provisions of the MACMA (section 6 and 9) cannot, therefore, assist the claimants in their assertion that they are treated differently from foreign witnesses in an adverse way so as to amount to inequitable and inhumane treatment by the 2nd respondent in the execution of her function under the MACMA.

[150] Mrs. Hay relied on dicta of the Privy Council in T**he Public Service Appeal Board v Omar Maraj** dealing with this issue of inequality of treatment under the Constitution of Trinidad and Tobago. On the strength of that authority, learned counsel noted that the issue of the contravention of the right to equal treatment guaranteed by the Constitution requires a demonstration that persons behaving in the same manner are meted out different treatment based on the possession of other distinguishing characteristics. She argued that there is no such evidence of inequality of treatment in this case.

[151] I do agree that the claimants have failed to demonstrate that they have been or are being treated differently by the 2nd respondent as a public authority from other persons in their position who have behaved in like manner in proceedings under the MACMA. I believe that it is with these persons that the comparison should be made and not with witnesses called during preliminary enquiry which is a totally different proceeding governed by different procedures established by Parliament.

[152] The claimants have also raised the argument, through Ms. Martin, that what is being done in relation to them giving evidence could not legally be pursued with respect to a witness in criminal proceedings in Jamaica. In seeking to bolster this contention, learned counsel placed reliance on section 16 (1) (a) (v) of the MACMA which prescribes one of the bases on which the 2nd respondent should refuse a request. This subsection, states, in summary, that a request for assistance made by a foreign state shall be refused if in the opinion of the Central Authority the steps required to be taken in order to comply with the request cannot be legally taken in Jamaica in respect of criminal matters arising in Jamaica.

[153] I find the claimants' reliance on this provision as a basis for constitutional redress to be misplaced in this proceeding. The 2nd respondent received a request from the Kingdom of the Netherlands made through a valid and appropriate legislative channel. Having exercised her professional judgment, she acceded to the request and embarked on a process to carry it through. No action has been taken by way of a claim for judicial review concerning the legality and/or rationality of the exercise of her judgment and her decision in granting the request.

[154] After a consideration of all the prevailing circumstances within the context of the constitutional provision under scrutiny, I reject this assertion by the claimants that they are being treated inequitably and inhumanely on the basis that the steps being taken to question them as witnesses cannot be legally pursued with respect to other witnesses in criminal matters in Jamaica. This assertion is not legally sound on which to hang a declaration that the claimants right to equitable and humane treatment pursuant to section 13 (3) (h) of the Charter of Rights has been breached by the 2nd respondent in the exercise of her function or by the Anderson Order.

[155] The same would hold true for the contention that there is a breach of section 19 (1) of the MACMA that provides for the execution of requests made by a foreign state. The section stipulates that requests to Jamaica must be executed in accordance with the laws of Jamaica and the procedures applicable under those laws subject, of course, to the provisions of the Act itself. The complaint is that in dealing with the claimants as proposed witnesses, the 2nd respondent failed to follow the procedures under which local investigative authorities would act in procuring witness statements. The contention is that the action taken by the 2nd respondent to secure the Anderson Order is not only in breach of subsection 19 (1) of the MACMA but is also unconstitutional.

[156] I find it necessary to reject this argument. It is important to note that the procedure to be adopted in executing the request is subject to the provisions of the MACMA. The procedure adopted is what is prescribed by the Act. It is, indisputably, in accordance with the provisions of the MACMA and the procedure it prescribes for the 2nd respondent to secure the evidence of witnesses in Jamaica on behalf of a foreign

state. In fact, there is nothing to say the procedure is not in accordance with the governing laws and, especially, the Constitution, of Jamaica. So the fact that the procedure under section 20 is different from what obtained under other statutes for the taking of witness statements is insufficient a basis on which to peg a claim of inequitable treatment, much more inhumane treatment, of the claimants by the 2nd respondent.

[157] The course the 2nd respondent embarked on involved the intervention of a Judge of the Supreme Court. That judge not only had the statutory authority to deal with the application but he also had an inherent jurisdiction to guard the processes of the court from abuse and to protect the rights of all persons appearing before him. Having considered the claim before him, and, obviously, being satisfied that the basis existed in law and fact to grant it, Anderson, J made the order for the claimants to attend court to give the evidence required.

[158] The learned judge, purportedly, acted in accordance with the powers given him by the Act of Parliament upon examining the matter brought before him. If there is a belief that the Judge had no basis in fact and/or law to grant the order he did, or that he erred in law or otherwise, then that would, again, be a question to be resolved by an appeal. It would not be one for constitutional redress on the grounds of breach of the right to equitable and humane treatment when there is no evidence of any such treatment.

[159] The point was also raised on the claimants' behalf that the decision of Campbell, J, in refusing to conduct the proceeding in chambers, also combined with the Anderson Order to mean that the claimants were subject to inequitable and inhumane treatment by the 2nd respondent. As already indicated, the method of hearing selected by a judge cannot be seen as inequitable and inhumane treatment, particularly, where it is not shown that in identical circumstances, the same judge had treated someone in the same position as the claimants differently and more favourably. There is no evidence of that.

[160] In the final analysis, I cannot find any basis on which a declaration could be granted, as sought, that the order of Anderson, J has breached the constitutional right of

the claimants to equitable and humane treatment by a public authority in the exercise of its functions provided for under section 13 (3) (h) of the Charter. The same would apply to the decision of Campbell, J. Accordingly, I would also deny this declaration as sought in paragraph 2 of the amended fixed date claim form.

Issue # 3: Whether breach of right to be free from discrimination on political ground

[161] The claimants are also seeking a declaration that the Anderson Order has breached Section 13(3)(i)(ii) of The Charter of Rights in that they were deprived of the right to be free from discrimination on the ground of political opinions and/or to be free from harassment on the ground of lawful political action. The question now is whether such a fundamental right, as guaranteed by the Constitution, is shown to have been infringed by the order of Anderson, J as alleged.

[162] Some specific provisions that I have distilled from the Charter of Rights that would be relevant to the complaint of the claimants in this regard are (i) the right to freedom of thought, conscience, belief and observance of political doctrines guaranteed under section 13 (3) (b); and (ii) the right to freedom from discrimination on the ground of political opinions guaranteed under section 13 (3) (i) (ii).

[163] I do agree with the submissions of counsel for the respondents that this claim, as to discrimination on the grounds of political opinion, cannot succeed. The claimants have put forward not a scintilla of evidence of any political opinion held, or being advanced by them that could be, or is, the subject of any political repercussion or discrimination in relation to the 2nd respondent carrying out the Dutch request. The claimants, like other named persons who were subjects of the Anderson Order, were to be asked questions preset by the Dutch authorities and not by the 2nd respondent or any other authority in Jamaica. It is not demonstrated, through clear and credible evidence, or any evidence at all, for that matter, that the questions being asked and the answers to be elicited were based on any political opinion held or political doctrines observed by any of the claimants.

[164] In fact, I find it unfathomable how it can be averred that the order of the learned judge, in the terms as stated and the purpose for which it was issued, could be said to have deprived the claimants of their right to be free from discrimination on the basis of their opinion or from harassment on the ground of lawful political action. There is no evidence given of any political opinion held by them on account of which they are being discriminated against or the lawful action they have taken for which they are being harassed by the learned judge's order. Even if they believe their action in accepting the Trafigura payment is a lawful political action, it is not their action that is in issue but the conduct of Trafigura in giving it to them. It is the action of Trafigura that is the subject of the investigation by the foreign state.

[165] At this juncture, I will simply state that I find, without the need for any more detailed consideration or to cite any authority in support of my findings that this, as a ground for constitutional redress, must fail. I would deny the declaration as sought in paragraph 3 of the amended fixed date claim.

Issue # 4: Whether Anderson Order breaches claimants' rights to fair hearing/ due process

[166] The fourth declaration being sought by the claimants is that the Anderson Order breached section 16 (2) of The Charter of Rights in that the claimants were deprived of the right to a fair hearing. The complaint in this regard concerning the deprivation of the right to a fair hearing is multi-pronged.

[167] Section 16, as the marginal notes indicate, is, broadly speaking, the constitutional protection of the right to due process. Section 16 (2) reads:

> *"(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."*

Ex parte proceeding unfair

[168] The first issue taken by the claimants under this head is with the fact that the parties were not served before Anderson, J made the order for them to appear to give evidence. This, they said, deprived them of a right to a fair hearing under the Constitution. The claimants' contention on this point, as articulated by counsel on their behalf, is that they were never served with notice of the DPP's claim before the Anderson Order was made for them to attend court for questioning. The claim was made *ex parte* and so the order was the culmination of a process in which they did not participate.

[169] It was argued that Anderson, J ought to have required that hearing to be changed to an *inter partes* hearing. Mr. Samuels, being quite vociferous in his submission on this limb, submitted that Anderson, J was well aware that his order concerned criminal matters as the DPP's claim made it clear that the request was for assistance in a criminal matter in the Kingdom of the Netherlands. Further, he contended, proceedings under the MACMA can lead to criminal proceedings being pursued against a person who gives information which amounts to a criminal offence under Jamaican law. According to counsel, it was clear that one of the matters being investigated was bribery of a Jamaican public official and all the offences except those concerned with campaign financing are also offences in Jamaica.

[170] According to Mr. Samuels, Anderson, J ought to have exercised his inherent jurisdiction and have the matter proceed *inter partes* before he made the order. He cited provisions of the CPR, Rule 17.4 which prescribes the circumstances under which an order may be pursued *ex parte.* Counsel submitted that such provisions do not apply to the circumstances of the DPP's claim for the claim to have been dealt with *ex parte.* According to him, Anderson, J had before him no evidence to take the matter within the exceptions of Rule 17. 4 (4) of the CPR and the hearing being one concerned with criminal matters, the case ought not to have been heard in the absence of the claimants. This, he said, was in breach of section 20 (2) of the Constitution which was the applicable constitutional provision at the time the order was made (now section

16(2)). As he stated, *"one must be reminded that section 20(2) gives the right to be heard and heard fairly. It is part of the Audi Alteram Partem Rule, which concerns a matter of great public interest."*

[171 Learned counsel, in pushing forward this point, cited **National Commercial Bank Jamaica Limited v Olint Corp. Ltd** [2009] UKPC 16 as the binding authority that the judge ought not to have entertained the 2nd respondent by way of *ex parte* proceeding. He pointed out that the Privy Council in **NCB v Olint** had frowned on *ex parte* proceedings even in the context of civil matters.

[172] Mr. Samuels identified several matters in the circumstances of the case that he said, cumulatively, constitute a serious breach of section 16 (2) of the Charter of Rights in that the claimants were deprived a fair hearing. These are, as he stated:

A. the public importance attached to the matter;

B. the fact that the matter concerns the liberty of the subject;

C. the order was obtained in breach of Rule 17.4 (4);

D. the Charter of Rights no longer makes it mandatory for the application of redress in any other law but rather it is discretionary; and

E. that part of the complaint made against the claimants at the *ex parte* hearing was not disclosed to the court by the Applicant, the Director of Public Prosecutions, who was under a duty to disclose all relevant material in her hand, to wit, notes of the answers to be given to the Dutch investigators under her duty of disclosure established in the case of **Linton Berry v The Queen** [1992] A.C. 364.

[173] After a consideration of all the components of the claimants' complaint within the terms of the constitutional provision at section 16 (2), I form the view that the circumstances of the case do not put the claimants within the realm of the protection afforded by the subsection. It is the 2nd respondent, as the Central Authority, that has the power to authorise the taking of such evidence as required by the Kingdom of the Netherlands. The procedure before Anderson, J, at the time, was not directly or indirectly concerned with the determination of the rights and obligations of anyone, not

even the party of interest, Trafigura. All the 2nd respondent was seeking was an order for the persons listed in the request to attend court to be questioned pursuant to the provisions of the MACMA.

[174] In the circumstances that obtained before Anderson, J, there was clearly no determination of the civil rights or obligations of any of the claimants. The judge merely heard the application of the 2nd respondent and, apparently, having satisfied himself that he could act on it, he made his order pursuant to law. So, the learned judge, at that point, would not have been acting as a decision - maker in any way but merely to see whether the request of the 2nd respondent should be facilitated under the laws of Jamaica. He had no input in the types of questions to be asked and he was not in a position to make any decision that could adversely affect the rights and interests of any of the claimants, or anyone else for that matter.

[175] The constitutional provision under section 16 embodies the fundamental principle of natural justice which means that before a decision adverse to a person is made, he should be given an opportunity to be heard. It seems to me, however, that it was not in the contemplation of the Legislature, and, therefore, its intention, when making provision under section 20 of the MACMA that the *audi alteram partem rule* would operate at the point in the procedure when the 2nd respondent was authorising the taking of evidence by a judge and seeking an order for that to be done. There is nothing in section 20 of the MACMA to suggest such a right of the claimants to be heard at that stage. I think it safe to conclude, therefore, that the rules of natural justice were not meant to operate at that stage when the 2nd respondent, as the Central Authority, was making a request for the proposed witnesses to be examined on oath.

[176] I have arrived at this conclusion partly based on section 20 (3) of the MACMA which makes provision for the examining judge to permit specified persons to be a part of the hearing in which the evidence is being taken. The subsection provides:

> "*(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;

(b) may permit-

(i) the relevant foreign state;

(ii) the person to whom the proceeding in that state relates; and

(iii) any other person giving evidence or producing documents or other articles at the proceeding to have legal representation during the proceeding;

(c) shall afford to the person referred to in paragraph (b) (ii) facilities to examine in person or by his legal representative, any person giving evidence at that proceeding."

[177] The use of the word *'shall"* as distinct from *'may'* in paragraph (c) of the subsection is noted and this shows that the only person that the statute allows the right to participate, by way of examining persons during the course of the proceeding, is that person to whom the proceedings in the foreign state relates (the interested party). In this case, that would be Trafigura. That right given to Trafigura is limited to putting questions to the witnesses. It is duly noted that Trafigura would have the statutory right to participate not at the point that the 2nd respondent was authorising the taking of the statement or when Anderson, J was making his order to secure the attendance of the persons to be questioned but rather after the persons to be questioned have been summoned and are being examined on oath.

[178] The claimants are not subjects of the investigation for the purpose of initiating criminal proceedings against them. So, they are not interested parties on the same footing as Trafigura. Their role in the investigation is as persons with information that the Dutch believe could assist in their investigation in relation to Trafigura. It is Trafigura that is most likely to be ultimately affected by the proceeding conducted here in the

taking of the evidence by virtue of the request. Apart from answering questions to be put to them, the claimants have no other statutory right of participation in the process.

[179] The respondents have placed reliance on the Caymanian case, **Bertoli and Others v Malone (Cayman Mutual Legal Assistance Authority)** [1991] 39 WIR 117 in dealing with this aspect of the claimants' case. This authority has also served to fortify my view that the principles of natural justice was not intended by Parliament to operate at the point of the proceeding before Anderson, J. In that case, the appellants were US citizens and defendants to an indictment that was pending in the US courts where they were charged for what amounts to 'racketeering'. During the course of the proceedings, Letters of Request were issued to the Central Authority of the Cayman Islands pursuant to the Mutual Legal Assistance (United States of America) Law for documents to be produced and the depositions of certain witnesses to be taken.

[180] The appellants contended that they had a legal right to be heard and to oppose the application. The Attorney-General of the Cayman Islands responded that on a true construction of the Law, no hearing needed to be accorded them nor was the Central Authority obliged to consider whether a hearing should be given.

[181] It was then conceded by the appellants on appeal to the Privy Council that they had no right to demand a hearing. However, the question that remained for the determination of the Board was whether the Central Authority was bound, before executing the request, to consider whether as a matter of discretion, he should have given the appellants an opportunity to make oral representations. The Privy Council, agreeing with the Grand Court and the Court of Appeal of the Cayman Islands, decided that there was no such obligation on the part of the Central Authority to give the appellants a right to be heard at the point at which he was deciding whether to grant the request.

[182] I believe that albeit that the facts in **Bertoli v Malone** are a bit different from the case at bar, the principle could, nevertheless, be extended to cover this scenario where the 2nd respondent is empowered by statute to authorise a judge to take evidence from

persons pursuant to a request for assistance from a foreign state. The authorisation of a judge to take the statements from the claimants is a decision to be made solely by the 2nd respondent as it is exclusively her right to decide whether to grant the request for assistance. Her position in making the decision to deal with the Dutch request was, therefore, no different from that of the Cayman Islands' Central Authority in **Bertoli v Malone.**

[183] Following on the guidance afforded by the Privy Council in that case and on a proper construction of the relevant provisions of the MACMA, it would mean that in the instant case no participation from the claimants would be required as a matter of law in the decision taken by the 2nd respondent to apply to the judge for an order summoning them for questioning. The persons who were seeking a right to be heard in **Bertoli v Malone** were the parties most likely to be affected by that proceeding yet they were held not to have had such a right. The principle would apply with even greater force to persons who are merely required to furnish information in the furtherance of the investigation as these claimants are in this case.

[184] In considering this issue of the right to be heard as a requirement of natural justice, I find it necessary to repeat the words of Lord Reid in **Wiseman v Borneman** [1971] A.C. at 308 as reinforced in **Bertoli v Malone,** and with which I find favour, that:

> *"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplement procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and to require additional steps would not frustrate the apparent purpose of the legislation*."

[185] Following on the persuasive lead of **Bertoli v Malone; Wiseman v Borneman;** and the dictum of Lord Bridge of Harwich in **Lloyd v McMahon** [1987] A.C. 702,703, I would hold steadfast to my view that the statutory provision empowering the 2nd respondent to authorise the taking of the claimant's evidence by Anderson, J must be, in the words of Georges, J.A., "the starting point for the enquiry into the procedural requirements which acting fairly requires in this case."

[186] Therefore, having paid due regard to the wording of the relevant portions of the MACMA governing the request for the taking of evidence and the general circumstances of this case, I find there was no entitlement to the claimants to be heard as to whether an order should have been made by Anderson, J for them to attend court to give evidence. On the clear and unambiguous wording of the statute and given the general legislative schema, there was absolutely no need for the claimants to enter the picture before the order securing their attendance was made. In my view, the *ex parte* proceeding before Anderson, J did not deprive them of the right to a fair hearing or stripped them of any constitutional right to due process of law.

[187] I must say, therefore, that the guidance given by the Privy Council in **NCB v Olint** as to the requirement to serve notice on the party to be affected by an application for interim injunction is, for obvious reasons, wholly irrelevant to the circumstances of this case.

[188] I would hold that the claimants are not entitled to the declaration that there has been a breach of their right to a fair hearing guaranteed to them by section 16 (2) of the Constitution as a result of the order granted by Anderson, J in their absence.

Abuse of process amounting to denial of due process

[189] The claimants had gone further to allege breach of their right to due process of law on the ground that the Anderson Order was an abuse of process for separate and distinct reasons. Firstly, they argued that it was an abuse of process, it being the culmination of a process driven by political motives of the JLP and, in particular, its then leader, Mr. Golding. In essence, and as indicated before, the abuse of process

complaint which is the subject of paragraph 1 of the claim form has been extended and translated by the claimants, by way of submissions, to be a deprivation of their constitutional right to due process.

[190] Mr. Samuels had ventured further to argue under this limb of abuse of process amounting to deprivation of due process of law, that no protection was offered to the claimants when the Anderson Order was granted. He maintained that prior to any person being charged, it is against public policy for a person to give evidence in public. The reason for this, he said, is clear. According to him, the 2nd respondent, for the protection of the witness, has no duty to disclose that witness statement until someone is charged, or legal proceedings require the production of that material. According to him, this stems from the reason that witnesses must have the confidence that in supporting a criminal case to be made out against someone, they must do so in private so that they are free to implicate anyone, if needs be, without reprisals.

[191] He argued that it is on these bases, that Anderson, J, in issuing his order, ought to have given direction for due process for the protection of the claimants as witnesses. He urged this court to apply section 35 of the Justices of the Peace Jurisdiction Act and to say that the learned judge should have made directions for an *in camera* hearing as that section prohibits in clear language the use of an open court to carry out this exercise.

[192] I have given serious consideration to all that learned counsel has urged on this court. However, upon considering what the constitutional right to due process of law truly entails, I am unable to discern how the grounds raised on behalf of the claimants, as being an abuse of process, could translate into deprivation of a constitutional right to due process of law. There is, as already indicated, no evidence that the judge's order was influenced by political motives of the JLP and/or its operatives. That argument is, therefore, rejected out of hand.

[193] In relation to the second limb of Mr. Samuels' submission, concerning the treatment of the DPP's claim by Anderson, J, I have already stated my views in my

consideration of the claimants' allegations of breaches of their right to equitable treatment and a fair hearing. My observations under those headings are quite applicable here with equal force. I see no need to repeat them. I will simply say, in the interest of time, that I have found no constitutional breaches arising from the judge's treatment of the matter in the way he did. The learned judge, purportedly, did what the enabling provision of the MACMA empowered him to do, that is, to make an order for the claimants to appear before a Judge of the Supreme Court to give answers to the questions raised in the request as authorised by the Central Authority. He ordered that they be served with all documents and they were given the opportunity to secure legal representation for their appearance.

[194] As I have already stated in dealing with the issue of the judge proceeding *ex parte* , If the claimants are of the view that the learned judge acted wrongly or should have done differently, then that is a matter to be resolved by the appellate court and not this court consisting of judges of concurrent jurisdiction. This is so because there is nothing arising from the learned judge's treatment of the matter, in my humble view, that amounts to an erosion of any of the claimants' constitutional rights whether to due process of law, or otherwise, that would place them within the jurisdiction of this court.

[195] I will say for completeness too that it is not at all the duty of this court to extend the application of section 35 of the Justices of the Peace Jurisdiction Act to the MACMA proceedings, where the legislature has not so provided. The invitation to do so is, therefore, refused.

[196] In all the circumstances, I find that the claimants' claim that there has been a breach of their rights to a fair hearing and to due process of law by the Anderson Order must be rejected as being unsubstantiated and, therefore, unsustainable as a matter of law. The declaration sought to that effect in paragraph 4 of the amended fixed date claim form is refused.

Issue # 5: Whether 2nd respondent breached constitutional rights of the claimants by making application for them to give evidence

[197] The claimants, under paragraph 5 of their amended fixed date claim form, are seeking a declaration that the 2nd respondent has violated and is violating their constitutional rights when she proceeded to seek to compel them to testify publicly on oath concerning matters in which she, as the Central Authority of Jamaica, on behalf of the Kingdom of the Netherlands, alleges criminal conduct in Jamaica by the said claimants.

[198] The first hurdle that the claimants have not managed to surmount, in seeking this relief, is to identify and specify the rights under the Constitution that they claim have been, are being, or likely to be infringed. They have failed to set out their claim in accordance with Rule 56.9 (3) (c) of the CPR which stipulates that in a case of a claim under the Constitution, the claimant in his affidavit must state the provision of the Constitution that he is alleging has been, is being or likely to be infringed. In looking at the assertion of the claimants in this regard, I have a difficulty identifying any rights and freedoms guaranteed by the Constitution which was, is being, or likely to be, breached by the 2nd respondent in seeking the order of the judge in the way and in the circumstances she did.

[199] Secondly, the claimants have put forward no evidence that the 2nd respondent has alleged criminal conduct by them in Jamaica on behalf of the Netherlands. Indeed, there is no evidence arising from anywhere in this proceeding of any allegation of criminal conduct on the part of the claimants emanating from the Kingdom of the Netherlands.

[200] Finally, the 2nd respondent did not seek an order to compel the claimants to testify ***publicly*** on oath (emphasis added). The decision for the hearing to be in open court was the decision of Campbell, J, the judge taking the evidence. The learned judge's decision was not made on the application of the 2nd respondent that the hearing should have been so conducted.

[201] I find, therefore, that there is no factual and legal basis for the declaration being sought by the claimants in the terms as claimed, or at all, that the 2nd respondent has breached, or is breaching, their constitutional rights when she sought the order for them to attend court to give the evidence requested. In the result, I would deny that declaration sought in paragraph 5 of the claim.

Issue # 6: Whether the 2nd respondent acted *ex post facto* in relying on the amendment to the Schedule of the MACMA

[202] The claimants, in paragraph 6 of their amended fixed date claim form, are seeking a declaration that the 2nd respondent acted *ex post facto* when she relied on an amendment to the Schedule of the MACMA to include the Kingdom of the Netherlands. According to them, this amendment was made subsequent to the request by the Kingdom of the Netherlands for the 2nd respondent to act on its behalf.

[203] This aspect of the claimants' claim does not raise any allegation of constitutional breach for the consideration of this court and so no redress could lie from this court on that issue by way of the declaration sought. It does not fall within the ambit of section 19(1) of the Constitution. I would venture to say, however, that even if this aspect of the claim could properly be dealt with as raising a constitutional question, the prospect of success of it would be, at best, rather dubious given the evidence in this case. The uncontroverted evidence is that the passing of the Foreign States Order predated the request on which the 2nd respondent proceeded to act in assisting the Kingdom of the Netherlands and pursuant to which the Anderson Order was made. The claimants' contention is, therefore, not supported by the evidence.

[204] I would refuse to grant this declaration sought in paragraph 6 of the amended fixed date claim form that the 2nd respondent acted *ex post facto* when she granted the request to assist the Kingdom of the Netherlands.

Issue # 7: Whether claimants entitled to a declaration that the Anderson Order is an abuse of process as it was instigated for political reasons

[205] The claimants also seek, by way of relief, a declaration that the Anderson Order is an abuse of process as it was instigated by political agents and operatives of the Jamaica Labour Party, namely, its then leader, Mr. Golding, and Mr. Harold Brady, Attorney-at-Law, for political reasons.

[206] As is evident from all the material placed before this court, nowhere on the claimants' averments or evidence is there any assertion of breach of any constitutional right of the claimants on this basis. This claim overlaps substantially with the claim for declaration under paragraph 1 with respect to abuse of process and which have been already dealt with extensively under that heading above.

[207] In disposing of this complaint, I will simply state that Mr. Golding did not act on the request of the Kingdom of the Netherlands. The Kingdom of the Netherlands, acting on information it received, exercised its own judgment to initiate an investigation into the conduct of its own citizen. The 2nd respondent acted on a request from the Dutch that, in her view, was properly made in accordance with Jamaican law. She, purportedly, acted on the basis of the enabling provisions of the MACMA exercising her independent judgment in doing so. There is not an iota of evidence that she acted on any instruction of the JLP or its functionaries, particularly, Mr. Golding and Mr. Brady, as is alleged.

[208] There is thus no evidence whatsoever that the order of the learned judge, made on the application of the 2nd respondent, was instigated by Mr. Golding, Mr. Brady or any agent or affiliate of the JLP and/or for political reasons. Accordingly, no breach of any of the constitutional rights of the claimants is established on such a basis.

[209] I conclude that the claimants would not be entitled to such a declaration from this court that the Anderson Order was an abuse of process as it was instigated for political reasons. The declaration sought in paragraph 7 is, therefore, refused.

Issue # 8: Whether open court procedure adopted by Campbell, J breaches the claimants' right to due process and a fair hearing

[210] Finally, the claimants are asking for a declaration that the procedure adopted by Campbell, J pursuant to the Anderson Order, "to wit, conducting the taking of evidence in open court and refusing to revert to having the matter conducted in chambers, amounted to breach of the claimants' constitutional right to the protection of their right to due process and a fair hearing under Section 16 (2) of the Charter of Rights." This challenge is now to the decision of Campbell, J in hearing the DPP's claim in open court.

[211] As already noted, in terms of the right to due process which must be protected broadly, it encompasses the right to a fair hearing within reasonable time before an independent and impartial tribunal established by law. This right to a fair hearing, as contained in section 16 (2) of the Charter of Rights, is but one of the components of the right to the protection of due process. It should be reminded that the right to a fair hearing, as set out in section 16, is accorded to persons charged with a criminal offence [s.16 (1)]; to persons whose civil rights and obligations are to be determined and to persons whose interest would be adversely affected by any legal proceedings [s. 16(2)].

[212] In treating with this aspect of the claim of breach of right to due process, Mr. Samuels argued that the claimants' refusal to answer the questions asked of them is an acceptance by them of their right to due process. It was, according to him, a "legitimate allowable right" that resides with the [1st and 2nd] claimants which they can exercise under Jamaican law. In his view section 16 (2) is the relevant constitutional provision that protects them. The refusal of the claimants to cooperate with the Dutch authorities through the facilities of the 2nd respondent is, therefore, a right they possess under the MACMA as well as under the Charter of Rights. In his view, the claimants' requisite cooperation under the Act should have come to an end when they refused to answer questions prior to the order being sought.

[213] Learned counsel maintained that the claimants, having asked whether they were suspects, and having not received that information from the 2nd respondent, do have a

right to refuse to answer any further questions. According to him, where that right had been exercised by the claimants, compulsion in any form, by an order or otherwise, is a breach of their constitutional right to a fair hearing. Counsel maintained further that to use the order of the court as a vehicle to subject to questioning persons who refused to attend to be examined amounts to trespassing on the constitutional rights of these persons. That, he said, amounts to breach of their right to protection of the law.

[214] As indicated before, the claimants do not fall within any of these categories of persons to which this protection through right to silence and a fair hearing is given under the Constitution. That is to say that they are not persons who are charged for a criminal offence; they are not persons whose civil rights and obligations are to be determined and they are not persons whose interest would be adversely affected by the relevant proceeding. I find no basis, therefore, on which it could properly be found that there is any violation of their right to a fair hearing in the sense guaranteed by the Charter of Rights.

[215] It is my view that the constitutional right to a fair hearing under section 16 (2) is not breached by the procedure adopted by Campbell, J to hear the matter in open court.

[216] Another aspect of the right to due process protected by the Constitution, which is somehow relevant to the case being advanced by the claimants, is the right to a public hearing in all court proceedings as enshrined in section 16(3) of the Charter of Rights. The section reads:

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

[217] Subsection 16 (4) then goes on to state that nothing in subsection 16 (3) shall prevent any court or any authority from excluding from the proceedings, persons other than the parties and their legal representatives in certain specified circumstances. These circumstances include:

(1) "where it is considered necessary or expedient in circumstances where publicity would prejudice the ends of justice; or

(2) where it is required by law or is necessary in the interests of defence, public safety, public order, public morality, the welfare of children, or the protection of the private lives of persons concerned."

[218] In the case of the MACMA, no specific provision is made that the taking of evidence from persons in Jamaica, on behalf of a requesting state, should be in public or private. So, there is no requirement in the relevant statutory regime that the proceeding for the taking of the evidence of the claimants should be conducted in chambers or in private as the claimants are contending it should be. Also, there is no evidence that the Kingdom of the Netherlands has requested the taking of evidence to be in private as it could have done as provided for in the MACMA under the First Schedule to section 15 (4).

[219] In the absence of all these special provisions as to the procedure to be used in the taking of the evidence, Campbell, J had a discretion to deal with the hearing in private as can be seen from the relevant constitutional provisions in section 16(4) of the Charter of Rights. He, however, opted for an open court hearing in keeping with the provisions of the Constitution that, as a general rule, all proceedings of any court should be held in public. This is in keeping with an existing common law rule.

[220] The claimants' sought to draw some support from the opinion of the Privy Council in **Meerabux v Attorney-General of Belize** [2005] 2 WLR, 1308 in arguing that the proceeding should be conducted in chambers. In that case, the hearing was conducted in private but the argument advanced by the appellant was that the hearing should have been in open court in accordance with the constitutional provision of Belize. It was held that the constitutional requirement for every court or other authority to sit in public when determining the existence or extent of any civil right or obligation did not apply to the Belize Advisory Council whose function was not judicial but uniquely part of the executive. The proceeding in chambers was, therefore, not found to have infringed the appellant's right to a public hearing.

[221] I have not managed to readily grasp the relevance of the decision to the instant case since in this case, it is the converse that is being advanced by the claimants in saying that the constitutional provision for public hearing should not apply. Campbell, J, being a judicial officer, cannot at all be equated with the Belize Advisory Council in **Meerabux** whose function was not judicial but as the Board found was "uniquely part of the executive". The MACMA specifically provides for evidence to be taken by a judicial officer (Supreme Court Judge or Resident Magistrate) and no one else. It would seem to me that Parliament intended that even though a decision is not being made in the proceeding, judicial involvement in and supervision of the proceeding is required. By no stretch of the imagination could it be argued that the judge is required to carry out anything but a judicial function under the provisions of the MACMA. In my view, the case of **Meerabux** really does not offer much assistance to the claimants as they would like in arguing their case of constitutional breach arising from the conduct of the hearing in open court.

[222] In order to better justify a hearing in private, in accordance with the Constitution, (albeit that there is no constitutional right to a private hearing) the claimants would, perhaps stand a better chance, by establishing that their situation is one that would fall within the one or other of the circumstances specified under section 16 (4) of the Charter of Rights. That is to say that a hearing in chambers is reasonably required for the protection of one or other of the interests referred to in that subsection.

[223] In seeking to establish a basis for hearing *in camera* or in chambers, the claimants, through the submissions of their counsel, rather than through any evidence, have put forward the contention that the hearing in chambers would be necessary for their protection. The point was made that to expose them to giving evidence in open court would expose them to danger or is likely to expose them to danger of reprisal since they would be testifying in respect of persons to be charged for a criminal offence.

[224] Within this context, the Constitution does provide that although the general rule with respect to "all proceedings of every court" is that they be held in public, there is

nothing to preclude a judge from hearing the matter in private if it is necessary or reasonably required for the "protection of the private lives of persons involved in the proceedings". This seems to be the consideration that the claimants would wish to invoke as there is nothing put forward by them about a hearing in chambers being reasonably necessary or required for public safety or public order.

[225] In **Hinds and Others v The Queen** [1975] 13 JLR, 262, the issue of *in camera* hearing in the Gun Court, provided for by the then newly enacted Gun Court Act, was under consideration by the Privy Council. The statute was challenged as being unconstitutional in providing for hearing in private instead of in open court as provided for under the Constitution.

[226] The former corresponding provisions to sections 16 (3) and (16) (4) were considered (sections 20 (3) and 20 (4)). What the Board stated, that is, particularly, important to the instant proceeding, is what is meant by the phrase *"private lives of persons concerned in the proceedings*". Lord Diplock, at page 278, stated:

> *"The reference to the protection of the private lives of persons concerned in the proceedings as well as to "public safety" and "public order" would appear to be based upon a misinterpretation of this phrase where it is used in s. 20 (4) of the Constitution. The phrase, which also appears in s. 22 (2) (a) (ii) as a limitation upon freedom of expression, is not directed to the physical safety of individuals but to their right to privacy, i.e. to protection from disclosure to the public at large of matters of purely personal or domestic concern which are of no legitimate public interest." (emphasis added).*

[227] If one were to apply such definition to the circumstances of this case, then it seems highly unlikely that it could be successfully argued that a hearing in chambers would be justified merely in the interest of the protection of the claimants in "their private lives" as defined. The claimants in their affidavits have not made any mention to matters affecting, or likely to affect, their safety as a result of the decision to hear the matter in public. The issue as to risk of danger was raised in submissions with no evidential base established by the claimants by way of their affidavit evidence. Even more specifically, there is no evidence presented to say that the claimants require protection from

disclosure to the public of personal or domestic concerns which are of no legitimate public interest which is the meaning ascribed to the term "private lives of persons" as used in the Constitution .

[228] In all the circumstances, I am fortified in my view by the dictum of Lord Diplock that there is nothing placed before this court to move it to find that the refusal of Campbell J to proceed in chambers has infringed the claimants' constitutional rights to due process and protection of the law on the basis of risk to their physical /personal safety. Fundamentally, there is no constitutional right to a hearing *in camera*.

[229] I must go on to say too, that even if it could be properly argued that Campbell, J exercised his discretion wrongly, The first point worthy of note on this issue is that we are dealing with an order of a judge of the Supreme Court. Mr. Henriques, QC has drawn on several authorities to submit, with the concurrence of Mrs. Hay, that it cannot be said that in this case, the constitutional rights of the claimants have been infringed by either the order of Anderson, J or the decision of Campbell, J.

[230] Learned Queen's Counsel, Mr. Henriques, reminded us of the words of their Lordships in **Ramesh Lawrence Maharaj v Attorney- General of Trinidad and Tobago (No. 2)** [1979] AC 385 and as restated in **Clinton Forbes v The Attorney - General of Trinidad and Tobago** [2002] UKPC 21 at paragraph 18**.** In **Maharaj,** Lord Diplock at page 399 cautioned:

> *"In the first place, no human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of this kind is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1 (a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must be a failure to observe one of the fundamental*

rules of natural justice. Their Lordships do not believe that this can be anything but a rare event."

[231] Their Lordships in **Clinton Forbes**, after citing **Chokolingo v Attorney- General of Trinidad and Tobago** [1981] WLR 106; **Boodram v Attorney - General of Trinidad and Tobago** [1966] A.C. 842; and **Hinds v Attorney - General of Barbados** [2002] 2 WLR 470, declared at paragraph 18 of the judgment:

"Their Lordships do not think that it would be helpful or desirable to add their own observations to the foregoing citations. They establish that is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process."

[232] In **Boodram v Attorney - General of Trinidad and Tobago** at page 854, Lord Mustill said:

"The 'due process of law' guaranteed by this section has two elements relevant to the present case. First, and obviously, there is the fairness of the trial itself. Secondly, there is the availability of the mechanisms which enable the trial court to protect the fairness of the trial from outside influences. These mechanisms form part of the "protection of the law" which is guaranteed by section 4 (b), as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. It is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law..."

[233] Having taken all the relevant principles of law into consideration as derived from **Maharaj** and the related line of cases cited above, I am propelled to state that I fail to see in the circumstances of this case any subversion of the rule of law or any breach of a fundamental rule of natural justice arising, or likely to arise from any order or decision made by the judges in question. There is nothing to classify the claimants' case as one

of those rare ones that their Lordships would have had in their contemplation to justify the granting of constitutional redress in respect of the order of a Judge of the Supreme Court. The appellate process is still available to treat with any perceived error of law made by the particular judge in question. As already been said, this court cannot sit as an appellate court in respect of the decisions of Campbell and Anderson, JJ. It, therefore, has no authority to interfere with the decisions of the learned judges unless there is clear evidence of a breach of a fundamental human or constitutional right or a subversion of the rule of law and/or the processes of the court resulting from such decisions.

[234] I see no basis on which to find that there has been, is, or likely to be, a breach of the constitutional rights of the claimants as alleged resulting from the procedure adopted by Campbell, J pursuant to the order of Anderson, J. In the result, the declaration sought in paragraph 9 of the fixed date claim form, as amended, that there is a breach of the claimants' constitutional rights to due process of law and to a fair hearing is denied.

[235] This leaves me to say that the issue of hearing in chambers was raised before Campbell, J who heard submissions and refused the application for a private hearing. This conveys the impression that he had not seen any basis, as a matter of law and fact, on which to exercise his discretion to hold the matter in private. The refusal of the learned judge to exercise his discretion in favour of a hearing in chambers would give rise to the question as to whether he had acted properly as a matter of law. This would be a matter to be addressed by the Court of Appeal and not one that falls for determination by this court when no infringement of the claimants' constitutional rights has been established by the evidence as flowing from the learned judge's decision. The appellate process is still available to the claimants to correct what they perceive to be errors of law.

Conclusion

[236] I would conclude that the claimants have failed to prove by cogent and credible evidence that, as a matter of law, they are entitled to the reliefs they seek in their amended fixed date claim form. There has been no proven breach or likely breach of any of the constitutional rights alleged by them to have been, is being, or likely to be, infringed by the steps taken by the 2nd respondent to secure their attendance at court for them to be questioned on oath with respect to the Trafigura investigation.

[237] I find that the order of Anderson, J, made on 17 November 2010 for the claimants to appear before a Judge to give evidence on oath in the Trafigura investigation, and the decision of Campbell, J to conduct the hearing in open court, are unassailable on constitutional grounds.

[238] Accordingly, the claim for redress by way of declarations on all the grounds raised by the claimants in their amended fixed date claim form cannot succeed. I would refuse all the declarations sought and dismiss the claim in its entirety.

MARSH, J

[239] (1) The declarations sought in the claimants' amended fixed date claim form are refused.

(2) The claim is dismissed.

(3) Issue of award of costs reserved until further submissions from the parties.