

TRAFIGURA BEHEER

FULL COURT CASE SUMMARY

Constitutional Court Judgment in ‘Trafigura’ matter

CLAIM NO. 2011 HCV 07019

PANEL: THE HON. MR. JUSTICE MARSH
THE HON. MR. JUSTICE PUSEY
THE HON. MRS. JUSTICE McDONALD-BISHOP

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

HEARING DATES: 24, 26, 27, 28, September and 1 October 2012 and 20 September 2013

BACKGROUND

- The five (5) Claimants made an application for relief in the Constitutional Court.
- They sought a total of eight (8) Declarations having alleged that the actions of the Anderson and Campbell, JJ in granting the orders which they did, as well as the Director of Public Prosecutions, (on whose application the order of Anderson, J was made) breached the Charter of Fundamental Rights and Freedoms touching and concerning the Claimants’ Constitutional Rights.

BROAD ISSUE EXTRACTED

The broad issue as extracted the panel, as contained in the Judgment of McDonald-Bishop, J was whether there has been, is being, or is likely to be breaches of the claimants’ constitutional rights as per their claim as a result of the orders made by Anderson and Campbell, JJ that they attend court to publicly answer questions on oath concerning the Trafigura Affair.

POINT IN LIMINE

Diplomatic Immunity

Claimants’ argument

- Based on status of claimants #1, 2 and 4, they would enjoy diplomatic status in the Requesting State and as such would not be compellable to give evidence in that country. Therefore, via section 21 MACMA they should not be compelled to give evidence in these proceedings.

Full Court's treatment of the issues

- Diplomatic Immunity is not a privilege assumed by an individual but one conferred by state based on comity ad international customs.
- The question of whether Diplomatic Immunity would be afforded to claimants 1, 2 and 4 would be a question for the Requesting State.
- Nothing was adduced to show that their mere status as Ministers would make them non-compellable.

SPECIFIC ISSUES AS PER CLAIM:

Whether the "Anderson Order" and the Foreign States Order which gave rise to it constituted an abuse of process/politically motivated

Claimants' argument

- The JLP, more specifically the then leader Mr. B. Golding instigated the Requesting State Investigation to give effect to political aims and/or to 'score political points'.
- The Foreign States Order was passed solely to give effect to the political aims of the JLP (then in administration), as when a request was first made by the Requesting State, it was not contained in the schedule of countries which Jamaica could provide such assistance to under MACMA.
- The Central Authority (CA) was being used to further a political agenda.

Full Court's treatment of the Issues

- Section **31 MACMA** empowers the relevant Minister to make orders concerning the applicability of the Act to other countries.
- The passing of the Foreign States Order was thus in keeping with the provisions under section 31.
- There is a presumption of validity and constitutionality of the Foreign States Order.
- The Claimants have not demonstrated (or attempted to demonstrate) that the CA acted unlawfully in granting the Request.
- The claimants further, did not show a breach of **section 16(1)(a)(ii) MACMA** which concerns Grounds for Refusal of Request (*that "compliance with Request would facilitate the prosecution/ punishment of any of them as persons affected by the request on account of their political opinions"*)
- Referring to case of **Regina v. Secretary of State for the Home Department and Others Ex parte Fininvest S.p.A** – the fact that an offence was committed in a political context does not make it a political offence per se".
- The fact that the Requesting State enquiry might have had its genesis in politics of Jamaica does not transform the request for assistance into a political request.
- Argument re political motive influencing investigation is not relevant as no evidence of allegations of a political offence committed by Trafigura being investigated by the Requesting State.
- The motive of Mr. B. Golding is irrelevant.

- No evidence that Requesting State have alleged any criminality on part of the Claimants.
- **Breach of a constitutional right is distinct from abuse of process and this Court is not concerned with the latter standing by itself. Merely asserting that the order of the Judge amounted to an abuse of process without showing how it impacted on their intrinsic human, fundamental or constitutional rights does not make such claim justiciable in this Court.**

Whether the CA's application for Anderson Order deprived the claimants of their right to equitable and humane treatment by a public authority in the exercise of their function

Claimants' argument

- The claimants are being treated as persons accused of a crime rather than persons being asked questions to further an investigation.
- The claimants have been referred to as 'Defendants' in the affidavit of the CA.
- The CA's claim speaks to a 'criminal investigation concerning bribery of public officials', thus inferring that investigations would be conducted against them.
- The material disclosed to the claimants make it clear that they fall in the category of 'suspects' and not merely witnesses. Moreso, they are not only being treated differently from other witnesses, but even from other categories of 'suspects'.
- The insistence to ask questions of the claimants is reserved for persons being cross-examined in a trial.
- The claimants also take issue with being questioned in a courtroom open to the public.
- The claimants are not being treated equitably.

Full Court's treatment of the Issues

- Nothing in the MACMA speaks to how proceedings should be conducted (re the taking of evidence for the foreign state upon request).
- No Regulations/ Rules of Court deal with this matter of practice/ procedure.
- Resort would have to be had to existing practice and procedures governing applications to the Supreme Court, general law of evidence retaking evidence from witnesses and Judge's own professional judgment.
- No evidence that the CA's claim was influenced by political influence.
- CA's use of term 'Defendant' was in affidavit only and does not import legal status of the claimants in relation to Trafigura investigation but rather their standing as parties in proceedings brought by the CA for evidence to be taken.
- The investigation and request relate to matters concerning alleged breach of Requesting State law as distinct from Jamaican law and the party of interest is Trafigura. Nothing has been said of any parallel investigations to be undertaken by the Jamaican authorities to see whether the PNP or its functionaries, including the claimants have contravened any law. There is no evidence that claimants have attained status as 'suspects'.

- The names of persons to be questioned were not the creation of the CA but furnished by the foreign state.
- In any event, there is no law that prevents questioning of suspects. Limited measure of cover exists in the 'privilege against self-incrimination'.
- **There is no constitutional right of silence guaranteed to any suspect or witness. The questioning of witnesses (and even of suspects) would not, without more, amount to inequitable and inhumane treatment in contravention of the Constitution.**
- Reference was made to the case of **Downie v. Coe EWCA Civ 2648** cited in **Gerville v. Indecom** whereby the CJ reminded that the practice has always been that *"if any witness seeks to rely on the privilege against self-incrimination...he must take the objection on his oath."*
- **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 proceeding such as this.**
- The CA's application is an act pursuant to powers conferred by **section 20 MACMA**. **The claimants have not argued that the provision is incompatible with the Constitution and ought to be struck down. Thus, the CA's actions were carried out in accordance with law cannot be impugned as infringement of claimants' constitutional rights.**
- The mere fact that Campbell, J refused to conduct a hearing in chambers does not render his decision as one of treating claimants inequitably.
- **Claimants have failed to demonstrate that they have been/ are being treated differently by the CA as public authority from other persons in their position who have behaved in like manner in proceedings under the MACMA.**

Whether the Claimants' 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

Claimants' argument

- The claimants allege that they are victims of discrimination on the grounds of their political opinions. The right to be free from discrimination was alleged to have been breached by the application of the CA and the consequent order of Anderson, J.

Full Court's treatment of the Issues

- Questions to be asked were preset by the Requesting State and not the CA or any authority in Jamaica.
- It is not demonstrated that the questions being asked and the answers being elicited were based on any political opinion held or political doctrines observed by any of the claimants.
- There is no evidence of any political opinion held by them of an account which they are being discriminated against.

Whether the “Anderson Order” deprived claimants of the right to a fair hearing

Claimants’ argument

- Ex parte proceedings were unfair in that the claimants were not served before the “Anderson Order” was made for them to appear to give evidence.
- Ex parte proceedings to be frowned upon due to: public importance of matter, fact that it concerns the liberty of the subject, part of the complaint made against claimants at the ex parte hearing was not disclosed to the court by the CA
- CA had a duty to disclose all relevant material in hand, to wit notes of the answers to be given to the Requesting State investigators.

Full Court’s treatment of the Issues

- Legislation did not contemplate that the ‘**Audi alteram partem rule**’ would operate at point when CA was authorizing the taking of evidence by a judge and seeking for an order for that to be done.
- Nothing is contained in **section 20 of MACMA** to suggest a right for claimants to be heard at that stage. The rules of natural justice were not meant to operate at that stage.
- Section **20(3) of MACMA** allows the right of the interested party “Trafigura” to participate by way of examining persons during the course of the proceedings.
- The claimants are not subjects of the investigation for the purpose of initiating criminal proceedings against them. They are not interested parties on the same footing as ‘Trafigura’.
- In any event, Trafigura’s statutory right to participate would be at the time the persons to be questioned have been summoned and are being examined on oath.
- Apart from answering questions to be put to them, the claimants have no other statutory right of participation in the process.
- Reliance on case of **Bertoli and Others v. Malone (Cayman Mutual Legal Assistance Authority) [1991] 39 WIR 117** from which the principle was distilled that there was no 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. Although based on different facts, the principle could extend to this scenario.
- The authorization of a judge to take the statements from the claimants is a decision to be made solely by the CA as it is exclusively her right to decide whether to grant the request for assistance.
- There was no entitlement to the claimants to be heard as to whether an order should have been granted by Anderson, J for them to attend court to give evidence.
- **The ex parte proceeding before Anderson, J did not deprive the claimants of the right to a fair hearing or strip them of any constitutional right to due process of law.**
- **There was no evidence that the judge’s order was influenced by the political motives of the JLP and/or its operatives.**
- The judge’s order for the claimants to appear before a Judge of the Supreme court to give answers to questions raised in the request as authorized by the CA was enabled by the provisions of MACMA which empowered him to do same.

- If the claimants are of the view that the judge acted wrongly, that is a matter for the Appellate court and not a court consisting of judges of concurrent jurisdiction.

Whether the Claimants' constitutional Rights were deprived when the CA sought to compel the claimants to give evidence

Claimants' Argument

- CA violated constitutional rights by seeking to compel them to testify publicly.

Full Court's treatment of the Issues

- The CA did not seek an order to compel the claimants to testify publicly on oath. The decision for the hearing to be in open court was a decision of Campbell, J, as the judge taking the evidence.
- The Claimants ought to state in their affidavits the provision of the Constitution that they are alleging has been or is being or likely to be infringed (pursuant to **Rule 56.9(3) (c) CPR**)

Whether the CA acted ex post facto by relying on the amended schedule to the MACMA (amended subsequent to request for assistance by the Requesting State).

Claimants' Argument

- The amendment to the schedule of MACMA to include the Requesting State was made subsequent to the request by the Requesting State for the CA to act on its behalf.

Full Court's treatment of the Issues

- This aspect of the claimants' claim does not raise any allegation of constitutional breach 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.
- The Foreign States Order predated the request on which the CA proceeded to act in assisting the Requesting State and pursuant to which the Anderson Order was made.
- Mr. Golding did not act on the request of the Requesting State. The Requesting State, acting on information it received, exercised its own judgment to initiate an investigation into the conduct of its own citizen.
- The CA acted on a request from the Requesting State which in her view was properly made in accordance with Jamaican law.
- There is no evidence she acted on any instruction of the JLP or its functionaries.

Whether the open court procedure adopted by Campbell, J breached or is likely to breach claimants' rights to fair hearing/ due process of law

Claimants' Argument

- The Claimants argue that the proceedings ought to be held in chambers, and not in open court. They claim that the procedures under **section 35 of the Justices of the Peace Jurisdiction Act** are applicable to the proceedings.

Full Court's treatment of the Issues

- 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.
- 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.

- Campbell, J had discretion to deal with the hearing in private, however he opted for an open court hearing in keeping with the provisions of the Constitution, as a general rule, all proceedings of any court should be held in public.

Prepared by:

The Office of the Director of Public Prosecutions

23rd September 2013