[2006 JLR 31]

DURANT INTERNATIONAL CORPORATION, SUN DIAMOND LIMITED, KILDARE FINANCE LIMITED and MACDOEL INVESTMENTS LIMITED v. ATTORNEY GENERAL and FEDERAL REPUBLIC OF BRAZIL

ROYAL COURT (Birt, Deputy Bailiff and Jurats Allo and Newcombe): January 19th, 2006

Evidence—assistance in foreign proceedings—letters of request—Attorney General to take reasonable steps to ascertain lawfulness—may be sufficient that issued by central authority of requesting country—opinion on lawfulness from central authority precludes quashing of Attorney General's decision to disclose information requested for Wednesbury unreasonableness or procedural unfairness—lawfulness may be determined by court in requesting country, which could exclude information if ruled unlawful

The applicants sought judicial review of the Attorney General's refusal to disclose two letters of request from the Federal Republic of Brazil.

The applicants were companies incorporated in the British Virgin Islands which had bank accounts and other assets in Jersey. They were allegedly connected with M who was a prominent figure in Brazil and a successful businessman. He was the subject of criminal investigations in Brazil concerning allegations of corruption, embezzlement of public funds and money laundering in connection with public works contracts. Some of the investigations had led to criminal charges whilst others remained at the investigatory stage and some had already been dropped.

The Attorney General received several requests for assistance from Brazil, including requests from two state prosecutors who did not have the authority to make them. The applicants claimed that the allegations were part of a political campaign to discredit M and that the letters of request were mere fishing expeditions. The Attorney General therefore began his own investigation, under the Investigation of Fraud (Jersey) Law 1991, concerning assets in Jersey. Article 2(1) of that Law provided that he could obtain documents and information if it appeared to him that there was a suspected offence of serious or complex fraud wherever committed, and he could disclose them under art. 3(3)(a). In addition, the later Criminal Justice (International Co-operation) (Jersey) Law 2001, art. 5 provided that, if he received a request for assistance, ". . . the Attorney General may . . ." order that evidence be obtained concerning any suspected offence and disclose it to the requesting authority.

The Attorney General considered the confidential material which he obtained under the 1991 Law to be relevant to the Brazilian investigations and also to possible further offences. He received a formal letter of request from Brazil in 2003, which issued from the Federal Criminal Court and was forwarded to Jersey by the Brazilian National Justice Secretary, via the Brazilian Embassy. The Federal Republic subsequently produced an opinion, endorsed by the Brazilian Attorney General, which confirmed that the request had been lawfully made. A further, similar request was received in 2005.

The Attorney General informed the applicants that he was minded to accede to the Federal Republic's request but sought representations from them before making a final decision. He refused to disclose the letters of request but provided a summary of the allegations and the dates and source of the letters. He stated that, regardless of the requests, having conducted an independent investigation under the 1991 Law, he was in any case minded to disclose the information he had obtained to the Brazilian authorities under art. 3(3)(a) of the 1991 Law. The applicant companies maintained that they could not make proper representations without seeing the letters of request and brought the present proceedings seeking judicial review of the refusal to disclose them. Affidavits filed in support of their application were sworn by a solicitor and not by a director, officer or shareholder.

The applicants submitted that (a) the Attorney General could only provide information to the Federal Republic in response to the letters of request, under the Criminal Justice (International Co-operation) (Jersey) Law 2001 and he had therefore to follow the procedures prescribed by that Law which he had not; and (b) letters of request should generally be disclosed to persons they concerned and fairness required disclosure in the present case so that they could make meaningful representations.

The Attorney General submitted in reply that (a) the 2001 Law had not repealed or amended his powers under the 1991 Law and he could therefore disclose the information in the present case pursuant to the earlier Law despite having later received letters of request; (b) furthermore, the terms and lawfulness of the letters of request were irrelevant to a decision under art. 3(3)(a) of the 1991 Law to disclose the information to the Brazilian authorities; (c) neither he nor the Jersey courts should purport to determine the lawfulness of the letters of request; and (d) the application should, in any case, be dismissed, as the applicant companies had not made frank disclosure of all the relevant facts and affidavits supporting their application for leave to seek judicial review had been sworn by a solicitor rather than by a director, officer or shareholder.

Held, dismissing the application:

(1) The Attorney General's refusal to disclose the letters of request was not procedurally unfair or irrational and he would not therefore be ordered to disclose them. As he had obtained an opinion on their lawfulness from

the proper authorities of the Federal Republic of Brazil, a decision to disclose to those authorities the information he had obtained under the 1991 Law would not be liable to be quashed for *Wednesbury* unreasonableness or procedural unfairness and the interests of justice did not therefore require that the letters, or redacted versions, should be disclosed to the applicants so that they could make further representations on lawfulness. When considering whether to respond to letters of request, the Attorney General had merely to take reasonable steps to ascertain that they were lawful, not to determine their lawfulness. It might be sufficient, in certain cases, that the request was issued by the central authority of the requesting country. In other cases, especially if, as in the present proceedings, doubts had been raised, further steps might be required. The lawfulness of the letters of request could, if necessary, properly be determined by the courts of Brazil, as the requesting jurisdiction, which could exclude the material if the letters were found to be unlawful (paras. 48–49).

(2) In general, letters of request would be regarded as confidential and their existence and content would not be disclosed to persons they concerned, who would often be sophisticated, rich and ruthless, able to benefit from early notice of the state of an investigation and also from any delays caused by applications for disclosure. Letters of request should therefore be answered reasonably promptly. Furthermore, if they were routinely to be disclosed, requesting authorities might provide less information in them, which would make more difficult the Attorney General's decision whether or not to provide assistance. The need to investigate alleged criminal conduct had, however, to be balanced against the need for justice to be done to the subjects of investigations. If such a person sought disclosure of a letter of request, it would generally be sufficient, in the interests of justice, for the Attorney General to inform him of the nature of the investigation and the exact source of the letter of request. Although any concerns of the requesting authority as to particularly sensitive parts of the request should be taken into account, in order to fulfil his duty of fairness, the Attorney General should supply a sufficient level and degree of information to enable representations to be made as to the lawfulness of the request, as well as the general nature of the alleged offence and the investigation in the requesting country. A summary of a letter of request should, in general, contain as much information as would be consistent with respecting any concerns of the requesting jurisdiction as to confidentiality and with not hampering the investigation. In the present case, the applicants and the M family were fully aware of the nature of the investigations and would not be prejudiced by the refusal to disclose the letters of request. There might be cases in which justice would require the disclosure of the actual letter or a redacted version and disclosure by the Attorney General could, of course, be authorized by the requesting country itself (paras. 35–38; para. 50).

(3) The Attorney General's powers under the Investigation of Fraud (Jersey) Law 1991—to obtain information concerning suspected offences

of serious or complex fraud and to disclose it to the requesting country—had not been repealed or limited by the permissive and general wording of the powers introduced in the Criminal Justice (International Co-operation) (Jersey) Law 2001, *i.e.* to provide information on receipt of a letter of request, whether or not it concerned a suspected offence of serious or complex fraud. Indeed, general wording in a subsequent statute would be insufficient to repeal or amend such clear and explicit powers conferred in an earlier statute. On receipt of a letter of request for assistance concerning suspected serious or complex fraud, the Attorney General could therefore elect to act under either Law and he was not restricted only to exercising his powers under the 2001 Law (paras. 25–26).

(4) Although, in the present case, the Attorney General had obtained the confidential information pursuant to the Investigation of Fraud (Jersey) Law 1991 rather than the Criminal Justice (International Co-operation) (Jersey) Law 2001, the lawfulness and terms of the letters of request from Brazil might nevertheless be relevant considerations for him in deciding whether or not to disclose the information under art. 3(3)(a) of the 1991 Law. Any exercise of his powers under the 1991 Law, which could of course be subject to judicial review, should be reasonable and all relevant considerations should be taken into account. If he were to exercise those powers solely in response to a letter of request, the lawfulness of the request would be relevant to the reasonableness of the exercise. Alternatively, if he were to conduct an independent investigation but coincidentally also receive a letter of request, less or negligible weight might be attached to its lawfulness. As he had conducted the present investigation after receiving the earlier, unlawful letters of request from Brazil, the lawfulness of the later letters to which he proposed to reply was therefore relevant (para. 27).

(5) Although it was not necessary to consider the matter, as applicants for judicial review, the applicants owed a duty to the court to make frank disclosure of all the relevant facts. Whether or not that duty would require full disclosure by an applicant company of its beneficial ownership would depend on the circumstances of the individual case. Little weight would, however, be attached to an affidavit if the deponent did not have direct knowledge of the matters asserted in it, *e.g.* if he was not a director or beneficial owner. In certain cases, therefore, an applicant company which relied on an affidavit sworn by a solicitor might find its case very much weaker than it would have been had it been sworn by a director or shareholder (para.

55).

Cases cited:
(1) *Acturus Properties Ltd.* v. *Att. Gen.*, 2001 JLR 43, considered.
(2) *Buttes Gas & Oil Co.* v. *Hammer (Nos. 2 & 3)*, [1982] A.C. 888; [1981] 3 All E.R. 616, referred to.
(3) *Creaven* v. *Criminal Assets Bureau*, [2004] IESC 92, distinguished.

---

(4) *Hilsenrath* v. *Att. Gen.*, 2005 JLR *N* [27], not followed.
(5) *R.* v. *Home Secy.*, *ex p. Doody*, [1994] 1 A.C. 531; [1993] 3 All E.R. 92; [1995] 7 Admin. L.R. 1, *dicta* of Lord Mustill considered.
(6) *R.* v. *Home Secy.*, *ex p. Zardari*, [1998] EWHC 305 (Admin.), applied.
(7) *R. (Abacha)* v. *Home Secy.*, [2001] EWHC 787 (Admin.); [2001] All E.R. (D.) 247, applied.
(8) *R. (Energy Financing Team Ltd.)* v. *Bow Street Magistrates' Ct.*, [2005] 4 All E.R. 285; [2006] A.C.D. 8; [2005] EWHC 1626 (Admin.), distinguished.
(9) *R. (Evans)* v. *Serious Fraud Office Director*, [2003] 1 W.L.R. 299; [2002] EWHC 2304 (Admin.); (2002), 99(45) L.S. Gaz. 34, applied.
(10) *Seward* v. *The Vera Cruz* (1884), 10 App. Cas. 59; [1881–5] All E.R. Rep. 216, *dicta* of Earl of Selborne, L.C. applied.
(11) *Yaheeb Trust, In re*, 2003 JLR 92, referred to.

Legislation construed:
Criminal Justice (International Co-operation) (Jersey) Law 2001 (Revised Edition, ch.08.300), art. 5: The relevant terms of this article are set out at para. 21.
Schedule, para. 4(1): The relevant terms of this sub-paragraph are set out at para. 21.

Investigation of Fraud (Jersey) Law 1991 (Revised Edition, ch.08.640), art. 2(1): The relevant terms of this paragraph are set out at para. 19.
art. 3(3)(a): The relevant terms of this sub-paragraph are set out at para. 19.

Texts cited:
Bennion, *Statutory Interpretation*, 4th ed., sect. 88, at 255–256 (2002).
Jones & Doobay on Extradition & Mutual Assistance, 3rd ed., para. 20–057, at 424 (2005).
Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth, Harare (1986, as amended), para. 11.

G.S. Robinson for the applicants;
W.J. Bailhache, *Q.C.*, *Attorney General*, appeared in person;
N.M.C. Santos-Costa for the second respondent.

1 **BIRT, DEPUTY BAILIFF:**

Introduction

This is an application for judicial review of a decision of the Attorney General made in connection with a request by the Federal Republic of Brazil for assistance concerning certain criminal investigations in Brazil. The relief sought is an order that the Attorney General should disclose to

---

the applicants the two letters of request from the Federal Republic and an order that the deadline given by the Attorney General for the applicants to make representations as to whether he should accede to the letters of request should be extended.

2 Leave to apply for judicial review was granted by me on September 28th (having heard from both parties) and, in the unusual and exceptional circumstances of this case, I acceded to the Federal Republic's request that it be joined as a party. That decision has had certain consequences. Some of the material contained in affidavits sworn on behalf of the applicants and the Attorney General refers to material which is not yet known to the Federal Republic and will only become known to it if the Attorney General accedes to the letters of request. Clearly, it would be wrong for the Federal Republic to see material to which it may ultimately not be entitled and, accordingly, redacted versions of the affidavits have been supplied to the Federal Republic. In the circumstances, we propose to deal with the facts and arguments in such a way as not to disclose, so far as possible, information which has not yet been made available to the Federal Republic.

3 The court heard argument on November 30th and reserved its decision on the first issue. This judgment contains the court's decision on that issue. However, the court ruled that if it were to refuse to order disclosure of the letters of request it would not extend the time for the applicants to make representations. This was because the applicants had had ample time to make representations on the basis of the information presently in their possession. There was no reason why they should not undertake that exercise in the period between

the date of the hearing and the date of our decision. If the court were to side with the Attorney General, there would be no more material to come and there would therefore be no reason to extend the period. Conversely, should the court side with the applicants, the court would ensure a reasonable period of time between the provision of copies of the letters of request and the expiry of the deadline for representations. In short, the court emphasized to the applicants that if they wished to ensure that they had the opportunity of making representations in the event of the court deciding against them on the first issue, they should do so immediately.

The factual background

(i) *The investigations in Brazil*

4 The applicants are BVI companies with bank accounts and other assets in Jersey. There are grounds for believing that they may be connected with the family of Mr. Paulo Maluf, who is a prominent figure in Brazil, having had a career in public life as well as being a successful businessman. In particular, he was Mayor of the City of São Paulo

---

between 1993 and 1996. In 2002, he ran for the office of Governor of the State of São Paulo and in 2004 he ran once again for Mayor, but he was unsuccessful in both cases. Although he is now 74, he apparently remains active in politics.

5 No doubt because of Mr. Maluf's prominence, the matter has been widely reported in the Brazilian media and there have been numerous newspaper articles and reports on television and radio. It is accepted that, in the early years, there were indiscretions by Brazilian officials which gave rise to these reports.

6 The Attorney General has described the general nature of the investigations in Brazil in letters dated May 12th, 2005 and July 5th, 2005 to Messrs. Bailhache Labesse, acting for the applicants, and in two affidavits by Crown Advocate Whelan, who is employed in the Law Officers' Department. From the information before the court, there would appear to be investigations into four separate areas relating mainly to the period between 1993 and 1996 when Mr. Maluf was Mayor of São Paulo. It is not necessary to go into any detail but in brief summary they are as follows:

(i) *The Avenue Agua Espraiada.* This relates to a public works contract for the construction of the Avenue Agua Espraiada. It is alleged that Mr. Maluf and others were guilty of corruption and money laundering in relation to this contract. It is said that Mr. Maluf procured that sub-contractors should issue fraudulently inflated invoices that did not correspond to work actually done. It is said that up to US$195m. may have been falsely invoiced and the proceeds then divided between Mr. Maluf and his co-conspirators, with Mr. Maluf's share being passed to bank accounts in Switzerland and then Jersey which were ultimately held for the benefit of him and his family. At the time of the letters of request, the above matter was at the investigative stage but in September 2005 criminal charges were brought against Mr. Maluf, his son Flavio, a Mr. de Oliveira and a Mr. Alves.

(ii) *The Ayrton Senna Tunnel.* This involved another public works contract for the construction of a tunnel. The allegation is essentially identical to that concerning the Avenue Agua Espraiada, namely, that sub-contractors presented inflated invoices, the surplus then being divided between Mr. Maluf and the others involved. The total amount over-invoiced in this case is said to amount to some US$105m. Again, it is said that Mr. Maluf's share has been parcelled out to various entities on his behalf in Switzerland and then Jersey. This matter remains at the investigative stage.

(iii) *The municipal bonds case.* The allegation in this case is that in 1994 Mr. Maluf, with the aid of others, fraudulently issued municipal

---

public debt instruments. It is alleged that false information was provided to the Senate to obtain official authorization to issue these instruments for approximately US$600m., which was higher than the actual debts which had to be paid. The instruments were then traded on a secondary market and the "profit" laundered through accounts of individuals or companies who lent their accounts for this purpose, and the money was then transferred abroad. Indictments in this case were issued in 1997 against Mr. Maluf and two of his assistants, namely, the former Secretary of Finance and the former Budget Supervisor for the Municipality of São Paulo. The case against Mr. Maluf was dismissed on the ground that the limitation period had expired. The decision at first instance to this effect was given in October 2001 and was upheld by the Superior Court of Justice in December 2004. As we will mention later, it is apparently the case that, under Brazilian law, the relevant limitation period is reduced by half in the case of persons over 70. However, the case against the two co-accused continues.

(iv) *The capital flight case.* This involved alleged offences against the National Financial System, in particular, the transfer of funds abroad without authorization and the retention of those funds without declaration to the relevant Federal authority. These allegations relate to bank accounts allegedly held in Switzerland by Mr. Maluf and other members of his family. It is further alleged that some of these accounts

were closed in 1996 or early 1997 and the proceeds transferred to banks in Jersey. According to the affidavit (which was produced on behalf of the Federal Republic) of Mr. de Grandis, the Federal prosecutor with responsibility for these various investigations, indictments in this case were laid against Mr. Maluf and other members of his family in November 2004.

(ii) *Requests to other jurisdictions*

7 In 2002, the Federal Republic sent a letter of request to Switzerland. The request was made in connection with the first three criminal investigations mentioned above and sought details of bank accounts in Geneva. Mr. Maluf and various entities challenged the decision of the Swiss authorities to give assistance. On February 11th, 2004, the First Court of Public Law in Geneva dismissed the challenge and held that the letter of request could be acceded to. The judgment is exhibited to the affidavit of Crown Advocate Whelan and has at all times been available to the Maluf family. It sets out the nature of the three investigations in question.

8 A difficulty subsequently arose in connection with the Swiss information. It was apparently supplied under a condition of speciality, namely, that it could not be used in a prosecution for any fiscal offence. The Brazilian authorities sought to adduce the Swiss evidence in connection with the capital flight case but Switzerland took exception to

---

this, stating that it was in breach of the speciality condition. According to Mr. de Grandis, the error was based upon a genuine misunderstanding because the Brazilian authorities did not regard the capital flight case as being a fiscal case. However, in view of the strong representations of the Swiss authorities, they have agreed to remove the Swiss documents from the capital flight case.

9 However, it would seem that the capital flight case will proceed in any event because, according to Mr. de Grandis, the indictment was amended in July 2005 to refer to bank accounts held in France. This information had been obtained from France, where no speciality condition had been imposed upon the provision of the information.

Requests to Jersey

10 Mr. Philip Barden, a solicitor with Devonshires, Solicitors, in London, has sworn an affidavit on behalf of the applicants in which he sets out in considerable detail the history of the contact between Brazil and Jersey (so far as it is known to him) and between the Attorney General's Department and Bailhache Labesse, on behalf of the applicants. Miss Robinson has also filed a helpful and detailed chronology. Contact between Jersey and Brazil has undoubtedly been extremely protracted, with many difficulties and diversions along the way. However, we do not think it necessary to set out the history in great detail. Matters began in 1999, when the Jersey Financial Crimes Unit ("JFCU") disclosed to the head of Brazil's Intelligence Unit that the Maluf family had interests in valuable assets at a financial institution in Jersey. For some time, matters were dealt with between police officers but not long thereafter the Attorney General received the first of a number of requests (both formal and informal) from various agencies in Brazil asking for information and documents concerning bank accounts in the Island connected to Mr. Maluf and other members of his family. These included requests from two different state prosecutors, a Mr. Mendroni and a Mr. Marques. From May 2001 onwards, Bailhache Labesse were in contact with the Attorney General, making representations to him about the various requests. In due course, it was established that neither Mr. Mendroni nor Mr. Marques had any authority to submit letters of request on behalf of Brazil.

11 Because of the difficulties, Crown Advocate Whelan wrote to the Brazilian Embassy in the United Kingdom on July 4th, 2002, and again on November 25th, 2002, making it clear that three things were necessary before the Attorney General could legally provide assistance. These were, first, a letter of request setting out the main points of the allegations against Mr. Maluf and confirming that there was a criminal investigation in train; secondly, a sworn statement that the signatory to the letter of request was a person authorized under Brazilian law to make the request;

---

and, thirdly, an undertaking that any information received from Jersey would be used for the purposes of the criminal investigation/prosecution and for no other purpose.

12 To divert slightly from the narrative at this point, Crown Advocate Whelan states in his affidavit that, following representations from Bailhache Labesse that the allegations against Mr. Maluf were part of a political campaign to discredit him and that any letters of request were mere "fishing expeditions," the Attorney General decided to open his own investigation in order to ascertain whether the applicants' bank deposits in Jersey represented the proceeds of money laundering and, if so, whether any offence had been committed in Jersey. This involved the exercise of his powers under the Investigation of Fraud (Jersey) Law 1991 ("the Fraud Law"). Crown Advocate Whelan gives considerable detail of this investigation in his affidavit but, for the reasons described earlier concerning the provision of information to Brazil to which it is not at present entitled, suffice it to say that, having obtained information and records from certain banks in Jersey, the Attorney General sought assistance from the United States. The final information from the United States was forthcoming in January

2004. Having reviewed the very voluminous material, the Attorney General has concluded that, not only is he in possession of material which may be very relevant to the investigations currently being carried on in Brazil, but he also has evidence to suggest that Mr. Maluf and other members of his family may have been involved in other criminal offences which appear to be unknown to the Brazilian authorities.

13 Returning to the history of the requests, a formal letter of request was finally sent to the Attorney General on April 9th, 2003. It was sent via the Brazilian Embassy by the National Justice Secretary at the Ministry of Justice. In August 2004, the Federal Republic produced an opinion by a Mr. José Morais (described as Consultant of the Union), endorsed by the Attorney General of the Federal Republic, confirming that the letter of request was lawfully made under Brazilian law. The request had been made by the Federal Criminal Court and Federal prosecutors and forwarded on to Jersey by the National Justice Secretary at the Ministry of Justice.

14 In February 2005, the Attorney General met in Jersey with the Attorney General of the Federal Republic and other officials of the Ministry of Justice. The Attorney General expressed his concern about previous breaches of confidentiality and the alleged breach of the Swiss speciality condition referred to earlier. The Attorney General was given specific assurances by the Attorney General of the Federal Republic in respect of both matters. It was further pointed out that the previous National Justice Secretary had been dismissed for leaking confidential

---

information to the press. At the meeting, the Attorney General of the Federal Republic handed over a supplementary letter of request, dated February 28th, 2005, from the National Justice Secretary.

15 On May 12th, 2005, Crown Advocate Whelan wrote to Messrs. Bailhache Labesse stating that the Attorney General was minded to accede to the request from the Federal Republic to provide the material sought, *i.e.* documents related to any bank accounts held or controlled by Mr. Maluf and others named in the request. He went on to say that, even in the absence of a letter of request from the Brazilian authorities, having regard to what the Attorney General's own investigation had revealed, the Attorney General was of the provisional view that this was a case where his powers of disclosure pursuant to art. 3(3) of the Fraud Law should be exercised to provide material to Federal investigators in Brazil. The letter went on to provide certain details concerning the Brazilian investigations and the Attorney General's own investigations. The letter also stated that, as promised in previous correspondence, representations from the applicants were sought before any final decision on the matter was taken by the Attorney General.

16 On June 2nd, Bailhache Labesse requested disclosure of the letters of request, redacted if necessary. On June 16th, Crown Advocate Whelan wrote that the authorities suggested that letters of request were not disclosable documents but said that he would consider any counter-authorities which Bailhache Labesse might wish to put forward. On June 24th, Bailhache Labesse wrote referring to one English case (to which we will refer later) and emphasizing that they needed to see the letters of request in order to assess the lawfulness of the requests, given the chequered history of the matter and the fact that the Attorney General himself had said earlier that he required to be satisfied as to the lawfulness of any requests. The letter went on to say that, if the Attorney General was not minded to disclose the letters of request (even in redacted form), the applicants needed the Attorney General to identify the letters of request by reference to date, name of issuing authority, matter being investigated and precisely each offence with which the letters were concerned (as a matter of Brazilian law).

17 On July 5th, Crown Advocate Whelan wrote purporting to give the information requested. Thus, he summarized the allegations and gave the dates of the two letters (April 9th, 2003 and February 28th, 2005, the latter repeating matters contained in the earlier letter but also containing additional information). He said that both requests emanated from the National Justice Secretary at the Ministry of Justice in Brazil, via the Brazilian Embassy in London. He went on to emphasize that in 2003 the Attorney General had opened his own investigation under the Fraud Law to ascertain whether any offences involving serious and complex fraud

---

had been committed in Jersey. He stated that as a result of that investigation, irrespective of the letters of request, the Attorney General was minded to disclose the information he had obtained to the Ministry of Justice in Brazil for the purposes of a criminal investigation in Brazil as to the source of funds in Jersey and other matters. The basis for the disclosure was art. 3(3)(a) of the Fraud Law. He went on to say that the exercise of that power was not dependent on the letters of request other than that the information disclosed in the various requests might have been the trigger for the opening of the investigation by the Attorney General. On July 8th, Bailhache Labesse wrote again to the effect that, having considered the information in Crown Advocate Whelan's letter of July 5th, they could not make meaningful representations without the letters of request. The Attorney General maintained his refusal to disclose them and these proceedings then began.

What power is the Attorney General exercising?

18 We think we should address first the point made by the Attorney General to the effect that the letters of request are irrelevant because he is free to disclose the information in his possession to the Brazilian authorities by virtue of art. 3(3)(a) of the Fraud Law. Miss Robinson, on the other hand, argues that the

position is governed entirely by the Criminal Justice (International Co-operation) (Jersey) Law 2001 ("the 2001 Law"). Miss Robinson makes a further point, that it might be more appropriate to deal with this aspect of the matter at any judicial review hearing at which the legality of the Attorney General's decision to transmit (if such a decision is subsequently made by the Attorney General) is examined. However, we are of the view that we have to consider which statute is applicable before considering the question of disclosure of the letters of request. We have to decide what power the Attorney General will be exercising in order to consider the reasonableness and fairness of his decision not to supply the letters of request. Furthermore, if the Attorney General is right in his submission, it could be determinative of the whole matter.

19 For many years, Jersey was only able to give assistance to overseas authorities in connection with criminal matters once criminal proceedings had actually begun. The relevant statute, the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983, did not cover the investigative stage. The position changed in 1991, when the States passed the Fraud Law. Article 2(1) of the Law enabled the Attorney General to exercise his powers to obtain documents, information, *etc.* at the investigative stage in any case in which it appeared to him that ". . . there is a suspected offence involving serious or complex fraud, *wherever committed* . . ." [Emphasis supplied.] Article 3 of the Law dealt with disclosure of information obtained under his powers and art. 3(3) provided as follows:

"(3) Subject to paragraph (1) . . . information obtained by the Attorney General . . . may be disclosed—

(a) to any person or body for the purposes of any investigation of an offence or prosecution in Jersey *or elsewhere* . . ." [Emphasis supplied.]

20 The natural meaning of these words is clear, namely, that the Attorney General may exercise his powers to obtain information, *etc.* and may disclose information so obtained in order to assist overseas investigations of serious and complex fraud. If there were any doubt (which in our judgment there is not), the position is confirmed by the explanatory note which accompanied the draft Law when it went to the States:

"The purpose of this Law is to make provision for the investigation of cases of serious and complex fraud. In particular, it enables the insular authorities to give assistance to other jurisdictions in their investigation of such cases."

The Attorney General confirmed that, from 1991 onwards, the Fraud Law has been used on a regular basis to give assistance at the investigative stage when letters of request are received from overseas authorities and the suspected offence involves serious or complex fraud.

21 Subsequent statutes widened the position slightly so that assistance could also be given to overseas authorities at the investigative stage in cases of drug trafficking and money laundering. However, it was only in 2001 that the power to give assistance at the investigative stage was widened to cover all offences. This was achieved by the 2001 Law, art. 5 of which is in the following terms:

"(1) This Article applies where the Attorney General receives—

(a) from a court or tribunal exercising criminal jurisdiction in a country or territory outside Jersey or a prosecuting authority in such a country or territory; or

(b) from any other authority in such a country or territory which appears to the Attorney General to have the function of making requests of the kind to which this Article applies,

a request for assistance in obtaining evidence in Jersey in connection with criminal proceedings which have been instituted, or a criminal investigation that is being carried on, in that country or territory and the Attorney General is satisfied—

i(i) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and

---

(ii) that proceedings in respect of that offence have been instituted in that country or territory or that an investigation into that offence is being carried on there.

(2) Where this Article applies the Attorney General may, if he or she thinks fit, issue a notice in writing—

(a) specifying the evidence to be obtained in response to the request; and

(b) nominating a court or the Viscount to receive that evidence.

(3) The Schedule to this Law shall have effect with regard to proceedings before a nominated court or the Viscount in pursuance of a notice under paragraph (2)."

Paragraph 4(1) of the Schedule provides: "The evidence received by the court or the Viscount, as the case may be, shall be furnished to the Attorney General for transmission to the court, tribunal or authority which made the request."

22 The applicants and the Attorney General take very contrasting positions on the relationship between these two statutes. Miss Robinson argues that when the Attorney General receives a letter of request he can act only under the 2001 Law. Article 5 by its terms applies—". . . where the Attorney General receives . . . a request for assistance . . ." Thus, he may only disclose information pursuant to a letter of request if the provisions of the 2001 Law have been complied with. He has no jurisdiction to give effect to a letter of request by use of the Fraud Law. The legislature has set out a code to deal with giving effect to a letter of request. This is contained in the 2001 Law and the 1983 Order (which remains unrepealed). In support of this assertion, she referred also to the wording of the equivalent provision in England, namely, the Criminal Justice Act 1987.

23 The Attorney General, on the other hand, argued that the 2001 Law could not possibly be interpreted as impliedly either repealing or amending the Fraud Law. He referred to Bennion, *Statutory Interpretation*, 4th ed., sect. 88, at 255–256 (2002), where it is said:

> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

In connection with this principle, he cited the words of the Earl of Selborne, L.C. in *Seward* v. *The Vera Cruz* (10) (10 App. Cas. at 68):

> "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

24 He argued that it is impossible to read into the 2001 Law an intention to amend the Fraud Law by prohibiting the Attorney General from exercising his powers under the Fraud Law where the investigation concerns a suspected offence committed elsewhere and he has been requested to assist. Indeed, he went further. He argued that the terms of a letter of request are quite irrelevant where he has exercised his powers under the Fraud Law. Thus, if he were to receive a request from some junior overseas police officer who clearly had no right to send a letter of request, he could nevertheless act on that request, obtain the information under the Fraud Law and send it to that police officer. To hold otherwise would be to allow the 2001 Law to have altered or derogated from the Fraud Law.

25 We do not derive any assistance from the English statutory position because the wording of the statute is different. Our task is to consider and interpret the Jersey statutes. In our judgment, Miss Robinson's arguments cannot be supported. First, the wording of the Fraud Law is clear and explicit. The Attorney General may exercise his powers to obtain information in connection with suspected offences wherever committed and may disclose information so obtained to any person for the purposes of any investigation in Jersey or elsewhere. It would need very clear wording to repeal or limit the powers so conferred. The principle summarized in *Bennion* makes it clear that general wording in a subsequent statute is not sufficient. Secondly, the wording of art. 5 of the 2001 Law is not as prescriptive as Miss Robinson suggests. Article 5(1) states merely that art. 5 applies where the Attorney General receives a request for assistance. What does art. 5 actually say as to what then occurs? It provides, in para. (2), that the Attorney General *may* issue a notice specifying evidence to be obtained and nominating a court to receive it. It does not say that he must do so or that that is the only thing he can do. In our judgment, such permissive and general wording cannot possibly be sufficient to repeal or limit the express powers conferred on the Attorney General by the Fraud Law.

26 In our judgment, when he receives a letter of request from another country, the Attorney General has at least two options. He may (whether or not the offence involves serious fraud) choose to exercise the power conferred by art. 5(2) of the 2001 Law to nominate a court or the Viscount to receive evidence and then disclose the evidence so obtained

---

to the requesting country pursuant to para. 4(1) of the Schedule. Alternatively, where the suspected offence involves serious or complex fraud, he may exercise his powers under art. 2(2) of the Fraud Law and may subsequently disclose any information so obtained to the requesting country under art. 3(3)(a) of that Law.

27 However, we do not agree with the Attorney General that, if he chooses the latter course, the lawfulness and terms of the letter of request are irrelevant. Any decision by the Attorney General to exercise his discretion under art. 3(3)(a) to disclose information is capable of being judicially reviewed on the usual grounds (see *Acturus Properties Ltd.* v. *Att. Gen.* (1)). The lawfulness of a letter of request may well be a very material matter for the Attorney General to consider when deciding whether to exercise his discretion to obtain and then disclose information pursuant to the Fraud Law. To take the example postulated earlier in para. 24, it would surely be material for the Attorney General, when deciding whether to disclose information which had only been obtained because of a request, to consider the fact that the request came from an individual police officer who had no authority to request assistance from a foreign jurisdiction. To so hold is not surreptitiously to amend the Fraud Law by reference to the 2001 Law, as the Attorney General suggested in argument. It is

simply to acknowledge what has always been the case, namely, that when exercising his discretion under art. 3 (3)(a) the Attorney General must act reasonably and must take into account all relevant considerations. Where his powers under the Fraud Law have been exercised purely to respond to a letter of request, the lawfulness of that letter of request must be a relevant consideration when considering the reasonableness of a decision to obtain compulsorily and then supply confidential information to the person making the request. Conversely, where the Attorney General has carried out a wholly independent investigation under the Fraud Law and is about to disclose the information voluntarily when a letter of request dealing with the same matter coincidentally arrives, the weight to be attached to the lawfulness of the letter of request may be very much less or even negligible. There will of course be cases where the facts fall between these two examples. In the present case, the Attorney General's investigation under the Fraud Law was carried out because of information provided in one or more of the (unlawful) requests from Brazil. We consider therefore that the lawfulness of the letters of request to which he now proposes to reply is a relevant consideration.

28 In the present case, the Attorney General has not exercised any of his powers under the 2001 Law. He has not nominated a court or the Viscount to receive evidence. He is not therefore entitled to make disclosure pursuant to para. 4(1) of the Schedule to that Law. The powers which he has exercised are those under the Fraud Law and the question of

---

disclosure of the information to the Federal Republic therefore falls to be considered solely under art. 3(3)(a) of that Law. It is in that context that we must therefore turn to consider the applicants' argument that they should be entitled to see the letters of request in this case.

Authorities on letters of request

29 We turn next to consider the authorities which exist on the subject of whether letters of request are disclosable. The earliest case is that of *R.* v. *Home Secy.*, *ex p. Zardari* (6). In that case, the Government of Pakistan had sent a letter of request to the Home Secretary seeking assistance in connection with an investigation of Mr. Zardari. The Home Secretary had acceded to the request to the extent of nominating a court to receive evidence under the English equivalent of art. 5(2) of the 2001 Law. Mr. Zardari issued proceedings for judicial review, seeking disclosure of the letter of request which the Home Secretary had refused to disclose. Before the matter came to trial, the Government of Pakistan agreed to the Home Secretary's disclosing the letter of request. However, there remained an issue as to costs. Mr. Zardari argued that he would have won and should therefore have his costs, whereas the Home Secretary argued that Mr. Zardari would have lost and should therefore pay the costs. The Divisional Court heard argument on the merits and concluded that the outcome was by no means a foregone conclusion. It therefore made no order as to costs. In passing, Lord Bingham of Cornhill, C.J. said this ([1998] EWHC 305 (Admin.), at paras. 14–15):

> "14 It seems to me for my part that the outcome of this application for judicial review would have been by no means a foregone conclusion one way or the other. The 1990 Act provides for co-operation between different states in investigating and prosecuting serious international crime. Some of the suspects who are likely to be the subject of investigation and prosecution will be powerful, rich, ruthless, sophisticated criminals . . . It is, however, quite plain that the process envisaged by section 4 is not a trial; it is a process of gathering evidence. The use to be made of the evidence so gathered is a matter for the requesting state. If the evidence taken in an English court is to be used as primary evidence in the requesting state, then one would ordinarily expect, if the requesting state's legal system is at all analogous to our own, that the requesting state would recognise the need for the suspect to have a full and fair opportunity to contest the evidence either here or in its own court. If the evidence taken in England were not to be used as evidence in the requesting state then the need for a full and fair opportunity to contest that evidence in this country would be much less and might not exist at all. It seems to me entirely appropriate for the United Kingdom, requested to act by a foreign state, to pay regard to the

---

> wishes of that state when responding to a request by someone in the position of the applicant for details of the case against him.
>
> 15 It appears clear that the Home Secretary is not bound—certainly not bound to the extent of allowing English procedures to be used unjustly to a suspect—to abide by the wishes of a foreign state, but it seems to me to be entirely proper that he should have regard to those wishes."

In other words, the wishes of the requesting country as to whether the letter of request should be disclosed are a very relevant factor.

30 The next case in time is that of *R. (Abacha)* v. *Home Secy.* (7). There, the Government of Nigeria ("FGN") had sent a letter of request in connection with its investigation of whether the claimants had dishonestly received some of the money stolen by the former military ruler General Abacha. The Home Secretary, having consulted the FGN, refused to disclose the letter of request, although eventually he did provide a redacted version. The claimants sought judicial review of the Home Secretary's refusal to supply the full letter of request. The claim was brought both on the ground of procedural unfairness and on the ground that the Home

Secretary's decision was irrational. The Divisional Court dismissed the application and, in passing, Tuckey, L.J. had this to say ([2001] EWHC 787 (Admin.), at paras. 14–18):

"14 Miss Montgomery, QC for the Claimants conceded in the light of the treaty and the Harare Scheme that there can be no general obligation to disclose the existence or contents of letters of request to the parties who are the target of such a request. The reasons for this are obvious: the investigative or prosecution process might be prejudiced by, for example, evidence and/or the proceeds of crime being destroyed or hidden or suspects absconding. But, Miss Montgomery submits, on the facts of this case fairness demanded disclosure. There was no confidentiality in the request because its existence was reported in the press. The Claimants had already seen similar requests made to other European countries . . . The background to the whole affair is complex and goes back a number of years. It was possible therefore that the request contained manifest errors which could easily be corrected. The request was to be dealt with by the SFO so was not to be dealt with by the courts to which the Secretary of State refers requests which do not involve serious fraud (see Section 4(2)). Having agreed to consider representations the Secretary of State had assumed an obligation of procedural fairness. In a number of instances the Secretary of State merely said that the FGN had denied the allegations made by the Claimants in their representations. Fairness demanded that they should have been able to see the actual response.

. . .

---

17 In the light of the way in which Miss Montgomery put her case, we only have to decide whether there was procedural unfairness in this case. For this purpose we are prepared to assume without deciding that implementation of the FGN request will or may involve some interference with the Claimants' Article 8 rights bearing in mind that such interference may be justified if it is in accordance with law and necessary for the prevention of crime or the protection of rights and freedoms of others. We bear in mind also two general points. First, as Lord Bingham said, the section 4 process is not a trial. It leads only to the transmission of evidence to the requesting State where, if it is to be used, one can assume that the criminal defendant will have the opportunity of answering it. Secondly, such requests are made by friendly, foreign countries with whom we have treaty or similar obligations of mutual co-operation. The expectation must therefore be that we will comply with the request unless there are compelling reasons for not doing so and that we will do so as quickly as possible. Any requirement for procedural fairness must be fashioned with those considerations firmly in mind.

18 Looking at what happened in this case we have no hesitation in rejecting the complaint of unfairness. The history to which we have referred shows that the Claimants had an ample (some might say more than ample) opportunity to make representations to the Secretary of State as to why he should not accede to the FGN request. Those representations were obviously carefully considered by the Secretary of State in the light of the FGN's response to them before he came to his decision. One can infer that the request did contain confidential information from its redacted form, so there was a good reason for not disclosing it to the Claimants. More importantly however, the Claimants knew which transactions the Nigerian authorities were investigating and were able to make a prompt response to put their case. It does not seem to us that they suffered any real prejudice by not seeing the request or by not seeing the FGN's actual responses to their representations, the substance of which they were given by the Treasury Solicitor. The exercise which the Secretary of State has to perform should be simple. *He is not required to conduct a criminal trial on paper or to decide disputed questions of foreign law before making his decision.* Here the process which led to his decision was, in our judgment, entirely fair." [Emphasis supplied.]

Those three paragraphs were concerned with the question of procedural fairness. The court then turned to consider the merits of the decision and we would quote the following two paragraphs (*ibid.*, at paras. 26–27):

"26 In support of her general argument on discretion Miss Montgomery relies on the alleged breach of Swiss and Nigerian

---

court orders and the misuse of documents to which we have referred. She also alleges that the authorities in Switzerland, Luxembourg and Liechtenstein were misled by the FGN into invoking their procedures for freezing accounts and assets by the assertion that there were similar procedures in existence in Nigeria, when in fact the decree which contained such powers was repealed in May 1999. This is an allegation which has only recently been made and the FGN have had very little time to deal with it.

27 We have considered each of these general points but they do not lead us to conclude that the Secretary of State's discretion was wrongly exercised or that he should be required to reconsider the matter. *Each of the allegations made does or is likely to raise issues of foreign law or procedure which the Secretary of State cannot possibly be expected to resolve. If there is anything in these allegations they should be raised with and considered by the courts or authorities in the countries concerned.* They cannot be used as the basis for further delaying the implementation of the Secretary of State's decision (which we consider to be lawful) to provide the co-operation which the requesting State is entitled to receive and the United Kingdom is obliged to provide." [Emphasis supplied.]

31 The final English case is *R. (Evans)* v. *Serious Fraud Office Director* (9). In that case, a letter of request had been received by the Home Secretary and referred to the Serious Fraud Office. The claimants sought a copy of the letter of request and the Serious Fraud Office refused to disclose it on the basis that it was a confidential document, but went on in a letter to provide detailed information about the American investigation based on the letter of request. The claimants sought judicial review of the refusal to disclose the letter of request. The Divisional Court refused the application and we would refer to two paragraphs from the judgment of Kennedy, L.J. ([2003] 1 W.L.R. 299, at paras. 11–12):

> "11 Obviously, as it seems to me, the requesting state may have a perfectly proper interest in ensuring that there is no early disclosure of some of the material contained in the letter of request. Mr. Perry really did not argue otherwise.
>
> 12 In my judgment, as Mr. Qureshi submitted, having regard to the Treaty obligations it is right to start from the position that the letter of request is not a disclosable document, but justice must be done to those who are the subject of a section 2 notice pursuant to a letter of request and the consequential request from the Secretary of State to the Director of the Serious Fraud Office pursuant to section 4(2A) of the . . . Act. The needs of justice can normally be met, as in this case, if when a request is made for disclosure of the letter of request, information is given as to the nature of the criminal investigation,

---

> but in some cases the requirements of justice may require more. They certainly did not do so in this case."

32 Miss Robinson relies strongly on the one Jersey case, namely, *Hilsenrath* v. *Att. Gen.* (4). There, there was a request from the United States and the Attorney General exercised his power under art. 5(2) of the 2001 Law. Dr. Hilsenrath challenged the Attorney General's refusal to disclose the letter of request. The Royal Court refused to order disclosure on the short ground that Dr. Hilsenrath knew very well what was alleged against him and that no prejudice would be suffered by his not having sight of the letter of request. However, in passing, the court made the following observation:

> "We note that in Switzerland it is apparently the practice or perhaps even a legal obligation to release letters of request to a defendant in the circumstances of a case of this kind. Although we can very well envisage circumstances in which there may be grounds for withholding a letter of request in circumstances where evidence is sought from persons in Jersey, it seems to us, in general, that it is in the interests of justice that a letter of request should be disclosed."

That observation was clearly *obiter* given that the court did not in fact order disclosure in that case on the ground that Dr. Hilsenrath knew what was alleged against him.

33 Miss Robinson also relies upon the Irish case of *Creaven* v. *Criminal Assets Bureau* (3). In that case, a magistrate granted search warrants at the request of the Criminal Assets Bureau. The Bureau was, in turn, acting pursuant to a letter of request from the British Customs & Excise. The relevant Irish statute provided that no application for a warrant could be made except in response to a request received from ". . . the government of a country . . . on behalf of . . . a prosecuting authority in that country . . ." The letter of request from Customs & Excise specifically stated that it was a prosecuting authority. The Supreme Court held that, on its face, the letter of request was not from a government on behalf of the prosecuting authority; it was from a prosecuting authority. The statutory requirement was therefore not complied with and the warrants were quashed. The court specifically averred that it was not intending to "go behind" the terms of a letter of request; it was a matter where, on its very face, the requirements of the statute were not satisfied. Miss Robinson also referred to the comment of the Supreme Court deploring the refusal of the Bureau to provide the appellants with copies of the essential documents used to ground the application to the magistrate for the warrants. They were entitled to materials used for the purposes of proceedings in an Irish court.

34 We do not think that *Creaven* is particularly relevant for our purposes. The case turned on the specific wording of the Irish statute,

---

which is not the same as that of the Jersey statute. The case did not require the Irish court to consider whether, under English law, Customs & Excise was entitled to make the request. As to material put before a judge with a view to obtaining a search warrant, we agree that such material should normally be supplied to the persons subjected to the warrant when requested (see *R. (Energy Financing Team Ltd.)* v. *Bow Street Magistrates' Ct.* (8)). However, we are not dealing in this case with the grant of a warrant or any order made by a judge; we are dealing with a letter of request made to the Attorney General.

35 Pulling these cases together, it seems to us that, as set out in *Evans* (9), one starts from the position that letters of request are generally regarded as confidential. Thus, treaties between states would appear frequently to include such a provision. Furthermore, in the Harare Scheme of 1986, as amended (which governs nations of the Commonwealth), para. 11 provides that requested states shall use their best efforts to keep confidential the contents of a letter of request. The position would appear to be accurately described in *Jones & Doobay on Extradition & Mutual Assistance*, 3rd ed., para. 20–057, at 424 (2005), where it is stated:

> "Established international practice dictates that such requests should be kept confidential, and that central authorities should not disclose the existence or content of letters of request outside government departments or enforcement agencies. Letters of request are prima facie not disclosable at the investigatory stage. Requests are therefore not shown or copied to any witness or other person, nor is a witness informed of the identity of any other witness who is a subject in the request."

36 Furthermore, we think there are good reasons for such an approach. As Lord Bingham commented in *Zardari* (6), suspects in international criminal investigations are often sophisticated, rich and ruthless individuals who may well be able to derive considerable advantage from early notice of the state of the investigation in the overseas jurisdiction. Furthermore, in our judgment, it is important that requesting authorities should be as full and frank as possible in their letters of request, setting out as much detail as possible about the investigation. This will make it easier for the Attorney General to assess whether it is appropriate to exercise his powers under the 2001 Law or the Fraud Law. If the courts were routinely to order the disclosure of letters of request, it seems highly likely that requesting jurisdictions would become much more cautious and brief in what they put into the request. This would, in turn, make it more difficult for the Attorney General to assess whether there was sufficient material for him to decide it was in the interests of justice to force the disclosure of private and confidential information in order to

---

comply with the request. The court also endorses the comments of Tuckey, L.J. (*Abacha* (7) ([2001] EWHC 787 (Admin.), at para. 17)) set out at para. 30 above. Delay can often be an objective of those who are being investigated. Indeed, in the present case, the periods of limitation in respect of Mr. Maluf are halved because of his age and the municipal bonds case is already prescribed. The court must be astute to ensure that in cases concerning requests for mutual assistance its processes are not used as a weapon of delay and, when deciding what procedural fairness requires, it must bear in mind the need for a reasonably prompt response to requests for assistance.

37 As against that, the powers to obtain information (whether under the Fraud Law or the 2001 Law) are strong powers which enable private and confidential material to be compulsorily disclosed. The need to investigate alleged criminal conduct must be balanced against the need for justice to be done to those who are the subject of such notices. We note that, in the majority of cases to which we have referred, information was in fact disclosed, either by way of disclosure of the letter of request itself, a redacted version, or a summary of its contents. We agree with the approach of the court in *Evans* (9) that the interests of justice can usually be met if, when a request is made for disclosure of a letter of request, information is given as to the nature of the investigation and the exact source of the letter of request. We accept that, in providing such information, the Attorney General will need to have regard to any concerns of the requesting authority as to particularly sensitive parts of the request but, in order to fulfil his duty of fairness, the level and degree of information supplied must be sufficient to enable the subject, if he thinks fit, to make representations on issues such as the lawfulness of the request and the general nature of the alleged offences and investigation in the overseas jurisdiction. We also agree with the court in *Evans* that, although the course we have suggested would normally be sufficient, there may be some cases where justice requires disclosure of the letter of request itself or a redacted version.

38 We would emphasize that it is always open to a requesting authority to agree to the disclosure of the letter of request by the Attorney General or a redacted version thereof, as was done in some of the above cases. Where this is done, the Attorney General may safely disclose the letter of request without any fear that this may subsequently be held against him as a precedent and may weaken his position in another case where the requesting country does not consent to disclosure of the letter of request.

39 We are conscious that we are differing from the *obiter dictum* of the Royal Court in *Hilsenrath* (4) but, having had the advantage of full argument (which would not appear to have been available to the court in that case), we have concluded that the position is as we have described it

---

and that it would be incorrect to hold that letters of request should generally be disclosed.

Application to the facts

40 Miss Robinson submitted that this was a case (unlike most) where the Attorney General had invited representations. Fairness therefore required that he should provide sufficient information for the applicants to be able to make meaningful representations. She referred the court to the remarks of Lord Mustill in *R.* v. *Home Secy.*, *ex p. Doody* (5), where he said ([1994] 1 A.C. at 560) that the duty of fairness—

> ". . . will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result . . . Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer . . ."

And (*ibid.*, at 563):

> "It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision . . . This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed."

41 Miss Robinson submitted that the applicants could not make proper representations without seeing the letters of request. She referred to three specific reasons for this. First, they would wish to consider the lawfulness of the requests. She said that the history of the matter showed a lamentable record on the part of the Federal Republic in making unlawful requests. There were questions over the present request. Proper representations on lawfulness could not be made without seeing the letters of request themselves. Secondly, the applicants needed to know the detail of the allegations against them in order to make proper representations on that aspect. The Attorney General had purported to give a summary, but summaries could be unintentionally inaccurate. Thirdly, the Federal Republic had broken the speciality condition imposed by Switzerland when acceding to the Swiss letter of request and had also regularly disclosed correspondence, *etc.*, with Jersey so that the matter had been made available to the media. The Attorney General had stated that he had been given assurances that this would not recur but the applicants needed to see the letters of request in order to satisfy themselves that the position had been satisfactorily addressed.

---

42 Miss Robinson accepted that the applicants' reasons for requiring the letters of requests had to be balanced against the question of any prejudice to the investigation. She said that the alleged prejudice fell within two categories, namely, the need to maintain confidentiality and concern as to hampering the investigation. As to confidentiality, this had already fallen away because the applicants had been provided with the substance of the letters of request. If they had been provided with the substance, why could they not be provided with the actual documents? Secondly, the letter of request addressed to Switzerland covered much the same matters and the applicants had seen that letter of request as well as the Swiss judgment. Thirdly, if the letters of request had been processed through the proper channels as letters rogatory, they would in any event be available for inspection in the courts in Brazil and the applicants would therefore have had access to the letters. As to hampering the investigation, she submitted that there was no real concern about this. There could be no issue about tipping off as the Maluf family was well aware of the investigations and the allegations had been widely canvassed in the Brazilian press. As to the identity of witnesses, the letters of request could be redacted if necessary and, in any event, sight of the letter of request addressed to Switzerland had not hampered the investigation. As to the alleged tampering with witnesses, referred to in the affidavits filed on behalf of the Attorney General and the Federal Republic, this had been adequately responded to in the affidavit of Mr. Lopes.

43 We propose to deal first with the three reasons relied upon for saying that the applicants must see the letters of request. The issue of the lawfulness of the letters of request was the matter upon which Miss Robinson concentrated most. She emphasized that the applicants were not, at this stage, challenging any decision of the Attorney General to accede to the letters of request and transmit the information to the Federal Republic. That stage might come later. At this stage, the court was only concerned with whether to order disclosure of the letters of request. The issue of the lawfulness of the letters of request was therefore not directly before the court for consideration. That is, of course, correct but it seems to us that, in order to determine whether the requirements of fairness and reasonableness require the Attorney General to disclose the letters of request, it is necessary to consider what approach he will have to take towards the question of lawfulness when he gets to the point of deciding whether to transmit information to the Federal Republic.

44 We think it appropriate to summarize briefly the evidence before the court on the issue of lawfulness. The applicants rely upon an opinion from two Brazilian lawyers. The first is in a letter dated July 6th, 2005, from Mr. Antonio Pitombo of the firm of Moraes Pitombo & Pedroso. That letter is exhibited to Mr. Barden's first affidavit sworn in support of the application for leave to move for judicial review. The second opinion

---

is contained in an affidavit, dated October 26th, 2005, of Mr. Paulo de Mendonca Lopes of the firm of Leite Tosto & Barros, lawyers to Mr. Maluf. They are essentially agreed. They make it clear that, under the law of Brazil, there are two methods of obtaining assistance from overseas countries. The first is by letter rogatory. This is a letter from a court requesting assistance from a court in another country. It is nowadays sent by the central authority for the requesting country and then via diplomatic channels. The second method is the more modern and informal one, which is conveniently referred to as a request for mutual assistance. Such a request may be made by a prosecuting authority as well as a court. It can be used where there is a treaty between the two countries concerned or where Brazil has offered guarantees of reciprocity. Requests must go via the central authority in Brazil, which is a department in the Ministry of Justice known (in translation) as the Department of Recovery of Illicit Assets and International Legal Co-operation ("DRCI-MJ"). Mr. Lopes states that he assumes that the letters of request in this case are letters rogatory because there is no treaty between the United Kingdom (or Jersey) and Brazil and no mention has been made in any of the papers of guarantees of reciprocity. Letters rogatory must be issued by a court and there is a question mark over whether that has occurred in this case. The applicants need therefore to see the letters of request in order to make representations on whether they are lawful.

45 The Attorney General, on the other hand, relies upon the opinion of Mr. Morais, endorsed by the then Attorney General of the Federal Republic (see para. 13 above), confirming that the letter of request was lawful. Naturally, this opinion could not relate to the second letter of request delivered to the Attorney General in February 2005. During the course of the hearing, the Federal Republic has filed an affidavit from Mr. Antonio Madruga. He is the head of DRCI-MJ and is a member of the group of experts formed by the United Nations Office on Drugs and Crime in collaboration with the International Institute of Higher Studies in Criminal Sciences to review the draft Model Law on Mutual Legal Assistance in Criminal Matters to be submitted to the United Nations' Commission on Crime Prevention and Criminal Justice at its 15th session in 2006. He agrees that there are two methods of seeking assistance from an overseas jurisdiction, namely, letters rogatory and requests for mutual assistance. He endorses and confirms the Morais opinion and states that, contrary to the assumption made by Mr. Lopes, the two letters of request in this case are not letters rogatory; they are requests for mutual assistance (the less formal, modern procedure) and may therefore be made by Federal prosecutors or Federal criminal courts provided that they are dispatched under the auspices of DRCI-MJ. He agrees that there is no treaty in this case but states that it is up to the requested country (in this case Jersey) as to whether it requires reciprocity. If the requested

---

country is willing to accede to the request without the need for an assurance of reciprocity, that does not pose any problem for Brazil as the requesting country.

46 He goes on to say, however, that Brazil has from the outset offered a guarantee of reciprocity to Jersey and it stands by that offer of reciprocity although Jersey has apparently not required the offer to be formalized. He states that requests for mutual assistance by this method are routinely made by Brazil and to Brazil and he confirms, in his capacity as director of DRCI-MJ, that the Morais opinion is correct and that the letters of request in this case are valid. The Federal Republic has also filed an affidavit by Claudia Chagas, the National Justice Secretary in the Ministry of Justice, who has confirmed that Mr. Whelan correctly states the position when he says that it would be a matter for the courts of Brazil to decide if the requests were lawfully made and that, if they were found to be unlawful, evidence sent pursuant to the letters of request would be regarded as inadmissible in Brazil. In other words, the Brazilian criminal court will be able to rule on the question of the lawfulness of the request and to exclude any evidence if it finds that the requests are unlawful.

47 The Attorney General argues that it is not for him or this court to determine whether or not, as a matter of Brazilian law, the letters of request are lawful. He prays in aid not only the emphasized comments of the Divisional Court in *Abacha* (7) ([2001] EWHC 787 (Admin.), at paras. 18 and 27) (see para. 30 above) but also the doctrine of Act of State, whereby the courts of one country will not generally adjudicate upon the validity of the acts of a foreign government carried out in its territory (see *Buttes Gas & Oil Co.* v. *Hammer (Nos. 2 & 3)* (2), applied in Jersey in *In re Yaheeb Trust* (11)).

48 In our judgment, the Attorney General is correct. We agree with the comments of the Divisional Court in *Abacha* that the Attorney General is not required to determine disputed questions of foreign law; indeed, as a matter of practicality, he cannot possibly be expected to resolve such matters. It is for the courts of the requesting country to adjudicate upon such matters if necessary. It is clear that in this case it is open to Mr. Maluf to raise the question of the lawfulness of the letters of request in the criminal proceedings in Brazil and that the Brazilian courts have jurisdiction to exclude any material obtained if the letters of request are unlawful. That is not to say, however, that the Attorney General can simply ignore altogether questions of lawfulness. In our judgment, in order for his decision not to be challengeable on the ground of *Wednesbury* unreasonableness, he must act in a way that a reasonable Attorney General would act in order to satisfy himself as to the lawfulness of the request. In most cases, the fact that the request comes from the central authority of the requesting country will of itself be

---

sufficient and no further step need be taken. On other occasions, particularly if doubts have been raised, the Attorney General may need to do more. What he will need to do in any given case will of course depend upon the particular circumstances. We emphasize that all he has to do is to take reasonable steps to ascertain that the request is lawful; he most certainly does not have to determine that it is.

49 In this case, because of the history of difficulties, the Attorney General has obtained the Morais opinion which has been endorsed by the Attorney General of the Federal Republic. In the course of these proceedings, evidence has been given by Mr. Madruga, the director of the Brazilian central authority, that the letters of request are lawful. Furthermore, it is not irrelevant that the second letter of request was delivered in person by the current Attorney General of the Federal Republic. We accept that we do not strictly have to determine, for the purposes of these proceedings, whether the Attorney General would be acting unreasonably in relying upon the evidence available to him, but it is necessary to consider the issue in order to determine whether the interests of justice require the letters of request to be disclosed to the applicants so that they can make further representation on the question of lawfulness. We regard as being doomed to failure any argument that a decision of the Attorney General to rely upon the evidence currently available to him would be liable to be quashed on the grounds of *Wednesbury* unreasonableness or procedural unfairness. He has several opinions at the highest level from the Federal Republic stating that the letters of request are lawful. Even if the letters were

disclosed and even if the applicants were to produce a further legal opinion to the effect that the letters were unlawful, what further steps could the Attorney General take? There would then be a dispute as to the law of Brazil which neither the Attorney General nor this court would be in a position to or should resolve. The Attorney General would be faced with conflicting opinions and he would clearly not be acting unreasonably were he to proceed to transmit the information in the light of the opinions as to lawfulness available to him from the Federal Republic. In the circumstances, the interests of justice do not require that the letters of request (or redacted versions) be disclosed to the applicants for the purpose of further considering their lawfulness.

50 As to the second reason relied upon by Miss Robinson, namely, that the applicants must know the specific criminal investigations to which the letters of request relate, we are satisfied that the applicants are fully aware of the position. Not only have matters been going on for many years in Brazil but the position has also been summarized for them in Crown Advocate Whelan's letters and, in more detail, in his affidavit. We think that his two letters might be said to be somewhat sparse in the detail which they gave but very full details have been given in the affidavit. In

---

our judgment, the general approach when summarizing a letter of request should be to provide as much information as is consistent with the need to respect any concerns of the requesting state as to confidentiality and the need not to hamper the investigation. However, we are quite satisfied that in this case the applicants and the Maluf family are fully aware of the nature of the investigations and they will not be prejudiced in any way by not seeing the letters of request themselves. We would have come to that conclusion even without the evidence provided by the Federal Republic but we note that Mr. de Grandis, the Federal prosecutor with conduct of the various criminal investigations, specifically confirms in his affidavit that Mr. Whelan has correctly summarized all the criminal investigations.

51 As to the third reason relied upon, namely, breach by the Federal Republic of the speciality condition and the leaking of information to the media on previous occasions, we do not see that the letters of request will assist in this respect. The Attorney General accepts that there have been these difficulties and, indeed, raised such matters personally with the Attorney General of the Federal Republic. He has received an explanation for the breach of the speciality condition and has also received assurances as to the future in respect of leaking material to the media. It is ultimately a matter for the Attorney General as to whether he is content to rely upon such assurances and it is, of course, open to the applicants to make representations to the Attorney General as to why he should not rely on such assurances. However, we do not think that the applicants need to see the letters of request in order properly to make such representations.

52 As to the arguments on the prejudice which might be suffered if the letters were to be disclosed, we can state briefly our conclusion on the question of tampering, referred to by Miss Robinson. The affidavit of Mr. Whelan suggests that attempts had been made to persuade a Mr. de Oliveira and a Mr. Alves to retract their earlier statements implicating members of the Maluf family in the alleged offences. We note the explanations given for the changes of mind in the affidavits filed on behalf of the applicants and clearly it is not possible for the court to ascertain the truth. We certainly make no finding that there has been interference but, conversely, on the basis of the material before us, we cannot find that there is no risk of tampering. In those circumstances, there must be a risk of prejudice to the Federal Republic should it be forced to disclose all the information contained in the letters of request and should such information include material which might be useful to the Maluf family. As to confidentiality, we do not agree that it has been lost merely because a summary has been provided or because the Swiss letter of request is known to the applicants.

53 For the reasons we have given, we do not think that the matters relied upon by the applicants are sufficient to lead to a departure from the

---

general starting point that letters of request are confidential. The Attorney General's decision to refuse to disclose them cannot be said to be procedurally unfair or irrational.

Failure by the applicants to disclose relevant facts

54 The Attorney General submitted that, even if we would otherwise have found in favour of the applicants, we should dismiss this application on the ground that the applicants have not made frank disclosure of all relevant facts. In particular, Mr. Maluf and his family are said to have denied to the media and in judicial proceedings that they have any connection with bank accounts or assets in Jersey, whereas the applicants have failed to state who beneficially owns them and what (if any) is the connection with the Maluf family when there are grounds for believing that there is such a connection. Furthermore, the Attorney General pointed out that the affidavits sworn on behalf of the applicants when seeking leave to bring proceedings for judicial review were sworn by a solicitor instructed by the applicants rather than by a director or officer of the applicants. This was not in accordance with the statement of this court in *Acturus* (1) (2001 JLR 43, at para. 44), where it was said:

> "44 In our judgment, the evidence produced by the representors is wholly unsatisfactory. In the first place, the affidavits are sworn by a solicitor upon instructions. That is inappropriate. In such cases an affidavit must be sworn by someone who has direct knowledge of the relevant matters. It should normally

be the beneficial owner or a director of the applicant companies."

This point was raised by the Attorney General at the hearing of the application for leave and subsequently Mr. Maluf swore an affidavit. He expressly asserted, however, that he was not a director, officer or shareholder of the applicants and the affidavit essentially repeated that of Mr. Barden.

55 The Attorney General invited us to consider this issue whatever our decision on the main argument. However, in view of our findings on the substantive issues, we do not think it necessary to lengthen this judgment by considering whether the applicants failed in their duty in this case and, if so, the consequences of such failure. Suffice it to restate the general principles as follows:

(i) An applicant for judicial review does owe a duty to the court to make frank disclosure of all facts relevant to the issue which the court has to determine. Whether that duty will, in a particular case, involve full disclosure of beneficial ownership will depend upon the circumstances.

(ii) We do not think that the court, in the passage cited from *Acturus* (1), intended to say that if an affidavit were not filed by a director or

---

beneficial owner the court would automatically refuse all relief. We think the court was indicating merely that in cases of this nature little weight could be attached to an affidavit sworn by a person who did not have direct knowledge of the matters asserted in the affidavit. It follows that in some cases an applicant who chooses to rely upon an affidavit sworn by a solicitor may find his case is very much weaker than it would have been had a director or shareholder sworn the relevant affidavit.

Application dismissed.