Berge Gerdt Larsen v The Attorney General

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith OBE., Jurats Blampied, Pitman, Clyde-Smith
Judgment Date:	16 October 2019
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Text

[2019] JRC 203

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE., **Commissioner, and** Jurats Blampied **and** Pitman.

Berge Gerdt Larsen
and
The Attorney General

Advocate J. Harvey-Hills **for the Applicant**.

Advocate H. Sharp **QC for the Respondent**.

Authorities

Investigation of Fraud (Jersey) Law 1991.

Volaw & Ors v The Attorney General & Ors [2019] UKPC 29

Allen v United Kingdom [2013] 63 EHRR 10

R (Hallam) v Secretary of State for Justice [2019] UKSC 2E

Human Rights Act, 1998.

Criminal Justice Act 1998

R (on the application of AR) v Chief Constable of Greater Manchester Police [2016] 1 WLR 4125

National Crime Agency v A [2018] EWHC 2603 (Admin)

R v Southwark Crown Court ex p Bowles [1998] AC 641

Re Finucane's application for judicial review (Northern Ireland) [2019] 2 All ER 191

Bhojwani v Attorney General [2010] JRC 042 and *R (Soma Oil and Gas Limited) v Director of SFO* [2016] EWHC 2471 (Admin)

Trant v Attorney General [2007] JCA 073

Durant v Attorney General [2006] JLR 112

Mandalia v Secretary of State for the Home Department [2015] UKSC 59

Mutual Legal Assistance guidelines

Judicial Review — The Applicant applies to judicially review the decision of the Respondent.

APPLICATION FOR JUDICIAL REVIEW

THE COMMISSIONER:

1 The Applicant ("Mr Larsen") applies to judicially review the decision of the Respondent ("the Attorney General") to maintain a notice issued under the Investigation of Fraud (Jersey) Law 1991 ("the Investigation of Fraud Law"), leave having been granted on 18th March, 2019.

Background

2 On 4 th October, 2013, Mr Larsen was convicted in Norway of fraudulent breaches of trust and tax offences which covered the period 1999 – 2006.

3 As part of his preparation for his appeal against conviction, Mr Larsen and his defence attorneys requested that the prosecutor in Norway obtain, through the Attorney General, further information from Volaw Trust & Corporate Trust Services Limited ("Volaw") in Jersey, covering the period from 1 st January, 2009 to 1 st June, 2015. Volaw had administered a number of companies associated with Mr Larsen, and it was claimed that the procurement of such documentary evidence from Volaw would be of significant assistance in his appeal, by shedding light on the actual relationship between the shareholders during the earlier period covered by the criminal charges. Previous notices had been issued by the Attorney General to Volaw under the Investigation of Fraud Law in July 2006 and pursuant to this further request, a supplementary notice was issued by the Attorney General on 19 th August, 2015, which we will refer to as "the Notice". The Notice is in the following terms:-

> *"INVESTIGATION OF FRAUD (JERSEY) LAW, 1991*
>
> *SUPPLEMENTARY NOTICE*
>
> *To answer questions, furnish information and produce documents*
>
> *Person under investigation*
>
> *Berge Gerdt Larsen*
>
> > *1. It appears to the Attorney General that there exists a suspected offence involving serious or complex fraud and that there is good reason for him to exercise the powers conferred upon him by the Investigation of Fraud (Jersey) Law, 1991.*
> >
> > *2. I am a Crown Advocate authorised by the Attorney General to exercise the powers of investigation conferred upon him by the said Law. A copy of the Attorney General's signed Authority is attached.*
> >
> > *3. I have reason to believe that you have relevant information about the affairs of the person under investigation and I therefore require you to answer questions and otherwise furnish information with respect to matters relevant to the investigation to myself and/or to any persons designated to assist in this investigation. The persons so designated are named in the attached Attorney General's Authority and any other supplementary Authority issued at a later date.*
> >
> > *4. I also require you to produce within 21 days true copies of the following documents which appear to the Attorney General to relate to matters relevant to the investigation:-*

(a) For each of the following companies:

Independent Oilfield Rentals Ltd;

Larsen Oil and Gas Drilling Ltd;

Network Drilling Ltd;

North East Oil Ltd. (formerly Norden Oil Ltd);

Goodland Ventures Ltd;

OPS Personnel Services Ltd.;

Dove Energy Inc .

(i) Documents relating to changes in the registered shareholders of the companies for the period from 1st January, 2009 to 1st June, 2015; and

(ii) Documents relating to the disbursement of funds to include, without prejudice to the generality of the foregoing, dividends, loans and other payments and disbursements paid to the registered shareholders for the period from 1 st January, 2009 to 1 st June, 2015.

Documents required by sub-paragraph (i) should include (without prejudice to the generality of the foregoing) minutes of directors' and shareholders meetings, file and telephone notes, statutory records, correspondence, and contracts.

Documents required by sub-paragraph (ii) above should include (without prejudice to the generality of the foregoing) minutes of directors' and shareholders' meetings, accounts, financial statements, payment instructions, file and telephone notes, statutory records, correspondence, disbursement vouchers and payment authorisations.

(5) You are further required to furnish information as to the existence of any accounts or assets held in relation to the person named in the header to this Notice, which may not be specifically referred to in paragraph 4 above, identifying whether (and, if so, what) records are held concerning such person.

For the avoidance of doubt:

a) reference to any type of document in this Notice should be reads so as to include reference to information recorded in any form

(including, but not limited to, in written form, microfilm, magnetic tape, computer, computer disc, CD-Rom or any other form of mechanical or electronic data storage or retrieval mechanism); and

(b) Suspicious Activity reports filed with the Joint Financial Crimes Unit and correspondence and/or internal memoranda relating thereto do not fall to be disclosed pursuant to the instant Notice.

Signed: A J Belhomme

Crown Advocate

Date: 19 th August, 2015"

4 The requests under paragraph 4 of the Notice were those sought by Mr Larsen's defence attorneys, but, as we understand it, the request in paragraph 5 in relation to any accounts or assets held in relation to Mr Larsen was added by the Attorney General. Accordingly the Notice was issued in wider terms than those requested by Mr Larsen's defence attorneys.

5 On 17 th September, 2015, Volaw (and others) applied for Judicial Review of the Notice on the grounds that it infringed its privilege against self-incrimination ("PSI"). That application was dismissed by Mr Beloff QC on 27 th November 2015, and by the Court of Appeal on 15 th August, 2016. Compliance with the Notice was stayed in the interim.

6 Mr Larsen's appeal against conviction was successful, and on 21 st September, 2016, he was acquitted of all of the charges against him. That appeal hearing took place without the benefit of the documents sought under the Notice.

7 On 30 th September, 2016, the Court of Appeal further stayed compliance with the Notice until an application for leave to appeal was determined by the Privy Council.

8 On 25 th October, 2016, Advocate Harvey-Hills, for Mr Larsen, wrote to Advocate Sharp, for the Attorney General, asking for confirmation that certain notices that had been issued by the Comptroller of Income Tax under the Tax Information Exchange Agreement (TIEA) between Norway and Jersey against Volaw, which were also subject to appeal, be withdrawn. He wrote again on 31 st October, 2016, asking if the Attorney General intended to maintain the Notice, and if so, why. Reminders were sent on 10 th November, 2016, 22 nd November, 2016 and 16 th January, 2017.

9 Advocate Sharp responded on 20 th January, 2017, in relation to the TIEA notices, saying that the request for their withdrawal was premature, and should await the outcome of the Privy Council hearing, but he did not respond to the letter in relation to the Notice.

10 On 26 th January, 2017, Advocate Sharp wrote to Voisin Law, acting for Volaw, informing them that the Attorney General had determined to open his own investigation into the case, and he was therefore maintaining the Notice in order to progress his inquiry. That communication was not copied to Advocate Harvey-Hills, and did not state who was under investigation.

11 On 8 th February, 2018, the Privy Council granted the appellants leave to appeal in respect of the TIEA notices and the Notice.

12 On 5 th September, 2018, the Comptroller of Income Tax notified the appellants that the Norwegian tax authorities had withdrawn their requests under the TIEA and that, in consequence, he was withdrawing the TIEA notices.

13 On 9 th October, 2018, Advocate Harvey-Hills again wrote to Advocate Sharp, in respect of the Notice, and gave notice that if there was no response within 14 days, he would take this as a decision to maintain the Notice, and would immediately issue Judicial Review proceedings.

14 Advocate Sharp responded on 23 rd October, 2018, in these terms:-

> *"The Attorney General has maintained the Notice because he wishes to use the evidence for his own investigation into Volaw.* That has been the position for some considerable time and was communicated to Volaw on 26 th January, 2016. There has been no challenge to that decision by Volaw.
>
> *At this stage, your client is not the subject of the Attorney's investigation.* However, I wish to make it clear that this letter is not in any way offering your client immunity from prosecution. Article 6(2) is not engaged at all…"

15 The Privy Council hearing took place on 8 th November, 2018, and its decision dismissing the appeal was handed down on 17 th June, 2019, (*Volaw & Ors v The Attorney General & Ors* [2019] UKPC 29). The Attorney General gave Volaw 21 days in which to comply with the Notice.

16 On 1 st July 2019, Advocate Sharp confirmed to Advocate Harvey-Hills that if Volaw complied with the Notice, no point would be taken in the Judicial Review brought by Mr Larsen that it had become otiose or otherwise failed. An application by Volaw to be joined as a party to this application and for a further stay of the Notice was refused by the Court on 5 th July, 2019. Volaw has now complied with the Notice.

Grounds for Judicial Review

17 The grounds for Judicial Review are as follow:-

(i) The maintenance of the Notice breaches Mr Larsen's rights under Articles 6 and 8 of the European Convention on Human Rights ("the Convention").

(ii) Article 2 of the Investigation of Fraud Law cannot be exercised for an ulterior object.

(iii) Use of the Notice to investigate Volaw is outside the scope of the powers conferred by the Investigation of Fraud Law.

(iv) he failure to operate a fair procedure in altering the purpose of the Notice renders it defective in any event.

(v) The investigation of Volaw is unlawful in any event; and

(vi) Even if the investigation is lawful, it does not cover matters within the scope of the Investigation of Fraud Law.

18 Mr Larsen's primary ground of complaint is that the maintenance of the Notice post his acquittal breaches his rights under Articles 6 and 8 of the Convention, and he did not pursue the last two grounds as separate grounds of review. The relief sought is an order directing the Attorney General to withdraw the Notice, or alternatively, that the Court quash the Notice.

Article 6(2) of the Convention

19 Article 6(2) of the Convention is in the following terms:-

"2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

20 On any ordinary reading, this presumption would be limited to the pre-trial phases of any criminal proceeding. It has, however, been extended by the European Court of Human Rights ("ECtHR") by way of judicial gloss beyond the trial, referred to as ***"the second aspect"*** of Article 6(2). The second aspect was considered by the ECtHR in *Allen v United Kingdom* [2013] 63 EHRR 10 at paragraphs 92 to 94:-

"92 The object and purpose of the Convention, as an instrument for the protection of human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective ….. The Court has expressly stated that this applies to the right enshrined in Article 6(2) …

93 …

94 However, in keeping with the need to ensure that the right guaranteed by Article 6(2) is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair-trial guarantees of Article 6(2) could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public. To a certain extent, the protection afforded under Article 6(2) in this respect may overlap with the protection afforded by Article 8 (see, for example , *Zollman v United kingdom (dec.), no. 62902/00*, ***ECHR 2003-XII and*** *Taliadorou and Stylianou v Cyprus, nos. 39627/05 and 39631/05*, ***paragraphs 27 and 56–59, 16 October 2008).”***

21 The ECtHR continued at paragraphs 103 and 104:-

“103 The present case concerns the application of the presumption of innocence in judicial proceedings following the quashing by the [Court of Appeal Criminal Division] of the applicant's conviction, giving rise to an acquittal. Having regard to the aims of Article 6(2) discussed above (see paragraphs 92–94) and the approach which emerges from its case-law review, the Court would formulate the principle of the presumption of innocence in this context as follows: the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Article 6(2) in these cases .

104 Whenever the question of the applicability of Article 6(2) arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt.”

22 It was not difficult to establish a link in the case of *Allen v United Kingdom*, where the English court had rejected a claim for compensation following an acquittal, placing reliance on the reasons given by the English Court of Appeal for quashing the conviction. No violation of Article 6(2) was found.

23 Where the second aspect of Article 6(2) applies, the ECtHR explains that there is no single test for whether it has been infringed in the subsequent proceedings:-

> ***"125 It emerges from the above examination of the Court's case-law under Article 6(2) that there is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings.*** As illustrated by the Court's existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted .
>
> ***126 In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6(2)…."***

24 Under section 2(1)(a) of the Human Rights Act, 1998, the English courts must take into account any relevant case law of the ECtHR, as indeed must this Court under Article 3(1) of the Human Rights (Jersey) Law 2000 ("the Human Rights Law"). The Supreme Court considered *Allen v UK* in the recent case of *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, in which the applicants sought declarations under section 4 of the Human Rights Act, 1998 that decisions under section 133 of the Criminal Justice Act 1998, which provides for compensation where convictions had been reversed, were incompatible with Article 6(2).

25 Of the seven judges, the majority, comprising Lord Mance, Lady Hale, Lord Wilson, Lord Hughes and Lord Lloyd-Jones, declined to make such declarations. Lord Reed and Lord Kerr, dissenting, would have made such declarations. As Lord Kerr observed at paragraph 201, there was general agreement amongst the members of the court, or at least no overt dissent, that decisions made under section 133 fell within the ambit of the second aspect of Article 6(2), the question being whether section 133 involved an inevitable conflict with Article 6(2).

26 In his judgment, with which Lady Hale and Lord Lloyd-Jones agreed, Lord Mance set out a somewhat more limited test than that prescribed by the ECtHR dispensing with the notion of a link, encapsulated in paragraphs 37 and 47 of his judgment:-

> ***"37 Nevertheless, analysing the Strasbourg case law up to 2011 in the course of giving the majority judgment in*** *Serious Crime Agency v Gale* [2011] UKSC 49; [2011] 1 WLR 2760 ***on 26 October 2011, Lord Phillips was inclined to the view that***

> ***'all that the cases establish is that article 6(2) prohibits a public authority from suggesting that an acquitted defendant should have been convicted on the application of the criminal standard of proof and that to infringe article 6(2) in this way entitles an applicant to compensation for damage to reputation or injury to feelings.***'"
>
> ***"47 Like Lord Phillips, with whose judgment in*** *Serious Organised Crime Agency v Gale* ***I concurred, I can however accept that, once criminal proceedings have concluded with acquittal, or, indeed, a discontinuance, no court should in civil or other proceedings express itself in terms which takes issue with the correctness of the criminal acquittal or discontinuance.*** Such an extension, achieving a degree of harmony with the approach in Strasbourg, seems at least workable and, of course, reflects what one would hope was anyway proper practice. But courts have often – in contexts not involving the pursuit of a criminal charge and using tools and language appropriate to such contexts – to engage with identical facts to those which have led to a criminal acquittal or discontinuance of criminal proceedings. In such circumstances, it is very commonly the case that the standard of proof will differ in the different contexts of criminal and other proceedings. It is, thus, entirely possible that a court may, in a context not involving the pursuit of any criminal charge, find on the balance of probabilities facts which could not be established beyond reasonable doubt in criminal proceedings. The question whether a link exists between the criminal and, say, civil proceedings then appears as a diversion from the real question. The ECtHR may itself be seen to accept that the ***concept of a link is not critical, because its statement that the words used may themselves create a sufficient link effectively collapses that concept into a consideration of the nature of the words.*** However, the question remains what nature of words is it permissible to use? The real test is, or should be, whether the court in addressing the civil claim has suggested that the criminal proceedings should have been determined differently. If it has, it has exceeded its role."

27 Article 6(2) guarantees the presumption of innocence in criminal proceedings, and is an unqualified right. As such, there is no assessment of the proportionality of the infringement of that right (see *Volaw v The Attorney General* at paragraph 39).

28 The entitlement to be presumed innocent is not limited to subsequent proceedings, but applies equally to subsequent conduct by a public authority. In *R (on the application of AR) v Chief Constable of Greater Manchester Police* [2016] 1 WLR 4125 the appellant had been acquitted of rape but in two Enhanced Criminal Record Certificates, issued by the Criminal Records Bureau in respect of the appellant's intended employment, details of the allegation and acquittal were set out. The appellant argued that the issue of such certificates in this form infringed his rights under Article 6(2) and Article 8 (the right to respect for private life) of the Convention. It was held that what had occurred did not amount to a violation of Article 6(2). Quoting from paragraph 58 of the

judgment of McCombe LJ:-

> ***"58 There was, in the terminology of the ECtHR (paragraph 126), clearly 'some unfortunate language' in the reasoning behind the reviewing officer's conclusion that the information should be included in the certificate.*** I have in mind here in particular the suggestion that the decision to prosecute indicated that on a balance of probabilities the allegations were more likely to be true than false and the statement of the officer's own conclusion at the end that the 'information might be true'. Nevertheless, a statement that the allegations were more likely to be true on the balance of probabilities does not cast doubt on an acquittal in view of the different, and more exacting standard of proof in criminal proceedings. Further, that was not the only consideration brought to bear in the decision. I also bear in mind here, by way of comparison with the statements made in this case, the language in the judgments in our courts which were criticised by the claimant in the Allen case and were considered by the Grand Chambers; see again paragraph 110, quoted above. However, as I see it, up to the present the ECtHR has only applied Article 6(2), in a 'post criminal proceedings' context to the public statements of state organs and not to documents, such as the reviewing officer's reasons in this case, which are not in the general public domain."

29 Advocate Harvey-Hills argued that the maintenance of the Notice post his acquittal breaches Mr Larsen's rights because it casts doubt on the correctness of the criminal proceedings in Norway. It is a public document, to which the Attorney General is attaching a legal effect, which expressly states that Mr Larsen (and no other) is a ***"person under investigation"*** and states that it appears to the Attorney General that there is a suspected offence ***("serious or complex fraud")*** involving Mr Larsen. The fraud referred to is the charges of which Mr Larsen has been acquitted, and as such, the Notice directly contradicts and runs contrary to Mr Larsen's Article 6 rights. It casts doubt on the determination which was made in the criminal proceedings in Norway. Furthermore, the Attorney General has continued, he said, to cast doubt on Mr Larsen's innocence in the contents of his affidavit sworn in response to this application for judicial review.

30 He further contended that it was unlawful for the Attorney General to act in a way which is incompatible with a Convention right, pursuant to Article 7(1) of the Human Rights Law and the decision to maintain the Notice after it has ceased to be necessary for the purposes for which it was issued breaches Mr Larsen's Convention rights. In refusing to withdraw the Notice, he maintained that the Attorney General was acting unlawfully.

31 That breach on the part of the Attorney General was not resolved, he said, by statements to the effect that the Attorney General is not investigating Mr Larsen, which amounted to nothing more than *ex post facto* attempt to rehabilitate a Notice that had been unlawful for an extended period of time. It is fundamental that rights guaranteed by the Convention should be ***"practical and real"*** and the effect of Article 6(2) would be significantly undermined if it were open to a public authority, such as the Attorney General, to make after

the fact statements which purport to qualify statements or documents which are inconsistent with the right to be presumed innocent. The only way to respect that right is to withdraw the Notice.

32 He maintained that the only rational explanation for the Attorney General refusing to withdraw the Notice is that it is being maintained for the reason for which it was issued, namely to investigate Mr Larsen and even if the Attorney General states that this is not the case, the fact is that anybody reading the Notice would think so, which means that the existence of the Notice breaches Mr Larsen's Article 6(2) rights. The fact is that Mr Larsen has been acquitted following full consideration of all of the evidence. The Notice is, and remains, an affront to that acquittal.

33 Advocate Sharp accepted that there was a second aspect to Article 6(2) that continues after acquittal, in order to protect a person's reputation and the perception of the public, but he said it was not unlimited in scope and has no application here. The decision by the Attorney General to issue the Notice and maintain it were not public acts, nor were his reasons for doing so. They did not become public in nature just because Volaw and Mr Larsen chose to institute proceedings about those decisions. He referred in this respect to paragraph 58 of *R (AR) v Chief Constable* cited above.

34 There was no link, he said, between the Norwegian proceedings and the decision to maintain the Notice for the purpose of Article 6(2). The Notice did not require any person to perform an examination of the outcome of the proceedings in Norway, to analyse the Norwegian Court of Appeal's decision to acquit or review the evidence or comment on Mr Larson's involvement. There was nothing in the language of the Notice that speaks about Norway, far less the appeal. The Notice simply requires the production of certain documents that were never put before the Norwegian courts. Furthermore, to the extent that one is permitted to look at the reasons for the decision being reviewed, the Attorney General has made it clear on several occasions that the Notice is being maintained for a Jersey investigation into Volaw, and Mr Larsen is not a suspect at this particular point in time.

35 Further, and alternatively, Advocate Sharp argued that if Article 6(2) was found to be engaged, there is no breach because:–

(i) There can only be a breach, he said, if the Attorney General and/or the Notice had asserted that the Court of Appeal in Norway should have reached a different outcome having regard to the criminal standard of proof (see *Hallam v Secretary of State for Justice* at paragraph 47 referred to above).

(ii) Any comment made about Mr Larsen to a lesser standard of proof – the balance of probabilities or the appearance of suspicion, for example – does not constitute a breach of Article 6(2). In this respect, he referred again to *R (AR) v Chief Constable of Greater Manchester Police* at paragraph 58 set out above.

(iii) In the circumstances, the decision to maintain an investigatory notice that records the *"appearance of a suspicion"* for the purposes of a local investigation in Jersey comes nowhere near passing the necessary threshold to the extent that anything has actually been said that might engage Article 6(2) in the first instance.

36 The Notice does not say a word about the Norwegian Court of Appeal decision, not least because it was issued a year before the appeal hearing took place, nor does it comment upon the outcome. It is impossible, Advocate Sharp argued, for Mr Larsen to link the Notice to Norway, without having to point to the reasons given by the Attorney General for first issuing the Notice in 2015, which are not recorded on the Notice. If it is permissible to go outside the wording of the Notice, then one is entitled to have regard to the reasons for the decision provided by the Attorney General for the maintenance of the Notice. These reasons confirmed that the decision is unrelated to the outcome of the Norwegian Court of Appeal decision.

Decision

37 The decision which is being reviewed is a decision of the Attorney General to maintain the Notice post Mr Larsen's acquittal by the Norwegian Court of Appeal on 21 st September, 2016, a decision made in January 2017 and first notified to Mr Larsen via Advocate Harvey-Hills (at least formally) on 23 rd October, 2018.

38 Leaving aside the Attorney General's explanation both to Volaw and Advocate Harvey-Hills, that Mr Larsen was not the subject of the investigation at this stage, the Notice, taken on its own, states that Mr Larsen is still suspected of serious or complex fraud, and this after his acquittal before the Norwegian Court of Appeal.

39 Applying the test laid down by the ECtHR in *Allen v United Kingdom* at paragraph 104 set out above, Mr Larsen must demonstrate a link between the concluded criminal proceedings ***"and the subsequent proceedings"***, the subsequent proceedings in this case comprising the maintenance of the Notice by the Attorney General post the acquittal. The ECtHR gives examples of where a link is likely to be present:-

(i) Do the subsequent proceedings require examination of the outcome of the prior criminal proceedings?

(ii) Does the maintenance of the Notice allow a court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess Mr Larsen's participation in some or all of the events leading to the criminal charges or to comment on the subsisting indications of Mr Larsen's possible guilt?

40 In our view, the maintenance of the Notice requires none of this. There is an ongoing

investigation in Jersey by the Attorney General into Volaw and the Notice is an investigatory tool being maintained as part of that investigation.

41 The maintenance of the Notice in this case can be contrasted with the facts in *R (AR) v The Chief Constable of Greater Manchester Police* in which a statement that the allegation of rape was more likely to be true on the lower balance of probability test did not cast doubt on an acquittal on the more exacting criminal test. This was a direct comment about an acquittal but was still found not to violate Article 6(2), whereas the Notice makes no statement at all about the acquittal of Mr Larsen.

42 We agree with Advocate Sharp that a Notice issued or maintained under the Investigation of Fraud Law as part of an investigation being conducted by the Attorney General is not in ***"the general public domain"*** and does not constitute a public statement by the Attorney General. As McCombe LJ said in *R (AR) v The Chief Constable of Greater Manchester Police* at the end of paragraph 58:-

> ***"However, as I see it, up to the present the ECtHR has only applied Article 6(2), in a 'post criminal proceedings' context to the public statements of state organs and not to documents, such as the reviewing officer's reasons in this case, which are not in the general public domain."***

43 In terms of the decision to maintain the Notice coming into the public domain through the proceedings issued by Volaw and by Mr Larsen, we note that:-

> (i) The Privy Council, in its decision on 17 th June, 2019, states at paragraph 21 that the Attorney General has determined to open his own investigation into the case, and therefore maintained the Notice in order to progress his inquiry. The Privy Council records that the person under investigation is Volaw, not Mr Larsen.
>
> (ii) The Court's judgment of 18 th March, 2019, giving leave for Judicial Review makes it clear that the Attorney General was maintaining the Notice because he wished to use the evidence for his own investigation into Volaw, not Mr Larsen. (see paragraph 4(xi)).

44 When you take into account the fact that the Attorney General has informed Volaw, the party subject to the Notice, and Mr Larsen, the person whose name remains on the Notice as the person under investigation, that the Notice is being maintained for the purposes of a local investigation into Volaw, not Mr Larsen, the absence of any link to the acquittal of Mr Larsen is put beyond all doubt.

45 If we are wrong in concluding that there is no link between the acquittal of Mr Larsen and the maintenance of the Notice, has there been a violation of Article 6(2)? In this respect, has the decision of the Attorney General to maintain the Notice, as per Lord Mance at

paragraph 47 of *Hallam v Secretary of State for Justice*, suggested that Mr Larsen should not have been acquitted by the Norwegian Court of Appeal of the charges of fraudulent breaches of trust and tax offences? Lord Mance refers to courts in civil claims suggesting that the criminal proceedings should have been determined differently, but accepting the same applies to public authorities such as the Attorney General, we find there is nothing in the decision to maintain the Notice and the words used in the Notice, to suggest that Mr Larson should not have been acquitted of the Norwegian offences. Nothing at all is said about his acquittal either in the words used in the Notice, which pre-date the acquittal, or in the decision to maintain the Notice post his acquittal.

46 Using the wording of the ECtHR in *Allen v United Kingdom*, in maintaining the Notice for his investigation into Volaw, the Attorney General has not treated Mr Larsen as though he was guilty of the fraudulent breaches of trust and tax offences for which he was acquitted in Norway or shown any disrespect for that acquittal. To the extent that the Notice names Mr Larsen as the person under investigation and leaving aside the explanation given to both Volaw and Mr Larsen that it is Volaw that is now under investigation, we agree that this appearance of suspicion to a third party reader comes no-where near engaging Mr Larsen's Article 6(2) rights.

47 We therefore conclude that the decision of the Attorney General to maintain the Notice has not breached Mr Larsen's Article 6(2) rights.

Article 8 of the Convention

48 Article 8 of the Convention is in the following terms:-

> ***"Article 8***
>
> ***Right to respect for private and family life***
>
> ***1. Everyone has the right to respect for his private and family life, his home and his correspondence*** .
>
> ***2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the right and freedom of others."***

49 Advocate Harvey-Hill argues that the Notice and the Attorney General's affidavit of 10th May, 2019, sworn in response to the application impugn Mr Larsen's reputation, by maintaining the suggestion that he is guilty of/or suspected of a criminal offence. That suggestion is wrong, he says, because Mr Larsen has been acquitted of all charges, and

therefore causes reputational damage which engages Mr Larsen's rights under Article 8. This continues to have an effect in a number of ways, including:-

(i) Mr Larsen is unable to obtain international directors' and officers' insurance against liability as a director and/or board member. He says he would be under an obligation to disclose that he is named on the Notice to any potential insurer, a fact that would be likely to result in cover being refused.

(ii) It is a matter which is invariably picked up on in compliance checks and reports.

50 Mr Larsen did not adduce any evidence of insurers refusing cover because of the decision of the Attorney General to maintain the Notice. He did, however, exhibit reports on him from KYC World-Wide dated 8 th November, 2018, and by Exigir Diligence dated 21 st December 2018. These reports were heavily redacted, to remove material that he said was private and not relevant. The Court was critical of these reports being redacted in this way when he was claiming damage to his reputation, and full copies were supplied on the second day of the hearing.

51 Although it was acknowledged by Advocate Harvey-Hills that the reason for maintaining the Notice could be explained by Mr Larsen, he said that the Attorney General's conduct in maintaining the Notice was so far beyond the bounds of reasonable administrative action that such an explanation was not likely to be regarded as credible. On the contrary, to an uninterested party, it was more credible that Mr Larsen is subject to an investigation.

52 Advocate Sharp responded that the decision to maintain the Notice was not in the general public domain and the fact that Volaw and Mr Larsen had brought litigation in relation to these matters does not mean that Mr Larsen's Article 8 rights are engaged.

53 Prior to the hearing, Advocate Harvey-Hills had confirmed to him that Mr Larsen would not release the full unredacted versions of these reports, which Advocate Sharp described as remarkable conduct on the part of someone whose case is based on alleged allegations of reputational damage.

54 Advocate Sharp was very critical of the lack of any supporting evidence in relation to insurers refusing D&O cover and of the very heavily redacted reports. The material that had been exhibited showed that there were other substantive reasons for professional service providers to regard Mr Larsen as high risk.

55 In any event, Advocate Sharp maintained that the Article 8 claim did not pass the threshold of seriousness, and therefore simply did not arise. He referred to the case of *National Crime Agency v A* [2018] EWHC 2603 (Admin). That case was concerned with whether an anonymity order in favour of Mrs A (or her husband) should be maintained. She argued that she was at risk of unfair criminal proceedings if she were to return to her

country of origin and detention in conditions which would violate Article 3 of the Convention (the prohibition against torture), so her identification would have a significant impact on her right to family and private life under Article 8. Supperstone J said he was not persuaded that her identification would interfere with her rights under Article 8:-

> ***"This will only be the case if the consequences of identification reach a certain level of seriousness (see*** *Armes v Nottinghamshire County Council* [2016] EWHC 2864 (QB). ***I consider that any interference with their Article 8 rights is unlikely to be severe."***

Decision

56 Article 8 is, as Advocate Harvey-Hills submitted, a qualified right and therefore the principle of proportionality applies. The following emerged from the reports in their unredacted form:-

(i) There is no mention anywhere of the ongoing investigation by the Attorney General into Volaw and the maintenance of the Notice.

(ii) The Exiger reports says this in relation to Mr Larsen's overall reputation:-

"Research identified multiple reputational risks for Larsen, including investigations into offshore companies and trusts, charges of market manipulation, company bankruptcies, and a tax fraud lawsuit. In 2013 Larsen was sentenced to five years in prison and fined approximately USD 3.4 million for defrauding his own company. Following an appeal in 2016, Larsen was acquitted of the charges."

(iii) he KYC World-Wide report reached this overall conclusion:-

"In our opinion, an obliged person discovering Berge Larsen's alleged involvement in the investigation and prosecution for tax evasion, and investigation and settlement of insider dealing offences would be likely to generate a higher risk rating to the extent that the relationship may fall beyond the risk appetite of many financial institutions. Furthermore, the nature of Berge Larsen's business, Oil and Gas, many of the jurisdictions that his business is operating in, and his complicated offshore structure, will also cause him to be categorised as being high risk.

However, those institutions willing to conduct enhanced due diligence will find much mitigating information, not least the important acquittals of all tax evasion convictions on appeal together with the lack of any actions brought against him for other historic allegations, and many may conclude Berge Larsen can indeed be a valued customer.

Those with higher risk appetites who will take him on will be required to undertake enhanced due diligence, which could include the preparation of an independent report such as this and acting on the recommendations and considerations given in this report. Any financial service business complying with these actions should be able to demonstrate that they have identified all risks posed by Berge Larsen as a

customer and in identifying them, should be able to mitigate against those risks."

57 These reports indicate that Mr Larsen's reputation has already been damaged for the reasons given, to the extent that he would be regarded by any professional service provider as high risk. There is no evidence, in our view, that the Attorney General's decision to investigate Volaw and to maintain the Notice has in any way further damaged his reputation. Both reports were issued prior to this Court's judgment granting leave, and the decision of the Privy Council, but both judgments state that he is not the person under investigation.

58 We do not see how Mr Larsen can complain about the Attorney General's affidavit sworn in response to this application for a Judicial Review, and he does not explain which parts of the affidavit he takes exception to. Apart from pointing out in paragraph 9 that the decision of the Norwegian Court of Appeal was taken by a majority of the judges, the Attorney General does not anywhere conduct an examination or analysis of Mr Larsen's acquittal. To the extent that the Attorney General refers to the Norwegian proceedings, it is in relation to the conduct of Volaw. In his skeleton argument Advocate Harvey-Hills refers to paragraph 33 of the Attorney General's affidavit, in which he says that the reasons for maintaining the Notice have been explained:-

> *"33 I do not accept that the Notice is a 'public document' in the normal sense.* It is not available to any member of the public. The Notice has been referred to in certain judgments in the course of the Larsen litigation (predating his acquittal) but equally, the reasons for the Notice being maintained are also in the public domain as a result of the Royal Court's recent judgment of 18th March 2019. Paragraph 4(xi) of the Royal Court's judgment in respect of the application for leave quotes directly from the Advocate Sharp QC letter of 23rd October 2018 in which the reasons for the maintenance of the notice are explained to Mr Larsen's lawyers and it is expressly confirmed that Mr Larsen is not currently a person under investigation. The judgment for leave is freely available on the Internet. Thus the totality of the information in the public domain confirms that Mr Larsen is not currently a person under investigation."

59 We see nothing in paragraph 33 of the Attorney General's affidavit that in any way supports Mr Larsen's contention that his Article 8 Convention rights have been infringed. For all these reasons, we conclude that Mr Larsen's Article 8 Convention rights have not been infringed by the decision to maintain the Notice post acquittal.

60 We make this observation in terms of reputational risk, namely that although it is Volaw under investigation, the documents sought from Volaw under the Notice relate to companies associated with Mr Larsen and accounts or assets held in relation to him and it is those very documents that Volaw have claimed would expose it to real and appreciable danger of prosecution if disclosed. Mr Larsen is therefore closely connected to the matters under investigation, irrespective of the fact that he is not *"at this stage"* (using the words of Advocate Sharp) himself under investigation.

61 That disposes of the principal grounds for Judicial Review, and we now take the remaining grounds together which we do under the headings used in Advocate Harvey-Hills' skeleton argument.

Unlawful use of the power under the Investigation of Fraud Law

62 Advocate Harvey-Hills argued that the exercise of the power will only be lawful if the true and dominant purpose for which it was exercised was one permitted by the statute, relying on the decision in *R v Southwark Crown Court ex p Bowles* [1998] A.C. 641. It is a corollary of this that if that true and dominant purpose ceases, or is replaced by a different purpose, the exercise of the power (which he referred to as the ulterior purpose) ceases to be lawful.

63 In this case, the Notice was issued on the 19 th August, 2015, at the request of the Norwegian Prosecutor, who was in turn acting further to an application from Mr Larsen's defence attorneys. It is not disputed that this purpose no longer applies. It follows, he said, that since Mr Larsen's acquittal on 21 st September, 2016, the Notice has been maintained for an ulterior purpose. Just as it would have been unlawful for the Attorney General to issue a notice ostensibly against one person for the purpose of investigating another, Advocate Harvey-Hills submitted that it was equally unlawful to maintain a notice which on its face is misleading and references a non-existent investigation. The proper course for the Attorney General to investigate Volaw is to issue a new notice, which does not reference Mr Larsen.

The scope of the Investigation of Fraud Law

64 Advocate Harvey-Hills argued that the Notice is outside the scope of the Investigation of Fraud Law because the Attorney General had not set out the serious or complex fraud which he suspects Volaw of having committed. Advocate Harvey-Hills referred in detail to that part of the justification for the Notice being maintained contained in the Attorney General's affidavit, which refers to the judgment of the Norwegian Court of First Instance, and which covers the period 1999–2006 and which the Attorney General stated (at paragraph 15) were not obviously or expressly overturned by the Norwegian Court of Appeal. The Notice covers the period from 1 st January 2009 – 1 st June 2015.

65 All of this showed, he said, a clear disconnect between (a) the documents cited by the Norwegian Court of First Instance, which the Attorney General relied on as the basis for his decision to maintain the Notice in order to investigate Volaw and (b) the documents requested by way of the Notice (these being documents to which the Norwegian Courts did not have access and which covered a period many years later). Furthermore, he said the Norwegian Court of Appeal entirely rejected the ***"straw man theory"*** that formed the basis of the reasoning of the Norwegian Court of First Instance.

66 Having regard to the scope of the power, the absence of an explanation as to the investigation and the serious irregularities in the Attorney General's approach, Advocate Harvey-Hills submitted that the Notice should be quashed, on the ground that since September 2016, the purpose for which the Notice had been maintained lies outside the scope of the power conferred by Article 2 of the Investigation of Fraud Law.

Unlawful departure from the policy of identifying the subject of a Notice

67 Advocate Harvey-Hills argued that whilst there may not be a statutory requirement under the Investigation of Fraud Law for the person who is the subject of the investigation to be named, Mr Larsen was named in this case, and as such, the Notice is presently misleading as to who is under investigation, and the name of the applicant should either be replaced or removed. It is clearly a matter of good administration that the person be named, and that had been the long-standing policy of the Attorney General's office. He submitted that it should not be departed from without good reason, as it provides an important safeguard in relation to the use of an intrusive power, ensuring that those who are the object of the Notice are in a position to ensure that their rights (and the rule of law) are respected. There has been no explanation as to why this policy has been departed from. Relying on a notice which has previously been used for separate and ulterior purposes undermines the possibility of a fair procedure, because it seeks to place the basis of the decision to maintain the notice beyond the purview of the courts, and thereby deny interested persons the right to challenge what is being done.

Unlawful departure from Mutual Legal Assistance Guidelines

68 Mr Larsen had a legitimate expectation that the Attorney General would deal with the request of the Norwegian prosecuting authority in line with its published *"Mutual Legal Assistance Guidelines"*. He referred the Court to *Re Finucane's application for judicial review (Northern Ireland)* [2019] 2 All ER 191 at paragraph 62–72.

69 The Mutual Legal Assistance Guidelines indicate that requests will be dealt with in accordance with international standards and those preclude the use of documents for any purpose other than that for which they were provided. Annexe A contained a form of undertaking to the effect that information will only be used for the purpose for which it is granted. He referred to the case of *Gohil v Gohil* [2013] 2 All ER 1302, in which the wife sought disclosure into ancillary proceedings of evidence obtained from a number of foreign states in the criminal proceedings against her husband. Disclosure was not permitted, pursuant to the United Kingdom's international obligations on the use of evidence obtained pursuant to a request for assistance.

70 Once it was decided by the Attorney General to depart from the limited use to which the documents to be disclosed under the Notice were to be put, Mr Larsen should have been

informed and given an opportunity to comment.

Attorney General's response

71 Advocate Sharp made a composite response to the submissions made under the above headings. He submitted that a Judicial Review of a prosecution/investigatory decision was a highly exceptional remedy and leave is normally refused, referring by way of authority to *Bhojwani v Attorney General* [2010] JRC 042 and *R (Soma Oil and Gas Limited) v Director of SFO* [2016] EWHC 2471 (Admin). The latter case involved an application for Judicial Review against the Serious Fraud Office to bring an investigation to an end. Gross LJ said this at paragraphs 21–23:-

> ***"21 (2) The legal framework: (a) Challenging the decisions of investigators: The law in this area is clear*** . *Soma* ***faces and, in my judgment, rightly faces (as Andrews J expressed it), a 'very high hurdle indeed' in asking the Court to judicially review the discretionary decision of the SFO in conducting an investigation in good faith into serious criminality and in seeking mandatory orders terminating such an investigation***.
>
> ***(22) First, challenges to the decision of prosecutors can only be advanced on very narrow grounds and, even then, will succeed only in very rare cases:*** *R(L) v DPP* [2013] EWHC 1752; [2013] 177 JP 502, ***esp.*** (for present purposes at [3] – [7]. Sir John Thomas P (as he then was) said this:
>
> ***'3. The law is very clear as to challenges to decisions of the Crown Prosecution Services. It is set out in a decision of this court in*** *R v DPP, ex parte C* [1995] 1 Cr. App R 136, ***at pp. 140–141***.
>
> ***4… it was made clear in that case by Kennedy LJ that the grounds upon which challenge can be made are very narrow:***
>
> > ***(1) because there has been some unlawful policy;***
> >
> > ***(2) because the Director has failed to act in accordance with his own set policy; or***
> >
> > ***(3) because the decision was perverse; that is to say it is a decision that no reasonable prosecutor could have reached*** .
>
> ***5. In subsequent decisions … the courts have indicated that these applications will succeed only in very rare cases*** .
>
> ***6. That is for the good and sound constitutional reason that decisions to prosecute are entrusted under our constitution to the prosecuting authorities …*** ..
>
> ***7. It is very important that the constitutional position of the Crown***

prosecution Service as an independent decision-maker is respected and recognised. The courts have therefore adopted this very strict self-denying ordinance. They will, of course, put right cases where an unlawful policy has been adopted or where there has been a failure to follow policy, or where the decisions are perverse. But each of those is likely to arise only in exceptionally rare circumstances and that must be borne in mind.'

See too, very recently , *R v Chaudhry* [2016] EWHC 2447 (Admin), ***together with the authorities there cited***.

23. Secondly, if anything, it is still more difficult to challenge the decisions of investigators than to challenge the decisions of prosecutors."

72 Advocate Sharp submitted that a statement as to who is a suspect in the investigation at a particular point in time does not in any way affect the lawfulness of the notice issued, and is not a statutory requirement. The Attorney General can use the documents obtained from a notice to prosecute a person whether or not that person is named as a suspect on the notice, or known to the Attorney General at all at the time the notice is issued. The decision to maintain the Notice taken on 26 th January, 2017, did not in any way change the use to which the Attorney General can put the material.

73 This is, he said, in stark contrast of the position in *R v Southwark Crown Court ex parte Bowles*. That case focused on very different legislation which permitted the police to obtain a production order to gather evidence to recover the proceeds of crime, but not to investigate a suspected criminal offence. The police wished to use the evidence obtained through the production order to prosecute a person for a criminal offence which, on the face of it, was not the intended use of a production order, and was therefore unlawful. No such considerations, he said, arise here.

74 Volaw had refused to comply with the Notice on the grounds of PSI, which can only be claimed if the disclosure of the documents would have had the tendency to expose Volaw to a criminal charge and the danger of prosecution must be real and appreciable. He referred to the case of *Trant v Attorney General* [2007] JCA 073 at paragraph 41.

75 The Attorney General's affidavit sets out the concerns about Volaw's conduct, taken from the decision of the Norwegian Court of First Instance. They include an apparent practice of backdating commercial contracts, share sale agreements and accounts that run from 1996 – 2006. The Attorney General is entitled to investigate whether this established pattern of conduct continued and, *inter alia*, if it is the reason for the claim to PSI.

Decision

76 We do not accept that the decision to maintain the Notice is an unlawful use of the Attorney

General's powers under Article 2 of the Investigation of Fraud Law. Article 2, in so far as it is relevant, is in the following terms:-

> ***"2 Attorney General's powers of investigation***
>
> > ***(1) The powers of the Attorney General under this article shall be exercisable in any case in which it appears to the Attorney General that —***
> >
> > > ***(a) there is suspected offence involving serious or complex fraud, wherever committed; and***
> > >
> > > ***(b) there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person*** .
> >
> > ***(2) The Attorney General may —***
> >
> > > ***(a) by notice in writing require the person whose affairs are to be investigated ('the person under investigation') or any other person whom he or she has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith; and***
> > >
> > > ***(b) administer questions or otherwise obtain information accordingly*** .
> >
> > ***(3) The Attorney General may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified in any specified documents which appear to the Attorney General to relate to any matter relevant to the investigation or any documents of a specified description which appear to the Attorney General so to relate; and***
>
> ***(a) if any such documents are produced, the Attorney General may –***
>
> > ***(i) take copies or extracts from them*** ,
> >
> > ***(ii) require the person producing them to provide an explanation of any of them;***
>
> ***(b) if any such documents are not produced, the Attorney General may require the person who was required to produce them to state, to the best of the person's knowledge and belief, where they are."***

77 Article 2 does not therefore require the identity of the person under suspicion to be named

and we agree that the Attorney General can use the documents obtained to prosecute any person, whether or not they were named as a person under investigation at the time the notice was issued, or even known to the Attorney General at the time the notice was issued.

78 Article 3(3) of the Investigation of Fraud Law permits the Attorney General to share the documents obtained with prosecutors, regulators and disciplinary bodies around the world, whether or not they have requested the records (see *Durant v Attorney General* [2006] JLR 112 at paragraph 37).

79 No complaint is made about the legitimacy of the Notice as issued on 19 th August, 2015, but an investigation is an inherently fluid process with investigators following leads as evidence is gathered and which may lead them to suspect others whose identity may not even have been known at the outset and who may become the dominant focus of the investigation. An investigation's progress cannot be constrained by what was suspected at the outset.

80 As Advocate Sharp says, the position is quite different to that which pertained in *R v Southwark Crown Court ex parte Bowles* where the relevant legislation had been enacted solely for the purpose of assisting in the recovery of the proceeds of criminal conduct and did not permit applications relating to the investigation of criminal offences involving the obtaining of money or other property which need properly to be brought under different legislation. In this case, the service of the Notice upon Volaw had led to it claiming PSI. As stated by the Court of Appeal in *Trant v Attorney General* at paragraph 41, the danger of prosecution must be real and appreciable, with reference to the ordinary operation of law and in the ordinary course of things. The risk must not be remote or insubstantial. Accordingly, the Attorney General was faced with Volaw claiming PSI on grounds that disclosing the documents set out in the Notice would lead to a real and appreciable danger of it being prosecuted.

81 As the Attorney General points out in paragraph 16 of his affidavit, Volaw lodged its appeal with the Privy Council on 14 th October, 2016, after Mr Larsen had been acquitted, appearing to rule out the possibility that this claim to PSI was being made for reasons connected to Mr Larsen's appeal in Norway. In addition to this, were the wider issues about Volaw's conduct raised by the Norwegian proceedings against Mr Larsen, and as set out in paragraph 14 of the Attorney General's affidavit.

82 Since it is the very documents required to be disclosed in the Notice that gave rise to Volaw's belief that disclosure would incriminate it, it is those documents that, legitimately in our view, the Attorney General wished to see, hence the decision to maintain the Notice.

83 It may be the (unpublished) policy of successive Attorney Generals to name the person under investigation when issuing a notice under the Investigation of Fraud Law, but in the context of this case, such a policy would not dictate, in our view, that the Notice should be

withdrawn and a new notice issued, when it is the documents required under the Notice which gave rise to the PSI claim, and which accordingly the Attorney General required to see. Both Volaw and Mr Larsen were informed that it was Volaw and not Mr Larsen which was now under investigation.

84 As to the assertion that it is outside the scope of the Investigation of Fraud Law for the Notice to be maintained post acquittal, the absence of an explanation as to the serious or complex fraud being investigated and the alleged irregularities in the Attorney General's approach, we are reminded that this is an investigation into Volaw by the Attorney General, whose good faith is not challenged, with which it would be exceptional for this Court to interfere — see the passage from *R (Soma Oil and Gas Limited) v Director of SFO* cited above. In our view there are no exceptional grounds for this Court to interfere in the manner suggested. The Attorney General, as investigator, is not required to set out the serious or complex fraud he suspects, but the claim to PSI of itself provides a sufficient basis for an investigation and the Notice, which gave rise to the PSI claim, is a necessary tool in that investigation. We see no serious irregularities in the Attorney General's approach or the adoption by him of an unlawful policy sufficient to surmount the Court's very strict self-denying ordinance in relation to decisions of investigators, whose decisions are rightly even more difficult to challenge than decisions of prosecutors.

85 Advocate Harvey-Hills referred to the case of *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, which concerned an Indian national having to prove he had sufficient funds to support himself during his period of study. The Immigration Rules required a bank statement showing a minimum balance of £5,400 over 28 days. The applicant sent in a bank statement covering 22 days. The published policy relating to the Immigration Rules stated that the missing bank statements should be requested before determining the application. No such request was made, and a decision was taken for the applicant's removal from the UK. It was held that where, in lawful exercise of a discretion conferred by statute, a public authority had published a policy of how it would act in a given area, the authority had to follow that policy unless there was good reason for not doing so.

86 As Advocate Sharp says, the facts in *Mandalia* are starkly different and the failure to follow the policy in relation to the Immigration Rules was clearly unfair; indeed, it led to a decision to remove the applicant from the United Kingdom. In this case, no issue of fairness arises. Volaw has known since 26 th January, 2017, that it is now the subject of an investigation by the Attorney General, perhaps not surprisingly bearing in mind its PSI claim taken by appeal all the way to the Privy Council, and that the Notice was being maintained. It was, of course, a notice issued to Volaw in relation to documents associated with Mr Larsen and to the extent that it names Mr Larsen as the person under investigation, we have found that does not violate his Article 6(2) Convention rights.

87 Advocate Sharp accepted that it might have been neater for the Attorney General to withdraw the Notice and issue a new one, but if there is no breach of Mr Larsen's Article 6(2) Convention rights, then it would be lawful for the Attorney General to proceed in the

way that he did. A new notice, we surmise, would presumably have requested Volaw to provide all the documents required under the Notice, as it is those documents that gave rise to the PSI claim. They are documents which relate to companies associated with Mr Larsen and to accounts or assets held in relation to Mr Larsen. In other words any new notice would inevitably reference Mr Larsen. We have found that the use of the Notice did not violate Mr Larsen's Article 6(2) Convention rights, and we agree therefore that the use of the Notice in this way was lawful.

88 Finally, we turn to the Mutual Legal Assistance Guidelines. These apply to assistance give to overseas authorities. The form of undertaking in Annexe A is an undertaking to be given by an overseas authority relating to documents provided to it by the Attorney General. They have no application to documents disclosed to the Attorney General by a person within this jurisdiction pursuant to a notice issued under the Investigation of Fraud Law. No undertakings, whether expressed or implied, are given by the Attorney General to the person giving that disclosure or the person named as being under investigation.

Conclusion

89 For all these reasons, the application for Judicial Review fails and we decline the relief sought.