Neutral Citation: [2013] IEHC 15

THE HIGH COURT

Record Number: 2008 No. 397 JR

Between:

Frank Agrama

Applicant

And

The Minister for Justice, Equality and Law Reform, District Judge Catherine Murphy, and District Judge Bridget Reilly

Respondents

Judgment of Mr Justice Michael Peart delivered on the 25th day of January 2013:

1. In these proceedings the Applicant seeks certain reliefs by way of Judicial Review in relation to two Requests for mutual assistance received by the first named respondent ("the Central Authority") from an Italian prosecutor in Milan, Italy in relation to the investigation and/or prosecution of the Applicant on certain charges in Italy.

2. The First Request is dated 17th July 2006 and this is stated therein to be "*aimed at investigating a serious and complex fraud – which includes offences of money-laundering – carried out in the period 1999-2000 – which is connected to the purchase of broadcasting rights made by the company Fininvest spa, through the subsidiary companies Mediatrade spa and TRI spa*".

3. This Request goes on to state in its opening paragraphs that "*the broadcasting rights in question were supplied to the companies Mediatrade spa and RTI spa by Olympus Trading Ltd, a dummy company based in Dublin and which can be traced back to Frank Agrama. The latter is an Egyptian individual who operates in Los Angeles*."

4. The Second Request is dated 11th January 2008 and was sent to the Central Authority here by the same Italian prosecutor in substitution for the First Request in circumstances where the 1999 charges against the Applicant which were referred to in the First Request have become statute-barred under Italian law. The Second Request relates to the investigation of charges of a similar nature to those in the First Request, but in respect of later years, namely 1999 – 2005.

5. Each Request contained a lengthy narrative of background facts to the investigations. In the case of the First Request this runs to some 12 pages, and in the case of the Second Request to some 16 pages.

6. Section 51 of the Criminal Justice Act 1994 sets out the procedures to be undertaken where the Minister receives Requests of this kind for assistance in obtaining evidence in this State in connection with criminal proceedings which have been instituted, or in connection with a criminal investigation being carried on in the requesting state. Section 51, subsections (1), (2), and (3) provide as follows:

> *"51. – (1) this section shall have effect where the Minister receives --*
>
> *(a) from a court or tribunal exercising criminal jurisdiction in a country or territory outside the State 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 him to have the function of making requests of the kind to which this section applies, a request for assistance in obtaining evidence in the State in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, in that country or territory.*
>
> *(2) If the Minister is satisfied --*
>
> *(a) 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*
>
> *(b) that proceedings in respect of that offence have been initiated in that country or territory all that an investigation into that the fence is being carried on there, he may, if he thinks fit, by a notice in writing nominate a judge of the District Court to receive such of the evidence to which the request relates as may appear to the judge to be appropriate for the purpose of giving effect to the request.*
>
> *(3) For the purpose of satisfying himself as to the matter is mentioned in subsections (2) (a) and (b) of this section the Minister may regard as conclusive a certificate issued by such authority in the country or territory in question as appears to him to be appropriate."*

7. Following the receipt by him of the First Request, the Minister having satisfied himself of the matters referred to in section 51(2) of the Act of 1994 nominated a Judge of the District Court (Judge Malone) on the 16th February 2007 to receive the evidence and materials relating to National Irish Bank. According to an affidavit sworn by Anne Farrell, an Assistant Principal in the Minister's department, the other evidence and matters set forth in the First Request were at this time to be dealt with "*by way of police to police co-operation*" rather than by way of section 51. It appears that the evidence relating to National Irish Bank was gathered by the nominated District Judge on the 21st February 2007 and thereafter transmitted to the Italian authorities by the Central Authority. At this point in time the Applicant had not become aware of the existence of this First Request. He became aware of it only in May 2007.

8. By May 2007, according to the affidavit of Ms. Farrell, it had become apparent that the companies from whom the remainder of the evidence was to be gathered on the basis of police to police co-operation were not prepared to co-operate, and accordingly the

Minister decided to proceed in relation to that other evidence by way of section 51 also, and nominated the second named respondent on the 25th April 2007 to receive that evidence.

9. The date fixed for that hearing was the 16th May 2007. By that date the applicant had become aware of the Request. Counsel and solicitor attended on his behalf at the District Court and made certain submissions which resulted in the matter being adjourned. By letter dated 29th May 2007, the applicant's solicitors wrote to the Chief State Solicitor setting out at considerable length the basis on which the applicant considered that the First Request contained many untruths and misleading misrepresentations. The letter concluded by stating that in these circumstances the First Request was an abuse of process by the Italian prosecutor, and called for reconsideration of the Request and a withdrawal of the nomination of the second named respondent for the purpose of gathering the evidence in question. The point was made also that this abuse of process set at nought "*the safeguards identified by Ms. Justice Susan Denham in Brady v. Haughton*".

10. Having received this letter from the Applicant's solicitor, the Chief State Solicitor replied by letter dated 7th June 2007 acknowledging the letter and stating that it had been forwarded to the Italian prosecutor, and further stated "*I confirm that I will revert back to you when instructions have been received from him regarding the contents of same*". No further response has been received by the applicant's solicitors even after reminder letters were sent. By this time, the applicant was unaware that the First Request had been partially complied with by the transmission of material gathered by Judge Malone in relation to National Irish Bank. He did not become aware of that fact until the 27th May 2009. It follows also that when Judge Malone received the National Irish Bank evidence and materials and those were transmitted to the Italian Prosecutor in February 2007 the applicant's concerns about the inaccuracies and misrepresentations in the First Request had not been communicated.

11. Following the adjournment of the hearing on the First Request on the 16th May 2007, the second named respondent became unavailable through illness to deal with the matter further. No further steps have been taken in relation receiving evidence on foot of the First Request, as events have to a large extent been overtaken by the receipt by the Central Authority here of the Second Request dated 11th January 2008, whereupon the third named respondent (Judge Reilly) was nominated by the Minister to receive the evidence referred to therein.

12. The applicant learned of the existence of the Second Request on or about the 17th March 2008. Following the adjournment of the application on foot of the First Request the applicant was expecting and awaited a substantive response from the Chief State Solicitor's office to his solicitor's letter dated 29th May 2007 already referred to. When he became aware that the Second Request had been transmitted to the Central Authority, he saw that it made no reference to the First Request and, as he states in his grounding affidavit, largely replicates the request made in the First request, but with some additions.

13. The applicant was surprised that the Second Request, which he believes contains the very same misstatements, misrepresentations, untruths and inaccuracies as the First Request, would be issued without the Italian prosecutor having addressed or in any way dealt with the complaints made by the applicant's solicitors in their letter dated 29th May 2007, and further does not understand how the Minister could have felt in a position to be satisfied about the matters of which he is required to be satisfied under section 51(2) of the Act of 2004 before nominating Judge Reilly to receive the evidence requested, in view of the fact that he was by then aware of the complaints made by the applicant in relation to the First Request and that these complaints had not been responded to.

14. The applicant believes that the Second Request is an abuse of process, given the fact that it repeats the matters about which the applicant complained in relation to the First Request, and given also that the Italian Prosecutor has chosen to simply ignore the issues raised by the applicant in relation to the First Request. In his grounding affidavit the applicant has stated that the same Italian prosecutor was found by a Court in the United States to have been guilty of abuses of process in relation to the execution of certain search and seizure warrants there, and that those warrants were ordered to be withdrawn and the material seized returned. He refers to the fact that in Hong Kong also he had obtained leave to challenge the issue and execution of certain search warrants by way of judicial review. At the time of swearing of the grounding affidavit herein the Hong Kong courts had not concluded that application.

15. Having become aware of the transmission of the Second Request, the applicant's solicitors wrote a further letter dated 4th April 2008. Having referred to their letter dated 29th May 2007 and the lack of any substantive response thereto, it repeated the view that the First Request amounted to an abuse of process by reason of the misstatements and misleading information contained therein, and that in good faith they had been awaiting a response to the applicant's complaints. It went on to state that in these circumstances the Second Request was also an abuse of process, compounding the abuse of process in relation to the First Request. They referred also to the fact that the receiving of evidence on foot of the Second Request was scheduled to take place on the 9th April 2008, and submitted that the nomination of the third named respondent to take this evidence should be withdrawn and requested confirmation that the hearing on the 9th April 2008 would not proceed.

16. On the 7th April 2008, the applicant was granted leave to seek reliefs by way of Judicial Review in relation to the First Request and the Second Request, and that order operated as a stay on the hearing due to take place on the 9th April 2008 pending the determination of these proceedings.

17. The first named respondent ("the Minister") denies that he is obliged prior to nominating a District Judge to hear evidence under the Act of 1994 to consider whether or not the Letter of Request contains a fair, accurate and true statement of the material facts underlying the Request as asserted by the applicant. It is asserted that under the Act of 1994 the Minister's power is premised on his having received a Request falling within section 51 (1) of the Act, namely that there are at least reasonable grounds for suspecting that an offence has been committed, and that there is in existence either proceedings or an investigation in respect of that offence. The Minister submits that the accuracy, truthfulness and fairness of the statement of the material facts contained in the Request is a matter for the courts of the requesting state having seisin of, or ultimately to have seisin of, the proceedings relating to the offence in issue.

18. The Minister denies also that he is obliged to carry out the sort of inquiries asserted by the applicant in order to determine whether a Letter of Request is, as asserted by the applicant, vitiated by fundamental misstatements and misrepresentations, and further that he is entitled to assume the authenticity and accuracy of the Request sent by requesting authority.

19. The Minister submits that upon receipt of a Request he is obliged to consider whether there exists a criminal investigation or criminal prosecution in the requesting State, and that once he is satisfied from the contents of the Request that either or both exist, he is entitled to nominate a Judge of the District Judge to hear such evidence to which the Request relates as may appear to the Judge to be appropriate for the purpose of giving effect to the Request.

20. He asserts also that the complaints made by the applicant are properly a matter for the courts in the requesting State which will

have power to determine the admissibility of any evidence obtained pursuant to the Request. He denies also that he was obliged to withdraw the nomination of the Judge Murphy in relation to the First Request, and that in any event the Second Request was expressed to be in substitution for the First Request, and that in such circumstances he could not and would not have proceeded to seek evidence on foot of the First Request in any event, and that the applicant was so informed.

21. In relation to the Second Request, it is asserted by the Minister again that he is not obliged to engage in the kind of investigation or consideration of the alleged misstatements and misrepresentations said to be contained in the Request by the applicant before nominating a District Judge to hear the evidence. It is denied that the Second Request amounts to an abuse of process, and also that the Minister's actions are unreasonable, *ultra vires* or otherwise unlawful for any of the reasons put forward by the applicant, or at all. It is denied also that the Second Request is an abuse of process.

22. It is asserted also that without prejudice to his other arguments, there is nothing in the Convention itself, or the Act of 1994, which precludes the making of successive Requests for mutual assistance either in relation to the same offences or in relation to different offences allegedly committed by the same person.

23. During the course of a discovery application in May 2009, the Chief State Solicitor wrote a letter dated 26th May 2009 to the applicant's solicitors which informed them that certain of the documents sought by the Italian prosecutor in the Fist Letter of Request had by that time already been received by the District Judge and transmitted to the Italian authorities following a hearing in the District Court on the 21st February 2007, namely the documents acquired from National Irish Bank. The applicant had of course not become aware of the First Request by that time, and therefore had not made any complaint in relation to the contents of the First request. This letter went on to state that the documents in question do not form part of the Second Letter of Request as they had been previously provided, and further that "*the Second letter of Request substituted only the unexecuted part of the First Letter of Request*".

24. Following the making of an order for discovery the Minister swore a number of affidavits of discovery, the last of which was sworn on the 8th March 2011, and documents discovered were provided to the applicant. Following a review of the documentation so provided, the applicant formed the view that the First Request had not been properly transmitted to this State because it had not been addressed by the Italian Ministry of Justice to the Minister, but rather addressed by the Italian Prosecutor to the Minister. The applicant was unaware of this alleged infirmity until discovery was made by the Minister. This alleged infirmity in the transmission of the First Request is said to result in the First Request not having been properly before the Minister when he nominated a District Judge to hear the evidence, and accordingly he was not entitled to make that nomination, and consequently that any steps taken thereafter in relation to that request were invalid, including the transmission of the National Irish Bank material to the Italian authorities following the hearing in the District Court on the 21st February 2007.

25. An application by the applicant to amend his Statement of Grounds was brought. That application was granted by this Court on the 9th June 2011, following which the applicant filed and delivered an Amended Statement of Grounds on the 13th June 2011 in which an additional relief is sought, namely an Order directing the Minister to take all appropriate steps to retrieve from the Italian authorities material transmitted to the Italian authorities on foot of the partial execution of the First Letter of Request. The Amended Grounds on foot of which this additional relief is sought are:

> *"(a) The First Letter of Request was not and/or could not have appeared to the first named respondent to be a lawful and proper request for assistance under the provisions of the [Convention] or under the terms of the 1994 Act as the Letter of Request was not addressed by the Italian Ministry of Justice to the first named respondent.*
>
> *(b) In nominating a Judge of the District Court to receive evidence on foot of the First Letter of Request, the first named respondent acted ultra vires.*
>
> *(c) The evidence obtained by the District Judge who received evidence pursuant to the First Letter of Request was unlawfully obtained by reason of the invalid appointment of the District Judge.*
>
> *(d) The evidence thus obtained by the District Judge was, quite apart from being unlawfully obtained by him, unlawfully and/or invalidly transmitted by the first named respondent to the Italian Prosecutor, Fabio de Pasquale, rather than to the Italian Ministry of Justice in breach of the provisions of Article 15 of the 1959 Convention"*

26. The respondent filed an Amended Statement of Opposition on the 29th June 2011 which addressed the Amended Statement of Grounds in which the amended claims were responded to as follows:

> *"12. (a) The first named respondent duly and properly received the Letter of Request of the 17th July 2006 which constituted a lawful and proper request for assistance pursuant to the provisions of Section 51 of the Criminal Justice Act 1994 and pursuant to the provisions of the European Convention on Mutual Assistance and Criminal Matters. It is denied that either of these instruments precludes the making of a request by a Prosecutor in the form in which it was received by the first named respondent or require that such request be addressed by the Italian Ministry of Justice to the first named respondent.*
>
> *12 (b) In nominating a Judge of the District Court to receive evidence on foot of the Letter of Request of 17th July 2006 the first named respondent acted within jurisdiction and in accordance with the provisions of Section 51 of the Criminal Justice Act 1994.*
>
> *12 (c) The documentation obtained by the District Judge receiving the documentation pursuant to the Letter of Request of the 17th July 2006 was lawfully obtained. The first respondent denies that by reason of the invalid appointment of the District Judge (the invalidity of which appointment is denied) the evidence obtained by the District Judge was unlawfully obtained.*
>
> *12 (d) The respondent asserts that it was duly and properly entitled to consider the evidence taken by reason of the Letter of Request of 17th July 2006 to the Italian Prosecutor Mr Fabio De Pasquale. The respondent denies that the manner of transmission of same was in breach of the provisions of Article 15 of the European Convention on Mutual Assistance in Criminal Matters (done at Strasbourg 1959)."*

Conclusions on issues rose in relation to the First Request:

27. Prior to the completion of this judgment I listed this case so that I could give my conclusions in relation to the issues raised by the applicant in relation to the First Request, as the Italian Court was apparently to deal with this case again on the 18th November 2011. The applicant was concerned that if this Court was intending to make any order for the return of the National Irish Bank material which was already transmitted to the Italian Prosecutor on foot of the First Request, it should do so prior to that date since, otherwise, that material might be used and thereafter the issues may be moot. The conclusions which I reached and gave to the parties on the 14th October 2011 were as follows:

28. The Minister received the First Request dated 17th July 2006 from the Italian Prosecutor in Milan, and not from the Italian Ministry of Justice.

29. The applicant submits that this transmission is not in compliance with Article 15 of the Convention itself, and that it was not therefore properly transmitted and therefore that the Minister was not entitled to take any step on foot of same, and that consequently, even if satisfied as to the matters referred to in section 51 (2) of the Act of 1994, he was not entitled to nominate a District Judge to receive the evidence requested.

30. Article 15.1 of the Convention provides that such a Letter of Request "*shall be addressed by the Ministry of Justice of the Requesting Party to the Ministry of Justice of the Requested Party, and shall be returned through the same channels*." Ireland is a signatory to the said Convention, but it is not by reason of that fact alone part of domestic law. The Oireachtas enacted Section 51 of the Act of 1994 as part of its intention "TO MAKE PROVISION FOR INTERNATIONAL CO-OPERATION IN RESPECT OF CERTAIN CRIMINAL LAW ENFORCEMENT PROCEDURES AND FOR FORFEITURE OF PROPERTY USED IN THE COMMISSION OF CRIME AND TO PROVIDE FOR RELATED MATTERS" as stated in the long title to that Act. It is therefore section 51, and not Article 15 of the Convention which is the domestic law which operates and under which the Minister acts upon receipt of such a Request for mutual assistance.

31. Section 51 of the Act of 1994 provides:

> *"51. -- (1) This section shall have effect where the Minister receives --*
>
> > *(a) from a court or tribunal exercising criminal jurisdiction in a country or territory outside the State 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 him to have the function of making requests of the kind to which this section applies,*
>
> *a request for assistance in obtaining evidence in the State in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, in that country or territory." (my emphasis)*

32. The Minister received the Request from a prosecuting authority in Milan, and accordingly it was properly received in accordance with these provisions. The Minister was thereafter entitled to consider if he was satisfied as to the matters referred to in section 51 (2) of the Act of 1994. He was so satisfied and nominated a District Judge to receive the evidence requested. In my view, having read the contents of the Request, it was clearly open to the Minister to be satisfied on the basis of the information contained therein, as provided in section 51 (2) that

> *" (a) …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 (b) 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".*

33. It is noteworthy that the section does not require that the Minister be satisfied that are reasonable grounds for suspecting that such an offence has been committed by any particular or named person. It suffices that he be satisfied that an offence has been committed, and that, inter alia, an investigation into that offence is being carried on. It must be noted also that the applicant by this time had not become aware of this Request and had therefore not brought to the Minister's attention any of the matters which he subsequently had an opportunity to bring to his attention in April 2007.

34. It follows in my view that the nomination of the District Judge to receive the evidence was in accordance with law at that time.

35. Evidence was gathered from National Irish Bank in due course, and was transmitted by the Minister's office to the Italian Prosecutor. The same point is raised as to manner of transmission of the evidence to the Italian Prosecutor, as was made in relation to the transmission of the Letter of Request by that person to the Minister. However, as I have stated already, even though Article 15 of the Convention provides for transmission of evidence from the Minister here to the Ministry of Justice in the Requesting State, the Second Schedule to the Act of 1994 at paragraph 4(1) thereof provides that:

> *"The evidence received by the judge shall be furnished to the Minister for transmission to the court, tribunal or authority that made the request".*

It follows that the transmission of the National Irish Bank evidence and material to the Italian Prosecutor by the Minister was in accordance with domestic law.

36. The point is made also that the failure of the Minister to respond in a substantive way to the complaints made by the applicant in his solicitor's letter dated 29th May 2007 undermines the lawfulness of the First Request, which is said to be an abuse of process in the light of the complaints made in relation thereto, and that this Court should order the return of any evidence and material which was gathered and transmitted on foot of that Request.

37. In view of my conclusion that there is no unlawfulness in relation to the receipt of the First Letter of Request or the nomination of the District Judge, or in the manner in which the evidence was transmitted to the Italian prosecutor, and in view of the fact that any complaints which the applicant has in relation to that Request were not made at that time, but only subsequently, it would not be appropriate for this Court to make any order for the return of the gathered evidence as I have been requested to do, even if, and I am expressing no view in this regard, this Court has power to so order.

The Second Request:
38. I now turn to the submissions made by Paul Gardiner SC for the applicant and Nuala Butler SC for the respondents in relation to

the abuse of process issue in relation to the Second Request.

39. In relation to the Second Request the essential point made by the applicant is that when the Minister received the Second Request he was already aware from the earlier letter from the applicant's solicitor that the applicant contends that the First Request contained misstatements, inaccuracies and misrepresentations, and that the Minister had indicated that he would bring these matters to the attention of the Italian prosecutor and would revert to the applicant's solicitors, and that he had not yet done so. In other words, he knew that the issues complained of by the applicant had received no substantive response from the Italian prosecutor. In circumstances where there had been no response to the matters raised by the applicant, Mr Gardiner submits that the matters raised by the applicant and notified to the Minister must be presumed to be true and correct, given the lack of any contradiction. In the face of that lack of any response or contradiction, it is submitted that the Minister had no lawful basis for considering the Request to be bona fide, and ought not to have exercised his discretion to nominate a District Judge to receive the material and evidence requested. It is submitted also in this regard that the sending of a Request containing such errors, falsehoods and inaccuracies constitutes an abuse of the Convention, and that the Minister ought to have regarded it as such.

40. The point made is that in such circumstances, when the Minister received the Second Request, he was obliged, before making any nomination of a District Judge to receive evidence requested, to address his mind to the fact these concerns had not been responded to, given that he has a discretion under Section 51 as to whether to make a nomination or not. It is submitted that where he failed to address his mind to those concerns, and respond thereto, the nomination of the third named respondent to receive evidence on foot of the Second Request is invalid and unlawful, and that the Second Request itself amounts to an abuse of process by the Italian prosecutor, he not having made any response to the complaints made by the applicant.

41. In so far as the Minister's position is, and remains, that he is under no obligation to undertake the sort of inquiries which the applicant urges, the applicant submits that by adopting a fixed policy that he is not required to have regard to matters brought to his attention by the applicant, he has unlawfully fettered his discretion. The Statement of Opposition pleads that under Section 51 of the Act of 1997, he is not obliged to be satisfied that the Letter of Request contains a fair, accurate and true statement of the material facts underlying the Request. In so far as he may receive a communications from a person such as the applicant which raises issues of this kind, it is the Minister's view that while he may bring those matters to the attention of the requesting authority and may receive responses or not as the case may be, it is not part of his function to have regard to them when deciding whether or not to nominate a District Judge, or to wait until the matters raised are explained or resolved. It is submitted by the Minister that the provisions of Section 51 are clear, and that once he receives a Request, he must simply be satisfied from the contents of same either that an offence has been committed, or that there are reasonable grounds for suspecting that such an offence has been committed, and if so, either that proceedings have already been instituted or that an investigation into that offence is being carried out. It is emphasised on behalf of the Minister that in fulfilling his functions under Section 51 he is merely assisting another state in gathering evidence for proceedings instituted in respect of an offence committed in that state, or for an investigation into an offence in that state for the purposes of the Convention.

42. The applicant submits that the matters which he drew to attention through his solicitors are matters which the Minister was obliged to have regard to and be satisfied about before he satisfied himself of the matters set forth in Section 51 (2 of the Act of 1994, as otherwise he may reach his conclusion on certain parts of the Request which are untrue or inaccurate or otherwise misrepresent the true facts. The applicant has referred in this regard to Section 51 (3) of the Act which provides that in order to be satisfied as to the matters in Section 51(2) of the Act of 1994 "*the Minister may regard as conclusive a certificate issued by such authority in the country or territory in question as appears to him to be appropriate*". It is noted that in the present case there is no such certificate to assist the Minister, and that therefore he was obliged to bring his mind to bear on the contents of the Request and for that purpose it was necessary for him to at least have regard to the issues raised by the applicant, and seek a response from the Italian prosecutor, and consider those matters before he could be satisfied that he should exercise his discretion to nominate a District Judge for the purposes of Section 51 (2) of the Act of 1994.

43. The applicant asks rhetorically how was the Minister satisfied in this case where he received no certificate, and wonders what steps he in fact took to be so satisfied given the contents of the applicant's solicitor's letter to him, or did the Minister simply rubber-stamp the Request without actually satisfying himself. The applicant notes that the affidavit sworn by Mr Clerkin to which I have referred makes no assertion or statement as to the basis upon which the Minister was so satisfied. Mr Gardiner submits that it is not permissible for the Minister simply to read the Letter of Request in order to become satisfied that he may nominate a District Judge, the more so where he has been made aware of concerns by the applicant as to the accuracy of some of the contents of the Request. He submits, in view of the provisions of Section 51(3) of the Act of 1994, that the Minister is obliged, particularly in the absence of such a certificate, to satisfy himself in a real way and if necessary by some external enquiries, the more so when particular issues arising as to the content of the Request have been specifically brought to his attention. He emphasises also that even where the Minister is satisfied as to Section 51 (2), he retains a discretion whether or not to make a nomination, and it is the exercise of that discretion in the present case which is under challenge, given the fixed policy adopted by him whereby he feels under no obligation to make any enquiries beyond a reading of the Letter of Request.

44. The applicant seeks support from the judgment of Denham J. (as she then was) in *Brady v. Haughton* [2006] 1 IR. 1 where at page 44 she refers to certain "safeguards" which exist under the Act of 1994 as follows:

> "*126 The Convention provides for mutual assistance between different jurisdictions, which have different legal systems. The safeguards inherent in the system are as follows:*
>
> *(i) the request must go to the third respondent [the Minister] to be screened;*
>
> *(ii) the request must come from a court or tribunal exercising criminal jurisdiction or a prosecuting authority or from an authority which appears to the third respondent to have the required function;*
>
> *(iii) the request for assistance must be in relation to, and must so specify, either a criminal proceeding which has been instituted, or a criminal investigation which is being carried out, in the requesting State;*
>
> *(iv) the assistance relates only to the specific request;*
>
> *(v) the third respondent has to be satisfied: (a) that an offence under the law of the requesting country has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and (b) that proceedings have been instituted or that an investigation into that offence is being carried out;*
>
> *(vi) the third respondent has to nominate a judge of the District Court to receive such evidence;*

(vii) the said nominated person receives such of the relevant evidence to which the request relates as may appear to the nominated person to be appropriate for the purpose of giving effect to the request;

(viii) the procedure is subject to judicial review by the High Court, and, as here, an appeal to the Supreme Court." (emphasis added)

45. The applicant refers in particular to the reference to screening at (i) above, and submits that the Minister must carry out some meaningful screening exercise before he can form a view that he is "satisfied", and must not simply 'rubber-stamp' the application. Ms. Butler for the respondent does not deny that some screening occurs but submits that it is not necessary to "screen" beyond the provisions of Section 51 of the Act of 1994 in order to ensure that the Request fulfils those requirements. However, Mr Gardiner submits that in the present case the fact that the applicant had already brought his complaints and concerns to the Minister's attention in relation to the First Request, and the Minister was aware of those concerns, it was necessary for him to take those complaints and concerns on board when considering whether or not he was satisfied that the Second Request met the requirements of Section 51 of the Act of 1994, particularly because the Italian authorities had not provided any Certificate referred to in Section 51 (3) of that Act. The applicant submits that it is completely unclear how, in the absence of any such Certificate and in the absence of any response from the Italian authorities in relation to his complaints and concerns, the Minister could have become properly satisfied of the matters set forth in Section 51 (2) of the Act.

46. In relation to the discretion enjoyed by the Minister as to whether or not to nominate a District Judge, even where he is satisfied of the matters in Section 51, Mr Gardiner has referred to an extract from Nicholls, Montgomery and Knowles on *The Law of Extradition and Mutual Assistance* (Second Edition) OUP. At paragraph 19.13 of this work the authors refer to the discretion possessed by the territorial authority to grant assistance on foot of a Request which is otherwise in order. In so doing they state that for example the authority may refuse to make an order in such a case where to do so would be to ignore any relevant treaty grounds for so refusing, such as where the offence under investigation in the requesting state is a political offence. In that regard the authors refer to the judgment of Simon Brown LJ in *R v. Secretary of State for the Home Department ex p Fininvest Spa* [1997] 1 WLR 743, 758. Having done so, they go on at para. 19.14 to state:

"Thus the fact that statutory conditions for the grant of assistance are satisfied does not compel the territorial authority to grant assistance. Whilst in most cases it does so, there may be rare cases where it is not appropriate to do so. In R v Central Criminal Court ex p Propend Finance Property Limited [1996] 2 Cr App R 26, 33 Laws J said in relation to s. 7(4) of the Criminal Justice (International Co-operation) Act 1990:

> *'It is accepted on all hands (correctly) that the Secretary of State possesses a discretion whether or not he will make a direction under s. 7(4) at all. He must of course decide whether either of the conditions specified in (a) and (b) of the subsection is fulfilled, but even where they are it clearly does not follow that he is bound to issue a direction. In rare cases there may be reasons of state, perhaps touching national security, why he would choose not to do so.'*

Other relevant considerations are whether or not the requesting state has acted in good faith in the interests of justice and whether there are particular factors making assistance inappropriate, for example, if a person affected by the request has already been tried for the alleged offence."

47. The authors refer to other instances where a decision may be made to decline the assistance request, such as where some other right such as a right to privacy prevails, or where there are doubts about the fairness of any trial which may take place in the requesting state, or where the *ne bis in idem* principle would be infringed. They state that there may be such circumstances where the requested authority, although satisfied that the requirements of, say, Section 51 are satisfied, yet may decide to exercise its discretion not to grant the assistance requested.

48. The applicant has referred also to *R v. Bow Street Magistrates' Court, ex p Zardari* [2001] EWHC Admin 275. He does so in the context of his argument that the respondent is incorrect in saying that he has no obligation to consider and take account of representations made to him by the applicant concerning the contents of the letter of Request.

49. The applicant in *Zardari* was the husband of Benazir Bhutto whose government in Pakistan had been dissolved in November 1996, following which certain allegations of corruption and drug-trafficking were pursued against members and supporters of that government, including the applicant, who was arrested on the day his wife's government was dissolved.

50. On the 21st October 1997 a Letter of Request was received by the UK Government requesting assistance in relation to investigations into drug trafficking by the applicant. The applicant sought leave to seek judicial review on a number of grounds, one only of which was granted, namely that the applicant was entitled to disclosure of the Letter of Request. Ultimately the Pakistan government consented to that letter being disclosed to the applicant, and the proceedings were not pursued in those circumstances at that time. The matter in due course came before the Magistrates Court. The applicant was represented at that hearing, and made submissions that there was an abuse of process, and that the Magistrate was not bound by the Certificate from the requesting authority, and could hear evidence and entertain argument that the State of Pakistan was not acting in good faith, and was acting with an ulterior political motive.

51. The Magistrate rejected these arguments and proceeded to receive the evidence. The applicant then proceeded to seek a judicial review of the Magistrate's decision. Leave was granted but by the time it came for hearing the evidence gathering had already been completed and the application was withdrawn. However, the applicant then sought to challenge the Secretary of State's decision to transmit that evidence to the requesting authorities in Pakistan. Under the statutory scheme in the UK, the Secretary of State enjoys a wide discretion as whether or not to nominate a judge to take evidence. However, no such discretion applied to the decision to transmit any evidence actually obtained. The relevant provision provided that the evidence "*shall be furnished to the Secretary of State … for transmission*" (emphasis added).

52. In *Zardari* it appears that there was a good deal of communication between the Secretary of State and the solicitors for Mr Zardari. In October 1999 the Secretary of State had written to the solicitors to inform them that he had decided to transmit the evidence furnished to him by the Bow Street Magistrates' Court. However, as noted in the judgment, there was a military coup in Pakistan the day after that letter was written, followed by the declaration of a state of emergency. Having been asked by the solicitors to withdraw his decision to transmit the evidence in these circumstances, the Secretary of State indicated that he would delay the transmission until he had investigated whether or not the request was being pursued, and if it was, then to consider the implications of the recent political events in Pakistan. He even invited further representations from the solicitors for Zardari. In due course, the Attorney General in Pakistan confirmed that that the request for assistance was being pursued. The solicitors made

further representations in relation to concerns around the independence of the judiciary in Pakistan, and stating also that the former Pakistani Interior Minister and certain others had admitted that the narcotics charges against Zardari were bogus. The Secretary of State made inquiries of the authorities in Pakistan in relation to these matters and received assurances which had been previously given in relation to the use of the evidence to be transmitted, as well as that the applicant would not be subject to a death penalty. In addition it was denied that the proceedings against the applicant were bogus. Following these confirmations and assurances, the Secretary of State made a further decision to transmit the evidence, and it was that second decision which was the subject of the judicial review proceedings to which the judgment refers. The letter from the Secretary of State communicating this decision evinces a considerable consideration of the issues raised by the applicant, and the responses which he received.

53. Mr Gardiner relies upon *Zardari* for the proposition that the Minister is obliged to take into account such representations as may be made to him when he is deciding to exercise his discretion whether or not to nominate a District Judge to receive the evidence and material sought by the Letter of Request. He rejects the Minister's submission that he is simply not required under the statutory scheme to have regard to such representations, and submits that the Minister has failed to appreciate that he has a discretion which must be lawfully exercised, and that he has closed his mind to the possibility that he could refuse to make the nomination – in other words he has fettered his discretion by closing his mind to that possibility, and has misconstrued his statutory function.

54. In response, Ms. Butler has submitted that there is no obligation upon the Minister to determine the truth or accuracy of the allegations against the applicant which are contained in the Letter of Request before making a nomination. She submits that such a resolution is a matter for the trial court in Italy in due course, and that the Minister's function is to afford assistance and cooperation under the Convention, but only as provided for in national legislation since the convention itself is not part of Irish law. It is submitted that the Minister's obligations under the Act do not extend to conducting an investigation into the matters and concerns raised by the applicant. It is not accepted that because the Minister has not investigated the matters raised by the applicant, it must be assumed that everything raised by the applicant is correct. Rather, it is the Minister's position that the matters raised by the applicant, being complaints about the investigation process undertaken in Italy, are not the sort of issues which the Minister can or is obliged to investigate before deciding to nominate a District Judge. Ms. Butler does not go so far as to say that there may not be some exceptional circumstances in some other case, and where it may be appropriate for the Minister to make inquiries into a complaint, but she submits that the nature of the complaints in the present case are not exceptional. In that regard, she distinguishes the facts of the present case and the nature of the complaints made by the applicant from the *Zardari* case already referred to.

55. Ms. Butler submits that while the applicant clearly disputes the allegations made against him, and the accuracy of certain of the facts stated in the Request, as of course he is entitled to do, the place for him to do so is at any trial which may ensue in Italy. Ms. Butler submits that it simply cannot be the case that the Minister must decide whether the allegations contained in the Letter of Request are correct, or the facts alleged completely accurate, since that goes to the merits of the prosecution case, whereas Section 51 of the Act of 1994 requires the Minister to be satisfied only that an offence has been committed, or that there are reasonable grounds for suspecting that such an offence has been committed, and that either proceedings have been instituted or that an investigation into the offence is being carried out in the requesting state. It is emphasised that at the time of this Request there was an ongoing investigation into the suspected offences, and that the assistance requested was in furtherance of this investigation.

56. Ms. Butler has pointed to the precise complaints made by the applicant in relation to the allegations contained in the Request and describes them as mundane and trivial. These complaints appear set forth in a letter from Arthur Cox, solicitors dated 29th May 2007. That letter identifies a large number of particular factual matters with which the applicant takes issue, and explains in what way the applicant disputes what is contained in the Request. The letter concludes by saying that the placing of "*such a misleading request before you represents a serious abuse if process envisaged by the Convention and negates and sets at nought the safeguards identified by Ms. Justice Susan Denham in Brady v. Haughton……".*

57. Ms. Butler does not accept that the judgment of Denham J. (as she then was) in *Brady v. Haughton* is authority for the sort of investigation which the applicant urges the Minister is obliged to carry out in relation to the applicant's complaints and objections about this Letter of Request. In so far as that judgment refers to a "screening" of Requests by the Minister as being one of the safeguards in the system, Ms. Butler submits that this must be seen in the context of the objective of the Convention, and refers to p. 44 of that judgment where the following is stated:

> *"This Convention is, as stated in the Preamble 'to achieve greater unity among' members of the Council of Europe, in the belief that 'the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this aim'. It is reasonable to construe this intention to the Oireachtas in incorporating the Convention within the domestic law of Ireland by the Act of 1994. This construction is supported by the words of the preamble which state 'An Act … to make provision for international co-operation in respect of certain criminal law enforcement procedures'. Consequently this legislation was enacted by the Oireachtas with the intention of establishing common rules to support the development of mutual assistance between the states. It should be construed accordingly."*

It follows, in the respondent's submission, that the nature of the screening to be carried out by the Minister upon receipt of a Letter of Request is necessarily curtailed or of a more limited nature than that type of screening for which the applicant contends, even where certain complaints are raised by the applicant in relation to the contents of the Request. It is submitted that the 'screening' to be undertaken is that prescribed by Section 51 only, namely that the Minister must ensure that the request is from a court or prosecuting authority, that an offence has been committed or at least that there are reasonable grounds for suspecting that an offence has been committed, and that proceedings have either been instituted or an investigation into that offence is being carried on in the requesting state. Ms. Butler submits that this is the form of screening contemplated by the section, and which forms part of the safeguards referred in *Brady v. Haughton*.

58. Ms. Butler has also referred to the fact that the legislative scheme does not in fact contemplate that the target of the Request would be on notice of the hearing in the District Court following any nomination by the Minister. There is no requirement under the Act to put any person on notice of the fact that a Request has been received or that a District Judge has been nominated to receive the evidence for transmission. That, it is submitted, points to the fact that it is not part of the scheme that any sort of trial of issues of fact would take place in this jurisdiction even where issues of controversy or dispute are brought to the attention of the Minister.

Conclusion:

59. Article 1 of the European Convention on Mutual Assistance in Criminal Matters done at Strasbourg on 20th April 1959 and to which this State is a signatory provides that "*Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings …*".

60. Article 2 thereof allows that such assistance may be refused (a) where the offence is considered to be a political offence, an offence connected with a political offence or a fiscal offence, or (b) if the requested party considers that the execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

61. The Convention is not itself part of national law, but the procedure for the taking of evidence and its transmission to a requesting state is clearly laid out in Section 51 of the Criminal Justice Act, 1994 so that this State can fulfil its obligations under the Convention. Given this State's undertaking as a Contracting State to the Convention to give "the widest measure of mutual assistance" as provided in Article 1 thereof, it is unsurprising that the procedure provided for is a simple one as set forth in section 51. No provision has been made for any person to be put on notice of the hearing in the District Court which takes place following the nomination of a District Judge to receive the evidence requested, even where the target of the investigation being undertaken in the requesting state is known, and is even known to be resident in this State. The reason for this is very clearly explained by Murray C.J. (as he then was) in his judgment at pp. 17-18 *in Brady v. Haughton* [supra] and need not be repeated.

62. Nevertheless, as has been pointed out by the applicant in the present case, the Minister, even where he is satisfied of the matters set forth in Section 51 of the Act of 1994, has a discretion whether or not to make a nomination. The Convention clearly in Article 2 permits of such a discretion. While the Convention itself sets forth a number of circumstances in which that discretion may be exercised so as to refuse to provide the assistance requested, Section 51 itself is not specific in that regard. But in making a decision to exercise the discretion not to assist, the Minister will clearly be guided by what is provided for in Article 2 of the Convention. There is no provision in the Convention which mandates the requested state to conduct the sort of investigative exercise into the accuracy of background facts of the offence disclosed in the Request or any of the allegations contained therein. That is not surprising either, since there will be many an investigation underway in another jurisdiction where the perpetrator or perpetrators are not yet identified. The assistance sought may well be directed towards the task of identifying a person or persons who have been engaged in criminality in the requesting state. There will inevitably be different stages to an investigation, and mutual assistance can be requested under the Convention at any stage, no matter how early.

63. The present case is somewhat different in as much as the investigation is at a relatively advanced stage. The alleged perpetrator, or at least one of them, is known or believed to be known, namely the applicant. It is in the nature of an investigation that even at a late stage in the investigation into an alleged crime, and prior to trial, not every fact or allegation will have been tied down, and indeed some facts may not even be firmly established in advance of evidence being heard. Some alleged facts may be, or may turn out to be, inaccurate or even totally incorrect. Findings of fact will have to await the outcome of any trial which may or may not ever take place. The prosecution will have to prove its case.

64. In the present case, the applicant, who somehow became aware of the First Request, albeit after it had been partially processed, and also the Second Request, takes issue with some of the facts set forth therein and has made known his concerns and objections. He thinks that before acceding to the request for mutual assistance received from the Italian prosecutor, the Minister must in some way resolve the issues which the applicant has raised, and if resolved in favour of the applicant then refuse the assistance requested on the basis that the prosecutor has been guilty of some abuse of process in transmitting a Request of assistance which has proven not to be entirely accurate, or at least refuse the assistance requested until such time as there has been a substantive response from the prosecutor in Italy.

65. Apart from being unworkable from any practical point of view and potentially causing requests to get bogged down in a quagmire of disputed and unresolved issues and facts raised by persons referred to in a request who may have found out about the arrival of such a Request – something which I do not believe was ever intended or contemplated by the Convention itself – there is nothing in Section 51 of the Act of 1994 which places that sort of obligation on the Minister to investigate those issues even where his attention is directed to certain matters and facts which may be in dispute by a person, such as the present applicant.

66. It is of course the case that the Minister may not simply 'rubber stamp' the Request when it has been received. He must consider the contents of the Request in order to be satisfied of the matters set forth in Section 51 before nominating a District Judge. He may, if he wishes, accept a certificate from an appropriate authority in the requesting State in order to be satisfied as to the matters in Section 51 (2) if one is provided. But he need not do so, and in any event there is no obligation that such a certificate is provided. But in the absence of a certificate, the Minister clearly must bring his judgment to bear upon the contents of the Request so that he can be properly satisfied that the requirements of the Section are satisfied. But this cannot be expected to be a forensic examination into the facts set forth. The Minister is not in any way required to be satisfied as to the strength of the potential evidence or the merits of any possible prosecution which may ensue.

67. One could contemplate an extreme case, and for obvious reasons a truly exceptional case, where a nomination of a District Judge has been made, but in circumstances where on any sensible and plain reading of the request, the contents failed to meet the requirements of Section 51. Clearly in such an extreme and unlikely case the Minister may simply have made an unfortunate yet innocent error in making the nomination. Clearly in such a case, the decision can be quashed by way of judicial review, if necessary. The task of establishing actual mala fides on the part of any such Minister would, one would think, be a very difficult one indeed. There is no question of any such suggestion in the present case I hasten to add, and indeed none has been suggested, though the bona fides of the Italian prosecutor has been seriously questioned, as already set forth.

68. The consideration of the contents of the Request which I have described above is in my view entirely consistent with the sort of 'screening' referred to by Denham J. (as she then was) in *Brady v. Haughton* [supra]. It cannot extend to the sort of forensic examination of the issues raised by the applicant. Those issues are in the main simply instances where the applicant denies certain matters which the prosecutor is alleging at this stage of the case. Simply because the applicant considers that the Italian prosecutor is incorrect in some of his assertions and beliefs in relation to the case which he wishes to pursue against the applicant in Italy, cannot result in the onus of resolving those issues and disputed facts being placed upon the Minister here, or even on the Italian prosecutor at this stage of the proceedings, where the latter is simply at this stage seeking the assistance of this State in obtaining the evidence which he believes exists in this State and which he believes will assist him in bringing the case to a conclusion. The Convention does not contemplate such a process, and neither of course does the Act itself.

69. As for the *Zardari* case relied upon by the applicant, the circumstances and background to that case are far removed from the present case. Apart from that distinction, it should be noted also that for obvious reasons the request for mutual assistance was not being made by Pakistan under the provisions of the European Convention on Mutual assistance in Criminal Matters, 1959. That said, it is clear that the provisions of the UK Act mirror closely the provisions of the Convention and the Act of 1994 at play in these proceedings. The political turmoil in Pakistan which existed around the time of the request for assistance in that case, which is described in the judgment of Mr Justice Garland prompted the Secretary of State to himself make certain inquiries in Pakistan because of certain concerns which are set out by him, but Garland J. accepted the submissions made on behalf of the Secretary of State that "*neither the Secretary of State nor this Court …… can embark on a detailed enquiry as to whether or not the drug trafficking case*

now proceeding is well founded, or commenced and pursued in bad faith. The Secretary of State cannot be expected, on the evidence available, realistically to decide whether the proceedings were brought or continued in bad faith". Garland J. also noted, as appears in paragraph 30 of his judgment, that the discretion conferred upon the Secretary of State under the UK Act was not defined by statute and also that while he was under no obligation to receive representations, nevertheless "*fairness may require that he should*".

70. The enquiries undertaken by the Secretary of State in *Zardari* related to the administration of justice in Pakistan, and whether in view of the changes of government the Request was still being pursued. The Secretary of State was not seeking to establish whether or not the facts and allegations contained in the Request were inaccurate and/or incorrect.

71. For the purpose of the present case, there is nothing in the Act of 1994 which precludes the Minister from considering any representations which he may receive from any party such as the applicant herein in relation to a Request for mutual assistance received by the Minister. No doubt he could consider the content of any such representations when deciding whether or not to nominate a District Judge for the purpose of executing the Request. But he is not obliged to do so. Neither is he obliged to put any particular party on notice of the fact that he is considering a Request or that a judge has been so nominated. Neither is he obliged to seek representations from any party. That is nowhere to be found in the scheme of the Convention or the Act of 1994.

72. It is not the case that because a person such as the applicant writes to the Minister taking issue with certain matters contained in a Request, the Minister must thereupon not act on foot of the Request until those issues are resolved by some form of communication between the Minister and the requesting party. As I have already stated, such a scenario would cause the process to become bogged down. It would lead to the very antithesis of mutual cooperation. The potential for causing delay, obstruction and obfuscation would be boundless. It is difficult to see how any control could be had over the process if each time a representation was made to the Minister, he had to communicate with his counterpart in the requesting state for further information and clarification. Presumably under such a scheme, the Minister, upon receipt of any response, would have to furnish that response to the person who had made the representation, thereby begetting an inevitable further representation taking further issue with what had been received by way of response, and so the process would go on and on indefinitely. There is nothing in the Convention which anticipates such a procedure or process. In my view the Chief State Solicitor acted entirely properly in forwarding a copy of the letter from Arthur Cox, solicitors dated 29th May 2007 to the Italian prosecutor. The fact that the Chief State Solicitor told those solicitors that he would revert to him when instructions had been received from the Italian prosecutor is insufficient to lead to any expectation that matters would be halted until such time the Chief State Solicitor received such instructions. It may have been preferable if the Chief State Solicitor had made that clear in his letter of acknowledgement, but the fact that he did not cannot mean that because the Italian prosecutor has not made any response his Request may not be fulfilled, in circumstances where the Minister is satisfied, and in my view had every right to be so satisfied given the contents of the Request, that the Request fulfils the requirements of Section 51 of the Act.

73. I am not satisfied that the absence of any response to the applicant's complaints has rendered the Second Request an abuse of process on the part of the Italian prosecutor.

74. I have already reached conclusions when dealing with the issues raised on the First Request in relation to the transmission points raised the applicant, and it is unnecessary to say more about that.

75. For these reasons I refuse the application for reliefs sought by the applicant.