IN THE HIGH COURT OF JUSTICE — Claim No. CO/1567/2007

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

on the application of

(1) CORNER HOUSE RESEARCH

(2) CAMPAIGN AGAINST ARMS TRADE — Claimants

- and -

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE — Defendant

- and -

BAE SYSTEMS PLC — Interested Party

SKELETON ARGUMENT
ON BEHALF OF THE DEFENDANT
for permission hearing on 9 November 2007

The Defendant has submitted a separate skeleton argument dealing with the issue of a protective costs order and directions, which will only be relevant if permission is granted.

Time estimate: 2 hours
Essential reading: Amended Detailed Statement of Grounds [III/tab 22/1541-1558]; Defendant's Skeleton Argument (which covers the points made in the Amended Summary Grounds of Resistance [III/tab 26/1605-1632]); Order of Collins J dated 29 May 2007, refusing permission [III/tab 17/1526]; OECD Convention [I/346-356, esp.351]; Commentaries to the OECD Convention [I/357-363, esp.360]

1. The Claimants seek an order quashing the decision of the Director of the Serious Fraud Office ("the Director"), made on 14 December 2006, to terminate the investigation into the affairs of the Interested Party as far as they relate to the Al Yamamah defence contract with the government of Saudi Arabia. In essence, the Director decided that the risk to national security if the investigation carried on was so serious that the public interest required him to end it.

2. Collins J considered the application on the papers and, in an order dated 29 May 2007, refused permission [III/tab 17].

3. The principal ground on which the Claimants seek judicial review is that the decision was, they contend, made in breach of Article 5 of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Convention"). In addition, they put forward various matters which they contend were relevant or irrelevant considerations, which they allege the Director respectively failed to take into account or wrongly took into account, and one matter which they allege amounts to a mistake of fact.

4. The Director respectfully submits that for the reasons succinctly given by Collins J in refusing permission, and elaborated below, the claim is unarguable and permission should be refused. In particular, permission should be refused because (i) the claim is based upon the Claimants' submissions as to the interpretation of an international treaty, in circumstances where the Court has no jurisdiction to interpret or apply it, where it is clear that the Director would have taken the same decision (and would have lawfully been entitled to take that decision – since the OECD Convention is not incorporated into domestic law), whether or not it might involve the UK in any violation of the OECD Convention; and (ii) in any event, it is clear that the decision was not in breach of the OECD Convention. Accordingly, there are no arguable domestic law grounds on which to challenge the decision.

The Facts

5. The Director commenced an investigation into the affairs of the Interested Party in August 2004. One aspect of the investigation concerned an agreement, known as the Al Yamamah contract, to supply arms to the Kingdom of Saudi Arabia.

6. In December 2005 the Attorney General operated the Shawcross procedure referred to below to invite views on the public interest issues arising from this investigation

from the Foreign and Commonwealth Office, Ministry of Defence, Department of Trade and Industry, Home Office, HM Treasury and the Prime Minister's Office. Attention was drawn to Article 5 of the OECD Convention and it was made clear that the final decision would be a matter for the Director (subject to superintendence by the Attorney General), both acting independently of government.

7. In assessing whether the investigation should proceed, the Director and the Attorney General needed to acquaint themselves with all the relevant considerations. There is a well established practice in Government by which views about the public interest can be sought from other government Ministers. This is sometimes referred to as a "Shawcross exercise" after the classic statement by Attorney General Sir Hartley Shawcross in 1951:

> "The true doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance the effect which the prosecution would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may … consult with any of his colleagues in the government, and indeed … he would in some cases be a fool if he did not … The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter."

8. The Attorney General instituted a Shawcross exercise in December 2005 and was provided with views on the public interest, including on the commercial importance of the Al Yamamah programme, from the Prime Minister, Foreign Secretary and Defence Secretary in response to the Shawcross exercise. Their views were copied to the Director for him to take into account. The Attorney General met the Director to discuss the case. The Director at that stage, on the materials then available, took the view that the balance of the public interest was in favour of continuing the investigation, although he recognised that, having regard both to evidential and public interest factors, the matter would need to remain under review.

9. In January 2006, the Attorney General also concluded that despite the public interest issues raised by other Ministers the investigation should continue, which it did. No further public interest representations were made until September 2006.

10. On 29 September 2006, the Attorney General's Office received further representations from the Cabinet Secretary, regarding the public interest in the light of more recent developments. Amongst other matters, this letter raised the possibility that Saudi Arabia's cooperation with the UK on counter-terrorism would be prejudiced if the investigation continued. The Attorney General showed this letter to the Director at a meeting on 30 September 2006. The Attorney General carefully considered these further representations, but concluded that, if the case was soundly based, the investigation should continue.

11. The Attorney General met with the Director and SFO Officials on a number of occasions to discuss the investigation. The Attorney General was concerned that evidence needed to be obtained to address the question of who (under the Saudi constitutional arrangements) was the principal contracting party in relation to the Al Yamamah contract, and whether the financial arrangements which lay at the centre of the investigation had been approved or authorised by the principal. Although the Director had some reservations about seeking such evidence, he agreed to explore ways in which the question of principal's consent could be investigated.

12. On 30 November 2006, the Director met with, amongst others, HM Ambassador to the Kingdom of Saudi Arabia. During this meeting the Director received direct confirmation from the Ambassador that the threats to national and international security were very grave indeed, and were as represented by the Cabinet Secretary's letter. As he put it, British lives on British streets were at risk.

13. The Director had a further meeting with the Ambassador on 8 December 2006, at which the Ambassador again confirmed the damage to national security that any continuation of the investigation would inevitably cause.

14. On 11 December 2006 the Director attended a meeting with Jonathan Jones, the Director General of the Attorney General's Office. Mr Jones showed him a minute from the Prime Minister to the Attorney General dated 8 December 2006,

expressing the Prime Minister's views on the public interest considerations raised by the investigation, which were endorsed by the Foreign Secretary and the Secretary of State for Defence. The minute was accompanied by detailed notes on the public interest issues from senior officials. The Prime Minister expressed the view that continuation of the investigation would give rise to a real and immediate risk of a collapse in UK/Saudi security, intelligence and diplomatic cooperation, which was likely to have seriously negative consequences for the UK public interest in terms of both national security and the UK's highest priority foreign policy objectives in the Middle East. The assessment was formed with the benefit of advice from the Government's most senior national security official advisers.

15. The Attorney General decided that he should himself now review the case in detail, with the benefit of full briefing from SFO investigators and lawyers, sight of the underlying material and advice from independent leading Counsel. His review took place over the period 12-14 December 2006.

16. On 12 December 2006 the Director attended a third meeting with the Ambassador. The meeting was also attended by, amongst others, the Solicitor General. The Ambassador confirmed his view that the risk that Saudi Arabia would withdraw its cooperation with the UK on counterterrorism was real and acute. He expressed the view that the Saudi Arabians were not bluffing and there was a real threat to UK lives.

17. Having considered the views of the Prime Minister, the Foreign Secretary, the Secretary of State for Defence (see para. 14 above) and the Ambassador as to the public interest, the Director independently concluded that it would not be in the public interest to continue with the investigation because of the risk to national and international security and the risk that lives would be endangered[1]. He

[1] There is no (and the Director did not consider that there was any) material distinction to be drawn between national and international security concerns in this context: cf *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, [15]-[16] per Lord Slynn. His overall assessment was that, by reason of the matters about which he was informed, lives of UK citizens and service personnel would be endangered.

conveyed this view to the Attorney General on 13 December 2006 and, having considered the matter further overnight, confirmed his decision to the Attorney General's Office on 14 December 2006. The SFO issued a press release the same day [I/tab 5/77].

18. In taking his decision, the Director's view was that his decision to discontinue the investigation was compatible with Article 5 of the OECD Convention, albeit that was not for him a critical or decisive matter. (The threat to national and international security was such that, even if consideration of those matters had been contrary to that provision, he considered them to be of such compelling weight that he would still have taken the same decision).

19. Also on 14 December 2006, after meeting the heads of the security and intelligence agencies and the Cabinet Office Permanent Secretary for Intelligence, Security and Resilience, and after completing his own review of the evidence, the Attorney General made a statement to Parliament [I/tab 5/78]. He explained that the Director had independently decided to discontinue the investigation in view of the potential damage to the UK's national and international security if the investigation continued. The Attorney General explained that he agreed with the Director's decision to discontinue the investigation. The Attorney General agreed with the Director's reasons, but, in addition, he considered that there were evidential obstacles to a successful prosecution such that it was not likely to go ahead.

Approach to judicial review of decision relating to the investigation of crime

20. As Laws LJ observed in *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727:

> "63. ...There is much authority to the effect that the jurisdiction to conduct a judicial review of a public authority's decision to launch or not to launch a prosecution, though it undoubtedly exists, is to be exercised sparingly. ...
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> 64. Here, of course, the decision sought to be reviewed is a decision not to *investigate*. The position as regards the judicial review jurisdiction is in my judgment a fortiori a decision whether to prosecute. ...The true proposition is that it will take a wholly exceptional case on its legal merits to justify a judicial

review of a discretionary decision by the Director to investigate or not." (Underlining added.)

21. In considering the merits of each of the Claimants' grounds of review, this approach to judicial review of a decision relating to the investigation of crime should be kept in mind. As Collins J stated at paragraph 6 of his observations, applying this approach, "[t]his claim does not qualify" as an exceptional case in which judicial review should proceed.

Ground 1: Article 5 of the OECD Convention

Reliance on international treaty before domestic courts

22. The Claimants allege that the decision was made in breach of Article 5 of the OECD Convention. This is an international instrument which applies only at the level of international law. As Lord Hoffmann held in *R v Lyons* [2003] 1 AC 976 at [27]:

> "And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418."

See also [40] (Lord Hoffmann), [79] (Lord Hobhouse), [104] and [109] (Lord Millett); and *R (Campaign for Nuclear Disarmament) v Prime Minister & ors* [2002] EWHC 2777 (Admin), per Simon Brown LJ at [23].

23. The Claimants seek to rely on the exception to the ordinary position set out in *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839, namely, if the decision-maker has purported to act in accordance with an international convention, the courts may consider whether or not he misdirected himself in applying it. But the *Launder* exception is inapplicable on the facts of this case.

24. It is true that the Director considered, and remains of the view, that his decision to discontinue the investigation did not put the UK in breach of its international obligations under Art.5 of the OECD Convention. But that was not for him a

critical or decisive matter: the threat to national and international security was such that, even if consideration of those matters had been contrary to that provision, he considered them to be of such compelling weight that he would still have taken the same decision. In these circumstances, the Court has no jurisdiction to rule on the meaning of the OECD Convention on Combating Bribery: see *R v Secretary of State for the Home Dept ex p Fininvest* [1997] 1 WLR 743, per Simon Brown LJ at 758G-H; also *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, [53]-[59] (Lord Brown), with Lord Bingham and Lord Rodger agreeing at [1] and [9] respectively; [18] (Baroness Hale).

25. The Claimants' assertion that this is inadmissible retrospective reasoning is misconceived. The Director's reasons for taking the decision are clear. He considered that the damage to national and international security, and the consequent risk to UK lives, if the investigation continued was so significant that he should discontinue the investigation. Further, he was of the view that this decision did not put the UK in breach of Art.5 of the OECD Convention. The fact that he would have made the same decision, even if he had taken a different view of the scope of Art.5, is a further point that there was no reason for him to explain at the time of the decision: see *Wing Kew Leung v Imperial College of Science Technology and Medicine* [2002] EWHC 1358 (Admin), per Silber J at [29]. This point is consistent with the reasons he gave and there is absolutely no reason to doubt his evidence.

26. The Director respectfully submits that, even taking this point alone, the claim is unarguable and permission should be refused.

Press Release

27. The Claimants allege that because the press release issued by the Serious Fraud Office on 14 December 2006 [I/tab 5/77] states that "No weight has been given to commercial interests or to the national economic interest", but does not expressly state that the Director did not take into account the potential effect of the investigation on relations with another State, the Director must have taken the

latter consideration into account in a manner contrary to Art. 5 of the OECD Convention.

28. On this part of their case, the Claimants seek to place a weight on the press release which it will not bear. There is no valid inference to be drawn that if the SFO did not positively say in the press release that something had not been taken into account, therefore it must have been taken into account.

29. As set out above, and already explained in the correspondence before action, the Director did consider (and considers) that continuation of the investigation would be contrary to the public interest because of the prejudice to the UK's national security interests arising from the likely reaction of Saudi Arabia to such a continuing investigation, and considered (and considers) that basing his decision to discontinue the investigation on this does not involve any incompatibility with Art. 5 of the OECD Convention (see further below). He did not base his decision on the potential effect upon relations with any other State (i.e. in the sense - unrelated to national security concerns - that phrase is used in Art. 5 of the OECD Convention to identify an impermissible consideration). Nor was the operation of Art. 5 for him a critical or decisive matter (see para. 24 above).

30. So, in so far as this ground of claim is distinct from the principal ground of claim answered below, it turns on the contention that the Director based his decision on other aspects of relations with another State apart from the national security matters he accepts and asserts he did take into account. But the Director confirms that he did not base his decision on any other such aspects of relations with another State, and there is no evidence whatever to suggest that he did. The press release in fact makes it clear that he did not. (Indeed, in light of the terms of the press release and the Director's confirmation about the matters he did take into account, it is unclear what further aspects of relations with another State it is alleged it should be inferred he did improperly take into account).

31. In any event, the press release was not a 'decision notice', as the Claimants describe it. It was a press release intended to inform the press of the decision.

Given that the information was market sensitive it was written at speed and under pressure of time. It was not intended to be (nor could it reasonably be interpreted as) a full and exhaustive statement of reasons. Nor could it reasonably be expected that the press statement should work through Art.5 of the OECD Convention indicating, point by point, which matters had or had not been taken into account – so, e.g., Art. 5 also prescribes that the investigating/prosecuting authority shall not be influenced by the "identity of the natural or legal person involved"; the press release does not state positively that the Director was not influenced by this consideration, but it is not, and could not be, alleged that he did take it into account.

32. Further, the focus of press attention at the time was on commercial interests and potential loss of jobs. It was, therefore, not surprising that the press release responded to the issue that was live at the time in public debate by making it clear that the Director was not influenced at all in making his decision by any possibility of job losses in the UK.

33. It is submitted that there is nothing in the press release which could properly be said to call in question in any way the account the Director has given in the pre-action correspondence and reiterates in these Summary Grounds of the basis for his decision to discontinue the investigation.

Construction of Art.5 of the OECD Convention

34. In any event, the Claimants' assertion that Art.5 of the OECD Convention is to be interpreted so as to have the effect that in the exercise of the broad prosecutorial and investigatory discretion that the Director (and the national authorities generally) have the responsibility of exercising they are not permitted to discontinue an investigation, even where they consider that its continuance will risk lives and will prejudice national security, is plainly wrong.

35. As Collins J observed, in refusing permission, at [2]:

> "The potential effect on relations with another state will not automatically result in a danger to national security. The SFO has taken into account, because it has properly listened to advice from those responsible for protecting national security, that to continue the investigation would produce a risk to national security and to the lives of British citizens. It is in my view wholly unarguable that the Bribery Convention, which has no concerns with national security issues, would have been expected to include a specific exemption to deal with national security. For the reasons given in the Acknowledgment of Service, it is clear that national security must always prevail and no State could be expected to take action which jeopardises the security of the State or the lives of its citizens. In any event, the potential effect upon relations with a State is not the same as consideration of the effect of a particular action upon national security even if the danger to national security results from the reaction of another State to the action in question." (Emphasis added.)

36. First, Article 31(1) of the Vienna Convention on the Law of Treaties provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"

37. The object and purpose of the OECD Convention was not directed to limiting in any way the ability of a Contracting State to take steps it judged necessary for protection of national security or the right to life. The OECD Convention was not negotiated with any limitation on national security in mind. No reference was made to this in the Convention, nor does it appear that any reference was made to this in the negotiations leading up to it. It is relevant in this regard that the Convention contains no derogation provision in light of threats to national security etc - contrast Art. 15 of the ECHR and Art. 4 of the International Covenant on Civil and Political Rights ("the ICCPR"): the significance of this is that the Contracting Parties cannot, therefore, be taken to have considered that Art. 5 of the OECD Convention would have the effect of conflicting with such interests, so no provision was required to regulate any such conflict.[2]

[2] Cf the Advisory Opinion of the International Court of Justice in *Legality of the threat or use of nuclear weapons* [1996] ICJ 226, in which the ICJ rejected the contention that the use of nuclear weapons was prohibited by certain environmental treaties, observing that such treaties could not "have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment" [30].

38. Further, it would require the use of very clear language in a treaty to indicate that the Contracting States intended to override interests as fundamental as the right to life and national security. Article 5 of the OECD Convention states:

> "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

Thus, on its ordinary meaning, Art. 5 recognises that national authorities should continue to have their usual wide investigative and prosecutorial discretion, subject only to the three limitations set out. So a wide range of factors relevant to prosecutorial and investigative decisions (including many factors of considerably less weight than national security and the right to life) may, according to the ordinary meaning of Art. 5, legitimately be taken into account as the basis for a decision to discontinue an investigation.

39. *A fortiori*, it is clear that (leaving aside for one moment the question of relations with another State) considerations of the right to life (eg risk to witnesses, informants, general population) or national security are permissible matters to be taken into account by a Contracting State's investigative and prosecutorial authorities when deciding whether to continue or discontinue an investigation or prosecution, as they would take them into account in the usual way. Given this, it would be extraordinary if they became impermissible considerations by a side-wind, simply because the mechanism by which the threat to the right to life or national security might arise includes as one element the reaction of another State to the decision taken. In terms of the point of substance (is there a risk to the right to life or to national security?), the precise causal mechanism by which it might arise is adventitious, and it cannot plausibly be supposed that the Contracting States intended that the causal mechanism should be taken to govern the ability as a matter of substance under the Convention for a Contracting State to base its decisions on these factors.

40. An interpretation which prevented the national investigative and prosecutorial authorities from having regard to the public interest in protecting national security

and saving lives, solely because the potential risk to human life is connected to a breakdown in relations with another State, plainly goes beyond the contemplation of the parties to the OECD Convention and the ordinary meaning of the language used in Art. 5. As the Attorney-General put it in the House of Lords on 1 February 2007 [Hansard, col.378]:

> "I do not believe that we would have signed up to it if we had thought we were abandoning any ability to have regard to something as fundamental as national security, and I do not believe that any other country would have signed up, either."

41. It is a fundamental principle of international law that restrictions on States cannot be presumed, but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations. As the Permanent Court of International Justice put it in *The Case of the SS Lotus* (1927) PCIJ Series A No.10, at p.18:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

42. The continuing application of this principle is confirmed in *Oppenheim's International Law* (9th ed.), Sir Robert Jennings QC and Sir Arthur Watts KCMG QC eds., Vol I (Peace) Part 4, p.1278:

> "The principle *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the party…."

43. This principle of interpretation applies most strongly when a party seeks to interpret a treaty in such a way as to limit a State's power to ensure its own

security. As Samuel Pufendorf wrote in *On the Law of Nature and Nations* (1688)[3] (p.819):

> "For since every prince is obligated first of all to protect his own subjects, in all promises which he makes to outsiders he understands this condition: in so far as the safety of the state permits."

44. This approach is not outdated: far from it. As the Consultative Council of European Judges observed in their Opinion No. 8 for the attention of the Committee of Ministers of the Council of Europe, on "The Role of Judges in the Protection of the Rule of Law and Human Rights in the Context of Terrorism" (10 November 2006) at para. 11, "Everyday experience and current events show that, while terrorism is not a new problem, it has recently taken on an unprecedented international scale". The CCEJ noted (at para. 8) that the Committee of Ministers has recently affirmed "the obligation of the state to protect everyone against terrorism".[4]

45. Moreover, this approach is reflected in the case law of the Permanent Court of International Justice and the International Court of Justice. In the *Case of the SS Wimbledon* PCIJ Reports, Series A No.1 (1923), p.37, Judges Anzilotti and Huber in their opinion (dissenting, but not on this point) said:

> "The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though those stipulations do not conflict with such an interpretation."

In *Case of the Free Zones of Upper Savoy and the District of Gex*, PCIJ Reports, Series A No.24 (1930) at p.12 and PCIJ Reports, Series A/B No.46 (1932) p.167 the Permanent Court of International Justice held (in precisely the same terms in each judgment):

> "in case of doubt, a limitation of sovereignty must be construed restrictively".

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[3] In Classics of International Law (1934), English translation of Pufendorf's 2nd (and final) edition. See also, p.809, para 15, p.959, p.1118, para 3 and p.1334, para 5.

[4] See, to similar effect, Council of Europe Convention on the Prevention of Terrorism (2005).

And in the *Nuclear Tests Case*, ICJ Rep. (1974) p.473, the International Court of Justice stated[5]:

> "When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."

46. Similarly, in domestic case law it has been emphasised that the Courts should be astute to ensure that they do not construe international instruments to include obligations which the Contracting Parties did not clearly intend to enter into: *R v Stipendiary Magistrate, ex p. Pinochet Uguarte (No. 3)* [2000] 1 AC 147, 218E-H (Lord Goff); *Brown v Stott* [2003] 1 AC 681, 703D-F (Lord Bingham) ("… the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept"); *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, [18]-[19] (Lord Bingham).

47. The fundamental importance of protecting the security of the State has also been recognised by the domestic courts – eg in *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Hope observed at [99][6] that:

> "It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle."

This was reiterated by the House of Lords in *A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221: see [69] (Lord Nicholls), [105] (Lord Hope), [149] (Lord Carswell) and [161] (Lord Brown).

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[5] As Oppenheim (op. cit.) states at p.1279 "Although this observation was in relation to unilateral statements by a State, it reflects acceptance of the same principle", namely, the principle that if there is any doubt as to the meaning of a treaty provision, it should be interpreted in such a way as to impose the least restriction on the freedom of States.

[6] See also para 38 (Lord Bingham), para 79 (Lord Nicholls of Birkenhead).

48. The fundamental nature of the right to life (generally, and under Art. 2 of the ECHR and Article 6 of the ICCPR) is also obvious, and has been recognised as such by international and domestic tribunals: see below.

49. The principle of restrictive interpretation clearly applies in this instance. Art.5 of the OECD Convention does not expressly limit the prosecutorial discretion by reference to national security or by reference to the protection of the right to life. In view of the primary importance that is universally accorded to protecting the security of the State, and the lives of its citizens, such a limitation would involve a very substantial erosion of State sovereignty. Absent very clear language in a treaty provision (which does not appear in Art. 5) it cannot plausibly be inferred that the Contracting States intended to abandon their usual ability to have regard to such matters when taking decisions how to proceed.

50. Secondly, the OECD Convention should be interpreted in context: see Art.31(1) of the Vienna Convention. The Commentaries, adopted by the Negotiating Conference on the same day as the OECD Convention, form part of the context (and/or constitute supplementary means of interpretation as part of the circumstances of the conclusion of the Convention, relevant under Art. 32 of the Vienna Convention and/or are declarations constituting state practice, relevant under Art. 31(3)(b) of the Vienna Convention) which should be taken into account. In respect of Art.5, the Commentaries state at para 27:

> "***Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion***. It recognises as well that, in order to protect the independence of prosecution, ***such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature***. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this recommendation, including its monitoring and follow-up arrangements." [Emphasis added.]

51. Paragraph 6 of the Annex to the 1997 OECD Revised Recommendation, which is referred to in the Commentaries as complementing Art.5, states that prosecutorial discretion "should not be influenced by considerations of national economic interest, ***fostering good political relations*** or the identity of the victim" (emphasis added).

52. Reading Art.5 of the OECD Convention in the light of the Commentaries and the Annex, it is clear that the Parties recognised the importance of prosecutorial discretion, and emphasised the need for it to be exercised on the basis of professional motives (ie independently of purely political concerns). The injunction against taking into account "the potential effect upon relations with another State" was intended to ensure that the investigating/prosecuting authority would not be influenced by "improper" concerns of a "political nature" or the wish to foster "good political relations". But it is well recognised that questions of national security and protection of the right to life are factors which may be (and regularly are) taken into account by professional, independent prosecutors. In context, therefore, the reference in Art.5 to "the potential effect upon relations with another State" is not apt to cover considerations of national security and protection of the right to life, since such considerations are normal prosecutorial factors which go beyond any question of purely political concern.

53. Moreover, it is clear in the present case that the Director exercised his discretion on the basis of professional motives, and in doing so he was not improperly influenced by concerns of a political nature.

54. Thirdly, the Court should have regard to any subsequent practice in the application of the OECD Convention which establishes the agreement of the parties regarding its interpretation: Art.31(3)(b) of the Vienna Convention on the Law of Treaties. The OECD Convention provides for peer review of a State's compliance with the Convention. None of the States reviewed have specific provisions governing the prosecutions of the bribery of foreign public officials. The national prosecutorial code and/or guidelines applicable to all offences invariably govern the investigation and prosecution of these offences. Three of the countries that have been reviewed expressly include a reference to the consideration of national security interests in

their ordinary statements governing exercise of prosecutorial discretion, namely, the UK, Canada and Germany. In each case, the peer review reports make clear that the exercise of prosecutorial discretion should not take into account the elements prohibited by Art.5 of the OECD Convention, but they make no criticism of the inclusion of national security as a proper consideration to be taken into account in exercising the prosecutorial discretion. This is a further indication that the proper interpretation of Art.5 does not prevent the consideration of national security interests in the exercise of national prosecutorial discretion.

55. Fourthly, Art.5 of the OECD Convention should be construed in the light of the right to life as expressed in Art.3 of the Universal Declaration of Human Rights (1948), Art.6 of the ICCPR (1966) and Art.2 of the ECHR.

56. Although there is no general order of precedence between international legal rules, in practice "international law has always recognized the presence of some norms that are superior to other norms and must therefore be given effect": see the International Law Commission report on *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law,* finalised by Martti Koskenniemi (2006), paras 324-327, 361 and 407. The importance of norms protecting human rights, including in particular the right to life, is clear from a range of international instruments, including those referred to in the preceding paragraph and Art. 1(3) of the UN Charter (one purpose of the UN is to ".. promot[e] and encourag[e] respect for human rights and for fundamental freedoms …"); also see Recital (f) in the *Guidelines on Human Rights and the Fight Against Terrorism* (11 July 2002) issued by the Council of Europe Committee of Ministers (referring to "the imperative duty of States to protect their populations against possible terrorist acts").[7] Clearly the norm protecting the right to life is fundamental and has a higher importance than obligations such as Art. 5 of the

[7] See further the declaration in Security Council Resolution 1373 (2001) that "acts, methods, and practices of terrorism are contrary to the purpose of the United Nations…" and Article 1F(c) of the 1951 Convention relating to the Status of Refugees which provides that the Refugee Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has been guilty of "acts contrary to the purposes and principles of the United Nations".

OECD Convention, regulating discretionary decisions concerning prosecutions. Further, one of the means by which international law recognises that some norms are more important than others, and that in cases of conflict effect should be given to the more important norms, is the application of the maxim *generalia specialibus non derogant* (a general provision does not derogate from a special one).[8]

57. The human rights provisions referred to above are the provisions in international law which most directly address the substantive issue where a risk to life may arise (by contrast with Art. 5 of the OECD Convention, which does not address that question), and impose an obligation on the State to seek to take effective action to preserve life (or not to take action which will create an unnecessary threat to life): see *Osman v UK* (1998) 29 EHRR 245, [115]; *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249, [12]; and, eg, guideline I in the *Guidelines on Human Rights and the Fight Against Terrorism* (11 July 2002) issued by the Council of Europe Committee of Ministers - "States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life …"). Whilst the Director recognises the importance of investigating and prosecuting corruption offences, the duty to preserve life is plainly a higher and more important norm. Moreover, the specific human rights protections cannot be taken to be overridden by the general words in Art.5 of the OECD Convention.

Ground 2: relevant considerations

58. The Claimants contend that the decision is defective by reason of the Director's failure to take into account three considerations:

[8] See the rationale for this principle given in the Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006), Conclusion (7): "That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects."

(1) No consideration was given to the fact that Saudi Arabia would (they allege) have been in breach of its international obligations if it withdrew its co-operation with the UK on intelligence and security matters;

(2) No consideration was given to the risk that discontinuing the investigation might lead to a perception that Britain easily caves in to national security threats from other states and so might damage national security; and

(3) The risk of information about Prince Bandar's involvement in the alleged payment of bribes becoming public (as it has now done) was not taken into account.

59. As to (1), whether or not Saudi Arabia might put itself in breach of any international obligations was not the Director's concern. His concern was with the real risk that they would in fact withdraw such co-operation and the damage that this would cause. The Director took the advice of the Prime Minister (which was endorsed by the Secretary of State for Defence and the Foreign Secretary and was formed with the benefit of advice from the Government's most senior national security advisors) and HM Ambassador to the Kingdom of Saudi Arabia as to the degree of that risk, and the extent of the damage to national and international security in the event that Saudi Arabia did withdraw co-operation. The Director then took the decision as to whether this public interest outweighed the public interest in investigating allegations of corruption. On the basis of the representations made to him, he considered that continuation of the investigation would prejudice national security and put lives at risk. In these exceptional circumstances, he had no doubt that the clear balance of public interest required him to discontinue the investigation.

60. As Collins J observed at [3] [III/tab 17], the "fact (if it be established) that that other State would be acting in contravention of its international obligations is nothing to the point. It is the resulting damage to national security that matters

whether or not it results from a breach of law (international or other) by the body or State responsible".

61. Again, the domestic courts have no jurisdiction to rule upon the question whether Saudi Arabia would or would not be in breach of any of its obligations under international law if it ceased to co-operate in the relevant respects with the UK.

62. Further and in any event, the Claimants are mistaken in their submissions about the effect of the international obligations upon Saudi Arabia. United Nations Security Council Resolution 1373 does not require the Kingdom of Saudi Arabia to enter into bilateral arrangements with the UK to combat terrorism, and so it would not be a breach of Saudi Arabia's obligations under that resolution to withdraw from such arrangements.

63. As to (2), in fact this was taken into account as part of the national security analysis. In particular, on 11 December 2006, in a meeting with the (then) Attorney General, the (then) Prime Minister expressly acknowledged that "it was important that the Government did not give people reason to believe that threatening the British system resulted in parties getting their way". The possibility that discontinuing the investigation would lead to such a perception was taken into account when advice on national security was provided which informed the Director's decision, but it was assessed that the position in relation to Saudi Arabia was clearly exceptional and it was not considered that any such perception would in itself harm national security. Moreover, the Government has recently had reason to consider this matter further in the context of requests for Mutual Legal Assistance ("MLA") in relation to investigations by US authorities concerning the Al Yamamah contract, and concluded that there is no evidence to suggest that the actions taken in respect of the SFO investigation have damaged the UK's national security.

64. The Claimants' contention that this matter was not taken into account is based upon the Director's evidence to the Constitutional Affairs Committee on 27 June 2007, in particular, his answer to question 269 [III/tab 23/1564]. As the Director

made clear to the Constitutional Affairs Committee, he was speaking from recollection, without sight of the relevant papers (see his answer to Q.267). As stated above, the papers confirm that the importance of the UK Government not giving people reason to believe that threatening the UK was likely to be effective was expressly taken into account by the Prime Minister when he, and other Ministers, provided advice on the public interest.

65. Moreover, it is clear from the Director's response to Q.269, that what he understood David Howarth to be asking was whether discontinuing the investigation increased the risk of people thinking they could act corruptly with impunity. The Director's view was, when he took the decision, and remains, that this case was so exceptional that it was unlikely to have any appreciable effect on other corruption cases.

66. As to (3), the Director, and those in Government who provided him with advice on the public interest, were well aware that there had been a considerable degree of press interest in the investigation, and press reports on the subject had been published and it was likely that press interest and reporting would continue into the future. It was obvious that a decision to discontinue the investigation would provoke further press interest. The Director regarded it as impossible to predict with accuracy what press reporting there might be, and what matters might be published. (It so happens that, having regard to his knowledge of the state of the investigation, he had not expected any such further press reports to include speculation as to the involvement of Prince Bandar bin Sultan, National Security Adviser to the Kingdom of Saudi Arabia, in the alleged payment of bribes).

67. This did not constitute a failure to take into account a relevant consideration. The general likelihood of future press reporting was taken into account. The Director, and those advising on the public interest, fully understood that whilst members of the Saudi royal family might not welcome adverse press reports, such reports, unlike an official investigation under the auspices of UK law of the kind which the Director had to consider, would not be regarded by the Saudi Arabian Government as a breach of trust on the part of the UK Government. It was this assessment of

the reaction of the Saudi Arabian Government to the continuation of the SFO investigation which was the basis for the Director's decision to discontinue that investigation. Even if the Director had correctly anticipated the specific allegations that have been aired in the press, he would not have considered that they diminished the risk to the UK's national security of the SFO continuing its investigation.

68. Moreover, the Government has recently considered, in the context of the MLA request, whether the public interest is affected by the extent to which information is in the public domain. The Government's view is that any officially sanctioned action by the UK Government to disclose confidential documents would be regarded by the Government of Saudi Arabia as a very serious breach of trust, and this is unaffected by press reports into this matter.

Ground 3: irrelevant considerations: 'tainted' advice

69. The Claimants allege that advice given by senior ministers and the Prime Minister was tainted because it took into account an irrelevant consideration, namely the UK's relations with Saudi Arabia.

70. First, as a matter of domestic law, the UK's relations with Saudi Arabia would not be irrelevant. In order to advance this as a ground of challenge, the Claimants have to rely upon the OECD Convention. As explained above in response to Ground 1, in the circumstances of this case the Court has no jurisdiction to interpret or apply the OECD Convention. The advice of the Prime Minister, the Foreign Secretary and the Secretary of State for Defence did not include advice about Art. 5 of the OECD Convention in relation to the public interest matters set out in the document, but simply set out their own views relevant to the public interest.

71. Secondly, it is plain even from the passages that the Claimants quote [pp. 148, 78] that the essential concern of the Prime Minister and the Foreign Secretary and Secretary of State for Defence was not the UK's relations with Saudi Arabia *per se*,

but the serious damage to the UK's national and international security, which they expected would be the consequence of continuing the investigation. As explained above, Art.5 of the OECD Convention does not preclude taking into account such considerations.

72. Thirdly, even if (contrary to the submissions above) the advice of the Prime Minister and senior ministers had been 'tainted' by references to an irrelevant consideration, the Director's decision is not 'tainted' and remains lawful. The Director did not discontinue the investigation because of concerns about the UK's relations with Saudi Arabia (in the sense in which the Claimants use that phrase), but because he believed that the risk to national and international security, and ultimately the risk to the lives of UK citizens and service personnel, if the investigation continued was so significant that it ought to be discontinued.

Ground 4: mistake of fact: views of security services

73. In order to mount a successful challenge based on an error of fact, the Claimants must establish that the Director made a mistake as to an existing fact; the fact must have been 'established' in the sense that it was uncontentious and objectively verifiable; and the mistake must have played a material part in his reasoning: *E v Secretary of State for the Home Department* [2004] 1 QB 1044, [66]. In this case, as Collins J observed at [4], the attempt to show a factual issue has "no substance".

74. The Claimants allege that the Director was "misinformed" about the view of the Secret Intelligence Service. This allegation is based upon the following statement made by the Attorney-General to Parliament on 14 December 2006 [78]:

> "I have, as is normal practice in any sensitive case, obtained the views of the Prime Minister and the Foreign and Defence Secretaries as to the public interest considerations raised by this investigation. They have expressed the clear view that continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms both of national security and our highest priority foreign policy objectives

in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment."

75. On 18 January 2007 the Attorney-General told Parliament [Hansard, col.780]:

> "Let me be clear about this: the reports earlier this week that there were no national security considerations behind the decision to hold (sic) the SFO inquiry were wholly wrong, as the SIS itself said. I said in my Statement – it was not my assessment – that it was the clear view of the Prime Minister and other Ministers that continuation of the SFO investigation would cause serious damage to UK/Saudi co-operation and that that was likely to have serious negative consequences for UK interests, and potentially, UK lives. Indeed, the Prime Minister subsequently talked about the consequences as being "devastating".
>
> The SIS has made it clear publicly that it shares the concerns of others within government over the possible consequences for the public interest of the SFO investigation. Naturally, it did not say that the Saudis would be bound to withdraw co-operation, but certainly no one disagreed with the overall assessment that the Saudi threats were real. Before the SFO decision was taken, I discussed the matter with the head of the SIS, whose view was that the Saudis might withdraw their co-operation if the SFO investigation continued and that they could decide to do so at any time."

76. On 1 February 2007 the Attorney-General made a further statement to Parliament [Hansard, col.379]:

> "First, the position of SIS, the secret intelligence agency, was raised. I have dealt with this in the House and I want to say something about it again. SIS has made it clear publicly that it shared the concerns of others in government over the possible consequences for the public interest of the SFO investigation. It considered that there was a threat to the UK's national security interests from pursuing the Al Yamamah investigation and it had been informed of the threat to curtail co-operation directly. Neither SIS nor anyone else who was consulted disagreed with the overall assessment that the Saudi threats were real. SIS agreed that, while it did not know whether this threat would be carried out, it had to be taken seriously. As I said on 18 January, before the SFO decision was taken, I discussed the matter directly with the chief of SIS. The SIS has authorised me to say that it is clear about the importance of the Saudi counterterrorist effort to the UK. Its view is that it would not be possible to replicate the level of counter-terrorism effort that had been achieved with the Saudis on UK/Saudi aspects of the problem if it were necessary to work at one remove, via the USA, for example."

77. The Claimants have leapt to the unwarranted conclusion that the Director was informed that the Chief of SIS was of the view that Saudi Arabia *would* withdraw

co-operation if the investigation continued rather than that the threat to do so was a "real" one which had to be taken seriously and that they might withdraw co-operation and could decide to do so at any time.

78. The Claimants allegation is simply wrong. The Director was not informed or led to believe that the Chief of SIS was of the view that Saudi Arabia *would* withdraw co-operation if the investigation continued.

79. The Director made his decision as to the public interest in the light of the advice referred to in para. 59 above that there was a real risk of a collapse in UK/Saudi security, intelligence and diplomatic cooperation, which was likely to have seriously negative consequences for the UK public interest in terms of national and international security. The Director understood that the Foreign and Defence Secretaries shared the Prime Minister's overall view as to the damaging impact of continuing the investigation. He was aware that the Prime Minister's own assessment was formed with the benefit of advice from the Government's most senior national security official advisors. The Director also had the opportunity to speak, on three occasions, to HM Ambassador to the Kingdom of Saudi Arabia, who made it clear that the risk to UK national security was real and acute. The Director also saw information which gave details of Saudi Arabia's co-operation with the UK in respect of counter-terrorism and explained the importance of this co-operation.

80. The Director did not attend the meeting with, amongst others, the Chief of SIS held on 14 December 2006. Nor was his decision based upon or made with reference to any views expressed at that meeting. As the letter of 4 April 2007 from the Attorney-General's Office makes clear, the Attorney-General called this meeting <u>after</u> the Director had conveyed his view to the Attorney-General on 13 December 2006 that it was not in the public interest to continue the investigation because of the risk to national and international security, and the confirmation by the Director the following morning of his independent decision that the investigation should be discontinued was made without knowledge of and without reference to what had taken place at that meeting [I/tab 6/92]. The Attorney-General called the

meeting in order to consider for himself, in view of his duty of superintendence in relation to the SFO, the balance of public interest in continuing or halting the investigation. Moreover, it is a misunderstanding of the Attorney-General's statement of 14 December 2006 to suggest that he represented that SIS's view was that Saudi Arabia *would* withdraw co-operation. As the Attorney-General said on 18 January 2007, naturally SIS did not say that Saudi Arabia was bound to do so.

81. This ground of review is again unarguable. There was no error of fact on the part of the Director. It is incorrect to suggest that the Director's decision was based on a misunderstanding of the views of the Chief of SIS. It was not.

Conclusion

82. For the reasons given above, the Director respectfully submits that permission to apply for judicial review of his decision of 14 December 2006 should be refused.

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7 November 2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N:

THE QUEEN
on the application of
(1) CORNER HOUSE RESEARCH
(2) CAMPAIGN AGAINST ARMS TRADE Claimants

- and -

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE Defendant

- and -

BAE SYSTEMS PLC Interested Party

SKELETON ARGUMENT
ON BEHALF OF THE DEFENDANT
for permission hearing on 9 November 2007

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