In The House of Lords

ON APPEAL
FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH
DIVISION OF HER MAJESTY'S HIGH COURT OF JUSTICE

Divisional Court Ref: CO/1567/2007
[2008] EWHC 714 (Admin)

BETWEEN

THE QUEEN

on the application of

CORNER HOUSE RESEARCH and CAMPAIGN AGAINST ARMS TRADE

Respondents

- and -

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Appellant

- and -

BAE SYSTEMS PLC

Interested Party

CASE FOR THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

INTRODUCTION

1. This appeal raises questions of considerable importance concerning the discretion of prosecuting authorities to investigate and prosecute crime and the role of the Courts in reviewing their decisions.

2. The Director is an independent officer appointed under Section 1 of the Criminal Justice Act 1987, with a discretionary power to investigate and prosecute serious or complex fraud. On 14 December 2006 he decided to terminate an investigation into allegations of corruption by BAE

Systems Plc in relation to the Al Yamamah defence contract between the British and Saudi Arabian governments for which BAE was the prime contractor. He took this decision because, in his judgment, the risk to national security if the investigation continued was so serious that the public interest required him to bring it to an end.

3. The grounds on which he reached that conclusion, contrary to his initial instincts, are carefully explained in his two witness statements. The Divisional Court accepted his account, but since they have not fully or entirely fairly summarised it in their Judgment, Your Lordships are invited to read it in his own words. In summary, and it is necessarily an inadequate summary, the Director had no regard to representations which were made to him about the commercial interest of BAE and the economic interest of the United Kingdom. His decision followed protests from the Saudi Arabian government that the investigation was a breach of the inter-governmental confidentiality agreement in the Al Yamamah contract, and threats relayed through a number of channels from the Saudi Arabian government to withdraw diplomatic and intelligence cooperation if it continued.[1] The Director reached his decision about the public interest in the light of the assessment which he received from the Prime Minister that there was a real risk of a collapse of intelligence and diplomatic cooperation with Saudi Arabia, which was likely to have extremely grave consequences for the United Kingdom's national and international security. The Director understood that the Foreign and Defence Secretaries shared the Prime Minister's view about the damaging impact of continuing the investigation. He was aware that the Prime Minister's assessment was formed with the benefit of advice

[1] The Divisional Court appears to assume that the threat came only from Prince Bandar, the son of the Saudi Arabian Defence Minister and Crown Prince (Sultan) and the National Security Adviser to the Saudi Arabian government, on the occasion reported by the *Sunday Times* on 10 June 2007: see Judgment, para. [22]. In fact the pleaded case was that "Saudi Arabia" (i.e. the state) had made the threat, which the Director did not dispute. It was therefore unnecessary for the Director to adduce evidence about precisely how, by whom or through what channels the threat was made on behalf of Saudi Arabia. In fact the threat was made by a number of senior Saudi Arabian officials through a number of channels. So, for example, the Attorney General, Lord Goldsmith QC, had explained to Parliament on 1 February 2007 that the Secret Intelligence Service had itself had the threat communicated directly to it.

App Pt. I pp. 231-232
App Pt. I pp. 7, 14, 23, 88, 89, 100, 105-106 & 112

App Pt. II p. 551

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from the Government's most senior national security advisers. The Director saw information provided by the Cabinet Office, which gave details of the nature and extent of Saudi Arabia's co-operation with the United Kingdom on intelligence related to counter-terrorism, and which explained its importance to the United Kingdom's security. He discussed the problem personally, on three occasions, with HM Ambassador to Saudi Arabia, who made it clear to him that the risk to national security was real and acute. The Attorney General, while recognising that the decision was for the Director, concurred with his view.

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4. The present document is in two parts. Part A addresses the issues on which the Divisional Court held that the Director's decision was unlawful. These are the issues encompassed by the first of the two questions certified under Section 1(2) of the Administration of Justice Act 1960, and they are the major issues on this appeal. Part B addresses the issues arising out of Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) ("the OECD Convention"). These are the issues encompassed by the second of the certified questions. In point of form the Respondents' objections to the decision on this ground were rejected, principally because the Divisional Court considered that it was not appropriate for the Court to construe the Convention for the purpose of deciding whether the Director's decision was consistent with Article 5. However, the Court reached this conclusion only after it had gone most of the way to doing precisely that.

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5. In relation to both Parts, one point should be made at the outset. The Divisional Court repeatedly and tendentiously treated the submissions made on the Director's behalf as stating the position of the Government. It is therefore right to emphasise that these submissions are made on behalf of the Director. He made his own decision, when and only when he regarded the danger to national security as imminent, compelling and properly evidenced. His interest in this appeal is to defend his decision and the autonomy of his statutory discretions, and not with justifying

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any more general concerns of the Government. Since the decision of the Divisional Court, a new Director has taken office, who has independently endorsed the decision to take these issues to Your Lordships' House.

PART A: THE DIRECTOR'S DECISION

The reasoning of the Divisional Court

App Pt. I pp. 227-228, 231 & 252

6. The Divisional Court accepted the Director's evidence about the reasons for his decision (Judgment, paras. [8], [20]-[21], [101]). They also recognised (i) that the Director had a wide discretion to discontinue an investigation in the public interest (para. [51]); (ii) that the discretion extended in principle to discontinuing an investigation on the ground that its continuance would have presented an unacceptable risk to national security (para. [54]); (iii) that in assessing the extent of that risk he was entitled to receive and accord appropriate weight to information and assessments provided by those within the executive with responsibility for these matters, who had direct access to sources of information unavailable to him (para. [55]); (iv) that the executive has a particularly wide margin of discretion in the area of national security (para. [56]); and (v) that the Court was not in a position to make its own assessment of the risk (para. [55]). These propositions are based on long-settled law. The Court did not suggest that there was anything irrational or perverse about the Director's view of the risk to national security or the decision which he based on it. Nor did they suggest that he took into account any legally irrelevant or impermissible considerations.

App Pt. I p. 241

App Pt. I p. 242

App Pt. I p. 242

App Pt. I pp. 242-243

App Pt. I p. 242

7. Nevertheless, the Divisional Court held the Director's decision to be unlawful for reasons which may fairly be summarised as follows:

(1) There was, they said, a critical legal distinction between receiving and acting on advice as to the public interest consequences of an investigation or prosecution where a threat has been made, and doing so in other circumstances The Court described this as the

"essential point" (para. [57]). In their view, submission to a threat directed to the administration of justice undermined the rule of law (paras. [59]-[60]), and involved the unlawful surrender of the decision-maker's independent judgment (para. [68]). Therefore, the only lawful response to such a threat was to refuse to comply (paras. [78], [99], [102]).

App Pt. I p. 243
App Pt. I pp. 243-244
App Pt. I p. 245
App Pt. I pp. 247 & 252

(2) The Divisional Court regarded this rule as absolute unless it was "demonstrated to a court" (not, apparently, to the decision-maker) that there was no alternative to submission (para. [99]). Unless there was evidence to this effect, the Court was entitled to assume that the decision-maker "yielded too readily" (para. [86]). In the present context, they held that it would have been necessary for the Director to adduce evidence to show that an attempt had been made to resist the threat, by explaining to Saudi Arabia that it was futile, because the Director would be bound to resist it and the courts would strike down his decision if he succumbed (paras. [80], [86]-[90], [102]).

App Pt. I p. 252
App Pt. I p. 249
App Pt. I pp. 247, 249-250 & 252

(3) Underlying the Court's reasoning on both of the above points was their view that the courts have a special responsibility to "preserve the integrity of the criminal justice system", which extended beyond applying the ordinary public law standards of judicial review (paras. [57], [60], [62], [65]-[66], [78], [86]). The courts, they said, were "entitled to exercise their own judgment as to how best they may protect the rule of law" (para. [78]).

App Pt. I pp. 243-245, 247 & 249
App Pt. I p. 247

(4) As a distinct point, the Divisional Court considered that the Director had failed to take into account the damage which would be done to the rule of law, by allowing it to be thought that Britain caved in too readily to threats, thereby encouraging others to make them (paras. [92]-[96]).

App Pt. I pp. 250-251

8. In the Director's submission, none of these propositions can be supported.

The Director's discretion

9. Under Section 1(3) of the Criminal Justice Act 1987, the Director "may investigate any offence which appears to him on reasonable grounds to involve serious or complex fraud." There is a corresponding discretion whether to institute and conduct criminal proceedings under Section 1(5).

10. By statute, the Attorney General has a general superintendence over the work of all prosecuting authorities and ultimate responsibility to Parliament for their work.[2] The classic statement of principle on which the prosecutorial discretions are exercised is that of the then Attorney General, Sir Hartley Shawcross in the House of Commons on 29 January 1951. Sir Hartley observed that "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution." He went on:

> *"My hon and learned Friend then asked me how I direct myself in deciding whether or not to prosecute in a particular case. That is a very wide subject indeed, but there is only one consideration which is altogether excluded, and that it is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes; that is a consideration which never enters into account. Apart from that, the Attorney General may have to have regard to a variety of considerations, all of them leading to a final question – would a prosecution be in the public*

[2] Until 1879, most prosecutions were brought by persons acting in their private capacity. The Attorney General was the only public prosecuting authority. There was no system of public prosecutors in England comparable to the procurators fiscal who performed the function in Scotland under the supervision of the Lord Advocate, or the Crown Solicitors and Crown Counsel who did so in Ireland under the supervision of the Attorney General of Ireland. The Prosecution of Offences Act 1879 created the office of Director of Public Prosecutions to carry on criminal proceedings "under the superintendence of the Attorney General": Section 2. The same formula appears in the Prosecution of Offences Act 1985, which creates the Crown Prosecution Service and constitutes the DPP as the head of it: see Section 3(1). The corresponding formula applicable to the Director of the Serious Fraud Office is at Section 1(2) of the Criminal Justice Act 1987. The somewhat complex basis on which the DPP and the Attorney General supervised prosecutions brought by the police and other prosecuting authorities before 1985 is described in Chapter 1 of J.L.J. Edwards, *The Attorney General, Politics and the Public Interest* (1984).

> *interest, including in that phrase of course, in the interests of justice? …*
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> *Prosecution may involve a question of public policy or national, or sometimes international concern: but in cases like that, the Attorney General has to make up his mind not as a party politician; he must in a quasi-judicial way consider the effect of prosecution upon the administration of law and of government in the abstract rather than in any party sense…"*[3]

The existence of a broad discretion in prosecuting authorities reflects long-standing practice. It is based on the recognition that while there is a strong public interest in the enforcement of the criminal law where the evidence to secure a conviction exists or may be found, there are exceptional cases in which countervailing public interests require restraint.

11. The Director, like other prosecuting authorities, is subject to the Code for Crown Prosecutors, which refers to Sir Hartley Shawcross's statement and requires Crown Prosecutors to balance the factors for and against prosecution. It lists a number of illustrative public interest factors which may tell for or against prosecution. The list, which is expressly said not to be exhaustive, includes (para. 5.10(i)) the fact that "details may be made public that could harm sources of information, international relations or national security."

App Pt. II pp. 577-600

App Pt. II p. 589

12. Any decision not to investigate or prosecute is in principle susceptible to judicial review. But it has been accepted by the courts for many years that a prosecutor's discretion is wide and that the power of review should be sparingly exercised: *R v Director of Public Prosecutions, ex p C* [1995] 1 Cr App R 136; *R v Director of Public Prosecutions, ex p Manning* [2001] 1 QB 330, esp. at [23] (Lord Bingham); *R (Da Silva) v DPP* [2006] EWHC 3204 (Admin). This applies *a fortiori* to a decision not to investigate: *R (Bermingham) v SFO* [2007] QB 727 at [64] (Laws LJ). In *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 at [18], the Privy Council emphasised "the wide range of

[3] HC Deb., vol. 483, cols. 681, 683-4.

factors relating to available evidence, the public interest and perhaps other matters which [the DPP] may properly take into account", and observed that it followed that "the threshold of a successful challenge is a high one." The Board cited at [17] the reasoning of the Supreme Court of Fiji in *Matalulu v DPP* [2003] 4 LRC 712 in which the following observation was made:

> *It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion, to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. … contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings.*[4]

13. It is accepted that although conferred in wholly general terms, the Director's statutory discretion may properly be read subject to any fundamental common law principle which can be identified as being applicable at the time the statute was passed.[5] Examples include the presumption against retrospective legislation, accrued legal rights, certain human rights recognised by the European Convention, and so forth. But unless the common law principle in question is both fundamental and sufficiently well established for Parliament to have assumed as a matter of course that it would apply, this process would pervert rather than promote Parliament's intention. The point is forcefully made by Laws J. in *R. v. Lord Chancellor ex p. Lightfoot* [2000] QB 597, 608D-609E.[6] No such principle as the Divisional Court

[4] See also *Sharma v Brown-Antoine* [2007] 1 WLR 780, PC, at [14], principle (5); and *Eviston v DPP* [2002] 3 I.R. 260, Irish Sup. Ct., at pp.291-294, esp. p.294 (Keane CJ), at p.299 (Denham J) and p.320 (Geoghegan J).

[5] See *R v. Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115, at 131E-G (Lord Hoffmann); cf. *R. v. Secretary of State for the Home Department ex p. Stafford* [1999] 2 AC 38, 47G-49F (Lord Steyn).

[6] Laws J's Judgment was upheld in the Court of Appeal: see, in particular, 623C-624G (Simon Brown LJ).

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has laid down in this case had ever previously been recognised. On the contrary, the only plausible assumption that can be made about Parliament's intention in 1987 is that the Director's discretion would be exercised as it always had been exercised, in accordance with the practice and public statements of prosecuting authorities, and having regard to the extremely wide range of considerations recognised as relevant by the Courts.

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The relevance of the threat

14. The critical element in the Divisional Court's reasoning in this case is their view that the utterance of threats by the Saudi Arabian government made all the difference to the matters which the Director was entitled to take into account. For as long as the danger to national security was a matter of internal assessment by the specialised departments and agencies advising him, he was at liberty to give proper weight to them. But once an overt threat was made, he was bound as a matter of law to continue the investigation in order to establish the principle that such threats would not succeed, irrespective of the consequences for national security.

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15. It is submitted that there is no basis in law for the suggested distinction between public interest factors which arise from a threat and those which arise from any other circumstance which is factually relevant. Once it is accepted that the Director has a discretion which allows him to take account of national security, the distinction is illogical and its practical consequences absurd. In the present case it means that the Director could lawfully, in accordance with the Divisional Court's reasoning, have concluded in, say, January 2006 (before the specific threat was made) that the investigation should be discontinued because of the risk that Saudi Arabia would cease counter-terrorism cooperation with the United Kingdom. He could have reached that conclusion if he had received compelling information to that effect derived from the diplomatic and intelligence services. It is difficult to understand why he should cease to be entitled to do so if their assessment were subsequently to be

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reinforced by an explicit threat. Such a threat will often be the most compelling evidence of the reality and imminence of the danger to the public interest.[7]

16. The problem is well illustrated by the circumstances in which the Director actually took his decision. The Director considered the result of the Shawcross exercise in December 2005, and concluded that while the risk to UK/Saudi co-operation on counter-terrorism was the most powerful point made in it, he was not at that stage convinced that the danger was imminent. On the materials then available he considered that the balance of the public interest favoured continuing the investigation, but that the matter should remain under review. The Attorney General concurred in that view.[8] When the threat from Saudi representatives was brought to the attention of the Director and the Attorney General by the Cabinet Secretary's letter of 29 September 2006, they did not regard it as being in itself enough to justify halting the investigation, and said so.[9] The main factors which caused the Director to change his view were (i) a note of 23 November from Sir Richard Mottram (Permanent Secretary, Intelligence, Security and Resilience) on the impact of HMG's links with Saudi Arabia on Counter-Terrorism, drawing on material from the intelligence agencies and Joint Intelligence Committee assessments; (ii) a note of 24 November 2006 by Sir Peter Ricketts (Permanent Under-Secretary, FCO); (iii) the Prime Minister's Memorandum of 8 December 2006 which accompanied and was based on (i) and (ii), and reflected his own views and those of the Foreign and Defence Secretaries; and (iv) the Director's three meetings with HM Ambassador to Saudi Arabia. The Director later described his meetings with the Ambassador as "particularly helpful".[10] He concluded from the totality of this material

App Pt. II pp. 396-401

App Pt. II pp. 402-404

App Pt. II pp. 389-395

App Pt. I p. 242

[7] It is right to add that the Divisional Court's distinction was not even consistently applied in its own reasoning. They suggested (para. [53]) that a "more stringent evidential test" could properly be applied in a case where pursuing the investigation/prosecution would cause serious damage, than would be applied in a case where no public interest arises. The Director would not accept that this is a correct approach, but what is significant is that this analysis requires the threat to be taken into account as a matter of law, albeit for the limited purpose of deciding whether it is the "stringent" or the ordinary evidential test which applies.

App Pt. I pp. 319-320

[8] Wardle, 1st, paras. 19-21.

App Pt. I pp. 320-321 & App Pt. II pp. 384-386

[9] Wardle, 1st, paras. 23-25, and correspondence at RW2/11-13.

App Pt. II p 563

[10] HC Constitutional Affairs Sel. Ctte, Evidence (27 June 2007), Q248.

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that the danger was now both very grave and imminent.[11] The Divisional Court's view (paras. [18]-[19], [72]) that nothing had changed since the end of 2005 other than the utterance of the threat is an extraordinarily crude way of describing a complex and evolving situation, which was conveyed to the Director by reference to information derived from a wide range of sources. Yet the effect of the Divisional Court's judgment is that, subject to a very limited exception, the Director was bound as a matter of law not just to disregard the threat but to proceed with the investigation notwithstanding all the other information that he had received about the danger to national security, simply because the threat had been made.

App Pt. I pp. 231 & 246

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17. The only authority cited for the Divisional Court's distinction was *R v Coventry Airport ex p Phoenix Aviation* [1995] 3 All ER 37, which was not remotely analogous**.** Under domestic law there is a statutory duty upon ports and airports to admit legal trade. The ports refused to handle the export of livestock for slaughter because of the threats of unlawful violence by protestors. In those circumstances, the ports' decisions were held to be unlawful. There was no suggestion that the port authorities' assessment of the relevant factors should have been any different after the threats from the protesters became overt. Such cases, moreover, are always sensitive to their own facts. The Director's decision in the present case was taken in a very different context. In the first place, the authorities clearly establish the width of his discretion to pursue or halt investigations and prosecutions on grounds of the public interest, including grounds independent of the merits of the case against the proposed Defendant. Secondly, Saudi Arabia was not threatening to do anything that it was not lawfully entitled to do. Thirdly, the ports and the protestors in *Phoenix Aviation* were both subject to the jurisdiction and effective control of the domestic courts and other state institutions of the United Kingdom whereas Saudi Arabia is not.

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[11] Wardle, 1st, paras. 28, 34-8, 40. It is not possible to put before the Court and bring into the public domain all of the material disclosed to the Director, much of which is intelligence and diplomatic material of the utmost sensitivity. The documents at RW2/14-29 have been heavily redacted .

App Pt. I pp. 321-325

App Pt. II pp. 389-404

18. The distinction which commended itself to the Divisional Court has never previously been recognised in the practice of prosecuting authorities. Analogous cases are naturally rare, but that of Leila Khalid provides a striking illustration. An account of this incident appears in Edwards, *The Attorney General, Politics and the Public Interest* (1984), at p 324. Khalid was a member of the PLO who unsuccessfully attempted to hijack an aeroplane in 1970 and was arrested in London. The PLO threatened to kill Swiss and German hostages unless she was released. Sir Peter Rawlinson, the Attorney General, had to decide whether or not to press charges against her. He received advice from Cabinet colleagues that prosecuting Khalid would increase the danger to the lives of the hostages. He decided that she should be released. Edwards comments that the decision was "clearly defensible", and the Divisional Court seems to have agreed. There is a somewhat laboured attempt to distinguish the case on its facts at paras. [81]-[85] of their Judgment.

App Pt. I
pp. 247-248

19. The Divisional Court endeavoured to fortify their argument by referring (para. [59]) to the Saudi threat as something which would have been indictable as an attempt to pervert the course of justice if it had been uttered by someone subject to the criminal jurisdiction of the United Kingdom. It is not clear why this should have affected the Director's assessment of the danger to national security, which was the relevant matter for him to consider. But the point is in any event a bad one. The Director should not readily have supposed that the Saudi Arabian government had any intent to pervert the course of justice, nor should such an abrasive assumption about the conduct of a friendly foreign government have been made by the Divisional Court. The concern of the Saudi Arabian government was with the inter-governmental confidentiality agreement in the Al Yamamah contract, of which they considered, rightly or wrongly, that the investigation constituted a breach. As a matter of domestic law the Serious Fraud Office is of course independent of the government. But, as the Divisional Court itself remarked (para. [75]), the internal constitutional arrangements of

App Pt. I
pp. 243-244

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p. 247

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the state and the legal relationships of its different branches are of no concern to foreign states. As a matter of English law, moreover, the Saudi Arabian Government was not threatening to do anything unlawful. It was not obliged to enter into its existing bilateral arrangements with the UK to combat terrorism or to maintain security and intelligence cooperation.

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The Director's alleged surrender of his discretion

20. The principle of public law which the Divisional Court invoked to justify its approach is that a decision-maker in whom a discretion is vested by law may not surrender it to a third party: para. [68]. The principle itself is not in dispute. But the suggestion that the Director surrendered his discretion, by implication to Saudi Arabia, is a serious mischaracterisation of the facts.

App Pt. I p. 245

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21. It was the Director who made the decision to discontinue the investigation. Ultimately, it was he who took the view that he "had no choice but to halt the investigation"; and that the threat to the UK's national and international security was of "such compelling weight that it was imperative that I should halt the investigation at this point, in the public interest".[12] His assessment was that by December 2006 those factors were not finely balanced.[13] He reached a firm view that in the interests of protecting lives and UK national security the public interest clearly required him to halt the investigation.[14] In this process, the threat was a relevant and important factor, among others. But the Director's remarks do not mean that he surrendered his power to choose to someone else. They show that his decision was based on his own assessment of the weight to be given to the various public interest factors involved.

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[12] Wardle, 1st, para. 50.
[13] HC Constitutional Affairs Sel. Ctte, Evidence (27 June 2007), Q248.
[14] Wardle, 1st, para. 43.

App Pt. I p. 327
App Pt. II p. 563
App Pt. I pp. 325-326

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Alleged failure to demonstrate that there was no alternative to submission

22. The one exception which the Divisional Court recognised to the otherwise absolute rule that threats must be resisted, related to cases of necessity. For this purpose, they invoked by analogy (para. [84]) the common law concepts of duress and necessity. Neither concept seems to be particularly apt. These are defences or justifications in respect of conduct which would otherwise be criminal. They are not remotely analogous to the considerations which may properly influence the making of a discretionary decision by a prosecutor. It is, however, clear that whatever the theoretical basis of the exception, the Divisional Court considered (paras. [87]-[90]) that to justify his decision the Director had to put forward evidence that he had "not given way without the resistance necessary to protect the rule of law". In particular, he should have proved that someone had told the Saudi Arabian government that it was futile to threaten the Director because he would not be entitled to submit to the threat.

App Pt. I p. 248

App Pt. I pp. 249-250

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23. This is one of the most unsatisfactory parts of the Divisional Court's analysis.

24. In the first place, it does less than justice to the evidence which the Director did adduce:

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(1) The Director resisted the conclusion that the investigation should be stopped for as long as a fair and objective judgment of the material enabled him to do so. He had demonstrated both his independence and his scepticism at the end of 2005, when he had declined to halt the investigation on the information made available to him then. It has already been pointed out that when the threat was communicated to him in September 2006, his first reaction to it was to proceed with the investigation notwithstanding. It was not until he had received and studied a substantial body of further information that he changed his view.

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(2) If the information before the Director had suggested that the Saudi Arabian government would probably not carry out the threat, that would no doubt have been a highly relevant consideration for his decision. But it is not what the material suggested, nor was it the Director's view. The evidence is that the Saudi Arabian government had made the threat with serious intent. The Director satisfied himself of this from the written materials provided to him in December 2006, and in his successive meetings with HM Ambassador. The Ambassador in particular told him that the danger was "very grave indeed", that "in his opinion the authorities in Saudi Arabia would simply cease to co-operate on the intelligence and security issues", and that "the risk that Saudi Arabia would withdraw its cooperation with the UK on counter-terrorism was real and acute". The Director was advised, and formed the view (as he put it in his evidence to the House of Commons Constitutional Affairs Committee) that the Saudis were "not bluffing".[15]

(3) The Director was not in a position to conduct his own diplomacy with regard to the Saudi Arabian government. He had to assess the reality of the threat from the information provided by the executive agencies and departments responsible for dealings with the Saudis. Their assessment that the risk of a withdrawal of co-operation was serious, necessarily embraced within it an assessment that the Saudi Arabian government could not be persuaded to desist. If they could have been persuaded, then the assessment would have been that the threat did not need to be taken seriously.

App Pt. I p. 249

(4) It is not the case, as the Divisional Court put it (para. [87]), that those providing information to the Director "merely transmitted the threat to the Director and explained the consequences if it was

[15] Wardle, 1st, paras. 28, 34, 40, 50; 2nd, para. 21; HC Constitutional Affairs Sel. Ctte, Evidence (27 June 2007), Q250.

App Pt. I pp. 321-323, 324-325 & 327
App Pt. I p. 343 &
App Pt. II p. 563

App Pt. I
p. 246

carried out." Nor was the Divisional Court right to suggest (para. [72]) that the Director's independent judgment of the situation was confined to the consequences of the threat. Those from whom the Director derived his information told him that in their assessment the threat was likely to be carried out, and after carefully considering the position, the Director accepted that.

25. The Divisional Court thought that the appropriate way of persuading the Saudi Arabian government not to carry out the threat was to tell them that the Director was not entitled to discontinue the investigation in response to it, and that if he did discontinue it his decision would be quashed by the courts. This, with respect, is completely unrealistic. The Director could not have said that to the Saudi Arabian government because he had no direct dealings with them. The Government could not have said it to the Saudi Arabian Government because it would not have been true. The Director had a statutory discretion. Even on the Divisional Court's view of the law, a fair statement of the position would have been that if the Saudi Arabian government could not be deflected from their course, the Director would be entitled to halt the investigation on national public interest grounds. It does not require much experience of life to perceive that the effect would not have been to deflect the Saudi Arabian government but to encourage them to persist.

26. Even if the Divisional Court's judgment of the material before them had been correct, it was quite wrong for them to assume against the Director that no attempt was made to resist the threat by diplomatic means. Because much of the factual background to the Director's decision consisted of sensitive diplomatic or security-related material which could not be supplied to the Respondents or put into the public domain, the Director and those advising him gave particularly careful attention to the case pleaded against him in order to decide what evidence it was actually necessary to put before the Court to enable it to decide the case. This was explained to the Court by the Director's Counsel (Philip Sales

QC) in the course of the directions hearings.[16] There was never any case pleaded against the Director that his decision was flawed because no attempt had been made to check whether the Saudi Arabian threat was serious or might be deflected.[17] Therefore, the Director's evidence did not deal specifically with the question of attempting to persuade the Saudi Arabian government to desist, and the Divisional Court ought not to have resorted to speculation. If Your Lordships' House consider (contrary to the Appellant's submission) that further evidence on this point is required, the Director has had further witness statements prepared which have been disclosed to the Respondents and will be held in readiness at the bar, with a view to setting out the correct position as fully as is consistent with the sensitive character of the material.[18]

The role of the Court

27. Central to the Divisional Court's approach, and particularly its approach to this last issue, is the view which it took that the Court has a direct responsibility for dealing with threats affecting the administration of justice (paras. [65]-[66]), and that it was for the Court to conduct its own enquiry into "whether the decision-maker has yielded too readily" (para. [86]). Having reached this conclusion, they proceeded (para. [87]) to consider not just whether the decision-maker had yielded too readily having regard to the information before him, but whether the

App Pt. I p. 245

App Pt. I p. 249

[16] 21.12.07 p.40 lines 26-35; 21.12.07 p.41 lines 4-10; 21.12.07 p.45 lines 2-15; 17.01.08 p.12 lines 23-31; 17.01.08 p.22 lines 9-10; 17.01.08 p.26 lines 19-22; 17.01.08 p.27 lines 5-2-; and 17.01.08 p.35 lines 9-11.

App Pt. III p. 775; p776; p780; p794; p804; p808; p809; p817

[17] Cf, for example, the summary of the Respondents' pleaded case in the Re-re-amended Detailed Statement of Grounds at paras. 2.1 to 2.7. The Divisional Court referred (para. [88]) to a passage in the Respondents' Skeleton Argument in which they said: "there is no indication of any assessment by the UK of whether there were other means available to safeguard the UK's essential interest". The statement relied on by the Divisional Court formed part of a contention on the part of the Respondents that the Director would not be able to justify a breach of Article 5 of the OECD Convention by invoking the concept of state necessity in customary international law. In fact, the Director never sought to rely on that defence, as the Respondents acknowledged. The passage cited plainly did not amount to a contention that the risk to national security was in fact less dire than the Director had believed because the UK could have persuaded Saudi Arabia to desist.

App Pt. I p. 7; p249

App Pt. I p. 110

[18] This material is not a complete answer to the Divisional Court's complaint, because it does not show that British representatives told the Saudi Arabian government that the Director had no right in law to discontinue the investigation in response to a threat. That, as has been pointed out, would have been misleading. It does show (i) that the independence of the Serious Fraud Office and the Attorney General in relation to criminal investigations was explained to the Saudi Arabian government on several occasions between 2004 and 2006; and (ii) that in 2006, shortly after the threat had been communicated to them, the Serious Fraud Office raised with HM Ambassador the question whether it would be possible to persuade them to desist by explaining the independent status of the Director, and was advised that this would not work.

government departments and agencies (who were sources of information and assessments, but not decision-makers) had made sufficient effort to resist the threat.

28. It is submitted that this approach is contrary to the basic principles on which administrative action is reviewed by the courts:

(1) Decisions about whether to initiate or discontinue investigations and about what the public interest requires in that context, are not among the functions of the courts. They are functions of independent administrative officers, such as the Director, on whom the relevant powers and discretions have been conferred by statute. Nor do the courts have any general power of superintendence over them. That role is assigned by statute to the Attorney General, who is responsible for the operation of the system of public prosecutions to Parliament. The Court's function is that of judicial review, on ordinary principles of public law, and nothing else. These propositions apply in just the same way in a case where the subject matter of a discretionary decision includes a threat as they do in any other case.

(2) The Divisional Court has in significant respects assumed the primary decision-making role which Parliament has assigned to the Director under the superintendence of the Attorney General. In particular, it has claimed for itself the power to decide whether or not the investigation had to continue.

29. Not only was it wrong in principle for the Divisional Court to claim this power. It was also impractical. The Divisional Court had before it such information as was necessary in order to enable it fairly to decide the case. It did not have, and could not readily have been provided with, all the information necessary to put it in the Director's shoes and the shoes of those advising him, so as to enable it to weigh the public interest. For example, the Director had three meetings with the Ambassador at which

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he was able to discuss the problem in depth. The Court had no such opportunity. The Director saw unredacted copies of sensitive material supplied to him, whereas the Divisional Court proceeded on the basis of the redacted versions.[19] The Divisional Court did not have, even in redacted form, material which was not relevant to the particular pleaded grounds on which the Director's decision was challenged. The Director had a full understanding of the Al Yamamah investigation and the SFO's other investigations of BAE. The Divisional Court had virtually no information about these matters.

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The rule of law

30. The Divisional Court sought to justify its conclusion on the basis that it is necessary to protect the rule of law. It is submitted, with respect, that the Divisional Court's invocation of the rule of law adds nothing to the ordinary public law analysis set out above.

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31. As a general proposition, the rule of law means the principle by which "all persons and authorities within the state, whether public or private, should be bound and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts": Lord Bingham, "The Rule of Law" [2007] *CLJ* 67.[20] In the context of public law, this means that

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> *...ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. This sub-rule reflects the well-established and familiar grounds of judicial review. It is*

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[19] Unredacted copies were provided to the Court at the directions stage, when it was explained that a public interest immunity application would be made if necessary to set out the basis for the redactions and proposals for directions were put forward by the Appellant whereby the Court could admit the unredacted documents in evidence but subject to directions that they could not be provided to the Respondents (but, possibly, also allowing for appointment of a special advocate). In the event, the Court accepted the assurances of Counsel for the Appellant that the redactions were not such as to make the material misleading and found it unnecessary to admit the unredacted documents in evidence (and hence found that it was unnecessary for a PII application to be made or for any special directions to be made). See 17.01.08, p.36 line 13 – p.37 line 15.

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App Pt. III pp. 818-819

[20] Cf. Dicey, who described the rule of law as the principle that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary Tribunal….[and that] every official….is under the same responsibility for every act done without legal justification as any other citizen' (*Introduction to The Study of the Law of the Constitution*, 8th ed., 1915, p.114).

> *indeed fundamental. For although the citizens of a democracy empower their representative institutions to make laws which, duly made, bind all to whom they apply, and it falls to the executive, the government of the day, to carry those laws into effect, nothing ordinarily authorises the executive to act otherwise than in strict accordance with those laws. (I say "ordinarily" to acknowledge the survival of a shrinking body of unreviewable prerogative powers). The historic role of the courts has of course been to check excesses of executive power, a role greatly expanded in recent years due to the increased complexity of government and the greater willingness of the public to challenge governmental (in the broadest sense) decisions.*
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> Ibid., 73.

32. In the context of judicial control of administrative action, the rule of law is vindicated by the application by the Court of the ordinary principles of judicial review. As Lord Hoffmann put it in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [73]:

> *The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament.*

33. The rule of law does not require that all crimes must be investigated or prosecuted.[21] It does not require that public authorities should never be deflected from investigating or prosecuting crime by considerations of national security. Nor does it require that the Director's assessment of a public interest should disregard a threat if the threat is relevant to his factual analysis. The rule of law requires (i) that the Director comply with the duties which Parliament has laid upon him, in a manner consistent with general principles of public law, and (ii) that it should be

[21] It is relevant to point out that the rule of law is one of the fundamental principles underlying the European Convention on Human Rights: see the preamble and many statements to that effect in the Strasbourg jurisprudence. But the Convention does not create a right to have a prosecution brought. Even where state officials have caused a death in violation of Article 2 (right to life) and the implied procedural obligation arises, that obligation may but need not necessarily be satisfied by a criminal prosecution. Article 2 does not "entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence …" - *Oneryildiz v Turkey* (2001) 41 EHRR 20, [GC], at [96]. See also the recent decision of the Divisional Court (Richards LJ, Forbes, Mackay JJ) in the Stockwell shooting case: *R (Da Silva) v DPP* [2006] EWHC 3204 (Admin) at [42], [43], [49].

possible to hold him to account before a court if he does not.

34. The duties laid upon the Director by Parliament are subject to a discretion. The existence of that discretion is a matter of law. Its extent is a matter of law. If his decision was within the scope of his discretion, if it was not exercised for a collateral purpose or for improper or irrelevant reason, and if it was made rationally and in accordance with an appropriate procedure, then the rule of law imposes no greater obligation upon him.

Alleged failure to take account of damage to the rule of law and national security caused by halting the investigation

35. The Respondents alleged that the "Director failed to take into account as a relevant consideration the damage to national security that would flow from the discontinuance of the investigation and other associated matters".[22] In its judgment (para. [49(ii)]), the Divisional Court re-cast this as an allegation that "the Director failed to take into account the threat posed to the UK's national security, the integrity of its system of criminal justice and the rule of law caused by surrender to the type of threats made in the instant case".

App Pt. I p. 241

36. In what the Director would respectfully submit is a flagrant mischaracterisation of the facts, the Divisional Court said (para. [92]) that "Mr Wardle accepts that he did not take into account the damage to national security, the integrity of the criminal justice system and to the rule of law by discontinuing the investigation in response to the threat". The case against the Director has never included an allegation that he failed to take into account the alleged risk of damage to the integrity of the criminal justice system or to the rule of law. The suggestion that he has made an admission in respect of such an allegation is simply wrong. The Director's evidence was not directed to addressing this allegation,

App Pt. I p. 250

[22] The phrase, "other associated matters", was a reference to an allegation that the possibility of information coming into the public domain even if the investigation was discontinued was not taken into account. That allegation was withdrawn: Re-re-Amended Detailed Statement of Grounds, paras. 2.5, 44.

App Pt. I pp. 7 & 21

because it was made for the first time in the Divisional Court's judgment. But insofar as his evidence covered the point, he made it abundantly clear that he took into account the rule of law, the importance of investigating and prosecuting serious crime, the credibility of the SFO and the law of corruption.[23]

37. The allegation that the Director did face from the Respondents was that the decision was flawed because he failed to take into account the risk that discontinuing the investigation might lead to a perception that Britain easily caves in to threats from other states to its security, and that this might itself undermine national security. It is submitted that this criticism is unjustified:

(1) The Director accepts that he did not himself consider whether there was a risk that discontinuing the investigation might itself damage national security. It is, however, clear that this factor was taken into account by those within the executive agencies and departments who made the overall assessment of the danger to national security. It was, for example, raised by the Attorney General at his meeting with the Prime Minister on 11 December 2006, at which the Prime Minister acknowledged that "it was important that the British Government did not give people reason to believe that threatening the British system resulted in people getting their way."[24]

(2) The Director was entitled to attach weight to the overall assessment made of the risk to national security, which was made by those with special responsibility and knowledge in this area, without separately directing his mind to the weight to be given to each factor in their assessment. This process is common in areas of decision-making involving technical or sensitive facts. It has recently been observed that it is "not... aptly described as

App Pt. I pp. 340-342

[23] Wardle, 2nd, paras. 10-18.

App Pt. II pp. 405-406
App Pt. I pp. 329-330

[24] See the letter of 12 Dec. 2006 from the Prime Minister's Private Secretary to the Legal Secretary to the Law Officers, recording this meeting. This letter was not copied to the Director at the time, but he was generally kept informed of the Prime Minister's assessment: Wardle, 1st at para 58.

deference: it is the performance of the ordinary judicial task of weighing up competing considerations on each side and according appropriate weight to the judgement of a person with responsibility for a given subject matter and access to special sources of knowledge and advice": *Huang v. Secretary of State for the Home Department* [2007] 2 AC 167 at [16].

(3) In fact, the point made by the Divisional Court is highly speculative, for there was no evidence that discontinuing the investigation would in fact harm national security. The subsequent assessment by Ministers, after an extensive consultation across government departments and agencies, is that there is no evidence to suggest that it has done so.[25] When this point was first put to the Director by the Constitutional Affairs Committee, his immediate response was "I am not sure how much of a risk it really is. I think this was an exceptional case." In his evidence in these proceedings the Director reiterated this point, stating that "this was a highly exceptional case, which for that reason seemed unlikely to have significant wider ramifications".[26]

38. It is right to add that there is a well-established distinction between (i) those considerations which a decision-maker *must* take into account, (ii) those considerations which he *must not* take into account and (iii) those considerations which the decision-maker *may* take into account or ignore at it his discretion. In *CREEDNZ Inc. v Governor General* [1981] 1 NZLR 172 Cooke J observed at p.183:

> *What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.*

[25] Wardle, 1st , para. 60. App Pt. I p. 330
[26] HC Constitutional Affairs Sel. Ctte, Evidence (27 June 2007), Q269; Wardle, 1st, para. 59. App Pt. II p. 564 App Pt. I p. 330

In *Re Findlay* [1985] AC 318, at 333F-334C, Lord Scarman approved, as correct in principle, both this statement and Cooke J's recognition that in certain circumstances, notwithstanding the silence of the statute, there will be some matters "so obviously material" to a decision that anything short of direct consideration of them would be irrational.[27] The consideration referred to by the Divisional Court is far from being a mandatory relevant consideration which the Director was obliged to assess for himself, in circumstances where it was clear that the national security experts were focussing on what seemed important and significant to them.

PART B: ARTICLE 5 OF THE OECD CONVENTION

Background

39. The main purpose of the Convention is to require each Party to make it a criminal offence to be complicit in the bribery of a foreign public official. It was ratified by the United Kingdom on 14 December 1997. As a result, the Convention is binding on the state as a matter of international law. The United Kingdom complied with its obligation to criminalise international bribery by creating new offences in Chapter 12 (Sections 108-110) of the Anti-Terrorism, Crime and Security Act 2001. But the Convention was not referred to in the Act, and does not itself form part of English domestic law.

40. For present purposes, the relevant provisions of the Convention are those of Articles 5 and 12. Article 5 provides:

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> *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 on relations with another state or the identity of the natural or legal persons involved.*

[27] See also *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2007] 2 WLR 1219, CA, [131]; *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, [57] (Lord Brown).

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Article 12 lays down procedures for the collective monitoring of compliance with the Convention among Parties. It provides: App Pt. I p. 199

> *The Parties shall cooperate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference...*

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A witness statement of Mr. Dickerson describes the functions of the OECD Working Group on Bribery. In summary, it conducts assessments of each Party's arrangements for complying with the Convention. It monitors compliance. And it seeks to resolve issues about the effect of the Convention by consensus. App Pt. I pp. 333-337

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41. The Director considered Article 5 when making his decision. His evidence, which has not been challenged, is that he was not influenced by the potential effect on the United Kingdom's relations with Saudi Arabia *per se*. He appreciated that continuing the investigation would damage those relations, but in itself that consideration did not concern him. What did concern him was the practical consequences for the United Kingdom's national security of a breakdown in security cooperation between the two countries. The Director believed that Article 5 did not prohibit him from taking account of that when deciding how to proceed. However, his view about Article 5 was not a critical or decisive factor. He considered that the danger to the United Kingdom's national security was of such compelling weight that it was imperative to halt the investigation in any event. Having regard to the fact that the Convention was not part of English domestic law, he would have made the same decision, for the same reasons, even if he had thought that it was not compatible with Article 5.[28]

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42. The Respondents' case was that the Director's view about the effect of Article 5 was mistaken. In point of form, the Divisional Court rejected

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[28] Wardle, 1st, paras. 44-51. App Pt. I pp. 326-327

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this ground of complaint. They concluded (para. [153]) that they should not decide it, partly because it was unnecessary having regard to their view that the Director's decision was unlawful for other reasons; and partly because they concluded that such an exercise would be inappropriate in any event. This was because of the provisions of the Convention by which such matters were to be dealt with under the auspices of the OECD Working Group on Bribery, by consensus of the State Parties, an objective which would be impeded were national courts to express their own (possibly differing) views on the issue. The Divisional Court noted (para. [151]) that the question was currently under consideration by the Working Group. The United Kingdom's position in the Working Group was that an interpretation of the Convention which did not permit a State Party to have regard to its national security interests was not required by the language or purpose of Article 5 and would not be consistent with state practice or ordinary principles of international law.

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43. However, notwithstanding their view that it was inappropriate to do so, the Divisional Court's reasoning went most of the way towards deciding that Article 5 prohibits a State Party taking into account damage to national security arising from a threat by another country. They held that this was not a permissible consideration unless the state in question could make out the defence of state necessity in customary international law.

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44. Four submissions on this point are made on the Director's behalf:

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(1) The Director was under no legal duty to exercise his discretion in accordance with the Convention.

(2) While he undoubtedly took the view that his decision was compatible with Article 5, he did not in fact rely upon that view in reaching it. It is therefore unnecessary and inappropriate to determine whether or not his interpretation of the Convention was correct.

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(3) The Divisional Court was right to conclude that it should not decide whether the Director's decision was consistent with Article 5, for the reasons which they gave among others. They ought in those circumstances to have refrained from construing it.

(4) So far as it is necessary to construe Article 5 at all, it is submitted that the Director's view of it was correct. The customary law relating to state necessity has nothing to do with the matter.

Point (1): no legal duty to decide in accordance with the Convention

45. No provision of English domestic law obliges the Director to consider or act in accordance with the provisions of the OECD Convention when exercising his statutory discretion. Nor can the Director's discretion be read subject to an implied requirement to that effect. In *R v Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696, Your Lordships' House rejected a submission that an unfettered discretion conferred by statute must be read down so as to require it to be exercised in accordance with the European Convention on Human Rights, which was at the time an unincorporated treaty: see 747-8 (Lord Bridge). More recently, in *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, Your Lordships have held that a coroner was entitled to have regard to the international obligations of the United Kingdom under an unincorporated treaty, but that he was not bound to do so: see [53]-[59] (Lord Brown, with whom Lord Bingham and Lord Rodger agreed). The reasoning in *Brind* and *Hurst* is directly applicable in the present case.

46. It may be observed in passing that there are many treaties and similar instruments whose provisions might bear upon the exercise by a prosecutor of his discretion. Some of them relate specifically to bribery.[29] Others do not relate specifically to bribery, but might have

[29] For example, the EU Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union, adopted by the Council on 26 May 1997; Council of Europe Resolution (97) 24 on the twenty Guiding Principles for the fight against corruption, 6 November 1997; the United Nations Convention against Transnational Organized Crime, 2000, ratified by the United Kingdom on 9 February 2006; EU Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector; Council of Europe, Criminal Law Convention on Corruption, 21 January 1999, ratified by the United Kingdom on 9 December 2003; the UN Convention Against Corruption, 2003, ratified by the United Kingdom on 9 February 2006.

some bearing upon the exercise of a prosecutorial discretion because they guarantee, for example, non-discriminatory treatment for foreign investors in the United Kingdom. If there is no legislative direction to take account of an unincorporated treaty, then the recognition by the courts of a duty to do so would be tantamount to giving the Crown the power to legislate by making treaties. That would be contrary to the principle on which English law has set its face against allowing unincorporated treaties to have the force of law: see *R* v *Lyons* [2003] 1 AC 976, [27] (Lord Hoffmann); *R* v *Khan* [1997] AC 558, 581H-582C (Lord Nolan); *J H Rayner (Mincing Lane) Ltd* v *Department of Trade and Industry* [1990] 2 AC 418, 515C-D (Lord Oliver).

Point (2): Irrelevance to the Director's decision

47. If the Director was not bound in law to exercise his discretion in accordance with the provisions of the OECD Convention, or even with regard to it, then the only basis upon which a question can arise as to correct interpretation of the Convention is that it was, as a matter of fact, a material element in his reasoning.

48. It is accepted that there are circumstances in which a decision-maker relies upon an international treaty obligation as the foundation for his decision, and the English courts may properly examine the interpretation which he placed upon it. The principal authority is *R v Secretary of State for the Home Department, ex p. Launder* [1997] 1 WLR 839, HL. It was held that the court could examine the application of Article 3 of the ECHR, even though the ECHR was an unincorporated treaty at the time. This was because in the circumstances of that case there was a significant risk of violation of the applicant's human rights if he was extradited to Hong Kong, so that a more exacting standard of scrutiny applied as a matter of established domestic law: 867C-F (Lord Hope). On that basis, Lord Hope also referred to Article 13 of the ECHR (effective remedy) and continued:

> *If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected*

> *himself on the Convention which he himself says he took into account, it must be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy, that [counsel] directed his arguments.*

49. The Divisional Court purported to apply this principle, holding that the Director's decision should be tested "against the standard which the decision-maker has chosen to adopt." But the principle was plainly inapplicable. Quite apart from the fact that the present case does not involve any one's human (or other) rights, the underlying proposition is that if a decision-maker has made his decision on the basis that an unincorporated treaty means X, and it means Y, then the decision is unlawful because it is based on a false premise and therefore irrational. But the Director did not base his decision about the Al Yamamah investigation on the provisions of the OECD Convention. He based it on what he regarded as a compelling public interest in safeguarding the United Kingdom's security, and would have made the same decision even if he had thought that it was not consistent with Article 5. The rationality of his decision did not therefore depend on the correctness of his view about Article 5.

50. The Claimants have argued that this is retrospective reasoning, which is inadmissible. But this is misconceived. The Director's evidence as to the actual basis of his decision is that it was the danger to national security and its effect on the public interest. As Simon Brown LJ observed in *R v Secretary of State for the Home Department, ex p Fininvest Spa* [1997] 1 WLR 743 at 758H, if the decision-maker in that case had deposed in the judicial review proceedings that he would have made the same decision whether or not he had considered that the offences were political offences within the meaning of the European Convention on Mutual Assistance in Criminal Matters, his decision could not have been challenged on the question of interpretation of that Convention, whether or not he had directed himself correctly as to its interpretation. In this case, the Director has deposed that he would have made the same

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pp. 634-637

decision. Indeed he had previously made the point in a letter of 19 January 2007, as soon as the issue had been raised.

Point (3): Inappropriateness of construing the OECD Convention

51. The OECD Convention, like many international treaties, leaves considerable scope for interpretation. It was drafted by representatives of States with a variety of legal systems, significantly different constitutional arrangements and distinct rules and procedures governing the investigation and prosecution of crimes. It was drafted in English, but its terms have to be applied to legal systems operating in different languages and based on different concepts. The result is that Parties to the Convention are likely to have a range of views about its precise effect in particular cases. Each State Party has some room to adopt its own interpretation of the precise meaning of the Convention, in so far as the precise meaning is not expressed in the text of the Convention or clear from its *travaux préparatoires.* They are likely to seek to persuade other States Parties that its interpretation is correct. The search for a single objective and authoritative meaning is likely to be elusive, particularly for the domestic courts of a single State Party.

52. It is against this background that one must view the provisions of Article 12 for the implementation of the OECD Convention by consensus among the State Parties, under the auspices of the Working Group on Bribery. In his witness statement, Mr. Dickerson of the FCO has explained the process of peer review of the arrangements of different State Parties for the investigation and prosecution of offences, which the Working Group operates, and the position which the United Kingdom has taken in that forum. Pending a consensus, or a definitive ruling from a body which the State Parties have authorised to interpret the treaty, the interpretations on which the United Kingdom acts is a matter for the executive, whose proper function it is to conduct the United Kingdom's relations with other State Parties. The courts should, with respect, be slow to fix the policy of the United Kingdom with respect to the approach to be adopted to the implementation of the Convention. It

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should be slower still to declare the meaning of the Convention in a manner which reflects neither the procedure laid down by Article 12 nor the consensus among State Parties which that Article seeks to achieve.

Point (4): The construction of the OECD Convention

53. When an English court has cause to interpret the provisions of a treaty, it should do so "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation": *James Buchanan & Co. Ltd* v *Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 at [152] (Lord Wilberforce). The framework for treaty interpretation is provided by the rules of international law set out in the Vienna Convention on the Law of Treaties.[30] Article 31 of the Vienna Convention provides for the interpretation of treaties "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." Relevant aids to construction include any subsequent instrument related to the treaty, and any subsequent practice in the application of its provisions which establishes the agreement of the parties regarding its interpretation. Under Article 32, resort may be had to *travaux préparatoires* if the construction arrived at in accordance with Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

54. Article 5 of the OECD Convention provides for the investigation and prosecution of bribery offences in accordance with the "applicable rules and principles" of each State Party, subject to the exclusion of three specific considerations: (i) "national economic interest", (ii) "the potential effect upon relations with another State", and (iii) "the identity of the natural or legal persons involved".

55. The Divisional Court began by considering whether Article 5 of the Convention excluded national security from the range of factors that could legitimately enter into a prosecutorial decision. They accepted

[30] See eg *Sepet* v *Secretary of State for the Home Department* [2003] 1 WLR 856, HL, [6] (Lord Bingham); *Fothergill* v *Monarch Airlines* [1981] AC 251, 290C (Lord Scarman).

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pp. 257-258

(paras. [123]-[128]) that it did not. National security was a legitimate factor to be taken into account. This was because it is a basic principle of the law of treaties that restrictions on the freedom of states cannot be presumed: *Case of the SS Lotus* (1927) PCIJ Series A No.10, at p.18; *Oppenheim's International Law* (9th ed.), Sir Robert Jennings QC and Sir Arthur Watts KCMG QC eds., Vol I (Peace) Part 4, p.1278; *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; *Nuclear Tests Case*, ICJ Rep. (1974) p.473.[31] Although the Divisional Court did not put it that way, they did acknowledge (para. [126]) the authority of the best-known statement of the principle as applied to the freedom of states to safeguard their national security. In the *Case of the SS Wimbledon* PCIJ Reports, Series A No.1 (1923), p.37, Judges Anzilotti and Huber (dissenting, but not on this point), said:

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> *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.*[32]

This view of the matter is reflected (as the Divisional Court also acknowledged) in the absence of any criticism by the Working Group of the arrangements in all three State Parties to the Convention (the United Kingdom, Canada and Germany) whose prosecutorial codes expressly recognise the consideration of national security interests in the exercise of prosecutorial discretion.

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[31] Similarly, it has been emphasised in domestic case law 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 Ugarte (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).

[32] The same view has, again, been expressed as a matter of domestic law. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Hope observed at [99] that it was "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 Your Lordships' House in *A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221, at [69] (Lord Nicholls), [105] (Lord Hope), [149] (Lord Carswell) and [161] (Lord Brown).

56. Starting from the premise that national security was not excluded from consideration by prosecutors, the Divisional Court reasoned as follows. It was "essential", they said (para. [130]), to devise a principle for distinguishing between the effect of a prosecutorial decision upon relations with another state (which was an excluded consideration), and its effect on the security of the state and its citizens (which was not). Moreover (paras. [130], [141]-[142]), this principle had to operate on a basis which was uniform as between State Parties with potentially divergent interests on the issue. They then went on to suggest that although essential, such a distinction was practically impossible to draw (paras. [133]-[140]). This was because (paras. [133], [149]) there was an inherent inconsistency between excluding the potential effect on relations with another state from the relevant considerations and admitting considerations of national security: the adverse effects of a bribery investigation or prosecution on relations with other states were inherently likely to lead to an adverse effect on national security. Therefore, so the Divisional Court reasoned, the inconsistency should be resolved by holding that threats to national security arising from the impact of a bribery investigation upon relations with another state, should always be excluded considerations, but should be excused in cases where it could be justified by the exceptional doctrine of state necessity in customary international law (paras. [143]-[149]).

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App Pt. I pp 258 & 261

App Pt. I pp. 259-261 pp. 259 & 263

App Pt. I pp. 262-263

57. As the Divisional Court pointed out (paras. [145]-[146]), state necessity is a narrow doctrine. But they in some respects misunderstood it, and do not appear to have appreciated quite how narrow it is. The defence of state necessity is set out in Article 25 of the Articles on States Responsibility drafted by the United Nations International Law Commission ("ILC"). The Article is set out at para. [144] of the Divisional Court's Judgment. Necessity, where it applies, "precludes the wrongfulness" of an act which would otherwise be a breach of an international obligation of a state. The effect is not (as the Divisional Court believed) to release the state from liability for a wrong. It is that the act is not wrongful at all. It is justified, and therefore lawful. The

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necessity defence makes it lawful for a State to put aside any of its legal obligations, no matter how important they might be, with the sole exception of rules of *jus cogens* such as the prohibitions on genocide and the waging of aggressive war. As befits a defence with such sweeping effects, it is available only in utterly exceptional circumstances, and only under very strict conditions. Indeed, in one recent case an international tribunal described the very existence of the defence of necessity as "controversial".[33] The ILC Commentary refers to instances such as the *Caroline* incident, in which the destruction by British forces in 1837 of a US boat carrying recruits and military supplies to Canadian insurgents was justified on the basis of "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[34]

58. The Divisional Court's approach to the interpretation of Article 5 has no basis in its language, in authority, in state practice or in the authoritative *travaux* or commentaries. It is submitted that it is wrong.

(1) In the first place, to revert to a point already made in another context, the appropriate method of achieving a uniform approach between State Parties with potentially divergent interests, in this admittedly difficult area, is not to shrink the core of what the Divisional Court acknowledged to be a fundamental interest of all of them in their national security. The appropriate method is the one provided for by Article 12 of the Convention. It involves elements of collective interpretation, peer review and supplementary understandings and agreements, which are in practice likely to be based on a substantial measure of pragmatism and compromise. The tortuous, dogmatic and reductionist approach of the Divisional Court is completely alien to what the Parties to the OECD Convention intended.

[33] *Rainbow Warrior*, (New Zealand / France), XX *UN Reports of International Arbitral Awards* 217 at 254 (1990).
[34] Quoted in ILC, Commentary on Article 25, paragraph 5.

(2) Given the fundamental and common interest of all Parties to the Convention in their national security, it is inconceivable that the State Parties, when they agreed Article 5 in terms which contained no reservations about the admissibility of national security considerations in prosecutorial decisions, intended to accept limitations upon their application so extreme as to make them irrelevant for most practical purposes[35]. The solution which the Court proposed is equally unlikely to be accepted by consensus under the procedures of Article 12.

(3) There is a logical inconsistency in the Divisional Court's reasoning. Starting from the proposition, which they accepted, that national security was too fundamental a concern of states to be impliedly excluded from the decisions of prosecutors, they purported to reason their way to a conclusion that had precisely that effect.

59. What then is the right construction of Article 5 in circumstances such as those with which the Director had to deal? It is submitted that the correct position is much simpler than the Divisional Court thought:

(1) Article 5 acknowledges the primacy of national "rules and principles" governing the discretion of investigating and prosecuting authorities, subject to the exclusion of three specific matters.

(2) Considerations of national security are not among the excluded considerations and, for reasons already given, their exclusion is unlikely to have been intended by the Parties, let alone achieved by implication. Reading Article 5 "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", it is not

[35] It is submitted that there is much force in the observations of the Attorney General Lord Goldsmith in the House of Lords on 1 February 2007: "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." App Pt. II p550

permissible to disregard the fact that it is states which are party to the Convention. All States have fundamental obligations to protect their security and the lives of their citizens, which must inevitably colour what commitments they actually make and what commitments third persons may reasonably suppose that they have made.

(3) The position is not affected by the fact that considerations of national security may arise in contexts that touch upon questions of foreign relations. If national security is in principle an admissible consideration, it is illogical to exclude it simply because on the facts of a particular case the chain of causation by which the damage to national security arises includes the reaction of another state to a decision to investigate or prosecute. There is a perfectly rational distinction, which the Director made, between (i) allowing a decision whether to investigate or prosecute to be influenced by its potential effect on relations with a foreign state, and (ii) recognising as facts the domestic consequences of a breakdown in relations with that state, and having regard to those. The former is forbidden. The latter is not.

(4) This distinction is both workable and consistent with the Convention's objective of facilitating the suppression of international bribery, once it is borne in mind that national prosecuting authorities were expected by the draftsmen of the Convention to be independent of the government and therefore impervious to political influences. The object of the excluded considerations in Article 5 is to reinforce that independence by requiring State Parties to insulate their prosecutors from the three main political influences which are liable to lead to the collusive toleration of bribery. This was recognised in the authoritative Commentaries on the Convention, which were adopted by the Negotiating Conference on the same day as the Convention itself. Addressing Article 5, the Commentaries state at para 27:

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> *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.*

The reference in Article 5 to "the potential effect upon relations with another State" is not apt to cover considerations of national security, since such considerations are normal prosecutorial factors which are not symptomatic of political influence.

(5) Where an independent prosecutor gives evidence in good faith that his decision was taken on grounds of national security and not because of the potential impact on relations with another State, an English court may properly take the view that is the position.

CONCLUSION

60. The Director respectfully submits that his appeal should be allowed and the decision of the Divisional Court set aside for the following among other reasons:

(1) BECAUSE the decision whether to proceed with the investigation was a matter for the Director, subject to the ordinary requirements of legality, rationality and fairness;

(2) BECAUSE the Director was entitled in his discretion to discontinue the investigation if he considered that the public interest required it, notwithstanding that the public interest in question arose from the danger to national security occasioned by threats from the government of Saudi Arabia to withdraw security cooperation from the United Kingdom;

(3) BECAUSE there was no evidence of any adverse effect on national security arising from the Director's decision to discontinue the investigation, nor was he under any obligation to give specific attention to the possibility that there might be.

(4) BECAUSE the lawfulness and rationality of the Director's decision did not depend on the meaning of Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;

(5) BECAUSE, in any event, the decision was consistent with the Convention;

(6) BECAUSE the decision of the Divisional Court was wrong and ought to be overruled.

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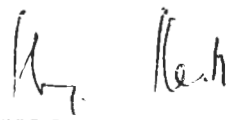

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IN THE HOUSE OF LORDS

ON APPEAL

FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION OF HER MAJESTY'S HIGH COURT OF JUSTICE

Divisional Court Ref: CO/1567/2007
[2008] EWHC 714 (Admin)

BETWEEN

THE QUEEN

on the application of

CORNER HOUSE RESEARCH and CAMPAIGN AGAINST ARMS TRADE

Respondents

- and -

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Appellant

- and -

BAE SYSTEMS PLC

Interested Party

CASE FOR THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

THE TREASURY SOLICITOR

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