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

In The Appellate Committee of The House of Lords

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

B E T W E E N :

THE QUEEN
on the application of

(1) CORNER HOUSE RESEARCH

(2) CAMPAIGN AGAINST ARMS TRADE

Respondents

and

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Appellant

and

BAE SYSTEMS PLC

Interested Party

CASE FOR THE RESPONDENTS

Introduction

1. On 14 December 2006, the Director of the Serious Fraud Office announced that he was ending the Serious Fraud Office's investigation into bribery and corruption by BAE Systems Plc ("BAE") in relation to the Al-Yamamah military aircraft contracts with the Kingdom of Saudi Arabia.

2. The Director stated in a press release that he had made his decision: App Pt. II p. 409

> *"following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security".*

He stated that he had:

> *"balance[d] the need to maintain the rule of law against the wider public interest"*

in reaching his decision, and that no weight had been given to commercial interests or to the national economic interest.

3. Further reasons for the decision were given by HM Attorney General in a statement to Parliament on the same day. The Attorney General stated that the Prime Minister and the Foreign and Defence Secretaries had:

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> *"expressed the clear view that continuation of the investigation would cause serious damage to the UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both 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.*
>
> *Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions precludes me and the Serious Fraud Office from taking into account considerations of the national economic interest or the potential effect upon relations with another state, and we have not done so".*

4. In fact, the decision to abandon the investigation was taken in response to explicit threats that, if the investigation was not stopped, Saudi Arabia would cancel a proposed order for Eurofighter Typhoon aircraft, and would withdraw security and intelligence co-operation with the United Kingdom.

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5. The threats were made by or on behalf of senior Saudi officials, including Prince Bandar bin Sultan bin Abdul Aziz of al-Saud, who is himself alleged to be the beneficiary of very large, allegedly corrupt, payments from BAE, which form part of the SFO's investigation.

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6. The United Kingdom Government or the Director did not explain to the Saudi officials that such threats were futile, or seek to persuade them to withdraw or to reconsider the threats. No consideration was given to the means by which Saudi Arabia could be publicly called to account before the United Nations for its obligations to co-operate internationally in sharing information to combat terrorism. No consideration was given by the Director or the Government to the damage that might be done to the principle of the rule of law, or to the national security of the United Kingdom, if it became known that the United Kingdom gives in to threats of this type.

7. The Respondents submit that in these circumstances the Divisional Court was correct in finding that the Director's decision to halt the prosecution was unlawful and should be quashed. In particular:

(a) The constitutional principle of the rule of law requires that an independent prosecutor should not give way to threats of adverse consequences in deciding whether to pursue an investigation or a prosecution. Such threats are extraneous considerations, irrelevant to the exercise of prosecutorial discretion. Otherwise, the more powerful the alleged criminal and his supporters, the less likely it is that a prosecution will take place and the law upheld. A central element of the rule of law is that the law must be applied to all equally, regardless of their identity, power or influence, or that of their supporters.

(b) The constitutional principle of the rule of law must be upheld by the prosecutor (unless and until Parliament intervenes to provide for different criteria) unless the facts of the case satisfy a test of strict necessity, that is an imminent risk to life the only means of preventing which is to abandon the investigation.

(c) The importance of the constitutional principle of the rule of law is such that the courts should give anxious scrutiny to a

decision to stop a criminal investigation or prosecution in response to a threat.

(d) In the present case, there was no imminent risk to life, there were other means available to address the problem which had not been exhausted, and the damaging consequences of giving in to the threats had not been properly considered. Therefore to stop the investigation by reference to the threats was a breach of the constitutional principle of the rule of law.

(e) Further and in the alternative, the Director expressly had regard to Article 5 of the OECD Anti-Bribery Convention ("the OECD Convention") when making his decision. He and the Attorney General repeatedly assured the public, Parliament and the OECD that he had complied with the OECD Convention and, in particular, that he had not taken into account considerations prohibited by Article 5 of the Convention. It is accordingly for the Courts to consider whether the Director correctly understood and applied the OECD Convention, and whether his decision complied with it. If it did not, then the Director took into account an irrelevant consideration (his erroneous understanding of the OECD Convention), and his decision was unlawful.

Auth. Tab 10

(f) Under the OECD Convention, including Article 5, the Director was prohibited when investigating the bribery of a foreign public official from being 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. In deciding to stop the investigation because of the threats to withdraw diplomatic and intelligence co-operation made by Saudi Arabian officials, the Director acted contrary to Article 5 of the OECD Convention.

(g) Accordingly, the matter should be remitted to the Director for him to reconsider it on a correct legal basis.

The Facts

8. The Appellate Committee is invited to read the unredacted versions of the documents exhibited to the Director's witness statements. Neither the Respondents nor their legal representatives have seen the unredacted versions of these documents, although they were provided to the Divisional Court, which commented at paragraph 21 of the Judgment that:

> *"the opportunity to see the unredacted version has ensured that the challenge can be advanced on a fair and accurate factual basis".*

App Pt. I p. 231

9. The Committee is also invited to read the new witness statements of Dr Jenkins of the Foreign and Commonwealth Office, Helen Garlick of the SFO, and the Director, referred to in paragraph 26 of the Appellant's case, introduced by the Appellant for the purposes of this appeal.

10. The Director has resisted the inclusion of many of the facts found by the Divisional Court in the Statement of Facts and Issues. It is therefore necessary to set out the facts in some detail.

11. In July 2004 the SFO began an investigation into allegations of bribery and corruption by BAE in relation to the Al-Yamamah contracts. On 14 October 2005, the SFO issued a statutory notice to BAE requiring it to disclose details of payments to agents and consultants in respect of the Al-Yamamah contracts.

App Pt. I p. 315 para 4

App Pt. I p. 316 para 7

12. In response to the notice, BAE's solicitors wrote to the Attorney General enclosing a memorandum and requesting that the investigation be halted on commercial and diplomatic grounds. The Attorney General's officials replied to BAE stating that it was not

App Pt. I p. 316 para 8

appropriate to make such representations on a "private and confidential" basis and forwarded the letter and memorandum to the SFO. It was thus the company under investigation which made the initial public interest representations seeking to have the investigation stopped in what was said to be the public interest.

App Pt. II
pp. 351-356

13. On 2 December 2005 the Director and the Attorney General met and agreed to commence a Shawcross exercise, under which Ministers would be invited to comment on the public interest considerations relevant to the investigation.

App Pt. I
p. 318 para 14

14. On 6 December 2005 the Attorney General's office wrote to Ministers to initiate the Shawcross exercise. The letter drew attention to Article 5 of the OECD Convention. Its terms were set out, and Ministers were informed that the operation of the OECD Convention within the United Kingdom had been subject to an evaluation by an OECD Working Group in 2004, which had reported the assurance given by the Attorney General that:

App Pt. II
pp. 362-364

> *"none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute"*

in foreign bribery cases. Ministers were informed that "you will need to have regard to the Convention in any comments made in response to this letter".

15. On 16 December 2005, the Cabinet Office responded to the letter of 6 December. Despite the request to Ministers to comply with Article 5, the Cabinet Office response:

> *"assume[s] that it may be possible for considerations of the kind mentioned in Article 5 at least to be taken into account for the purpose of taking an early view on the viability of any investigation"* .

App Pt. II
pp. 373-377

Various concerns were raised, including commercial matters and the risk that anti-terrorism co-operation might be endangered if the investigation continued.

App Pt. I
p. 319 para 18

16. In January 2006, the Attorney General decided that the investigation should continue. The Shawcross representations made by Ministers were rejected. The Director agreed with that decision.

App Pt. I p. 340 para 8
App Pt. II pp. 382-383

17. By July 2006, the SFO was about to obtain access to various Swiss bank accounts.

App Pt. I p. 227 para 4
App Pt. II p. 562 Q239
App Pt. II pp. 532-533

18. In July 2006, the Prime Minister's officials met Prince Bandar. At this meeting, Prince Bandar made threats:

> *"Bandar went into No. 10 and said 'Get it stopped' ... 'Bandar suggested to [Jonathan] Powell [then the Prime Minister's Chief of Staff] he knew the SFO were looking at the Swiss accounts. ... if they didn't stop it the Typhoon contract was going to be stopped and the intelligence and diplomatic relations would be pulled" (Sunday Times, 10 June 2007).*

App Pt. II p. 537

19. It was conceded by the Director before the Divisional Court that the Court should proceed on the basis that this allegation is true.

App Pt. I pp. 231-232 paras 22-24

20. Prince Bandar is alleged to be a continuing recipient of corrupt payments from BAE. He therefore had a strong motivation to ensure that the SFO investigation did not proceed, whether because it might prove embarrassing to him, or because it would be adverse to the interests of BAE, which is alleged to have made very large payments to secure his favour.

App Pt. II pp. 534-536

21. In a carefully worded footnote to his Case (footnote 1), the Director does not deny the involvement of Prince Bandar but suggests that the threats were made by the State of Saudi Arabia, not merely by officials. During the hearing before the Divisional Court, counsel for the Director repeatedly made the same point: "it is not individuals coming forward and making threats, it is Saudi Arabia adopting a particular stance". Lord Justice Moses (who had seen the unredacted documents dealing with these matters) responded:

App Pt. III
p. 1047

"I am afraid I do not know how you can say that. That is how it developed. It is not how it was triggered in September, was it?".

22. In a further exchange, Lord Justice Moses raised the same point:

"Mr Sales: ... I have already made the submission that what the Director had to deal with was a stance adopted by Saudi Arabia as a state, not specific threat and by anyone walking into his room ---

Lord Justice Moses: I think you have to be very careful about saying that. It was not quite the situation if you look in detail at it, was it? It was if you go on, 'this is the threat that will be made by the state' which is slightly different".

App Pt. III
pp. 1035-1036

23. In September 2006, the Attorney General received further Shawcross representations in the form of a letter from the Cabinet Secretary, sent on the instructions of the Prime Minister. This letter is heavily redacted but refers to the "recent course of the investigation [REDACTION]" that "has taken us to the brink of such consequences". It appears that the redacted references are to the SFO being close to obtaining access to the Swiss bank accounts, and to the representations by Saudi officials on this matter:

App Pt. I
p. 320 para 23

App Pt. II
p. 385

"[Robert Wardle:] I think it was perhaps more to do with the pursuit of the money trail, particularly through the accounts in Switzerland".

App Pt. II
p. 562 Q239

"The Saudi threat was made in September after the royal family became alarmed at the latest turn in the fraud inquiry. Sources close to the investigation say the Saudis 'hit the roof' after discovering that SFO lawyers had persuaded a magistrate in Switzerland to force disclosure about a series of confidential Swiss bank accounts... It was the Swiss stuff that sent the Saudis over the top. The threat to cut off diplomatic and intelligence ties was a very real one ... " (Sunday Times, 19 November 2006).

Feltham 2
exhibit

24. The Attorney General adopted a principled stance in response to the "representations made by the Saudi representatives as to the repercussions which they say will ensure if the SFO investigation proceeds". He rejected the further Shawcross representations in a letter dated 3 October 2006. The Attorney General was:

App. Pt. II
p. 386

A

"of the firm view that, if the case is in fact soundly-based, it would not be right to discontinue it on the basis that the consequences threatened by the Saudi representatives may result".

25. At this stage, the Saudis were at the "brink" of withdrawing both diplomatic and intelligence co-operation, and a very large order for Eurofighter Typhoon aircraft. Nonetheless, the Attorney General concluded that "it would not be right" to discontinue the investigation because these consequences might follow.

App. Pt. II p. 385

App. Pt. II p. 386

B

C

26. On 27 October 2006, Helen Garlick, an Assistant Director of the SFO, wrote to the Attorney General's office expressing some scepticism about the escalation of Saudi threats. It was pointed out that both BAE and the Saudis had been well aware of the SFO's investigation and where it was leading for a considerable time, and this had not dissuaded them from agreeing to the next phase of the Al Yamamah contract in December 2005. Further, there should be "some caution exercised when considering the views of [REDACTION - remainder of paragraph]". The redaction presumably refers to the identity of the individual making the threats.

App. Pt. II pp. 387-388

D

E

27. On 21 November 2006, the United Kingdom Ambassador to Saudi Arabia met with persons whose identity has been redacted in the disclosed documents but whom the Daily Telegraph reported were "representatives of the Saudi royal family". It was "suggested ... that all intelligence co-operation was under threat".

App. Pt. II p. 392

Feltham 2 exhibit

F

28. Meanwhile, on 29 November 2006, the Guardian reported that access to the Swiss bank accounts had been obtained and that they had been linked to Wafic Said, reported to be Prince Bandar's business manager.

Feltham 2 exhibit

G

29. The Ambassador then met with the Director three times in November and early December 2006. The Ambassador told the Director that the threats to security "were as represented by the Cabinet Secretary's letter of 29 September 2006". However, as time passed "the representations on public interest [were] made with renewed and increasing force by HM Ambassador".

App. Pt. I p. 321 para 28

App. Pt. II p. 407

30. By early December 2006, the press was reporting that the Saudis had told the government that the proposed purchase of Typhoon aircraft would be cancelled within 10 days, unless the investigation was brought to an immediate end. To emphasise the point, Prince Bandar spent time that week in Paris negotiating an alternative purchase of Rafale fighter aircraft with President Chirac of France, in circumstances of considerable publicity.

Feltham 2 exhibit

31. At the same time, the SFO contemplated approaching BAE and offering a plea bargain. If BAE would plead guilty to lesser charges, the wider investigation would be dropped. Such a course would have avoided any need to name members of the Saudi royal family in open court. On 5 December 2006, the Attorney General informed the Director that he had no objection to offering BAE a plea bargain on this basis.

App. Pt. I p. 321 para 29

32. On the same day (5 December 2006), Prince Bandar visited London and met Foreign Office officials (Hansard 16 May 2007, Col 781W). No disclosure has been given of the representations Prince Bandar made during that meeting. It may be inferred from the surrounding material, including the reaction of Prime Minister set out below, that the threats not to proceed with the Typhoon contract, and to withdraw diplomatic and intelligence co-operation, were repeated.

App. Pt. II pp. 558-559

33. The following day, the Prime Minister's office informed the Attorney General that the Prime Minister wished to make further representations before any offer of a plea bargain was made to BAE.

App. Pt. I p. 332 para 32

34. On 8 December 2006, the Prime Minister wrote a "Personal Minute" to the Attorney General, attaching assessments prepared by Cabinet Office and Foreign Office officials. App. Pt. II pp. 389-404

35. On 11 December 2006, the Prime Minister met with the Attorney General. A letter recording the meeting has been disclosed in redacted form. App. Pt. II pp. 405-406

36. Following further meetings, the Director informed the Attorney General at a meeting on 13 December 2006 that he had concluded that it would not be in the public interest to continue the investigation, but would reflect on the issue overnight. At that meeting, the Attorney General said: App. Pt. I p. 325 para 41; App. Pt. II pp. 407-408

> *"... whilst he had wished to test the SFO case, he was committed to supporting it provided it was viable, whatever the outcome might be. He was extremely unhappy at the implications of dropping it now".*

37. The following morning, the Director confirmed his decision and the decision was announced by press release and Parliamentary statement by the Attorney General on the same day. App. Pt. I p. 325 para 43; App. Pt. I p. 328 paras 52-53; App. Pt. II pp. 409-413

38. The United States Department of Justice and the Swiss authorities have commenced criminal investigations which are continuing. The Respondents have prepared an additional witness statement dealing with recent developments in the investigation. Feltham 2 exhibit

The Constitutional Principle of the Rule of Law

The general principle

39. The Director accepts that a decision not to investigate or prosecute is in principle susceptible to judicial review. See paragraph 12 of the Appellant's Printed Case.

40. The dispute concerns the principles to be applied by the Courts in assessing the legality of a decision to stop an investigation by reason of threats of adverse consequences made by powerful persons:

(1) The Respondents take issue with the Appellant's contention (paragraphs 28(1) and 30 of the Appellant's Printed Case) that "invocation of the rule of law adds nothing to" the "ordinary principles of public law" which are said to be applicable in this appeal. Those principles are identified by the Appellant (paragraph 34 of the Appellant's Printed Case) as confining the role of the Courts to assessing whether the Director has acted within the scope of his discretion, for a proper purpose, by reference to relevant factors, by an appropriate procedure and in a rational manner.

(2) In the submission of the Respondents, the Courts will also provide appropriate protection for fundamental constitutional principles, one of which is the rule of law.

41. As stated in De Smith's Judicial Review (6th edition, 2007, edited by Lord Woolf, Jeffrey Jowell QC and Andrew Le Sueur, paragraph 1-016, at p.10), the justification for judicial review itself is the recognition of a constitutional norm:

> *"the standards applied by the courts in judicial review must ultimately be justified by constitutional principle, which governs the exercise of public power in a democracy".*

Auth. Tab 116

42. It is now well-established that in determining the procedural and substantive criteria for judicial review, Courts seek to identify and uphold relevant constitutional principles. As De Smith explains (paragraph 5-036 at p.242),

> *"what we now explicitly call constitutional rights, based on constitutional principle such as the rule of law, have always been acknowledged in the common law".*

Auth. Tab 116

There are many common law authorities recognising the right to life, personal liberty, a fair hearing, freedom of expression, access to legal

advice, and prohibition on retrospective application of criminal law. See, for example, R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115, 131E-G (Lord Hoffmann). De Smith contains a valuable analysis of the case-law at paragraph 5-039, pp.244-246. De Smith adds at paragraph 11-057, pp.569-570, that before the enactment of the 1998 Act

Auth. Tab 64

Auth. Tab 116

> *"the courts adopted an approach which, instead of seeking to apply the ungrounded reasonableness standard, based their assessment upon the rule of law and other necessary condition[s] of a constitutional democracy. Thus the absence of a prisoner's access to a lawyer or to the press was struck down not on the ground of unreasonableness (however strictly scrutinised) but on the ground that a fundamental constitutional principle (access to justice and free expression respectively) had been infringed. These principles were implied from the fact that public officials ought to maintain the standards of a modern European democracy. An orthogonal principle of 'legality' provided that the courts would apply the rule of law and any other constitutional principles (such as free expression) unless Parliament expressly and clearly excluded them. ...".*

43. The rule of law is a fundamental constitutional principle. It was recognised by Parliament in section 1 of the Constitutional Reform Act 2005:

> *"This Act does not adversely affect –*
>
> *(a) the existing constitutional principle of the rule of law, ...".*

Auth. Tab 83

De Smith states at paragraph 5-037, p.242, that

> *"Of the common-law presumptions, the most influential in modern administrative law is one based on the rule of law, namely, that the courts should have the ultimate jurisdiction to pronounce on matters of law".*

Auth. Tab 116

Courts, including the House, have frequently referred to the "constitutional principle requiring the rule of law to be observed" : R (Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604, 621, paragraph 28 (Lord Steyn for the Appellate Committee). "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based" : R (Jackson) v

Auth. Tab 32

Auth. Tab 50

Attorney General [2006] 1 AC 262, 304, paragraph 107 (Lord Hope of Craighead). See also, for example, R v Horseferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42, 62A and 64D (Lord Griffiths), 67G (Lord Bridge), 76C-D and 77B (Lord Lowry) and A v Secretary of State for the Home Department [2005] 2 AC 68, 110, paragraph 42 (Lord Bingham of Cornhill for the Appellate Committee of 9 members) and 127, paragraph 74 (Lord Nicholls of Birkenhead for the Appellate Committee of 9 members). Lord Woolf has stated that both Parliament and the courts "derive their authority from the rule of law ... both are subject to it and cannot act in a manner which involves its repudiation": Droit Public - English Style [1995] Public Law 57, 68.

Auth. Tab 48

Auth. Tab 61

Auth. Tab 123

44. The European Court of Human Rights has referred to "the notion of the rule of law from which the whole Convention draws its inspiration" : Engel v The Netherlands (No. 1) (1976) 1 EHRR 647, 672, paragraph 69. And see also Golder v United Kingdom (1975) 1 EHRR 529, 589, paragraph 34.

Auth. Tab 9

Auth. Tab 13

45. The preamble to the Universal Declaration of Human Rights 1948 states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

Auth. Tab 113

46. The central importance of the rule of law has also been recognised by the European Court of Justice in Partie Ecologiste (Les Verts) v European Parliament [1986] ECR 1339, paragraph 23 (the EU "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty").

Auth. Tab 27

47. The principle was articulated by the Heads of State and Government attending the September 2005 World Summit held at United Nations Headquarters (UN Document A/60/L.1, 15 September 2005, paragraph 119): Auth. Tab 101

> *"We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates".*

48. The SFO's own published aims and objectives also reflect the importance of the rule of law:

> *"The Serious Fraud Office aims to contribute to:*
> ...
> *b. the delivery of justice and the rule of law".* Feltham 2 exhibit

49. As De Smith observes (paragraph 1-106 at p.10),

> *"The scope of the rule of law is broad and it incorporates different values".* Auth. Tab 116

Many of these were addressed by Lord Bingham of Cornhill in his Sir David Williams Lecture "The Rule of Law" [2007] Cambridge Law Journal 67. One central element of the rule of law is that criminal liability must depend on the acts or omissions of the relevant person, irrespective of their identity or the power they or their friends or allies have to cause adverse consequences, or the threats they make to do so. In other words, we are ruled by law, not by the strength or influence of particular individuals. Auth. Tab 115

50. The core of the principle was identified by Dicey in his Introduction to the Study of the Law of the Constitution (8th edition), p.114 and p.120: Auth. Tab 117

> *"We mean ... when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here 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 tribunals".

"It means ... equality before the law, of the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts".

51. As Lord Bingham of Cornhill explained the concept in The Rule of Law at p.69:

Auth. Tab 115

"The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts. I doubt if anyone would suggest that this statement, even if accurate as one of general principle, could be applied without exception or qualification. There are, for instance, some proceedings in which justice can only be done if they are not in public. But it seems to me that any derogation calls for close consideration and clear justification. And I think that this formulation, of course owing much to Dicey, expresses the fundamental truth propounded by John Locke in 1690 that 'Wherever law ends, tyranny begins', and also that famously stated by Thomas Paine in 1776, 'that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other'".

Lord Bingham's proposed third sub-rule (at p.73) was that

"the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. I doubt if this would strike a modern audience as doubtful".

The Rule of Law and terrorism

52. Respect for the rule of law may require steps to be taken which increase the difficulties of preventing and detecting terrorism. See, for example, Secretary of State for the Home Department v MB [2007] 3 WLR 681, 719 at paragraph 91 (Lord Brown of Eaton-Under-Heywood):

Auth. Tab 72

"I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an

absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute (A v Secretary of State for the Home Department (No 2) [2006] 2 AC 221), so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing".

Auth. Tab 2

53. The then Attorney General, Lord Goldsmith QC, set out similar views in a speech to the French Cour de Cassation in June 2004 emphasising that preservation of the rule of law is of paramount importance:

"I do not believe [there] can be a simple utilitarian calculation of balancing the right to security of the many against the legal rights of the few. That would be to ignore the values on which our democratic society is built. ...

The rule of law is the heart of our democratic systems. As President Barak of the Israeli Supreme Court put it: '... the war against terrorism is a war of a law abiding nation and law abiding citizens against law breakers. It is, therefore, not merely a war of the State against its enemies; it is also a war of the law against its enemies'.

There will always be measures which are not open to governments. Certain rights - for example the right to life, the prohibition on torture, on slavery - are simply non-negotiable.

There are others such as the presumption of innocence or the right to a fair trial by an independent and impartial tribunal established by law, where we cannot compromise on long-standing principles of justice and liberty, even if we may recognise that there may sometimes be a need to guarantee these principles in new or different ways.

This has consequences for the manner in which the State is required to respond to the most extreme provocation. ... The result may be to put limits on actions which would be in the interests of the many. Again to quote President Barak of the Israeli Supreme Court: 'This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its

App. Pt. II pp. 435-436

difficulties'".

54. A similar view has been endorsed by the Heads of State and Government attending the September 2005 World Summit held at United Nations Headquarters (UN Document A/60/L.1, 15 September 2005, paragraph 85):

Auth. Tab 101

> *"We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law".*

55. The relationship between the rule of law and national security has been considered in many cases before the Israeli Supreme Court. In Beit Sourik Village Council v Government of Israel (2004), the Court held that the route of the West Bank wall then under construction was not lawful. President Barak noted at paragraph 86:

Auth. Tab 3

> *"Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognise the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. ... Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for".*

56. The Consultative Council of European Judges of the Council of Europe in their Opinion on the Role of Judges in the Protection of the Rule of Law and Human Rights in the Context of Terrorism have

Auth. Tab 92

made similar points at paragraph 85:

> *"The basic message is that the threats to security and the rule of law posed by terrorism should not give rise to measures which themselves tend to undermine fundamental democratic values, human rights or principles of the rule of law. This is a message which, if put into effect, reduces the risk that measures taken with a view to countering terrorism will themselves fuel new tensions or even promote terrorism itself. It is a message which needs to be understood and accepted in democracies by the public, politicians, media and courts alike".*

57. These principles also represent United Kingdom government policy. In the National Security Strategy of the United Kingdom (March 2008), the Cabinet Office emphasises the importance of upholding the rule of law despite terrorist threats. For example: Auth. Tab 86

> *"Our approach to national security is clearly grounded in a set of core values. They include human rights, the rule of law, legitimate and accountable government, justice, freedom, tolerance and opportunity for all" (p.6).*
>
> *"The single biggest positive driver of security within and between states is the presence of legitimate, accountable and capable government operating by the rule of law" (p.19).*

The rule of law in criminal investigations and prosecutions

58. In the context of criminal investigations and prosecutions, the rule of law assumes particular importance. It may require the release of a person who has committed terrorist crimes; the exclusion of evidence obtained by torture; compelling a person to give evidence even at increased risk to his or her life and limb; or continuing with an investigation or prosecution in the face of credible threats. The law is to be upheld and applied, equally and impartially, without fear or favour even if doing so may put individuals or society at increased risk of harm.

59. In R v Horseferry Road Magistrates Court ex parte Bennett [1994] 1 AC 42, 61H-62C, Lord Griffiths explained the duty of the Courts to uphold the rule of law: Auth. Tab 48

> *"If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.*
>
> *My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it".*

60. Accordingly, when the Secret Intelligence Service arranged for the unlawful arrest, incommunicado detention and rendition of an Irishman in Zimbabwe to the United Kingdom this amounted to "a blatant and extremely serious failure to adhere to the rule of law" : R v Mullen [2000] QB 520, 535G (Rose LJ for the Court of Appeal). Mullen's conviction was quashed by the Court of Appeal, even though it led to the release of a dangerous terrorist who had been fairly convicted on the evidence.

Auth. Tab 57

61. By reason of the constitutional principle of the rule of law, citizens have a duty to co-operate with the criminal justice system and the prosecution of offenders. For example, a witness summoned to attend court must do so, and tell the truth, even if she would risk her life by so doing. In R v Yusuf (2003) 2 Cr App R 32, Rose LJ for the Court of Appeal commented at paragraph 17:

Auth. Tab 69

> *"In the present case, the appellant was an important prosecution witness in a murder trial. It may be that he was fearful of the personal consequences to him of the malign behaviour of others, if he attended court. It is a sad reflection on our society that, in many cases, up and down the land, almost every day, witnesses, commonly prosecution witnesses, are fearful of the consequences if they do attend court. But, in most cases, they do their duty and come to court; if they did not, the alternative would be anarchy".*

A witness may be required to change her identity, move home and disrupt her private and family life. Her life may be permanently changed, and remain at risk after the trial. Steps will be taken to minimise the risks, but the criminal trial must go ahead because of the need to uphold the rule of law.

62. A further example is R (A) v Lord Saville of Newdigate [2002] 1 WLR 1249 where soldiers called to give evidence to the Bloody Sunday Inquiry sought judicial review of the decision not to accede to their request that their evidence be taken in London rather than Londonderry to reduce the risk to their life. The Court of Appeal held that the decision was unlawful. However, it was common ground that even in London, the soldiers giving evidence would still be at some risk: Lord Phillips of Worth Matravers MR for the Court of Appeal at paragraph 53. The importance of the Inquiry required that the soldiers take such a risk. Auth. Tab 29

63. Jurors and judges have a similar duty to serve, even if they are subject to threats and intimidation. Maintenance of the rule of law requires that alleged offenders are subject to investigation and are prosecuted, even (indeed, especially) when alleged criminals or their accomplices and supporters make serious threats to life or limb. Such threats are themselves criminal offences. An attempt to pervert the course of justice includes an attempt to interfere with the process of criminal investigation : R v Cotter [2002] 2 Cr App R 29, 30-31. Auth. Tab 39

The Rule of Law and prosecutorial discretion

64. The rule of law requires that no prosecutor has an unconstrained discretion as to what matters may be taken into account when deciding whether to investigate or prosecute.

65. In R v Commissioner of the Metropolitan Police ex parte Blackburn [1968] 2 QB 118 the Court of Appeal considered whether the Commissioner's policy of not prosecuting gambling operators was Auth. Tab 38

lawful. Lord Denning MR stated at p.136 that the Commissioner (who at the time had both investigatory and prosecutorial functions, as the Appellant does now)

> *"is not the servant of anyone, save of the law itself" but there were "some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law".*

Lord Denning MR concluded at p.138 by emphasising that "the rule of law must prevail".

Auth. Tab 38 66. Salmon LJ held at pp.139-140:

> *"In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn".*

Auth. Tab 38 67. Edmund Davies LJ agreed at pp.148-149:

> *"[Counsel for the Commissioner] has addressed to the court an elaborate and learned argument in support of the bald and startling proposition that the law enforcement officers of this country owe no duty to the public to enforce the law. ...*
>
> *The very idea is as repugnant as it is startling, and I consider it regrettable that it was ever advanced. How ill it accords with the seventeenth-century assertion of Thomas Fuller that, 'Be you never so high, the law is above you'. The applicant is right in his assertion that its effect would be to place the police above the law. I should indeed regret to have to assent to the proposition thus advanced on behalf of the respondent, and, for the reasons already given by my Lords, I do not regard it as well founded. On the contrary, I agree with them in holding that the law enforcement officers of this country certainly owe a legal duty to the public to perform those functions which are the raison d'etre of their existence".*

68. Blackburn was cited with approval by Lord Keith of Kinkel for the Appellate Committee in Hill v Chief Constable of West Yorkshire [1989] 1 AC 53, 59D-E. Auth. Tab 14

69. In R v Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board [1982] QB 458 the Court of Appeal considered a refusal by the police to remove demonstrators from a potential site for a nuclear power station so that works could take place. Lawton LJ stated at pp.472-473: Auth. Tab 36

> *"This appeal has two aspects, the general and the particular. The general can be described as follows: can those who disapprove of the exercise by a statutory body of statutory powers frustrate their exercise on private property by adopting unlawful means, not involving violence, such as lying down in front of moving vehicles, chaining themselves to equipment and sitting down where work has to be done. Such means are sometimes referred to as passive resistance. The answer is an emphatic 'No'. If it were otherwise, there would be no rule of law. Parliament decides who shall have statutory powers and under what conditions and for what purpose they shall be used. Those who do not like what Parliament has done can protest, but they must do so in a lawful manner. What cannot be tolerated, and certainly not by the police, are protests which are not made in a lawful manner".*

70. In a similar factual situation (unlawful protests designed to disrupt the live animal export trade), Simon Brown LJ stated (for the Divisional Court) in R v Coventry City Council ex parte Phoenix Aviation [1995] 3 All ER 37, 62e-f: Auth. Tab 40

> *"One thread runs consistently through all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated. As suggested in certain of the authorities, there may be a lawful response. But it is one thing to respond to unlawful threats, quite another to submit to them - the difference, although perhaps difficult to define, will generally be easy to recognise".*

71. Similar principles apply to a prosecutor. The Director's discretionary power to investigate and prosecute serious or complex fraud is not an unconstrained discretion. The principle of legality requires that

Parliament is presumed to have legislated so as to require such a general discretion to be exercised consistently with basic constitutional principles. See R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115 at 131E-G (Lord Hoffmann). Those basic principles include the rule of law.

Auth. Tab 64

72. Parliament has legislated to make the bribery of a foreign public official an offence. See sections 108-110 of the Anti-Terrorism, Crime and Security Act 2001. Threats (akin to an attempt to pervert the course of justice), whether express or implied, by or on behalf of a foreign public official allegedly involved in the criminal conduct are not a relevant consideration for the prosecutor when deciding whether to investigate or prosecute such an offence. Succumbing to such threats is contrary to the objects and purpose of the criminal law which it is the duty of the Director to enforce. That is particularly so where the allegation under investigation is of a criminal "conspiracy to avoid the provisions of the 2001 Act" which make the bribery of foreign public officials unlawful. If it were otherwise, the more severe the threat that a foreign public official is able to make, and the more powerful he is, the less likely it would be that criminal conduct would be investigated or prosecuted. Such a situation cannot be compatible with the rule of law or the intention of Parliament in legislating to outlaw the bribery of foreign public officials.

Auth. Tab 82

App. Pt. II p. 381

73. The Director's discretion is limited and framed by the importance of upholding the rule of law. He must carry out his task without fear or favour. In 2001 Lord Goldsmith QC accurately identified the relevant principles in giving the 13th Annual Tom Sargent Memorial Lecture, Politics, Public Interest and Prosecutions - A View by the Attorney General (20 November 2001):

> *"A fundamental safeguard to fairness is the independence of the prosecutor. National and international standards recognise the importance of the independence of the prosecutor; the ability to exercise the prosecutor's discretion independently and free from political interference; to perform their duties without fear, favour or prejudice...*

> *I cannot stress too much how important this is. You simply cannot maintain a free and democratic society without the checks and balances that over the centuries we have evolved as part of our constitution. The independence of prosecutors is crucial to this".*

App. Pt. II p. 425

74. In Sharma v Brown-Antoine [2007] 1 WLR 780, 788A, the Judicial Committee of the Privy Council confirmed that for a prosecutor to surrender to a threat is subject to judicial review:

Auth. Tab 74

> *"It is well established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial decision to political instruction (or the Board would add, persuasion or pressure) is a recognised ground of review".*

75. A prosecutor who accedes to threats made by or on behalf of persons said to be involved in the criminal conduct under investigation is not acting without fear or favour and is succumbing to improper pressure. Such conduct is contrary to the constitutional principle of the rule of law and is unlawful. A deliberate attempt to interfere with the course of justice to frustrate an investigation or prosecution cannot be taken into account when making a prosecution decision, because it is so inimical to the proper function and role of a prosecutor in a society where all are equal before the law.

76. The Respondents do not seek to distinguish in this respect between cases where the prosecutor decides to abandon an investigation or prosecution because there is an express threat of adverse consequences by or on behalf of a person said to be involved in the criminal conduct under investigation, and cases where the prosecutor acts by reference to his belief that such adverse consequences would occur. The rule of law is also undermined if the prosecutor decides to abandon an investigation or prosecution because of a belief that continuation would result in acts of retaliation on or behalf of persons said to be involved in the criminal conduct. Cf. the Appellant's Printed Case at paragraphs 14-15. The express nature of the threat is relevant only in an evidential sense that it makes it more likely that the

prosecutor will need to consider the issue and its existence assists in identifying (as in the present case) why (if he does) the prosecutor has abandoned the investigation and the illegality of such a decision.

77. The Respondents also do not dispute that it is generally open to a prosecutor to take account of public interest factors in deciding whether to investigate or prosecute alleged criminal offences. The Respondents' submission is confined to cases where the public interest factor on which the prosecutor bases the decision is, as here, a breach of the constitutional principle of the rule of law because the prosecutor is acting by reason of a threat (express or implied) to cause damage if the investigation or prosecution is pursued.

A strict necessity test

78. The Respondents do not contend that the constitutional principle of the rule of law is absolute so that in no circumstances whatever could a prosecutor lawfully have regard to a threat (made by or on behalf of a person whose conduct is under investigation) of damage to the public interest, however grave and imminent the damage may be and however clear it may be that there is no other means of addressing the threat. The Respondents' submission is that any such violation of the rule of law could only be lawful if a strict necessity test is satisfied, the onus being on the prosecutor to show that:

(1) There was an imminent threat of loss of life or serious injury to identifiable persons or groups of persons.

(2) All reasonable alternatives to violating the rule of law had been tried and failed.

(3) The consequences of violating the rule of law had been properly recognised and considered (in particular the encouragement given to others to make similar threats in the future), and weighed in the balance.

79. The Appellant's Printed Case refers at paragraph 18 to the case of Leila Khalid, a member of the PLO. She was taken into custody following a failed attempt to hijack an aircraft. At the same time, other aircraft were successfully hijacked by the PLO and hostages were taken. The PLO threatened to kill those hostages unless Khalid was released. Sir Peter Rawlinson, the Attorney General, ordered Khalid's release in exchange for the release of the hostages. The criteria of strict necessity may have been satisfied in that case if the matter had been the subject of litigation.

80. The strict necessity test is supported by the cases and principles to which reference is made in paragraphs 81-85 below.

81. In ex parte Phoenix Aviation, Simon Brown LJ identified the issue at p.58g : Auth. Tab 40

> *"Coventry and Plymouth City Councils and Dover Harbour Board argue against any absolute principle that the rule of law must prevail. Unlawful disruptive activity cannot simply be ignored. Rather it will on occasion justify or even require the suspension of lawful pursuits. An obvious illustration is the closure of an airport following a bomb threat. The question therefore becomes: what the permissible limits within which a public authority may properly respond to unlawful action?"*

Simon Brown LJ provided the answer at p.62g-j :

> *"Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour - this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role.*
>
> *Turning briefly to the present cases, all of them to our mind have one thing in common, a consideration that brings small credit to any of the three authorities concerned to bar this trade. None of them, it appears, gave the least thought to the awesome implications for the rule of law of doing what they propose. None considered the inevitable impact upon the future conduct of the protestors; that their ever more enthusiastic activities would concentrate upon an ever smaller number of outlets. None seems to have considered the legitimate interests of all of those whose livelihood depends upon this lawful trade. Rather each authority appears to have focused exclusively upon*

its own narrow self interest. Of course there are security and safety implications involved in handling this trade. But so too there are in refusing it, for the protests will not cease, rather they will intensify elsewhere".

Auth. Tab 115

As Lord Bingham of Cornhill said in The Rule of Law at p.67, "close consideration and clear justification" is needed where an inroad into the rule of law is proposed.

82. The Respondents submit that, as Simon Brown LJ stated, it is not just human rights cases which require a standard of strict scrutiny by the courts. The same approach is called for in any case where important constitutional norms are in issue. This has been recognised in a number of cases :

Auth. Tab 1

(1) In A v Secretary of State for the Home Department [2005] 2 AC 68, 127, paragraph 74, Lord Nicholls of Birkenhead (for the Appellate Committee of 9 members) said :

> *"indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified".*

Auth. Tab 76

(2) In Smith v Jones [1999] 1 SCR 455, the Canadian Supreme Court held that the constitutional right to privilege against self-incrimination must recognise an exception where a defendant was charged with sexual assault and a psychiatric report obtained by his legal advisers revealed the defendant's plan to kidnap, rape and kill prostitutes. Cory J stated for the Supreme Court (at paragraph 74) that the constitutional right to privilege

> *"is so fundamentally important that only a compelling public interest may justify setting aside solicitor-client privilege".*

The Supreme Court stated (at paragraph 77) that there were three criteria to be satisfied before an exception could be recognised :

> *"First, is there a clear risk to an identifiable person or group of persons? Second, is there is a risk of serious bodily harm or death? Third, is the danger imminent?".*

It is implicit in the Court's formulation that alternative means of addressing the issue had been excluded.

(3) In assessing the constitutional validity of a reverse onus of proof in a criminal context by reference to whether the means employed go beyond what is necessary to achieve a legitimate aim, courts require the justification to be established "clearly and convincingly" or in a "compelling" manner : see HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574, 600-601, paragraphs 44 (Sir Anthony Mason for the Hong Kong Court of Final Appeal) applying State v Mbatha [1996] (3) BCLR 293 (South African Constitutional Court) and R v Johnstone [2003] 1 WLR 1736, 1749G-1750A (Lord Nicholls of Birkenhead for the Appellate Committee). Auth. Tab 15 Auth. Tab 77 Auth. Tab 52

(4) In R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 545, paragraph 21, Lord Bingham of Cornhill (for the Appellate Committee) stated Auth. Tab 41

> *"the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners".*

83. In the human rights context, it is well-established that the more important the right, and the greater the extent to which the issues raise matters in respect of which the courts have expertise, the stricter the test of necessity and the stricter the scrutiny of the court in assessing whether the necessity test is satisfied. See A v Secretary of State for the Home Department [2005] 2 AC 68, 108-109, paragraphs 39-40 (Lord Bingham of Cornhill for the Appellate Committee). So, for example, where there is an interference with especially sensitive areas Auth. Tab 1

of a person's private life, "particularly convincing and weighty reasons" need to be established by way of justification : Lustig-Prean v United Kingdom (1999) 29 EHRR 548, 582, paragraph 87.

Auth. Tab 21

84. The Respondents also draw attention to the international law test of necessity set out in paragraphs 173-176 below. To rely on necessity, the state must show (amongst other factors) that its interests have been threatened by a "grave and imminent peril" and that its impugned action was the "only means" of safeguarding that interest. This is a rule of customary international law and so part of the common law : Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529, 553B-554H (Lord Denning MR). In a context concerned with the international relations between this country and Saudi Arabia, the criteria set out in the international law principle of necessity are of particular value in identifying the width of any exception to the constitutional principle of the rule of law.

Auth. Tab 79

85. Duress is a recognised defence in criminal law, excusing a person from criminal liability in circumstances where they have no other option but to act contrary to law : R v Z (Hasan) [2005] 2 AC 467, 489, paragraphs 17-19 (Lord Bingham of Cornhill for the Appellate Committee).

Auth. Tab 70

86. The Courts retain their responsibility even in cases which concern terrorism and national security : A v Secretary of State for the Home Department [2005] 2 AC 68, 109-111, paragraphs 41-42 (Lord Bingham of Cornhill for the Appellate Committee). Although, of course, the Courts will recognise the competence of the executive in relation to some aspects of a determination, equally there are other matters which lie within the competence of the Courts. See Secretary of State for the Home Department ex parte Rehman [2003] 1 AC 153, 193, paragraph 54 (Lord Hoffmann for the Appellate Committee):

Auth. Tab 1

Auth. Tab 71

> *"It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive ... First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. ... Secondly, the Commission may reject the Home Secretary's opinion on the ground that it was 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held'. Thirdly, an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question, which arose in Chahal itself, as to whether deporting someone would infringe his rights under Article 3. ... In answering such a question, the executive enjoys no constitutional prerogative".*

87. The present case raises issues which do not lie within the exclusive province of the executive. The judiciary has a particular and special expertise and responsibility for the protection of the rule of law. As Lord Griffiths stated in Bennett at p.62A, "the judiciary accept a responsibility for the maintenance of the rule of law". Accordingly, as Simon Brown LJ added in Phoenix Aviation (at p.62g), "the courts will adopt a more interventionist role" in protecting against threats to the rule of law.

Auth. Tab 48

Auth. Tab 40

88. The context of terrorism and national security does not preclude a searching review by the courts of the decision under challenge, just as in cases involving the use of evidence obtained by torture (A v Secretary of State for the Home Department (No.2) [2006] 2 AC 221) and fair trial guarantees (MB). The court is competent and it has the responsibility to consider whether the correct legal principles have been applied and whether the evidence meets the applicable legal standard.

Auth. Tab 2

Auth. Tab 72

The application of the legal test as to the Rule of Law in the present case

89. In the present case, the evidence does not satisfy a strict necessity test justifying a departure from the rule of law. Moreover, the Director failed properly to consider the relevance of the rule of law and whether it was appropriate to depart from it.

Absence of evidence to show attempts to persuade Saudi Arabia to cease the threats

90. The first point concerns the absence of evidence to show that any proper consideration was given as to how to resist the threats made, or how to seek to persuade Saudi Arabia to withdraw the threat.

91. This point was raised repeatedly by the Respondents in the Divisional Court and was not met by any evidence : Judgment at paragraphs 87-89. In the Divisional Court, the Appellants filed no evidence of an attempt to explain to Saudi Arabia that the United Kingdom is a democracy characterised by the separation of powers in which any attempt to interfere with a criminal investigation is a criminal offence, and that prosecutors act independently and without fear or favour, ignoring improper threats, so that the threats being made were futile.

App. Pt. I p. 249

92. The Director has now served three witness statements which seek to explain the factual background in more detail. The Respondents do not object to the admission of these statements in evidence. The statements confirm the failure on the part of the authorities

(1) to take steps to explain to Saudi Arabia the impermissibility of any attempt to interfere with an independent criminal investigation;

(2) to consider the implications for the rule of law of stopping the investigation; or

(3) to give any consideration to alternative ways by which the threats could be resisted, including by recourse to international institutions and international law, in particular through the United Nations.

93. In Ms Garlick's second witness statement, at paragraph 5, she confirms that she asked HM Ambassador to Saudi Arabia whether Saudi Arabia could be persuaded to withdraw the threats. The

Ambassador's response was that "this would not be a viable approach" because "the Saudis had a very different understanding of criminal justice systems and despite a great deal of experience in dealing with the West, the Saudis would find it difficult to accept, in comparison with their own system, that the UK Government and the Prime Minister could not stop the investigation if they chose to do so".

94. Dr Jenkins provides further evidence on the same issue. He checked the records held by the FCO and other government departments and has provided extracts from documents to show that HM Government did seek to explain to Saudi officials in 2004 and 2005 (before the threats were made) that the SFO was independent of government. Such statements were made to Saudi officials in 2004 and 2005 on several occasions.

95. However, it is clear that no attempt was made to dissuade the Saudis from their threats in 2006. The situation is clear from a letter from HM Ambassador to Saudi Arabia to the Permanent Secretary at the FCO, Sir Peter Ricketts dated 25 September 2006:

> *"I recall that, in the margins of the meetings recorded above, and possibly on one or two other occasions (eg during the Prince of Wales's visit in March this year), I had brief oral exchanges with [a senior representative of the Saudi Arabian Government] on the SFO enquiry, including those mentioned [above]. I remember [the senior representative of the Saudi Arabian Government] giving that impression that he had information of his own about the SFO enquiry (for example, he volunteered that he understood that the enquiry could be discontinued if it was not in the public interest (although he used a curious phrase which I can't now recall)). I remember telling him more than once that senior officials in London were well aware of just how serious the enquiry could be, and that we were working to persuade the legal authorities of this. But I always made clear that the enquiry was not in our hands, and that there could be no guarantees. I remember being worried that [senior representative of the Saudi Arabian Government] was more optimistic about the SFO enquiry than seemed justified on the facts available to me. I confess that I did ask myself at least once whether I should have done more to disabuse him. But he always gave the impression he had his own information, and really just wanted to use me to convey to*

London how concerned he was".

96. The contrast between this letter and the evidence given by Ms Garlick is striking. In the letter, dated 25 September 2006 (immediately after the threats had been made), the Ambassador confesses his concern that he "should have done more" to "disabuse" the Saudi official (who it may be inferred is probably Prince Bandar) making threats. However, he did not do so, either at the time or subsequently. Despite this concern, the Ambassador told Ms Garlick and the Appellant that it would not be "viable" to seek to persuade the Saudis to withdraw their threats, or to disabuse them of the notion that further threats might produce the desired results. The Ambassador does not appear to have told the Appellant of the concerns he expressed in this letter.

97. The chronology is also of importance. In November 2006 (around 2 months after the above letter was sent), there was a meeting between the Ambassador and unnamed Saudi officials. At that meeting, the threats were repeated and intensified. Further, in early December 2006, Prince Bandar met Foreign Office officials. Records would have been kept of both meetings, which Dr Jenkins no doubt reviewed as part of his search for relevant material. Nothing has been disclosed, so it appears clear that no attempt was made at the critical stage to attempt to dissuade the Saudi officials from their threats. Indeed, it is plain from the letter cited above that HM Government's actual concern was to pacify the Saudis by assuring them that HM Government was doing everything it could to dispose of the undoubtedly inconvenient SFO enquiry.

App. Pt. II p. 392

App. Pt. II pp. 558-559

98. In short, the new evidence makes it clear that after the threats were made, no attempt was made to seek to persuade the Saudis to withdraw them, or to explain that the threats were futile.

No evidence to show attempts to counter the threats by reference to Saudi Arabia's international obligations

99. The second point is that, as the Respondents contended before the Divisional Court, the United Kingdom could and should have countered the threats by calling Saudi Arabia to account before the UN Security Council, or by warning Saudi Arabia that it would do so if the threats were not withdrawn. It is significant that no attempt has been made in the new evidence to explain why this was not done, notwithstanding the fact that mandatory rules of international law adopted by the UN Security Council impose a duty of cooperation in relation to international terrorism and would prohibit threats of the kind made by the Saudis.

100. By way of example, Security Council Resolution 1373/2001, adopted in the aftermath of the terrorist attacks on 11 September 2001, required all states (including Saudi Arabia) to co-operate to prevent any repetition. Article 2 of the Resolution required states to: Auth. Tab 107

> *"... take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information. ...*
>
> *afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings".*

Article 3 called upon states to

> *"co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts".*

Resolution 1373 allows for no exceptions to these obligations, and Article 6 created a monitoring committee and a reporting mechanism.

101. On 19 September 2002, the Minister of Foreign Affairs of Saudi Arabia, Prince Saud al Faisal, gave a speech to the General Assembly of the United Nations in which he reaffirmed Saudi Arabia's support

for Resolution 1373:

> *"The Kingdom of Saudi Arabia reaffirms its support for all Security Council Resolutions related to the question of terrorism, and has cooperated with the international community in implementing these resolutions with the aim of combating it ...".*

App. Pt. I p. 293

102. Pursuant to the reporting mechanism in Resolution 1373, Saudi Arabia has been asked numerous questions about its counter-terrorist co-operation procedures, and has given assurances to the Security Council about them. For example, on 29 May 2003, the Saudi Ambassador to the UN provided a response to various queries raised by the Security Council about Saudi Arabia's implementation of Resolution 1373:

> *"1.13 The CTC would be grateful to know the institutional mechanism by which Saudi Arabia provides early warning of any anticipated terrorist activity to another Member State, whether or not the States are parties to bilateral or multilateral treaties with Saudi Arabia.*
>
> *Response*
>
> *In the event that the competent authorities in the Kingdom of Saudi Arabia come into possession of information on the possibility that a terrorist offence might occur within the territory of a State or States, against their nationals or persons resident within their territory or against their interests, the Kingdom communicates to that State or States the information in its possession through notification of a possible terrorist offence, transmitted through the embassy of the targeted State or States in Saudi Arabia if such State or States have no bilateral or multilateral treaties with the Kingdom. If, however, security arrangements or treaties exist between Saudi Arabia and a particular State or States, the notification is addressed to the competent counter-terrorism authority in the State or States whose interests, nationals or residents are targeted".*

App. Pt. I p. 294

103. If Saudi Arabia had terminated security and intelligence co-operation with the UK, it would have been in plain breach of Resolution 1373 and its assurances to the Security Council.

104. Saudi Arabia could have been called to account by the UK before the Security Council for its breach of Resolution 1373. This is the normal means by which such disputes are resolved between states. The United Kingdom could also have warned Saudi Arabia that this step would be taken if the threats were not withdrawn.

105. Further, taking such steps is government policy, even in cases where national security is threatened. The National Security Strategy of the United Kingdom states: Auth. Tab 86

> *"Overseas, our belief in the rule of law means we will support a rules-based approach to international affairs, under which issues are resolved wherever possible through discussion and due process, with the use of force as a last resort (p.6).*
>
> *We believe that a multilateral approach in particular a rules-based approach led by international institutions brings not only greater effectiveness but also, crucially, greater legitimacy (p.7)".*

106. It is apparent from the Appellant's silence on this point that no such steps were taken or even considered. No good reason for the failure to do so has been advanced.

Failure properly to consider the damage to the rule of law and the adverse consequences

107. Further, the Director never gave any consideration to the damage to national security that might flow from discontinuing the investigation because of the perception that Britain easily succumbs to threats from other states to its security. This is admitted at paragraph 37(1) of the Director's Printed Case.

108. The admission is inevitable given the Director's answers before the House of Commons Constitutional Affairs Committee on this issue:

> *"Q269 David Howarth: ... if other countries get to know that Britain gives in to this sort of pressure, that in itself could be a threat to our national security? Was that risk taken into account in the decision?*

> *Robert Wardle: No, it was not expressed in the risk, and I am not sure how much of a risk it really is. I think this was an exceptional case. We are continuing other investigations, both into BAE Systems Plc and into other areas, where we are doing our best to pursue them. I think that the risk of people thinking we can get away with it, which is effectively, I think, what you are saying, will be lessened if we are able to pursue those investigations, which we are, indeed, doing".*

App. Pt. II
pp. 564-565

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App. Pt. I
p. 251

109. As the Divisional Court observed, this does not answer the point (Judgment at paragraph 95). There is no suggestion that the other investigations into BAE were being pursued despite threats. A failure to resist a threat cannot be excused by a willingness to prosecute absent such a threat.

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110. It is suggested by the Director (paragraph 37(1) of his Printed Case) 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". The only evidence relied on by the Director in support of this assertion is that the Prime Minister is recorded as saying in a meeting with the Attorney General that:

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> *"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. But the Government also needed to consider the damage done to the credibility of the law in this area by a long and failed trial, and its good reputation on bribery and corruption compared with many of its international partners".*

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App. Pt. II
p. 406

App. Pt. II
p. 406

111. Again, this does not demonstrate any adequate consideration of this issue by Ministers. The reference to a "long and failed trial" reflects the Attorney General's view that achieving a conviction on corruption charges would be difficult. This view was not shared by the Director, so cannot be relevant. The assertion that Britain previously had a "good reputation" on bribery and corruption, even if correct, does not answer the concern as to the damage to national security that would be caused by abandoning the investigation into BAE.

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112. The evidence suggests that the Appellant failed properly to understand the relevance and significance of the constitutional principle of the rule of law.

Imminent harm

113. In any event, there was no imminent threat of loss of life or serious injury to identifiable persons or groups of persons, and therefore a strict necessity test was not here satisfied and there was no basis for departing from the rule of law by succumbing to the threats.

Conclusion on the Rule of Law

114. For the reasons set out above, for the Director to terminate an investigation into alleged criminal conduct because of an extraneous threat undermines the rule of law, and, in particular, the equal application of the law without fear or favour. Permitting a powerful person to frustrate a criminal investigation by the making of threats is the very opposite of the notion of equality under the law. All must be equal before the law, even if they are powerful and are able to make weighty and convincing threats. Without strict protection against the making of threats, the rule of law has little practical content or effect. The Director has failed to justify his decision as required by a strict necessity test.

115. The Director complains (without actually denying it) that the suggestion that Saudi officials wished to interfere with the course of justice is an "abrasive assumption" (Director's Printed Case, paragraph 19). The underlying concern of the Saudi officials may or may not have been to protect the "confidentiality" of the terms of the Al-Yamamah contractual arrangements, but their express intention was to make threats in order to halt the criminal investigation. The additional complaint that "as a matter of English law ... the Saudi Arabian Government was not threatening to do anything unlawful" (Director's Printed Case, paragraph 19) does not assist the Director. Upholding the rule of law in the present context depends on ensuring

that those whose criminal conduct was being investigated do not escape criminal liability because they have powerful friends who make threats of adverse consequences if the investigation continues. Upholding the rule of law does not depend on whether the person making the threats is acting unlawfully. An attempt at blackmail is still unlawful even if the threat is to carry out an otherwise lawful act. See Thorne v Motor Trade Association [1937] AC 797, 806-807 (Lord Atkin) :

Auth. Tab 78

> *"The ordinary blackmailer normally threatens to do what he has a perfect right to do namely communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. ...".*

116. Threats made in an attempt to dissuade a prosecutor from investigating alleged criminal conduct are a direct attack on the integrity of the justice system. The courts will intervene to protect the integrity of that system, even where national security concerns are raised.

117. In these circumstances, it was unlawful for the Director to permit such threats to influence the decision to discontinue the investigation. If it were otherwise, the more powerful, ruthless and unscrupulous the foreign public official, the more likely it is that crime can be committed with impunity. As the Judicial Committee of the Privy Council stated in Sharma at paragraph 14(1):

Auth. Tab 74

> *"The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high or dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed".*

The OECD Anti-Bribery Convention

118. The Director describes the rule of law issue as the major question on the appeal (Director's Printed Case, paragraph 4). The Respondents respectfully disagree. There are two main questions. The second concerns the OECD Convention. For the reasons set out below, the decision of the Director was also unlawful because he misconstrued Article 5 of the OECD Convention. Auth. Tab 104

Jurisdiction of the Courts to interpret international law instruments

119. Ordinarily, domestic courts do not have jurisdiction to adjudicate on or to enforce rights arising out of treaty obligations between states at the level of international law. See JH Rayner (Mincing Lane) Limited v Department of Trade and Industry [1990] 2 AC 418, 499F-500D (Lord Oliver of Aylmerton for the Appellate Committee), R v Lyons [2003] 1 AC 976, 992, paragraph 27 (Lord Hoffmann for the Appellate Committee), and R (Hurst) v London Northern District Coroner [2007] 2 AC 189, 216-219, paragraphs 53-59 (Lord Brown of Eaton-Under-Heywood for the Appellate Committee). Auth. Tab 19 Auth. Tab 56 Auth. Tab 49

120. But there are circumstances in which the domestic courts will consider and rule upon the meaning and effect of an international instrument. In particular, it is a well-established principle of public law that where a public body states that it has complied with, or taken into account, an international law obligation when making a decision, the court has jurisdiction to review the decision to assess compliance with that obligation.

121. In R v Secretary of State for the Home Department ex parte Launder [1997] 1 WLR 839 the Appellate Committee considered the legality of the Secretary of State's decision to extradite the Applicant, who relied on the European Convention on Human Rights prior to its incorporation into domestic law by the 1998 Act. The Secretary of State asserted that he had taken into account the Applicant's representations that his extradition would be a breach of his Auth. Tab 63

Convention rights. The Appellate Committee held that it would review the Secretary of State's decision for compliance with the Convention. Lord Hope of Craighead stated (for the Appellate Committee) at p.867F that:

> *"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 surely 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 Mr Vaughan directed his argument".*

Auth. Tab 44 122. In R v Director of Public Prosecutions ex parte Kebilene [2000] 2 AC 326 the principle in Launder was confirmed and applied. The question was whether the courts could review the soundness of advice as to the effect of the European Convention on Human Rights on the basis of which the Director consented to the prosecution of the applicants under counter-terrorist legislation. Lord Bingham of Cornhill CJ (for the Divisional Court) held at pp.341D-E and 342C:

> *"It is, therefore, as it seems to me, appropriate for this court to review the soundness of the legal advice on which the Director has made clear, publicly, that he relied; for if the legal advice he relied on was unsound he should, in the public interest, have the opportunity to reconsider the confirmation of his consent on a sound legal basis. This approach is in my judgment consistent with that of Lord Hope ... in Launder ... .*
>
> *In offering such guidance as it can on the true effect of the Convention, the court does not in my view usurp the legislative responsibility of Parliament nor the independent decision-making responsibility of the Director, so long as it leaves the final decision to him".*

Auth. Tab 44 123. In the Appellate Committee in Kebilene, Lords Steyn and Hope of Craighead endorsed the above approach : pp.367E-G and 375F-376A.

124. In R (Gentle) v Prime Minister [2008] 2 WLR 879 at paragraph 26, Lord Hope of Craighead commented in relation to Launder : Auth. Tab 47

> *"At p.867E-F I said that, if the applicant was to have an effective remedy against a decision which was flawed because the decision-maker had misdirected himself on the Convention which he himself said he took into account, the House should examine the substance of the argument. But the context in which I made that observation was a case where the Secretary of State was dealing with the applicant's rights under domestic extradition law. He chose to do this by reference, amongst other things, to the Convention. If he misunderstood its provisions he was, according to the ordinary principles of domestic law, reviewable".*

125. Therefore, if a decision-maker purports to act on the basis of a particular international instrument and directs himself that he is acting in accordance with that instrument, but he misunderstands or misconstrues that instrument, then he has taken into account an irrelevant consideration, namely his erroneous understanding of the instrument. The instrument will be construed by the court applying ordinary public law principles. The court is doing no more than testing the rationality and legality of a decision against the standard which the decision-maker has chosen to adopt.

126. By contrast, in R (Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2777 (Admin) the Divisional Court refused to rule on whether UN Security Council Resolution 1441 permitted the United Kingdom to go to war in Iraq without a further Resolution. At that time, the government had not publicly declared any view of the position in international law and no right, interest or duty under domestic law required determination of the issue. Indeed, the government had taken great care not to state any view as to the effect of Resolution 1441. Launder therefore had no application. See Simon Brown LJ at paragraph 36 and Richards J at paragraph 61(iv). Auth. Tab 35 Auth. Tab 63

Auth. Tab 63

127. The Director contends that the facts of the decision in Launder set the boundaries as to the circumstances in which a court may interpret an international instrument. He identifies two conditions which, he says, must be satisfied (Director's Printed Case, paragraphs 48-49):

(a) The decision relates to an individual's human rights in circumstances where domestic law requires anxious scrutiny of the grounds on which the decision was taken.

(b) The international instrument requires the domestic legal order to produce an effective remedy.

128. The Divisional Court rejected these contentions. The Respondents submit that it was correct to do so, there being no principled reason for the proposed limitations. In any event:

(a) Although the present case does not concern human rights, it raises a constitutional issue (the rule of law) in which a court will apply a standard of strict scrutiny.

(b) The essence of the OECD Convention is to require an effective domestic remedy against bribery and corruption by means of prosecution and enforcement by competent national authorities in accordance with the standards set out in that Convention.

Jurisdiction of the Courts to interpret the OECD Anti-Bribery Convention in this case

129. The Director and the Attorney General repeatedly informed the public, Parliament and the OECD that the decision to halt the investigation was taken in accordance with the OECD Convention and that those considerations which the Director was precluded from taking into account under Article 5 were not taken into account by him. When announcing the decision to Parliament, the Attorney General said:

"Article 5 of the OECD Convention on Combating Bribery of

> *Foreign Public Officials in International Business Transactions precludes me and the Serious Fraud Office from taking into account considerations of the national economic interest or the potential effect upon relations with another state, and we have not done so".*

App. Pt. II p. 410

130. Further, the United Kingdom government has publicly stated that the United Kingdom will comply with the OECD Convention, including Article 5, when making prosecution decisions. Pursuant to Article 12 of the OECD Convention, the OECD Working Group has visited the United Kingdom and reported on its implementation of the OECD Convention. Amongst other matters, the OECD has expressed concern that the involvement of the Attorney General in giving consent for a prosecution "involves the possible consideration of UK interests that the Convention expressly prohibits in the context of decisions about foreign bribery cases". However, to allay the OECD's concerns, the Attorney General:

App. Pt. II p. 497 para 170

> *"specifically confirmed that none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute. Moreover, the Attorney General noted that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust. In addition the UK authorities note that by acceding to the Convention, the UK has confirmed that the circumstances covered by the Convention are public interest factors in favour of a prosecution (OECD UK Phase 2 Report on the Implementation of the Convention, 2005)".*

App. Pt. II p. 497 para 171

131. This assurance was specifically drawn to the attention of Ministers when the Shawcross exercise was undertaken on behalf of the Attorney General in December 2005.

App. Pt. II p. 363

132. Once the decision had been made, the Director and the Attorney General assured the OECD that the United Kingdom had complied with the Convention :

> *"10 The SFO and the Attorney General at all times had regard to the requirements of the OECD Anti-Bribery Convention. In particular, as the Attorney's statement*

App. Pt. II
p. 544

makes clear, the considerations set out in Article 5 of the Convention played no part in the SFO's decision to discontinue the investigation. ...".

133. In a later public submission to the OECD, the Director went further and assured the OECD that the domestic courts would make a determination as to whether the decision to halt the investigation was compatible with Article 5 of the Convention :

> *"As anticipated at the Working Group meeting in January, the SFO's decision to discontinue the investigation is now the subject of legal challenge by way of judicial review. This is the process by which the legality of a decision by a public authority, such as the SFO, can be challenged in court. That case raises the very issue of whether the SFO's decision was compatible with Article 5 of the Convention. That question is therefore now likely to be determined by the English High Court. The SFO will vigorously defend the legality of its decision and its compatibility with the Convention, as explained".*

App. Pt. II
p. 557 para 18

134. The Director cannot have it both ways. He cannot simultaneously assure the OECD that it need not be concerned because the English courts will rule on the compatibility of his decision with Article 5 *and* also argue before those English courts that the matter is non-justiciable.

Auth. Tab 63

135. The present case satisfies the Launder criteria. The Respondents adopt the conclusions of the Divisional Court at paragraph 119 of the Judgment:

> *"In the instant application, the Director has chosen, publicly, (to echo Lord Bingham's description of the decision of the Director in Kebilene) to justify his decision by reference to Article 5. The public justification for the decision depended upon the assertion that it was necessary to discontinue the investigation for reasons which were compatible with Article 5, that is, national security. In order to achieve public acceptance of a controversial decision, he invoked compliance with the UK's international obligations under Article 5. If the Director mis-directed himself as to such compatibility then his public justification and reasons for the decision are flawed. The fact that the Attorney General and Director chose to justify the decision by invoking compatibility with the Convention entitled*

this court to review the legality of the decision under ordinary domestic law principles".

App. Pt. I p. 256

136. In these circumstances, the Respondents submit that the courts have jurisdiction to interpret Article 5 of the OECD Convention in this case.

Should the court refrain from considering Article 5 as a matter of discretion?

137. After concluding that the Respondents' construction of Article 5 of the OECD Convention was correct, the Divisional Court held at paragraphs 153-154 of the Judgment that it was not necessary for it so to rule:

> *"the Contracting Parties have invested the authority to draw that line not in the domestic courts of those Parties but on the [OECD Working Group on Bribery]".*

App. Pt. I p. 264

Accordingly,

> *"the Government will have to defend itself before the court of the WGB. It will be for that body to determine whether it was open to the UK to yield to the explicit threat ...".*

App. Pt. I p. 265 para 157

The Director supports the Divisional Court's findings on this issue : Director's Printed Case, paragraphs 51-52.

138. The Respondents submit that this analysis is incorrect. The Appellant Committee in Launder did not refrain from construing the European Convention on Human Rights because Mr Launder had a right of individual petition to the Strasbourg Court, a far more useful and effective international law mechanism than anything provided for under the OECD Convention. Nor has the Appellate Committee refrained from construing the International Covenant on Civil and Political Rights, for example, because of the role of the Human Rights Committee in receiving and assessing reports from States Parties: see, for example, R (Mullen) v Secretary of State for the Home Department [2005] 1 AC 1, 26, at paragraph 9 (Lord Bingham of Cornhill), 43-45 at paragraphs 45-49 (Lord Steyn).

Auth. Tab 63

Auth. Tab 58

139. In any event, the OECD Working Group is not a court, but a committee comprised of representatives of state parties to the OECD Convention. It is neither independent nor impartial and has no judicial role. It has a limited mandate (as revised in 1997 by OECD Council Revised Recommendation C(97)123/FINAL) and no power to issue an authoritative ruling on the true construction of Article 5. Its powers under the OECD Convention are limited to those identified in Article 12 ("Monitoring and Follow-Up") which provides:

Auth. Tab 105

Auth. Tab 104

> *"The Parties shall co-operate 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, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body".*

140. The Working Group has no power to require the Director to reconsider his decision applying the Convention that he purported to follow. The United Kingdom informed the OCED that the English courts will be examining whether the decision of the Director complies with Article 5 (as a means of persuading the OECD that the United Kingdom complies with its international law obligations). In those circumstances, the possibility of an international investigation of the Director's decision should not dissuade the Appellate Committee from considering the issues.

Would the Director have made the same decision in any event?

141. The Director has sought to argue that he would have taken the same decision, even if he had known that he was acting in breach of the OECD Convention. The Director therefore contends that the Appellate Committee should not intervene, even if satisfied that the Director acted in breach of Article 5 of the OECD Convention (Director's Printed Case, paragraph 49). The Divisional Court rightly described this submission as "unattractive", although it did not in the

App. Pt. I p. 265

event need to rule on it (paragraph 158 of the Judgment).

142. In the Grounds for Judicial Review at paragraphs 39-41, the Respondents contended that this was an impermissible attempt by the Appellant at ex post facto justification of a decision. This was expressly denied at paragraph 20 of the Director's Amended Summary Grounds : App. Pt. I pp. 19-20

> *"The Claimants' assertion that this is inadmissible retrospective reasoning is misconceived. ... The fact that he would have made the same decision, even if he had taken a different view of the scope of Article 5, is a further point that there was no reason for him to explain at the time of the decision. ... This point is consistent with the reasons he gave and there is absolutely no reason to doubt his evidence".* App. Pt. I p. 36

That denial is not supported by the first witness statement of the Director. At paragraph 51 of that statement, the Director accepts that he "did not specifically consider the question at the time". App. Pt. I p. 327

143. The Director therefore seeks to rely on an ex post facto rationalisation of what he would have done, but did not in fact do. The attempt to rely on ex post facto reasoning should be rejected: Wing Kew Leung v Imperial College [2002] EWHC 1358 (Admin), at paragraphs 28-30 and R v Westminster City Council ex parte Ermakov [1996] 2 All ER 302. In this regard it is particularly important that Parliament and the OECD have both been assured by the Attorney General that the Director's decision was taken on the basis that considerations precluded by Article 5 were not taken into account. Auth. Tab 80 Auth. Tab 68

144. The Director accepts, in particular, that he made his decision in the belief that the considerations he took into account were not precluded from being considered under Article 5. He was thus able to make his decision without having to face the political consequences, and the consequences before the OECD, of admitting publicly to a breach of the OECD Convention. If he erred in law in believing that his decision complied with the Convention, it cannot be said with certainty that the same decision would have been taken in any event

had he correctly understood it to be a breach of the Convention. See, for example, R (Bradley) v Secretary of State for Work and Pensions [2007] EHWC 242 (Admin) at paragraphs 85-86. As in Bradley, the Director should be given an opportunity to reconsider his position on the correct legal basis.

Auth. Tab 34

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Auth. Tab 62

145. The Director relies on R v Secretary of State for the Home Department ex parte Fininvest Spa [1997] 1 WLR 743. That case concerned letters of request issued by the Italian prosecuting authorities. The Secretary of State referred the requests to the SFO which obtained a search warrant under statutory powers. Article 2 of the European Convention on Mutual Assistance in Criminal Matters 1959 (which was incorporated into domestic law) imposed a duty on the Secretary of State to assist if the case did not concern a political offence. If the case did concern a political offence, the Secretary of State had a discretion but not a duty to provide assistance.

Auth. Tab 99

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Auth. Tab 62

146. Simon Brown LJ (for the Divisional Court) held at 758G:

> *"That is not to say, however, that the Secretary of State was bound to reach a decision as to whether or not these offences were themselves, or were connected with, political offences. He could instead, had he wished, have decided that whether or not they were ... he would not in event exercise it to refuse co-operation with the Italian authorities in the particular circumstances of this case. Had he followed that course or, indeed, had he deposed in the present proceedings that, even had he reached a contrary view on the political offence question, he would still have decided to comply with the request, his decision would in my judgment be proof against this particular ground of challenge, irrespective of whether he directed himself correctly on the substantive issues".*

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Auth. Tab 62

147. Fininvest is not comparable. If the Secretary of State had deposed as Simon Brown LJ indicated, there would have been no breach of the 1959 Convention whether or not the underlying case involved a political offence. Accordingly, it would be irrelevant whether the offence was a political one or not. By contrast, if the Respondents are correct in the present case, the Director took a decision in the

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incorrect belief that it was compatible with Article 5. The Appellate Committee should be slow to accept an ex post facto rationalisation that the Director would have made the same decision even if he has misunderstood the international legal obligation with which he purported to comply.

Principles for the interpretation of treaties

148. Article 31(1) of the Vienna Convention on the Law of Treaties requires that: Auth. Tab 114

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

149. The proper meaning of a treaty is a question of law to which there can only be one correct and autonomous answer. This is reflected in Article 33(3) of the Vienna Convention on the Law of Treaties which, being concerned with treaties which are authenticated in two or more languages, provides that Auth. Tab 114

> *"The terms of the treaty are presumed to have the same meaning in each authentic text".*

See also Sir Robert Jennings and Sir Arthur Watts (eds.), Oppenheim's International Law, 9th edition, 1992, p.1283 : Auth. Tab 120

> *"it is fundamental that although there is more than one authentic text there is only one treaty with one set of terms".*

The suggestion made by the Director that "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 preparatoires" (Director's Printed Case, paragraph 51) is wrong as a matter of elementary international law.

Auth. Tab 60 150. In R v Secretary of State for the Home Department ex parte Adan [2001] 2 AC 477, the Secretary of State presented the same argument in relation to the proper construction of the Refugee Convention. Lord Steyn noted at p.515F that such a result would be "remarkable". He added at pp.515-517 :

> *"It follows that the enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. ...".*

Lord Steyn cited the international law authorities and continued :

> *"It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention on the Law of Treaties] and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning".*

See also Lord Slynn at pp.507-509 and Lord Hobhouse at pp.529-531 to the same effect.

Auth. Tab 58 151. See also R (Mullen) v Secretary of State for the Home Department [2005] 1 AC 1, 26, paragraph 9(1) where Lord Bingham of Cornhill considered the expression "miscarriage of justice" in Article 14(6) of

Auth. Tab 102 the International Covenant on Civil and Political Rights:

> *"the expression describes a concept which is autonomous, in the sense that its content should be the same in all states party to the ICCPR, irrespective of the language in which the text appears"*

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The meaning of Article 5 of the Convention

152. The United Kingdom, along with all other OECD member states, has ratified the OECD Convention. The purpose of the OECD Convention is to remove barriers to the prosecution of international bribery and corruption. The Convention is a multilateral treaty, to which 37 parties are now signatories, under which the parties all agree not to accede to diplomatic threats and other forms of blackmail commonly used to frustrate embarrassing international bribery prosecutions in exchange for a similar promise by other states. All states thereby benefit and the rule of law is promoted and upheld. Auth. Tab 104

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153. The preamble to the Convention states: Auth. Tab 104

> *"The Parties*
>
> *Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions ...*
>
> *Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up.*
>
> *Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence".*

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154. Article 1 of the Convention requires parties to create a criminal offence of bribery of a foreign public official. Auth. Tab 104

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155. Article 5 of the Convention provides for enforcement provisions: Auth. Tab 104

> *"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".*

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156. The Respondents submit that the true construction of Article 5 of the OECD Convention is that it prohibits a prosecutor from abandoning an investigation on the basis of threats by foreign public officials to withdraw security and intelligence co-operation. Any other approach is inconsistent with the objects and purpose of the Convention.

Auth. Tab 114

157. Pursuant to Article 31 of the Vienna Convention, it is necessary to identify the object and purpose of the Convention:

(a) The Convention is a multilateral treaty. Its purpose was to ensure that all OECD countries present a combined and united front against bribery and corruption of foreign public officials. For that objective to be met, the obligations it imposes must be treated as autonomous in the sense that their content should be the same in all parties. Bribery has serious consequences, including itself threatening national security. See the witness statement of Nicholas Hildyard where the views of the leaders of the G8 are cited:

> *"We recognise that corrupt practices contribute to the spread of organised crime and terrorism, undermine public trust in government, and destabilise economies" (G8, Fighting High Level Corruption, July 2006).*

App. Pt. I p. 277

(b) Cross-border corruption is particularly difficult to eliminate because the bribed foreign public official will often be senior in status and thus able to deploy the machinery of his state to impose adverse consequences on the state that exposes his conduct. The foreign official or his associates or agents may be in a position to make powerful threats to ensure that his conduct is not exposed, and to protect the interests of the company that has purchased his cooperation. When faced with such threats, the demands of realpolitik mean that bribery prosecutions will often come a poor second. This is the mischief that Article 5 was intended to address.

(c) If states capitulate to such threats, the end result is that bribery flourishes. Conversely, if OECD countries maintain the same common high standard of refusing to abandon bribery investigations on the basis of diplomatic threats (real or bluffed), all states ultimately benefit. Each state agrees to limit its freedom of action in individual cases in order to secure long term benefits for all. In these circumstances, uniformity of interpretation and enforcement is essential.

158. The OECD Convention must be construed with these purposes in mind, which are common to much international law. The classic example is the four 1949 Geneva Conventions. Under the Geneva Conventions, each party agrees to forego many methods or means of warfare that might permit it to defend itself more effectively and with lower casualties amongst its citizens against an unlawful and unprovoked attack, or to win a lawful war. By following the terms of the 1949 Geneva Conventions, all states (and their citizens) benefit in the long run. The same considerations apply to the OECD Convention. Its purpose is to deny parties the freedom of action they would otherwise enjoy in order to develop a long term collective benefit for all state parties and their citizens.

Auth. Tab 108

159. In the above context, the Respondents submit that the ordinary meaning of the words of Article 5 is clear:

(a) Article 5 preserves "the applicable rules and principles of each Party". Without more, this would permit a prosecutor to take a national security issue into account. For example, if a bribery prosecution would cause damage to national security which flowed from, for example, the disclosure of the identity of an agent, this would not offend against Article 5.

Auth. Tab 104

(b) However, Article 5 is subject to three provisos which operate to override the ordinary national regime of prosecutorial discretion: national economic interest, potential effect on

relations with another state, and the identity of the persons involved. National principles and rules only apply to the extent they are consistent with the provisos in Article 5.

(c) Article 5 provides that the effect on relations with another state may not be taken into account when making investigation and prosecution decisions. This phrase must be construed in accordance with the object and purpose of the Convention, so as to ensure that the Convention has real and practical effect. The kinds of effects on relations that might occur if a bribery investigation is continued can easily be identified. They include a withdrawal of diplomatic co-operation, ending of co-operation on intelligence sharing, and other similar matters. These are precisely the matters relied upon by the Appellant in this case.

(d) Article 5 requires that these effects must be ignored because they are effects on the relationship between states. The Convention cannot properly be interpreted to allow one state to make diplomatic threats to another to achieve the aim of ending a bribery investigation. Such conduct is plainly prohibited by the object and purpose of the Convention and the wording and spirit of Article 5: it would defeat the purpose of the multilateral Convention under which states each agree not to submit to pressure or blackmail in individual cases in order to advance the common good for all states. It is precisely because the contracting parties recognise that if an investigation into bribery by a powerful foreign public official is commenced, diplomatic threats may be issued, Article 5 provides that regard must not be had to the potential effect on relations with another state.

(e) If Article 5 were to be read so as to permit the Director to take into account the alleged national security effects of damaged relations with Saudi Arabia, this would frustrate the purpose of Article 5 and undermine the entire

Convention. A system of multilateral commitments would be replaced by unilateral actions, in which each party would be free to determine for itself that a consideration of national security would trump the constraints imposed by the Convention. There will always be such "potential effect[s]" if relations with another state are damaged. Article 5 requires that these effects must be ignored because of the importance of preventing bribery and corruption in international business transactions. As Mr Cowie, the SFO Case Controller, accurately put it in a memorandum to the Director:

> *"Article 5 OECD ... envisage[s] an independent role for law enforcement outside of economic or political considerations. To have any meaningful effect they must have application, regardless of the seriousness of the consequences stated. There [are] always likely to be economic and political consequences of any major enquiry into defence contracts. That is why such considerations must ultimately be irrelevant to the independent conduct of such enquiries".* App. Pt. I p. 378

160. Accordingly, the Respondents agree with the analysis of the Divisional Court (paragraphs 140-142) that if the threats made in this case are not prohibited considerations, "Article 5 seems to have little, if any, utility": App. Pt. I p. 261

> *"It is all too easy for a state which wishes to maintain good relations with another state whose official is under investigation to identify some potential damage to national security should good relations deteriorate, all the more so where that other state is powerful and of strategic importance.*
>
> *...*
>
> *Self interest is bound to have the tendency to defeat the eradication of international bribery. The Convention is deprived of effect unless competitors are prepared to adopt the same discipline. The state which condones bribery in its economic or diplomatic self-interest will merely step into the commercial shoes of the states which honour their commitment. Unless a uniform distinction is drawn between the potential effect upon relation with another state and national security, some signatories of the Convention will be able to escape its*

discipline by relying upon a broad definition of national security, thus depriving the prohibited consideration of the effect upon relations with another state of any force".

161. The Director describes the above analysis as "tortuous, dogmatic and reductionist" and "completely alien to what the Parties to the OECD Convention intended" (Director's Printed Case, paragraph 58(1)). This view is not shared by the Secretary General of the OECD who has stated that the "founding fathers" of the Convention included Article 5 for the reasons identified by the Respondents above.

App. Pt. II p. 541

162. The Director also places reliance on the observation of Lord Goldsmith QC that he does not believe that the United Kingdom would have ratified the OECD Convention if it had thought that it could not "have regard to something as fundamental as national security". With respect to Lord Goldsmith QC, this comment takes matters no further forward. Nor does Lord Goldsmith QC explain why if the United Kingdom wanted a broad and unfettered national security exception, it did not insist on express words in the Convention, in line with its practice in other treaties negotiated around the same time (see paragraph 167 below).

163. The Director proposes that a distinction should be drawn between (a) a decision whether to investigate or prosecute being influenced by its potential effect on relations with a foreign state; and (b) "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" (Director's Printed Case, paragraph 59(3)). Using this suggested distinction, the Director claims that "he was not influenced by the potential effect on the United Kingdom's relations with Saudi Arabia per se" (Director's Printed Case, paragraph 41).

164. The Respondents invite the Appellate Committee to note the use of the phrase "per se" and the failure of the Director to identify what kind of potential effects on relations with a foreign state do fall within

the prohibition in Article 5. The Appellant's proposed construction would render Article 5 of no practical value. The Convention would be unlikely to make a significant contribution to the elimination of bribery of foreign public officials. Nor can the Appellant's construction be reconciled with the words "potential effect" in Article 5, which make clear that the actual effects on relations between states are to be ignored.

165. The Appellant's approach concludes with the suggestion that Article 5 "is not apt to cover considerations of national security, since such considerations are normal prosecutorial factors which are not symptomatic of political influence" (Director's Printed Case, paragraph 59(4)). In light of the facts of the present case, such a submission cannot be maintained. The risk to national security in the present case arose directly out of an improper attempt at influence by senior Saudi officials. The decision of the Appellant is a paradigm example of the mischief against which Article 5 of the OECD Convention is intended to offer protection.

An implied national security exception?

166. The Appellant also contends that a treaty should not prevent a state from relying on national security concerns without clear words (Appellant's Printed Case, paragraph 55). The Director relies on the dissent of Judges Anzilotti and Huber in the Case of the SS Wimbledon (1923) PCIJ Reports, Series A, No. 1. However, the majority opinion holds that such a restrictive approach cannot be accepted once it starts to operate contrary to the plain terms of the treaty and destroys the essence of the rights granted (pp.24-25). Auth. Tab 7

167. It is noteworthy that the Director relies on historical international case-law and ignores later developments, including restrictions on the circumstances in which considerations of national security may be invoked, as well as the role of international courts in reviewing a State's entitlement to rely on a national security exception. Modern

treaty law does not permit important treaty rights to be cut down by way of a general appeal to national security. Where state parties want a general national security opt-out, this is expressly addressed. For example:

Auth. Tab 75

(1) In Sirdar v Army Board [2000] ICR 130, 163, paragraph 16, (concerning sex discrimination against women in the Royal Marines), the ECJ rejected the submission of the United Kingdom that there was

> *"inherent in the [EC] Treaty a general exception covering all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application".*

Auth. Tab 20

See similarly Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1987] QB 129 (ECJ). The same principles apply in the present case. A general national security exception should not be implied into a multinational treaty where to do so would impair its effectiveness.

(2) Where states intend to allow for a national security exception to treaty obligations, they do so explicitly. The United Kingdom is party to a large number of modern bilateral treaties that include express provisions for a national security exception. Several such treaties have been negotiated and adopted contemporaneously with the OECD Convention. See, for example:

Auth. Tab 110

(a) The 1994 Treaty between the USA and the United Kingdom on Mutual Legal Assistance in Criminal Matters, at Article 3(1): "The Central Authority or the Requested Party may refuse assistance if: (a) the Requested Party is of the opinion that the request, if granted, would impair its sovereignty, security or other essential interests, or would be

contrary to important public policy".

(b) The 1992 Agreement between India and the United Kingdom concerning the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds and instruments of crime and terrorist funds, at Article 6(1): "Assistance may be refused if: (a) the Requested Party is of the opinion that the request, if granted, would seriously impair its sovereignty, security, national interest or other essential interest". Auth. Tab 91

(c) The 1994 Agreement between the United Kingdom and Paraguay concerning mutual assistance in relation to drug trafficking, Article 6 (identical language as above). Auth. Tab 90

(d) The 1988 Treaty between Australia and the United Kingdom of Great concerning the Investigation of Drug Trafficking and Confiscation of the Proceeds of Drug Trafficking, at Article 6(2)(a) (identical language as above). Auth. Tab 109

Where the United Kingdom government wishes to be able to avoid an international law obligation on national security grounds, it makes that clear by using express language. Reading a general and sweeping national security exception into the OECD Convention would make the language of these other instruments redundant.

(3) Conversely, where the United Kingdom does not wish to permit an international law obligation to be avoided on national security grounds, no express provision is made. In a recent survey published by the OECD of the United Kingdom's bilateral investment treaties, 90 of the 91 treaties reviewed did not contain a national security exception (Essential Security Interests Under International Investment Auth. Tab 119

Law, OECD 2007, fn 12).

(4) The same situation pertains in relation to numerous multilateral treaties to which the UK is party:

Auth. Tab 108

(a) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War provides for a national security exception to be invoked in specified circumstances (see Article 103: "A prisoner of war shall not be confined while awaiting trial unless ... it is essential to do so in the interests of national security"), whereas on matters on which it is silent no national security exception is allowed.

Auth. Tab 102

(b) The 1966 International Covenant on Civil and Political Rights includes a number of provisions which explicitly permit a national security exception (Article 12(3) on free movement, Article 13 on expulsion of aliens, Article 14(1) on public hearings in court, Article 19(3)(b) on freedom of expression, Article 21 on freedom of assembly and Article 22(2) on freedom of association), whereas for all other rights there is no national security exception.

Auth. Tab 100

(c) The General Agreement on Tariffs and Trade 1994 provides a general "essential security" exception in Article XIV.7.

Auth. Tab 106

(d) The 1998 Statute of the International Criminal Court recognises exceptional circumstances in which a national security exception will limit an obligation under the Statute: the Article 93 obligation to cooperate includes a limitation "if the request concerns the production of any documents or disclosure of evidence which relates to its

national security" (Article 93(4)).

(5) The practice in relation to OECD conventions also indicates that where the OECD recognises a place for "essential interests" (including national security) to limit the obligations under a convention, it has made explicit provision. See, for example, the 1959 European Convention on Mutual Assistance in Criminal Matters, which provides for a self-judging national security exception (see Article 2(b): "Assistance may be refused: ... if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country". See also the 1988 Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, at Article 21(2) recognising an exception (in defined circumstances) in respect of "measures which [the state] considers contrary to public policy (ordre public) or to its essential interests". Auth. Tab 99 Auth. Tab 103

168. The above examples indicate that where the United Kingdom and other States have sought to introduce a national security exception into a modern bilateral or multilateral treaty, they have done so explicitly. In the absence of any such provision in the OECD Convention, the United Kingdom and other parties are not entitled - as a matter of treaty law - to imply a general national security exception to justify actions under the Convention or to override their obligations.

169. In Treaties and National Security Exceptions (2007), Professor Rose-Ackerman of Yale University, a leading academic legal authority on corruption law, considers whether, in the absence of any express provision, there is an implicit national security exception in relation to the obligations under the OECD Convention, including Article 5. She concludes that there is not. There is no general or inherent right in treaty law to invoke a national security exception to Auth. Tab 122

excuse a failure to comply with a treaty.

Auth. Tab 121

170. Similarly, in The OECD Convention on Bribery: A Commentary (Edited by Pieth and others, Cambridge University Press, 2007), Peter Cullen distinguishes between national security arguments based on considerations of international relations, and free-standing national security arguments, such as those where a prosecution would lead to the revelation of defence secrets. In relation to the former, Cullen has no doubt that such arguments cannot be sustained in the light of Article 5: "National security arguments based on considerations of international relations would also, clearly, fall foul of the Article 5 prohibition". The threats made by Saudi officials in this case fall into the prohibited category.

171. Further, the Director seeks to invoke a unilateral right to invoke a national security without any meaningful review by the court. Such an approach is contrary to the approach taken to national security issues under international law. In the recent Oil Platforms case, the ICJ interpreted and applied Article XX(1)(d) of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran ("The present Treaty shall not preclude the application of measures ... (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests"). The Court held (2003 ICJ Reports, p.183, paragraph 43) that such provisions were not self-judging, had to meet objective criteria, and were to be assessed by the Court:

Auth. Tab 24

> *"As the Court emphasized, in relation to the comparable provision of the 1956 United States - Nicaragua Treaty in the case concerning Military and Paramilitary Activities in and against Nicaragua, 'the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be "necessary" for that purpose'; and whether a given measure is 'necessary' is 'not purely a question for the subjective judgment of the party' (ICJ Reports 1986, p.141, paragraph 282), and may thus be assessed by the Court".*

Necessity

172. Article 5 does not preclude a State from invoking a national security requirement in exceptional cases. This is envisaged by the law of state responsibility, as reflected in the International Law Commission's draft Articles on State Responsibility.

173. Article 25 of the draft ILC Articles (Necessity) provides: Auth. Tab 96

> *"1 Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> *(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
>
> *(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
>
> *2 In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
>
> *(a) The international obligation in question excludes the possibility of invoking necessity; or*
>
> *(b) The State has contributed to the situation of necessity".*

174. The International Court of Justice has held that ILC Article 25 reflects a rule of customary international law. In the Case Concerning the Gabcikovo-Nagymaros Project 1997 ICJ Reports, paragraph 51, the International Court of Justice confirmed that: Auth. Tab 12

> *"the state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis".*

The Court added:

> *"the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met".*

Auth. Tab 96

175. The Commentary to the ILC Articles (Report of the ILC, 53rd Session 2001, at p.80) also emphasises the narrow and exceptional scope of Article 25:

> *"The term 'necessity' (etat de necessite) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognised as a circumstance precluding wrongfulness".*

Auth. Tab 12

176. In the Gabcikovo-Nagymaros Case, at paragraph 50 the ICJ identified the basic conditions that have to be met if a State is to be entitled to invoke necessity:

(1) The act must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations.

(2) That interest must have been threatened by a "grave and imminent peril".

(3) The act being challenged must have been the "only means" of safeguarding that interest.

(4) That act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed.

(5) The State which is the author of that act must not have "contributed to the occurrence of the state of necessity".

177. A recent example of the application of these principles is the decision of the ICJ in its Advisory Opinion of 9 July 2004 on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. The ICJ rejected Israel's claim of necessity ("the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction", 2004 ICJ Reports, p.195 at paragraph 140) despite the acknowledged risk to the lives of Israeli citizens if the wall were not built.

Auth. Tab 26

178. The Director suggests that the existence of the defence of necessity is controversial, relying on the 1990 Rainbow Warrior decision of an international arbitral tribunal (Director's Printed Case, paragraph 57). This obiter comment pre-dated the adoption by the ILC of the draft Articles and the authoritative approval of the ILC's approach by the ICJ in Gabcikovo-Nagymaros.

Auth. Tab 28

Auth. Tab 12

179. The Director has not sought to justify his actions by reference to the conditions for a plea of necessity. During the hearing before the Divisional Court, the Director's counsel confirmed that the Director did not seek to argue that the requirements for necessity under ILC draft Article 25 could be satisfied:

> *"Lord Justice Moses: ... if one thinks that merely talking about national security is enough, it is argued against you that you have not applied the right test, that you cannot give way to threat other than in circumstances where there is no realistic alternative ...*
>
> *Mr Sales: My Lord, it has never been our case to rely upon article 25 of the draft articles on state responsibility. Our case, in relation to Article 5 of the OECD Convention, is a simple question of construction of that Convention together with our arguments about the effect of the Launder principle".*

App. Pt. III p. 985

In particular, for the reasons set out above, there is no evidence that conditions (2) and (3) in paragraph 176 have been met.

180. In this regard, the common law principle of the rule of law is in accordance with the relevant principles of international law. That is the result that would be expected, given that necessity is a principle of customary international law and, as such, part of English law.

181. It follows that the Director is not able to rely on a claim of necessity under the law of state responsibility to preclude wrongfulness in respect of his violations of the OECD Convention.

Conclusion

182. The Respondents respectfully submit that the Director's appeal should be dismissed for the following :

REASONS

(1) BECAUSE the Decision of the Director was in breach of the constitutional principle of the rule of law.

(2) BECAUSE the Director's decision was in breach of Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

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DINAH ROSE QC

BEN JAFFEY

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

IN THE APPELLATE COMMITTEE OF THE HOUSE OF LORDS

ON APPEAL

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

B E T W E E N :

THE QUEEN
on the application of

(1) CORNER HOUSE RESEARCH

(2) CAMPAIGN AGAINST ARMS TRADE

Respondents

and

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Appellant

and

BAE SYSTEMS PLC

Interested Party

CASE FOR THE RESPONDENTS

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