Detailed summary of and guide to

Judgment delivered by Lord Justice Moses and Mr Justice Sullivan on

Corner House Research and Campaign Against the Arms Trade (CAAT)
v.
Director of the Serious Fraud Office
and
BAE Systems PLC

prepared by The Corner House
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Please note: underlining indicates Corner House emphasis

Introduction

The judges summarise the main events relating to the judgment, focusing on the specific threat made by Saudi representatives to the then Prime Minister's Chief of Staff, Jonathan Powell (para 4) that if the investigation wasn't stopped, there would be no typhoon contract and intelligence and diplomatic relations would cease.

The judges express their dismay that the Government has contended that "*the law is powerless to resist the specific and, as it turns out, successful attempt by a foreign government to pervert the course of justice in the United Kingdom, by causing the investigation to be halted*" (para 6). They say that "*so bleak a picture of the impotence of the law invites at least dismay, if not outrage* (para 7). They go on to say that their job however is to search for legal principle, and whether there is indeed any such principle *"which may be deployed in defence of so blatant a threat."* (para 7).

Facts

The judgment goes through the facts and course of events relevant for reaching the judges' conclusion.

It was not the courts' job to conduct an full enquiry of the facts leading to the Director's decision. The judges only sought to assess whether the decision was lawful. The judges, who saw unredacted versions of the documents released to the court, believe that sufficient facts were disclosed for the judges to reach a conclusion, but that this did not represent a "*complete account of the events*" (para 8).

The relevant facts as far as the judges were concerned are:
1. BAE's confidential representations to the Attorney General, that the investigation should be halted on public interest grounds, namely that damage would be caused to UK-Saudi relations and that the UK's "*largest export contract in the last decade*" would be jeopardised (para 9).

2. The response from the Serious Fraud Office's Case Controller, Matthew Cowie to BAE, pointing out the SFO's statutory independence and the importance of Article 5 of the OECD Anti-Bribery Convention. This article prohibits parties to the Convention from allowing

considerations of national economic interest, potential effect upon relations with another State or the identity of the person involved (paras 10).
3. The Shawcross exercise, where the Attorney and Director consulted ministers, carried out in 2005, in which ministers specifically ignored the Attorney's injunction to have regard to issues prohibited under Article 5 (paras 11-13).

4. The response from the Serious Fraud Office's Case Controller, Matthew Cowie to the Shawcross exercise, emphasising the importance of balancing the rule of law, the independence of law enforcement and the potential reputation damage to the government with political and economic considerations (para 14-17).

5. The threats made by Prince Bandar to Jonathan Powell reported in the Sunday Times on 10th June 2007, following the SFO being granted access to bank accounts in Switzerland (para 22). Although the government did not acknowledge the threat in their response to the court case they did not deny it either (paras 23-24).

6. The representations made by the Ambassador to Saudi Arabia to Wardle. While Wardle accepted these arguments, the judges note the Assistant Director of the SFO, Helen Garlick, warned specifically against taking threats from the particular person making them (I.e. Prince Bandar) too seriously (para 26-7).

7. The intervention of Tony Blair, then Prime Minister (paras 31) in the form of a personal minute with notes from the Permanent Secretary for Intelligence, Security and Resilience (para 32) and the Permanent Under-Secretary to the Foreign Office (para 33). This intervention came following further meetings that Bandar held with foreign office officials on 5th December 2006 and just as the SFO were considering inviting BAE to plead guilty (Paras 29-30).

8. The meeting between the Attorney and the Prime Minister on 11th December 2006, at which the Attorney stated that halting the investigation would "*send a bad message about the credibility of the law in this area and look like giving into threats*". The Prime Minister's response was that "*higher considerations were at stake*", namely the damage that Saudi-UK cooperation on counter terrorism and Middle East issues, and said it was "*the clearest case for intervention in the public interest he has seen*" (para 34).

9. Final meetings between the Attorney and the Director, at which the Attorney expressed his concerns about the strength of the evidence for the case and his concern at dropping the case in response to threats (paras 34-37).

10. The press release of the SFO announcing the ending of the investigation and announcement by the Attorney General to the House of Lords (paras 37-38).

Director's reasons for terminating the investigation.

The judges record the Director's reasons for discontinuing the investigation (paras 39-44), given in his witness statements to the court. The Director stated that he believed that the UK's national security and innocent lives were at risk if the investigation continued. He did not believe that the decision was in breach of Article 5 of the OECD Anti-Bribery Convention, but even if it had been, he would still have discontinued the investigation.

The Parties

While discussing the parties, the judges discuss the limits to the judicial review. They note that the court was not concerned with whether or not the investigation would result in a successful prosecution. However, they state that "*It would be unfair to BAE to assume that there was a realistic possibility, let alone a probability, of proving that it was guilty of any criminal offence. It is unfortunate that no time was taken to adopt the suggestion to canvass with leading counsel the Attorney's reservations as to the adequacy of the evidence*" (para 47). They also note that Prince Bandar had no opportunity to give his version of events (para 48).

The six grounds on which The Corner House and CAAT mounted their challenge to the Director's decision (para 49):

1. It was unlawful and against the constitutional principle of the rule of law for the Director to give in to the threat made by Bandar;
2. The Director failed to take into account the threat posed to the UK's national security, the integrity of its criminal justice system, and the rule of law by giving into the threat;
3. The Director mis-interpreted Article 5 of the OECD Convention and took into account irrelevant considerations;
4. The Director failed to take into account the fact that Saudi Arabia would be breaching its international obligations on terrorism if it carried out the threat;
5. The advice given by ministers was tainted by irrelevant considerations under Article 5 of the OECD Convention;
6. The Shawcross exercise was improperly conducted as ministers expressed opinion as to what the Director's decision should be.

The Judgment

A. The Rule of Law

Preliminary points

•The judges accept that the Director was entitled to take into account risk to life and national security given the broad prosecutorial discretion allowed him (para 54).

•The judges state that the Director was not in a position to exercise independent judgement as to gravity of risk. He was entitled lawfully to "*accord appropriate weight to the judgement of those with responsibility for national security who have direct access to sources of intelligence unavailable to him*" (para 55).

•Under the doctrine of the separation of powers, the courts are not in a position to trespass on the government's areas of foreign relations and national security, and the courts in practice give the executive "*an especially wide margin of discretion*" (para 56).

Main points

<u>1. The courts have both the right and the duty to intervene in this case because a threat was made against the British legal system</u>

•The essential point of the application for the judges is that the government and the Director of the SFO submitted to the threat from Prince Bandar (paras 57-60). They state: "*It is one*

thing to assess the risk of damage which might flow from continuing an investigation, quite another to submit to a threat designed to compel the investigator to call a halt. When the threat involves the criminal jurisdiction of this country, then the issue is no longer a matter only for the Government, the courts are bound to consider what steps they must take to preserve the integrity of the criminal justice system" (para 57).

•The judges consider that the Government failed to recognise that the threat was aimed not just at the UK's commercial, diplomatic and security interests, "*it was aimed at its legal system*" (para 58). The threat was being made, in effect, against the Director of the Serious Fraud Office in that the threat was designed to "*prevent the course which the SFO wished to pursue*", namely inspect Swiss bank accounts (para 58). "*Had such a threat",* they continue, "*been made by one who was subject to the criminal law of this country, he would risk being charged with an attempt to pervert the course of justice"* (para 59).

•The judges note that the "*essential feature*" of this case "*is that it was the administration of public justice that was traduced"* (para 59). They go on: "*Threats to the administration of public justice within the United Kingdom are the concern primarily of the courts, not the executive. It is the responsibility of the court to provide protection*". This is because "*the surrender of a public authority to threat or pressure undermines the rule of law"* (para 60).

•In recognising the duty of courts and judges to protect the rule of law, the judges state that "*the rule of law is nothing if it fails to constrain overweening power*" (para 65).

2. The duty of the court is to protect the statutory powers of independence provided to the Director of the Serious Fraud Office

•The Judges state that "*the courts fulfil their primary obligation to protect the rule of law, by ensuring that a decision-maker on whom statutory powers are conferred, exercises those powers independently and without surrendering them to a third party*" (para 67). In their opinion, "*In yielding to the threat, the Director ceased to exercise the power to make the independent judgement conferred on him by Parliament*" in the Criminal Justice Act 1987 (para 68). That independence is fundamental to the Director's powers, and the basis of the broad prosecutorial discretion granted to him (para 70).

•The government argued before the judges that the courts have no role where the threat is made by a foreign state. Their argument, the judges recall, was that whilst giving into such threats may be "*a matter of regret, what happened was a part of life."* The Judges describe this as a "*dispiriting submission*" (para 74). On the contrary, they argue, "*it is difficult to identify any integrity in the role of the courts to uphold the rule of law, if the courts are to abdicate in response to a threat from a foreign power*" (para 76). In their view, "*a resolute refusal to buckle to such a threat is the only way the law can resist*" (para 78).

3. The courts have a duty to protect the British legal system from threats

•The judges argue that "*surrender [to a threat] deprives the law of any power to resist for the future"*, and that it "*encourages those with power, in a position of strategic and political important, to repeat such threats*." (para 79). They state that "*for the future, those who wish to deliver a threat designed to interfere with our internal, domestic system of law, need to be told that they cannot achieve their objective"* (para 80).

•The judges recognise that there may be cases "*so extreme that the necessity to save lives compels a decision not to detain or to prosecute*" (para 82). However, it is for courts to decide on whether reaction to a threat was lawful or not, and to draw the line between "*unavoidable submission and unlawful surrender*".

•The judges in effect say that this cannot be regarded as such a case. In this case, "*there was no specific, direct threat made against the life of anyone*" (para 85). Furthermore, there was no attempt to stand up to the threat. "*There is no evidence whatever that any*

consideration was given as to how to persuade the Saudis to withdraw the threat, let alone any attempt made to resist the threat" (para 87). In their eyes, "*it was incumbent on the Director … to satisfy the court that he had not given way without the resistance necessary to protect the rule of law*" (para 89) and he failed to do so. In the judges' view the damage to the rule of law and the UK's national security (which they argue is based on preservation of the rule of law) by giving into the Saudi threats "*was never properly considered*" (para 94-98).

•The judges state that "*the principle we have identified is that submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker*" (para 99). This principle is essential to ensure that rule of law is protected (para 100) and to avoid "*the suspicion that the threat was not the real ground for the decision at all; rather it was a useful pretext*" (para 101). In this particular case, they argue, "*it is obvious … that the decision to halt the investigation suited the objectives of the executive. Stopping the investigation avoided uncomfortable consequences, both commercial and diplomatic… in future cases, absent a principle of necessity, it would be all too tempting to use a threat as a ground for a convenient conclusion*" (para 101).

4. Conclusion

The judges state that "*we are driven to the conclusion that the Director's submission to the threat was unlawful*" (para 102). This was because he "*failed to appreciate that protection of the rule of law demanded that he should not yield to the threat*".

B. Article 5 of the OECD Convention

1. Contrary to the government's submissions that the court had no jurisdiction to interpret an international treaty, the judges ruled that the court was entitled to do so (para 119).

2. In their view, because of wide prosecutorial discretion accepted by OECD Working Group on Bribery in its reviews of countries party to the OECD Convention (para 125), and because of the fundamental right of states to take measures to protect the lives of its citizens (paras 126-127), national security was not a prohibited consideration. However, for the Convention to have any meaning the judges identify three key considerations:

•a distinction must be drawn between national security and the potential effect upon relations with another state (paras 131-140). In this particular case, this distinction was not adequately drawn. The judges state that if the distinction is not drawn, "*it is all too easy for a state which wishes to maintain good relations with another state whose officials is under investigation to identify some potential damage to national security should good relations deteriorate*" (para 140);

•there must be uniformity of interpretation and application by all contracting parties (paras 141-143) otherwise "*some signatories of the Convention will be able to escape its discipline by relying upon a broad definition of national security*" (para 143);

•The doctrine of necessity under international law, identified by the claimants, particularly Article 25 of the International Law Commission's Articles on State Responsibility is a useful way to achieve uniformity and the objective of the Convention (paras 144-149).

3. The judges conclude that it is the duty of the OECD's Working Group on Bribery and not domestic courts to develop an authoritative and uniform interpretation of Article 5 (para 153). They state that it is not necessary for them to give a ruling on Article 5 having found the Director's decision to be unlawful under "*conventional domestic law principles*" (para 154).

Other Issues

1. Whether the Director failed to take into account that Saudi Arabia would be breaching its international obligations on providing cooperation on terrorism.
The judges rule that it is not for the court to determine this, but that the fact it was not considered by the Director or Attorney General is "*further illustration of the lack of any resistance to the threat*" (para 162).

2. The advice on public interest from ministers was tainted by irrelevant considerations prohibited under Article 5.
The judges rule that this is irrelevant since it was the Director not the Ministers who made the decision and it is for the OECD Working Group on Bribery to decide whether the Director was influenced by Article 5 considerations (para 161). However, they argue that "*no-one can be confident*" that the Director maintained the distinction between the effect on relations with Saudi Arabia and national security in reaching his conclusion (para 162).

3. The Shawcross exercise was breached by ministers expressing an opinion on what course of action the Director should take.
The judges rule that it is not for the court to pronounce on this. However, they note that where the Government expresses too vigorous an opinion, "*it makes it all the more difficult for the independent decision maker clearly to demonstrate that his decision was exercised independently and free from … pressure from his colleagues*" (para 168).

Conclusion

In summing up (paras 170-171), the judges state:

> •The Director and Government failed to recognise that the rule of law required "*the decision to discontinue to be reached as an exercise of independent judgement*". This demanded "*resistance to the pressure exerted by means of a specific threat*". The Director failed to satisfy the court that "*all that could reasonably be done had been done to resist the threat*". He "*submitted too readily*", because he focused on "*the effects which were feared should the threat be carried out and not on how the threat might be resisted*".

The judges conclude:

> "*No-one, whether within this country or outside is entitled to interfere with the course of our justice. It is the failure of Government and the respondent to bear that essential principle in mind that justifies the intervention of this court .. We intervene in fulfilment of our responsibility to protect the independence of the Director and of our criminal justice system from threat*" (para 171).

Quoting Tony Blair back at himself, they end their judgement saying:

> "*On 11 December 2006, the Prime Minister said that this was the clearest case for intervention in the public interest he had seen. We agree*".