

1 IN THE HIGH COURT OF JUSTICE No: CO/1567/2007
2 QUEEN'S BENCH DIVISION
3 ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

4 Thursday, 14th February 2008

5 Before:

6 LORD JUSTICE MOSES
7 MR. JUSTICE SULLIVAN

8 - - - - -
9 THE QUEEN ON THE APPLICATION OF

10 (1) CORNER HOUSE RESEARCH
11 (2) CAMPAIGN AGAINST ARMS TRADE
12 Claimants

13 - and -

14 THE DIRECTOR OF THE SERIOUS FRAUD OFFICE
15 Defendant

16 -and-

17 BAE SYSTEMS PLC
18 Interested Party

19 - - - - -

20 MS DINAH ROSE QC, PROFESSOR PHILIPPE SANDS and MR. BEN JAFFEY
21 (instructed by Leigh Day & Co) appeared on behalf of the
22 Claimants.

23 MR. PHILIP SALES QC, MR. KEITH and MR. STEYN appeared on behalf of
24 the Defendant.

25 MS CLAIRE MONTGOMERY QC appeared on behalf of the Interested
Party.

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31 P R O C E E D I N G S
32 THIS TRANSCRIPT WAS PREPARED WITHOUT
33 ANY OF THE CASE DOCUMENTATION
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1 LORD JUSTICE MOSES: Yes, Ms Rose.

2 MS ROSE: My Lords, I appear with Professor Sands and Mr. Jaffey
3 for the claimants. My learned friends Mr. Sales, Mr. Keith
4 and Mr. Steyn appear for the defendant and my learned friend
5 Miss Montgomery appears for BAE, the interested party. I hope
6 your Lordships have received ----

7 LORD JUSTICE MOSES: She is not expected to say anything, is she?

8 MS ROSE: No, my Lord.

9 LORD JUSTICE MOSES : Nice work if you can get it! Yes, right.

10 MS ROSE: I hope your Lordships have two skeleton arguments.

11 LORD JUSTICE MOSES: Yes.

12 MS ROSE: And a completely ridiculous quantity of authorities.

13 LORD JUSTICE MOSES: Good, well, at least you have said it. So
14 far as the authorities are concerned, although perhaps it is a
15 job for Miss Montgomery, but as you are going through it could
16 somebody keep a running index of which cases are actually
17 referred to, which bit is being referred to and on what point,
18 if only just a word. At the end we can have a typed index
19 with that in and that will be a very useful note when we write
20 our judgment.

21 MS ROSE: My Lord, Mr. Jaffey will do that.

22 LORD JUSTICE MOSES: Somebody can.

23 MS ROSE: There are some pages missing from the bundles, may I
24 hand these up? They are labelled.

25 LORD JUSTICE MOSES: Do we need to put them in now?

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1 MS ROSE: That will probably be wise or we will lose them.

2 MR. JUSTICE SULLIVAN: These are the authorities bundles?

3 MS ROSE: Yes, my Lord.

4 LORD JUSTICE MOSES: Yes. You were not at Professor Barratt's(?)
5 lecture last night?

6 MS ROSE: I am afraid I was not.

7 LORD JUSTICE MOSES: He said it all (unclear)

8 MS ROSE: I will get my coat!

9 LORD JUSTICE MOSES: I do not know whether there is a copy, I mean
10 there probably will be, he was quite hot on the rule of law.
11 Yes.

12 MS ROSE: As your Lordships' know the claimants in this case,
13 Campaign Against Arms Trade and Corner House, are two
14 well-respected campaigning groups which campaign respectively
15 against the arms trade and against international corruption.
16 They brought this claim for judicial review of the decision of
17 the Director of the Serious Fraud Office made on 14th December
18 2006 to stop the SFO's investigation into allegations that BAE
19 had been involved in very large scale bribery of senior
20 Saudi Arabian officials in relation to the Al Yamamah
21 contracts for the supply of military equipment to the Kingdom
22 of Saudi Arabia.

23 The reasons for the Director's decision were initially
24 set out in a press release and were then elaborated upon in a
25 statement made by the Attorney General to the House of Lords.

1 If we can just turn those up as the starting point, they are
2 both in the core bundle at pages 180 and 181 of the core
3 bundle. First of all, a very short press release simply
4 stating that the SFO has decided to discontinue the
5 investigation, that that had been taken following
6 representations made to the Attorney General and to the
7 Director concerning the need to safeguard national security.
8 This has been necessary to balance the need to maintain the
9 rule of law against the wider public interest. That somewhat
10 controversial statement, both the Attorney and the Director
11 have subsequently sort to resile from what we submitted ----

12 LORD JUSTICE MOSES: It is a category error.

13 MS ROSE: Yes, my Lord.

14 LORD JUSTICE MOSES: The notion that there is some dichotomy
15 between the two shows a complete misunderstanding of the rule
16 of law.

17 MS ROSE: Yes, my Lord. In our submission, the use of that phrase
18 in this contemporaneous document is revealing of the thought
19 process of the decision-maker at the time. Then it was said
20 that no weight had been given to commercial interests or the
21 national economic interest.

22 Then on the facing page 181, we have the statement that
23 was made by the Attorney General to the House of Lords where
24 he set out the same press release. Then just below the second
25 hole punch he said:

1 "As to the public interest considerations there is a
2 strong public interest in upholding and enforcing criminal
3 law, in particular against international corruption which
4 Parliament specifically legislated to prohibit in 2001. In
5 addition, I have, as normal practice in any sense dictates,
6 obtained the views of the Prime Minister and the Foreign and
7 Defence Secretaries as to public interest considerations
8 raised by this investigation. They have expressed the clear
9 view that continuation of the investigation would cause
10 serious damage to UK/Saudi security intelligence and
11 diplomatic co-operation which is likely to have seriously
12 negative consequences for the United Kingdom public interest
13 in terms of both national security and our highest priority
14 foreign objectives (unclear)."

15 Your Lordships will note that in fact the decision is
16 not taken solely on the basis of national security. There are
17 two reasons given in this statement. What is said is that the
18 withdrawal of the Saudi co-operation in security, intelligence
19 and diplomatic co-operation will have two effects: firstly,
20 seriously negative consequences for national security and,
21 secondly, seriously negative consequences for what is
22 described as our highest priority foreign policy objectives in
23 the Middle East. As your Lordships will know that refers to
24 what is said to be the key role of Saudi Arabia in terms of
25 the Middle East peace initiatives and in relation to the

1 Israel/Palestine conflict in particular.

2 In fact of course, as we now know, the position was that
3 threats had been made by senior Saudi Arabian officials to the
4 British Government to the effect that if this investigation
5 was continued the Saudis would cancel a proposed order for
6 Eurofighter Typhoon aircraft and would withdraw diplomatic and
7 intelligence co-operation. It appears that those threats were
8 made following BAE's discovery that the SFO was about to
9 obtain access to details of various Swiss bank accounts. It
10 has been reported that these threats or some of them at least
11 may indeed have been made personally by Prince Bandar, the
12 head of the Saudi Arabian security council, who is himself
13 alleged to have been a recipient of very large bribes from
14 BAE.

15 LORD JUSTICE MOSES: May we just pause there because it is very
16 important that we are clear as to the factual basis upon which
17 this case is going ahead. Do you understand from the
18 government's skeleton the extent to which they are denying the
19 factual basis upon which you rely?

20 MS ROSE: I am glad that your Lordship has raised that question.

21 LORD JUSTICE MOSES: I am perturbed about it.

22 MS ROSE: My Lord, we are perturbed as well, by one paragraph in
23 particular in my learned friend's skeleton argument. It is at
24 paragraph 51. Would your Lordship go to page 17 of the
25 skeleton argument first under the heading Factual Premise.

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1 LORD JUSTICE MOSES: Which starts a little bit earlier at
2 paragraph 32.2.

3 MS ROSE: Yes, my Lord, that is why they summarize the argument
4 that they then develop. At 32.2 they say that "the factual
5 premises is mischaracterised. The Director has not made
6 (unclear) threats had proper regard to the risk to national
7 security."

8 It is not clear to me whether the only point that is
9 being made was someone was not saying to the Director "I will
10 kneecap you personally and your children".

11 LORD JUSTICE MOSES: Nobody is saying that he was.

12 MS ROSE: Of course not, my Lord.

13 LORD JUSTICE MOSES: Then we have four paragraphs.

14 MS ROSE: Which are highly obscure with respect to my learned
15 friends.

16 LORD JUSTICE MOSES: They set out your contentions, factual ones,
17 1 and 2.

18 MS ROSE: Yes. They do not deny any of those contentions.

19 LORD JUSTICE MOSES: That is your understanding. That is why I
20 was so bemused.

21 MS ROSE: What is very strange is we then have at 49 simply the
22 assertion that the Director did not accede to blackmail
23 directed against him.

24 LORD JUSTICE MOSES: Which has never been alleged.

25 MS ROSE: No, but reacted properly to a serious threat against

1 national security. Query whether that is an admission of the
2 factual assertions that we have made.

3 LORD JUSTICE MOSES: There is in the public domain the letter from
4 the Attorney saying, he does not use the word threat, I think
5 he says representation.

6 MS ROSE: My Lord, it is in the evidence in fact because in the
7 second witness statement of Mr. Wardle he refers to the fact
8 that representations have been made by senior Saudi officials
9 as to the consequences that would follow if the investigation
10 continued. He says "my every instinct was against succumbing
11 to these threats", so he clearly perceived them to be threats.

12 LORD JUSTICE MOSES: I was assuming that we would proceed on the
13 basis that the factual account that you have advanced on the
14 basis of which of the legal arguments are being raised was to
15 be the factual context in which we have to make our decision.

16 I think we need to be clear, I am not asking for a
17 positive admission for all sorts of reasons, but this is the
18 court and not the government and the court needs to know the
19 factual basis because it is just going to completely skew the
20 argument if they say, well, we do not accept that.

21 MS ROSE: We do not accept that. My Lord, I respectfully agree
22 and it is particularly paragraph 51 which was of concern to us
23 because it said: "It follows that the claimants' argument
24 proceeds" ----

25 LORD JUSTICE MOSES: Impermissibly.

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1 MS ROSE: "---- impermissibly on the basis that the Director
2 should not have regard to a matter, namely blackmail designed
3 to force an end to a criminal investigation which on the
4 evidence has not in fact been established".

5 LORD JUSTICE MOSES: It may be the word blackmail because that is
6 a term of art.

7 MS ROSE: But, my Lord, if one substitutes the word threats. I
8 mean, in my submission it is plainly established that there
9 were threats ----

10 LORD JUSTICE MOSES: I think we need to know, do we not?

11 MS ROSE: Yes, we do, my Lord, and perhaps Mr. Sales can help.

12 MR. SALES: The evidence is entirely clear, it is that set out by
13 Mr. Wardle. He accepts that threats of the kind in relation
14 to withdrawal of co-operation were made. The use of the word
15 blackmail picks up the language used in my learned friend's
16 skeleton argument.

17 LORD JUSTICE MOSES: I do not understand why we have had five
18 paragraphs, nobody has suggested that Mr. Wardle personally
19 was threatened.

20 MR. SALES: No, but we want to emphasize that that is the factual
21 context in which the case is to be considered because we say
22 that there is an important difference from the point of view
23 of legal analysis between personal blackmail directed to the
24 decision-maker themselves where they take into account their
25 personal interests in arriving at a decision, as opposed to a

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1 threat to national security which is what happened in this
2 case.

3 LORD JUSTICE MOSES: You see, threat to national security is so
4 vague. Of course assessing a risk you can say that is a
5 threat to national security, lives are at stake but we are
6 talking about threat in a different sense. Someone going to
7 the government and saying "if you go on with this
8 investigation I threaten you with the following consequences".
9 Now that is a threat in a different sense and that is the
10 factual basis alleged against you. I want to be absolutely
11 clear that that is the factual basis upon which this court is
12 to proceed.

13 MR. SALES: Obviously I will be making my submissions about the
14 relationship between the threat in that sense and the threat
15 to national security which is the foundation for the decision.

16 LORD JUSTICE MOSES: Of course, will he or she, whoever made it,
17 carry it out?

18 MR. SALES: I do not, with respect, accept that there is a
19 distinction analytically in the context of this case between
20 the threats in both senses.

21 LORD JUSTICE MOSES: I know you do not. It is, therefore, rather
22 disappointing that was not made clear in the skeleton, that is
23 all I am saying.

24 MR. SALES: My Lord, then I must apologize for that. It was made
25 abundantly clear in the witness statement and in the skeleton

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1 argument we are making a legal point which I will be
2 emphasizing in due course.

3 MR. JUSTICE SULLIVAN: The only point made in this paragraph 49 is
4 that it was not a blackmail directed against him personally.

5 MR. SALES: Yes.

6 MR. JUSTICE SULLIVAN: You add in the word personally. I mean,
7 frankly, no one has ever suggested it so it is a point not
8 worth very much but you thought it sensible to make in the
9 skeleton.

10 MR. SALES: My Lord, the formulation adopted in the other side's
11 skeleton argument does talk about blackmail. The legally
12 analytical point to be made is that these are not personal
13 concerns of the Director. He has exercised a professional
14 judgment based on the public interest.

15 MR. JUSTICE SULLIVAN: Provided I add in personally afterwards I
16 am content. I see the extent to which the allegations are
17 disputed.

18 MR. SALES: Very good.

19 LORD JUSTICE MOSES: I do not think they are now. You may proceed
20 on the basis that you set out in your skeleton.

21 MS ROSE: Yes.

22 LORD JUSTICE MOSES: "It does not matter but somebody marched in
23 and said this to our representatives". If that had happened
24 in this country with somebody subject to our law, they would
25 have been guilty of criminal offence, would they not?

1 MS ROSE: Clearly in an attempt to pervert the course of justice.

2 LORD JUSTICE MOSES: Yes. Thank you.

3 MS ROSE: Of course it did happen in our country.

4 LORD JUSTICE MOSES: Well, we had better be careful. There may
5 have been other considerations which prevented a prosecution.

6 MS ROSE: Yes. As your Lordships know it is the claimants' case
7 that this decision was unlawful on a number of grounds and we
8 summarize those grounds in our skeleton argument at page 4
9 where there are six grounds set out.

10 As regards the first of these, which is Article 5 of the
11 OECD Convention, there are a number of issues that arise. In
12 particular first whether the claimants are entitled to rely on
13 this treaty before the national courts in the circumstances of
14 this case. As your Lordships know it is our case that this is
15 precisely the sort of situation envisaged in *Launder* and
16 *Kebilene* where a decision-maker has directed himself as to the
17 meaning of an international treaty when taking his decision.
18 We submit that in those circumstances if he misdirected
19 himself as to the correct meaning of the treaty he took into
20 account an irrelevant consideration when making his decision
21 and, therefore, should have the opportunity to reconsider on
22 the correct legal basis. That is the way that we put it.

23 We then submit that it is for the court to rule on the
24 proper meaning of Article 5 of the OECD Convention. My
25 learned friend's submission on this -- this is the second

1 issue under Article 5 -- is that the court should not seek to
2 establish a definitive meaning for Article 5 but he says it is
3 sufficient if the interpretation adopted by the Director was a
4 tenable or permissible interpretation of Article 5. There is,
5 as he puts it, a margin of appreciation in the interpretation
6 of the treaty. We submit that that approach is wholly wrong in
7 principle, that a legal instrument has one meaning whether it
8 is an instrument of national or international law and it is
9 the task of the court to construe it.

10 The third issue that arises under Article 5 is the
11 substantive question, whether Article 5 permitted the Director
12 to take into account the effect of continuing the
13 investigation on the UK's relationship with Saudi Arabia
14 including the consequences of the damage to that relationship
15 for national security and the UK's foreign policy strategy
16 objectives. Our submission is that Article 5 did not permit
17 that matter to be taken into account.

18 We submit that Article 5 expressly forbids the effect of
19 relations with a foreign state from influencing a decision
20 whether or not to investigate or prosecute international
21 bribery. We say there is no implicit exception in the treaty
22 to that prohibition where damage to relations with the foreign
23 state would damage national security.

24 There is a clear difference of approach here to the
25 interpretation of the treaty between the claimants and the

1 defendant because the defendant argues that we are seeking to
2 imply into the treaty a prohibition on the Secretary of State
3 taking into account national security grounds. We say that is
4 entirely the wrong way of looking at it. We say that the
5 grounds that were taken into account in this case fall
6 squarely within the express prohibition in the treaty on
7 taking into account the effect of the investigation on
8 relations with a foreign state and that there is no implied
9 exception to that express prohibition where national security
10 is in place.

11 LORD JUSTICE MOSES: One of the problems may be -- I am wondering
12 at the end of the day there will be a lot between you -- is
13 waiving these wide words national security which can cover all
14 sorts of things. There is a much more discreet point,
15 entirely consistent with the rule of law, and that is duress,
16 that the threat is so imminent that the state must do
17 something to protect life which is a part of our law. That
18 one might say, if it has got that bad and that is why
19 Khaled(?) is such a good example.

20 MS ROSE: Yes, indeed.

21 LORD JUSTICE MOSES: One might readily say, of course it would be
22 absurd to think otherwise.

23 MS ROSE: Precisely, my Lord. We say that the proper analysis --
24 I will show your Lordships the case law on this even though I
25 cannot pronounce some of it -- the proper analysis is that

1 there is no implicit national security exception in the treaty
2 but that the international law of state responsibility permits
3 a state to act contrary to its treaty obligations where it is
4 necessary for it to do so and that the doctrine of necessity
5 very strictly defined in terms analogous to the duress that
6 your Lordship puts to me, covers the type of back to the wall
7 ticking bomb, no alternative situation and we submit that that
8 ----

9 LORD JUSTICE MOSES: That is what is so interesting about this
10 case because when it comes down to it in Wardle 2, it is
11 exactly what Mr. Wardle is saying. He is saying, "my view was
12 I had no choice". So he in a sense, whatever the high flown
13 arguments, actually when it comes down to it, he is saying, "I
14 was in a situation where I could do nothing else" implicit
15 within that "had there been something else I could do I would
16 not have done it", raises the question when the court comes to
17 scrutinize, "well, was there something else he might have
18 done?"

19 MS ROSE: Yes. We submit that that is the correct analysis of the
20 relationship between national security, Article 5 and the law
21 of state responsibility.

22 The final point that arises in relation to Article 5 of
23 the OECD Convention is whether the claim should be dismissed
24 or relief refused on the ground that the Director would have
25 taken the same decision even if it was a breach of Article 5.

1 We submit that that is a completely hopeless submission for my
2 learned friend to make. The Director's evidence on this,
3 which is all after the event, he expressly acknowledges that
4 he did not consider this question at the time he took his
5 decision and does not confront the consequences either
6 nationally or internationally of the United Kingdom making a
7 public acknowledgment that it was acting in breach of the OECD
8 anti-bribery convention. We submit that without that
9 confrontation of that consequence there simply is no way in
10 which the defendant is in a position to say for certain
11 whether the same decision would have been taken had it been a
12 breach of the convention.

13 The second key ground upon which we rely, although
14 placed last here is the second to which I will turn, is the
15 question of the rule of law. This, of course, is an entirely
16 free-standing argument, wholly independent of the
17 international law case. We submit that as a matter of
18 ordinary public law it was unlawful for the Director to permit
19 threats and what we would in common parlance describe as an
20 attempt to pervert the course of justice, to influence or
21 determine the decision to discontinue the investigation
22 because, we submit, that giving in to improper pressure by
23 stopping an investigation into serious crime undermines the
24 rule of law.

25 The implication is that the more powerful and the more

1 unscrupulous the criminal, the more likely he is to be able to
2 commit crime with impunity because either he or his associates
3 will be able to make threats which the authorities will give
4 way to.

5 Again, as your Lordship has already flagged up, we do
6 acknowledge that there are limits to this doctrine which again
7 might be described as a case of necessity and that the Leyla
8 Khaled case is an example of such a situation. You have the
9 hostages on the plane with a gun to their head, do you release
10 the terrorist or the hostages will be killed.

11 LORD JUSTICE MOSES: There is no question about that.

12 MS ROSE: Unless you have access to the Israeli defence forces

13 ----

14 LORD JUSTICE MOSES: The importance of it is that everybody can
15 see what is going on. Nobody is conceding anything about the
16 law. It is just as if a gun had been held the Director's
17 head. There is no distinction. There is nothing else you can
18 do and it is important because then publicly you can see that
19 as the reason.

20 MS ROSE: Yes.

21 LORD JUSTICE MOSES: If it is anything less than that you are
22 going to taint, everybody is going to say, "Ah, actually, it
23 is just because you wanted another contract".

24 MS ROSE: Precisely.

25 LORD JUSTICE MOSES: You are never going to know.

1 MS ROSE: Precisely, my Lord. We do submit that the decision in
2 this case does not meet either the international standard of
3 necessity to engage the doctrine of state responsibility or
4 the national standard, whether you want to call it necessity
5 or duress, that would be capable of overriding the need to
6 ensure that the rule of law is upheld. We submit there simply
7 was not any consideration given to the question whether they
8 were in extremis at the time and whether there were any
9 alternatives which were reasonably open to them to mitigate
10 the threat.

11 The starting point has to be, of course, that this was
12 not a situation where it is alleged that the Saudis were
13 themselves threatening to launch a terrorist risk or military
14 attack. It was not a situation where they were saying we will
15 detonate a bomb; it was a much longer term proposal, the flow
16 of intelligence will be cut off. We submit that there are a
17 number of things that the United Kingdom could have done in
18 that situation to mitigate the effect of that on its national
19 security. One of the points I will be returning to is that
20 that in itself would have put Saudi Arabia in breach of its
21 own international law obligations and that there were steps
22 which the United Kingdom could have taken in the UN to seek to
23 hold Saudi Arabia to account, either through the UN or, of
24 course, using the United Kingdom's own powerful friends,
25 particularly the USA which would not have been happy with the

1 situation.

2 The second important point is that we do live in a
3 functioning democracy with a police force, with security
4 services, with armed forces who are capable of protecting our
5 citizen against terrorist attack.

6 MR. JUSTICE SULLIVAN: There is a danger in that line of argument
7 because then you are second guessing the advice that everybody
8 is getting is that when they threaten this they mean it. We
9 do not have ----

10 MS ROSE: What they mean ----

11 MR. JUSTICE SULLIVAN: What they say was there was not as good an
12 alternative source of intelligence. There is nothing this
13 court can do about that as such.

14 MS ROSE: My Lord, we have to accept for these purposes ... Of
15 course, one of my points is that the United Kingdom could have
16 sought to hold the Saudis to account through international
17 law. Leaving that aside, if you have a situation where the
18 Saudis cannot be held to account and where the flow of
19 intelligence is cut off, yes, the United Kingdom can get the
20 intelligence through other sources, particularly from the
21 United States, but we have to accept for the purposes of this
22 application that there will be less intelligence against than
23 there otherwise would be. It does not follow from that that
24 you have to stop the prosecution.

25 MR. JUSTICE SULLIVAN: Stop the investigation.

1 MS ROSE: Stop the investigation, I beg your pardon. Some of the
2 cases that we will be looking at and I accept, of course, they
3 are in different circumstances but they concern situations
4 where you may have a witness or a defendant whose life is
5 being put at risk either because they need to give evidence in
6 a criminal trial or because they are a defendant in a criminal
7 trial. There is one case of an informer who was being asked
8 to stand trial and he had said he was terrified that he would
9 be killed if he did so. What the court says is, well, it is
10 incumbent in that situation on the prosecutor to do everything
11 that he can to mitigate the effects of the risk to put into
12 place, to satisfy himself that steps will be taken to mitigate
13 the risk, but that does not mean that that person will be
14 placed in the situation that they would have been in had they
15 not been required to stand trial. They may be required to
16 change their identity, to move home, to disrupt their family.
17 Their life may still be at risk and indeed will almost
18 certainly be at greater risk following the trial when their
19 associates know that they have informed upon them than it
20 would have been without the trial, but nevertheless the trial
21 goes ahead.

22 The underlying assumption is that the courts assume that
23 the United Kingdom public authorities do have in place systems
24 which are capable of providing adequate protection for their
25 citizens. There may be circumstances where those citizens are

1 unavoidably put at greater risk than they would otherwise be
2 because of the need to uphold the rule of law but nevertheless
3 the court say provided there is adequate protection that is
4 sufficient.

5 Other examples of that are of course the Bloody Sunday
6 enquiry that my Lord, Sullivan J, will recall where measures
7 were taken to lower the risk to the soldiers who were to give
8 evidence, both in terms of anonymisation and of moving
9 hearings from Derry to London. It was never suggested in that
10 case that in order to eliminate the risk to the lives of those
11 soldiers the enquiry should be halted. It was accepted that
12 there would still be a heightened risk to their life, a
13 greater risk than there would have been if they had not given
14 evidence but that was a risk that they would simply have to
15 take.

16 So we do submit that in order for this decision to be
17 good, at the very least the defendants would have to be in a
18 position to show that all of these matters were considered and
19 taken into account and that the conclusion at the end of the
20 day was that there was literally no alternative ----

21 LORD JUSTICE MOSES: One of the things you have not mentioned that
22 struck me looking at all the evidence was, all right the
23 threat has been issued by someone who clearly did not
24 understand our system of separation of powers, independence,
25 rule of law, criminal law and let us assume that, well, we

1 know that the threats were from a friendly state, what is so
2 odd is that nobody wrote on the side of A4 what our domestic
3 criminal justice system was about, the independence of the
4 prosecution, the rule of law and how a government cannot
5 interfere with decisions as to investigate and to prosecute,
6 they can only speak of the implications and go to them and
7 say, "look, you are a friendly state, you must please
8 understand that we cannot, as a sovereign state, interfere
9 with your domestic law and nor can you. Please have another
10 think". None of that. There was no public, no defence as far
11 as we know unless we are going to now get more evidence, we
12 seen nothing which suggests that anybody did anything other
13 just roll over in the face of that.

14 MS ROSE: Indeed, my Lord. We know that part of the problem
15 appears to have been that the Saudis regarded this as a breach
16 of confidence because they said "we have a confidentiality
17 agreement with the United Kingdom government and this
18 prosecution is a breach of confidence". Plainly a
19 misunderstanding on the part of the Saudis.

20 LORD JUSTICE MOSES: The answer to that was, "look, we will do our
21 best as a government to make jolly sure that Mr. Wardle
22 understands the law of bribery and realizes that he may have
23 very difficult evidential problems in proving this case but
24 you must understand there is nothing we can do by way of
25 interference so it is no good threatening us".

1 MS ROSE: My Lord, that does take me to one of our grounds which
2 is the tainted advice point, that it does appear that right up
3 until the very last moment before the decision a major part of
4 a threat that the Saudis were making was that they would pull
5 the Typhoon contract, they would not conclude the contract for
6 the Typhoon fighters and that this does, with respect, appear
7 to have operated on the mind of the Prime Minister in
8 particular and, we submit, may be a reason why the efforts
9 were made to seek alternatives to pulling the prosecution and
10 that, of course, would be wholly illegitimate both under the
11 convention and, we submit, as a matter of domestic law.

12 MR. JUSTICE SULLIVAN: You have mentioned, so far as I can see,
13 nothing to indicate that anyone actually said to the Saudi
14 authorities, "look here, we signed up to Article 5. We have
15 made it very, very clear that we are going to comply with
16 Article 5. We are terribly sorry, you have to understand that
17 we simply cannot take any account of the effect on relations
18 between our two states". End of story.

19 MS ROSE: Indeed.

20 MR. JUSTICE SULLIVAN: Obviously, we do not know what their
21 reaction would be but it is perhaps a little surprising that
22 there does not appear to be any evidence, as my Lord says,
23 that anyone made any attempt to resist the push.

24 MS ROSE: And nobody ever appears to have said to the Saudis,
25 "well, look, you have signed up to these UN resolutions that

1 oblige you to co-operate with us and to share information with
2 us in relation to international terrorism, so you need to
3 consider your own position if you are saying that you are
4 going to withdraw from those agreements". Again nothing ever
5 appears to have been said.

6 LORD JUSTICE MOSES: That is where, you see, it is arguable that
7 the Director's responsibilities and the law office's
8 responsibility to safeguard the rule of law comes in saying,
9 "well, we cannot judge security. We are reliant on you. We
10 cannot judge relations, but in order for us to satisfy
11 ourselves there was no choice please make representations.
12 You are the Ambassador, you must have friends within the court
13 there. Speak to them".

14 MS ROSE: My Lord, I respectfully agree. So, with that
15 introduction to the shape of our argument I would now like to
16 turn to the facts. I can pick this up at paragraph 12 of our
17 skeleton argument. I shall be referring to some documents
18 which are in the core bundle mainly behind tab 9 of the core
19 bundle. As your Lordship will see ----

20 LORD JUSTICE MOSES: I have let you have sort of half an hour, I
21 mean I have been talking rather a lot too. We have, of
22 course, read everything.

23 MS ROSE: I understand that, my Lord.

24 LORD JUSTICE MOSES: Except the authorities. We would have done
25 if there had not been so many that the sight of them filled us

1 with such dismay.

2 MS ROSE: My Lord, I have read the authorities and you were right
3 to be filled with dismay. There must be 15 that say that
4 decisions not to prosecute are judicially reviewable but only
5 in rare circumstances.

6 LORD JUSTICE MOSES: Yes.

7 MS ROSE: In any event, my Lord, there are some points I want to
8 make on the documents.

9 LORD JUSTICE MOSES: Certainly.

10 MS ROSE: I will try not to labour them. As your Lordships know
11 the investigation began in July 2004. A statutory notice was
12 issued to BAE in October 2005 requiring BAE to disclose
13 details of payments to agents and consultants and it was in
14 response to that that BAE first made representations in
15 relation to public interest. One of the striking features of
16 the case is that it was not Her Majesty's Government which
17 said there is a problem with national security or there is a
18 problem with the contract; it was the potential defendant
19 which first sought to raise the issue of public interest.

20 We see these submissions at page 133 where there is a
21 covering letter to Lord Goldsmith of 7th November and that is
22 accompanied with a note beginning at page 134. If we turn
23 over to page 136 your Lordships can see how it was being put
24 at that time by BAE, at paragraph 8:

25 "Following the Prime Minister's visit to Saudi Arabia

1 earlier this year the company has been working with the MOD to
2 secure the next tranche of work under the Al Yamamah
3 programme. This covers a sustainment programme for the
4 Tornado aircraft previously supplied by the company to the
5 Royal Saudi air force and the sale of new Typhoon aircraft.
6 The Secretary of State for defence is currently scheduled to
7 visit Saudi Arabia in early December to sign an MOU".

8 It is from that that the public interest is analyzed.
9 It is said that the disclosure of information to the SFO be
10 regarded as a serious breach of confidence by the Saudis and
11 that the company believes that there is little prospect of it
12 remaining confidential with consequent jeopardy to the next
13 tranche of the Al Yamamah programme. The main concern at this
14 point is clearly the jeopardy for the next tranche of the
15 Al Yamamah programme.

16 Then, at paragraph 10, two public interests against
17 continuing with the investigation are identified. The first
18 is that:

19 "The investigation would adversely and seriously affect
20 relations with the UK and Saudi Arabian Governments. The time
21 when the UK and the Prime Minister in particular are seeking
22 to nurture the relationship in pursuit of the UK's strategic
23 objectives in the Middle East and, secondly, is the Al Yamamah
24 contract."

25 What is striking in its absence from this analysis is

1 any reference at all to any damage to national security. What
2 we have here is the commercial consideration and the
3 diplomatic consideration.

4 LORD JUSTICE MOSES: I do not know what point there is to gain.
5 Of course BAE cannot say there is going to be a damage to
6 national security. What is much more striking from your point
7 of view is that their representations failed and lo and
8 behold, those having failed, the next thing that happens is
9 that there is then a threat to national security.

10 MS ROSE: Precisely, my Lord. If we follow it through we can see
11 what happens which is that similar representations are then
12 made on behalf of the government and then they are told this
13 will not wash because of Article 5 and they start to think of
14 a different way of putting it.

15 LORD JUSTICE MOSES: That is very unkind!

16 MS ROSE: My Lord, if we turn on in the bundle a letter from the
17 SFO to Allen & Overy, solicitors for BAE, of 15th November
18 responding to the representations we have just seen.
19 Mr. Cowley of the SFO draws the attention of Allen & Overy at
20 page 141 to the provisions of Article 5 and explains to him
21 that:

22 "On this basis I can confidently discount the public
23 interest considerations raised in the memorandum based on
24 economic considerations."

25 Then he states:

1 "If there is material in existence which gives weight to
2 the assertion at paragraph 10.1 concerning national interests
3 I would ask you to supply it forthwith".

4 We submit of course Mr. Cowley is wrong in law there in
5 considering ----

6 LORD JUSTICE MOSES: Sorry, where were you reading from?

7 MS ROSE: Sorry, page 141 at the bottom of the page.

8 LORD JUSTICE MOSES: Yes, thank you.

9 MS ROSE: We submit that Mr. Cowley is wrong in law in assuming
10 that the public interest consideration at 10.1 was capable of
11 being taken into account under Article 5, but it is clear at
12 this point that it is being explained to BAE that their
13 current position is not going to wash.

14 We then have the Shawcross letter at page 143 dated
15 6th December and immediately the attention of the Secretary of
16 the Cabinet and head of the Civil Service is drawn to the
17 provisions of Article 5 at the bottom of page 143. Then over
18 the page it said:

19 "The operation of that convention within the UK was
20 subject to an evaluation by an OECD working group in 2004.
21 Its report, which was the subject of consultation with all
22 relevant government departments, records the attorney's
23 assurance that none of the considerations prohibited by
24 Article 5 will be taken into account as public interest
25 factors not to prosecute foreign bribery cases."

1 In my submission, when one sees that it is impossible
2 for the defendant to maintain the submission that this is not
3 a Launder Kebilene case because the Shawcross exercise is
4 undertaken specifically on that basis. It said that you will
5 need to have regard to the convention in any comments made in
6 response to this letter and then they explain the nature of
7 the Shawcross exercise.

8 The response of the Cabinet Office on 16th December is
9 at page 154 (a) to (e). One of these are slightly out of
10 chronological order for reasons I do not quite understand but
11 if we go to 154(a) under the heading "BAE Systems' Response to
12 the Shawcross Exercise", this is the response. They start off
13 by saying that they know what is said about Article 5 and they
14 say it is obviously for the Attorney General and the
15 prosecuting authorities to decide whether there should be a
16 prosecution and how Article 5 bears in the current
17 circumstances. Then they state:

18 "We have, however, assumed it may be possible for
19 considerations of the kind mentioned in Article 5 at least to
20 be taken into account for the purposes of taking an early view
21 on the viability of any investigation."

22 So they are rather hopefully trying to get Article 5
23 prohibited considerations to take into account at this stage,
24 notwithstanding what they have been told.

25 We then have a reference to the importance of the

1 relationship with Saudi Arabia and then the importance of the
2 Al Yamamah air defence programme. As your Lordships can see
3 ----

4 LORD JUSTICE MOSES: Well, you may be being a bit unfair in that
5 paragraph because it is something that actually is not for
6 this court. When you are looking at the evidential
7 requirement, in other words are you going to be ever able to
8 prove it, it surely is legitimate to say "you must realize, do
9 not take a punt, this is not just sort of a handling case. If
10 you go on with this and fail either it comes to nothing or you
11 prosecute and so far as is reasonably foreseeable you do not
12 get a conviction, you will do enormous damage."

13 Now, that is a perfectly respectable equation. It is
14 like when you are thinking am I going to prosecute someone who
15 if it fails you will have done him or her enormous damages
16 merely by sort of making the accusation. So it would be fair
17 to say to the SFO "look, make jolly sure you are on the right
18 lines, you understand the law of bribery and understand your
19 evidential difficulties because otherwise we are going to lose
20 so much goodwill with the Saudis, on whom we depend for",
21 etc., etc. that is perfectly legitimate, is it not?

22 MS ROSE: Well, if it is no more than simply saying you must be
23 sure that the evidential requirement is fulfilled but what is
24 ----

25 LORD JUSTICE MOSES: In the context of the consequences if you do

1 not.

2 MS ROSE: What is impermissible is if you conclude that the
3 evidential requirement is or may be fulfilled and remember
4 that this is, of course, still the investigation stage,
5 impermissible at that point to say, well, the public interest
6 is against it because of the effect on the commercial ----

7 LORD JUSTICE MOSES: Yes, I see.

8 MS ROSE: What is notable here, as your Lordships could see, again
9 was put up front in this note is not national security but the
10 commercial situation.

11 MR. JUSTICE SULLIVAN: Is it not commercial, as far as I can see
12 on the face of it, it is the commercial situation and a
13 lengthy explanation of what the potential effect on the
14 relations with Saudi Arabia will be, i.e. squarely within
15 Article 5 on the face of it. I mean it constantly talks about
16 relationship, bilateral relationship, relations with
17 Saudi Arabia and so on. No wonder they say we assume you can
18 take Article 5 into account at this stage otherwise there
19 would not be anything left in the letter.

20 MS ROSE: Precisely, my Lord. Of course, our submission is that
21 actually things never really moved beyond this because what we
22 have here is first of all a long explanation of the importance
23 of Al Yamamah and then we see on page 154(b) towards the
24 bottom of the page:

25 "As regards counter terrorism Saudi Arabia is a key

1 partner in the fight against Islamic terrorism ... leaving
2 aside the commercial considerations, the net damage to British
3 security interests in the fight against terrorism could be
4 substantial."

5 We submit that that is essentially no different from the
6 position in December 2006 when this investigation was pulled.
7 The only thing that changes in the interim is that at some
8 point in the autumn of 2006 and with apparently mounting
9 intensity the Saudis began to make actual threats that they
10 were going to withdraw co-operation. The acknowledgment of
11 the effect if they were to do so appears right from this
12 stage.

13 MR. JUSTICE SULLIVAN: Well, at the top of page 154(c) it sums it
14 all up, close bilateral relationship we have with the Saudi
15 authorities, all these views(?) would be in danger. I mean,
16 anything more squarely dealing the potential effect on the
17 ----

18 LORD JUSTICE MOSES: I am not sure I quite buy that. The change
19 was somebody actually choosing to march in and say "drop it or
20 else".

21 MS ROSE: Yes.

22 LORD JUSTICE MOSES: No wonder, then they all say, well, it is
23 much more imminent than it was because he has actually uttered
24 this threat. That is the change. Question, what do you do
25 then to mitigate it?

1 MS ROSE: Yes, the consequences are always envisaged but it is the
2 threat which makes the difference. If we then move on there
3 was a second representation by BAE on 8th December 2005, that
4 is at page 148. There is a covering e-mail.

5 LORD JUSTICE MOSES: Sorry, this is page?

6 MS ROSE: Page 148 is the e-mail.

7 LORD JUSTICE MOSES: So we are back.

8 MS ROSE: It is the e-mail and the actual representation is at
9 pages 150 to 153 and it reiterates the public interest
10 considerations that were originally made, your Lordships can
11 see that at paragraph 10, and raises the concern again about
12 breach of confidence.

13 There is then an internal SFO briefing which is at
14 154(e) which we submit is significant because Mr. Cowley in
15 the first paragraph of this briefing, in my submission, makes
16 a completely correct legal analysis.

17 LORD JUSTICE MOSES: He is a bit of a hero, Mr. Cowley.

18 MS ROSE: He is, he is. One hopes he is still there and plugging
19 away. At page 154(e), the first paragraph which I will not
20 read out but your Lordships can see it, we respectfully submit
21 that is a correct application of Article 5 and in particular
22 where he states:

23 "There are always likely to be economic and political
24 consequences of any major enquiries into defence contracts,
25 that is why such considerations must ultimately be irrelevant

1 to the independent conduct such enquiries."

2 LORD JUSTICE MOSES: Next sentence.

3 MS ROSE: "It is impossible for the Director of the SFO to weigh
4 up those competing public considerations". We submit that is
5 absolutely correct and correctly identifies the whole purpose
6 of Article 5. That is why it is in the treaty. That is why
7 we submit that the effect of my learned friend's position is
8 wholly to undermine effectiveness of the OECD treaty because
9 that is the whole point.

10 LORD JUSTICE MOSES: That is effectively a response, is it not, to
11 the Cabinet Office paper of 16th December.

12 MS ROSE: Yes.

13 LORD JUSTICE MOSES: Effectively, it was dealing with potential
14 effect.

15 MS ROSE: Yes, so his first position is all of this is irrelevant
16 and his second position is, well, if we concede that it is
17 relevant and it is not excluded by Article 5 what do we do
18 then? He then comes to the conclusion that they are in a real
19 difficulty because as he says at 154(f):

20 "The only challenge we can make, if it is conceded that
21 this issue is not covered by Article 5, is if we have grounds
22 to believe that the cabinet are not fully apprised of
23 considerations that are capable of altering the balance of the
24 public interest. Have they given full consideration to the
25 public interest in the rule of law, the independence of the

1 SFO and MDP and the role of central government, all of which
2 can suffer reputational damage if it emerged that an
3 investigation by the SFO had been cut short."

4 Again, we respectfully submit, pertinent questions
5 raised there by Mr. Cowley which do not ever appear to have
6 been followed through. In the event and not surprisingly in
7 the light of that, the decision that was taken by the Attorney
8 General was that the investigation would continue. Your
9 Lordship has that at page 154(i).

10 What appears to have happened next, and I am now back in
11 my skeleton argument at paragraph 19, is that the
12 Prime Minister in July 2006 met with Prince Bandar. We have
13 quoted here a press report which your Lordships have at
14 volume 4, we do not need to turn it up, it is volume 4,
15 tab 47, page 2034:

16 "Bandar went into No. 10 and said 'Get it stopped'
17 Bandar suggested to [Jonathan] Powell he knew the SFO were
18 looking at the Swiss accounts ... if they didn't stop it the
19 Typhoon contract was going to be stopped and the intelligence
20 and diplomatic relations would be pulled."

21 That appears to be ----

22 LORD JUSTICE MOSES: That has never been denied.

23 MS ROSE: It has never been denied, my Lord, no. On the contrary
24 it has been admitted that there were Saudi officials who made
25 threats of this nature. Of course it is not necessary to my

1 argument that it was Prince Bandar in person, but if it was
2 him it is piquant because he has alleged to have been the
3 recipient of very, very large bribes indeed.

4 LORD JUSTICE MOSES: Is it not relevant?

5 MS ROSE: My Lord, the difficulty I am in because of the
6 redactions and we do suspect that there are redactions here
7 that name one or more of those who made the threats, if it was
8 Prince Bandar then we do submit that is a pertinent fact but
9 our case succeeds whether or not it was him in person. If it
10 was him it is of particular significance, of course, because
11 if he was in the pay of BAE then it is possible that the
12 threats were being made not in the interest of the Saudi State
13 but in the interests of BAE, as it were, with part of the
14 service ----

15 LORD JUSTICE MOSES: That is why you rely upon the sequence of
16 events.

17 MS ROSE: Yes, my Lord. Your Lordship knows the difficulty we
18 have because of the redaction. As your Lordship says we have
19 made the allegation which has not been denied.

20 Following that, in September 2006 further ----

21 LORD JUSTICE MOSES: One has to be careful but we know that right
22 at the end Helen Garlick was writing saying, "have you borne
23 in mind the source of these threats?"

24 MS ROSE: Yes, indeed; yes, my Lord. Well, your Lordships have my
25 submission on the fact that it does strengthen our case if

1 Prince Bandar was the source of the threats and that there is
2 circumstantial evidence to suggest that he was. The
3 circumstantial evidence becomes more powerful in fact later in
4 the day as we shall see.

5 In September 2006 further representations were made to
6 the Attorney General and these are at page 155 in the bundle,
7 29th September, "I am writing to update you on some
8 significant recent developments." Now, this letter is
9 redacted but we can infer from it that the significant recent
10 development included threats. The reason we draw that
11 inference is that if you go to page 157 in the response ----

12 MR. JUSTICE SULLIVAN: It is not being denied. The trigger for
13 what happened at the end of the year were the threats.

14 MS ROSE: Yes, but, my Lord, we can see the specific reference at
15 157, this is the Attorney General's response to this letter:

16 "The Attorney General has carefully considered the
17 developments described in your letter. He has noted the
18 strength of the representations made by the Saudi
19 representatives as to the repercussions which they say will
20 ensue if the SFO (unclear)."

21 We say that is a specific reference to threats being
22 made and that that appears to be the recent development.
23 What, of course, had happened was that they were on the trail
24 of the Swiss bank accounts and that is what appears to have
25 raised the temperature with BAE and also with the Saudis.

1 MR. JUSTICE SULLIVAN: In summary what this further note says is
2 that the considerations that were raised in December 2005
3 still apply with greater force, so if and in so as far as
4 those considerations were only dealing with potential effect
5 on the relations with Saudi Arabia then they are simply
6 repeating the same point over again but emphasizing it.

7 MS ROSE: Precisely. The considerations are never different in
8 kind from those that were originally raised in the first
9 response to the Shawcross exercise. They simply become more
10 immediate because the threat has been made that they will
11 withdraw co-operation but nothing different is ever said at
12 any stage.

13 Your Lordship sees that in the middle of 156 where what
14 is said is:

15 "Severe damage to the public interest over and above the
16 national economic interest that we feared was likely in 2005
17 is now imminent" so it is the same damage but now imminent.
18 Then: "If the Saudis are already starting to take such steps
19 in relation to the Typhoon programme we must anticipate they
20 could follow through. I say assume that it actually means
21 their threats in relation to counter terrorism and the
22 bilateral relationship."

23 Again what we see there is the Saudis have already
24 started to take steps to move their business elsewhere and
25 that is what is causing the great anxiety on the part of the

1 government.

2 The response to this letter, as your Lordships can see,
3 the Attorney General held firm:

4 "The Attorney is of the firm view that if the case is in
5 fact (unclear) it would not be right to discontinue it on the
6 basis that the consequences threatened by the Saudi
7 representatives may result."

8 What we see from this point onwards is essentially
9 mounting pressure being put on the Attorney and on the
10 Director of the SFO without any new material but simply the
11 same consideration being hammered home, repeated visits from
12 the Ambassador, personal memorandum from Tony Blair,
13 personally face to face meeting between the Attorney and
14 Tony Blair, irresistible pressure to force them to drop the
15 prosecution.

16 LORD JUSTICE MOSES: At 159, the assistant director, penultimate
17 paragraph, "there perhaps should be some caution exercised
18 when considering the views of".

19 MS ROSE: Yes, I have assumed that that means Prince Bandar. We
20 have said that we assume the missing words are Bandar.

21 LORD JUSTICE MOSES: And that is why we need proper guidance and
22 briefing on the substance of the threat.

23 MS ROSE: Yes, that is right.

24 LORD JUSTICE MOSES: Presumably somebody then says, well, I know
25 these people, they mean it when they say it.

1 MS ROSE: What we then have, if we go back to my skeleton argument

2 ----

3 LORD JUSTICE MOSES: The response to that, to carry forward the
4 point, is not that they do not mean it when they said, of
5 course the bluffing that you or the court can do to second
6 guess that view, that assessment, the answer may be, can we
7 get them to withdraw the threat or to explain the context in
8 which they are doing this because it is perfectly plain as a
9 friendly state with sophisticated, intelligent people they
10 have not understood our system.

11 MS ROSE: That does not appear to have ever been contemplated.

12 LORD JUSTICE MOSES: Anyway, that is what she said.

13 MS ROSE: Yes. What we then see, returning to my skeleton
14 argument, paragraph 25, the Guardian reports that access to
15 the Swiss bank accounts have been obtained. Then the meetings
16 with the Ambassador where the Ambassador makes the comment
17 about British lives on British streets being at risk, mounting
18 intensity of language from the Ambassador.

19 Then at paragraph 27:

20 "By early December 2006, newspapers were reporting that
21 the Saudis had told the government that the sale of
22 Eurofighter Typhoon aircraft would be cancelled within 10
23 days, unless the investigation was brought to an immediate
24 end."

25 That appears to have been the real ultimatum that they

1 were about to cancel the Typhoon:

2 "To emphasise the point, it was reported that
3 Prince Bandar had spent the week in Paris negotiating an
4 alternative purchase of Rafale fighter aircraft with President
5 Chirac."

6 Your Lordships can see that press report, we do not need
7 to turn it up, it is volume 1, tab 10, page 276. There was
8 then the contemplation by the SFO of the plea bargain, whether
9 BAE would plea to lesser charges. They were told this was not
10 going to help.

11 Then on 5th December we know that Prince Bandar visited
12 London and met the Foreign Office officials. We have that as
13 a reply to a parliamentary question, the reference to that is
14 volume 4, tab 49, page 2039. We know that Prince Bandar on
15 5th December met Foreign Office officials. We do not know
16 what he said at that meeting but we do know that the next day
17 the Prime Minister's office informed the Attorney General that
18 the Prime Minister wanted to make further representations
19 before my offer of a plea bargain was made to BAE.

20 The course of events seems to have been ultimatum from
21 the Saudis they were going to withdraw the Typhoon contract,
22 Bandar goes to Paris to negotiate with Chirac, comes to
23 London, sees Tony Blair and then Tony Blair sends his
24 memorandum. This is the memorandum of 8th December which your
25 Lordships have at page 160 in the core bundle. I know your

1 Lordships are very familiar with this but this is the point at
2 which there is the real escalation in language that is used in
3 relation to national security, apparently as a direct result
4 to the threat to withdraw the Typhoon contract. In bold he
5 states:

6 "It is my judgment on the basis of recent evidence and
7 the advice of colleagues that these developments have given
8 rise to a real and immediate risk of a collapse in UK/Saudi
9 security intelligence and diplomatic co-operation. This is
10 likely to have seriously negative consequences for the UK
11 public interest in terms of national security and our highest
12 priority foreign policy in the Middle East."

13 This is the point at which the argument has been recast
14 in terms which they hope will bypass Article 5 of the OECD
15 Convention by putting the focus on national security rather
16 than in relation to the foreign state but of course the
17 substance of it is still the same as it has always been.

18 Then at 161 he still cannot resist referring to the
19 Typhoon contract and the damage to the bilateral relationship,
20 but then he states:

21 "My primary duty is to UK national security" it is this
22 basis ..." ----

23 LORD JUSTICE MOSES: However, I think you must ----

24 MS ROSE: Yes, however, "to UK national security it is on this
25 basis I must urge you to consider the public interest in

1 relation to pursuance of this investigation."

2 Your Lordships will know, of course, that already twice
3 representations have been made and been rejected by the
4 Attorney General in 2005 and in September/October 2006 the
5 Attorney General has twice said, no, I am not going to stop
6 the investigation on these grounds but here is the third, very
7 strongly worded personal approach from the Prime Minister on
8 essentially the same basis.

9 Your Lordships will be familiar with the rest of this
10 document and with its two attachments which detail what would
11 be the damage to UK interests resulting from the withdrawal of
12 Saudi co-operation and, as your Lordships know, there are the
13 two facets, firstly, in relation to terrorism and, secondly,
14 in relation to the UK strategic objectives in the Middle East.

15 MR. JUSTICE SULLIVAN: I must say for my part I do wonder how all
16 these references to co-operation, page 162, relationships,
17 co-operation, centrality of our partnership, confidence in the
18 relationship and confidence in the UK as an international
19 partner, whether they are just different ways of talking about
20 that which Article 5 says you should not take into account,
21 that is to say the potential effect on the relationship with
22 another state. To talk about "damage to Saudi confidence in
23 the UK as an international partner has two important
24 consequences", is that not just another way of saying "the
25 potential effects of bad relations with Saudi Arabia are

1 ...". I do not know, it may be my understanding of the
2 language is just odd but I find it quite difficult to see how
3 all of this is not squarely within Article 5.

4 MS ROSE: My Lord, that is precisely our case, yes.

5 LORD JUSTICE MOSES: If the true view of the law is that faced
6 with no choice to protect our citizens, a state cannot be
7 deprived of the power to act in a sense that does not matter.

8 MR. JUSTICE SULLIVAN: Yes, it trumps Article 5.

9 MS ROSE: My Lord, in our submission the true view of the law is
10 it is within Article 5 but the state responsibility enables
11 the state to ----

12 LORD JUSTICE MOSES: It is rather important that that should be
13 said.

14 MS ROSE: It is important, my Lord.

15 LORD JUSTICE MOSES: Rather than saying, "Oh, well, it is not this
16 consideration, it is not that", saying "of course we are not
17 fools, these are considerations but they are not ones with
18 which we will stop the investigation. What we are doing is
19 acting because we have no other way of defending lives".

20 MS ROSE: Exactly. It has to be as extreme as that.

21 On 11th December there is a meeting between the
22 Prime Minister and the Attorney General. We have a letter
23 recording the content of that meeting at page 176 of the core
24 bundle. The Attorney opening the meeting stated:

25 "Whilst he could see the force of the point of the

1 Prime Minister's minute he had to weigh these up against other
2 considerations. In particular he was concerned that halting
3 the investigation would send a bad message about the
4 credibility of the law in this area and look like giving in to
5 threats. He was clear, however, that he felt justified in
6 questioning whether the grounds for the investigation were
7 soundly based and exploring legal options resolving the case
8 as quickly as possible".

9 It is an interesting feature of this case that the
10 Attorney General was very uncomfortable with this.

11 LORD JUSTICE MOSES: Yes, I am not surprised and we know when one
12 looks at the law commission proposals about bribery, the
13 quotation of his interview with the Financial Times, he was
14 very worried about whether you were going to show there was a
15 breach of trust between agent and principal, which has never
16 been resolved but we cannot decide this case, well, actually
17 Mr. Waldon did not understand the law and it was doomed to
18 failure.

19 MS ROSE: Indeed.

20 LORD JUSTICE MOSES: Because he has sworn an affidavit saying "I
21 really did believe that it was worth while going on
22 evidentially".

23 MS ROSE: What is significant about this in my submission and this
24 goes right through to the time of the decision and afterwards,
25 is that Attorney General was very uncomfortable about stopping

1 the investigation on the basis of the relations with
2 Saudi Arabia and his view appears to have been that the right
3 way forward was to stop the investigation because the
4 evidential test was not going to be made. He pushed that view
5 very hard.

6 LORD JUSTICE MOSES: One can well see the wisdom of it, and it is
7 back to the point I made. If the implications generally to
8 contracts, livelihoods, diplomatic relations in the
9 Middle East are so severe as they clearly were, you,
10 Mr. Director, have to be jolly sure that you are on evidential
11 grounds. That is what he is putting.

12 MS ROSE: The difficulty was that the Attorney General was never
13 able to persuade the Director that that was correct.
14 Therefore, there is in fact a clear dichotomy between their
15 positions where it appears that the Attorney General was very
16 concerned about the rule of law, was very concerned that it
17 would like look getting to threats but felt there was another
18 way that the investigation could legitimately be stopped, but
19 that the Director rejected that approach and, we submit, took
20 the impermissible approach of giving in to the threats.

21 Then we have the Prime Minister's response to the
22 Attorney General that he felt higher considerations were at
23 stake, proceeding with the case would result in the end of
24 Saudi/UK co-operation, which takes us back to my Lord,
25 Sullivan J's point, losing the confidence of Saudi Arabia ----

Transcript prepared without access to case documentation.

1 LORD JUSTICE MOSES: Sorry, where are you now?

2 MS ROSE: I beg your pardon, page 176.

3 LORD JUSTICE MOSES: I see, yes.

4 MS ROSE: Saudi/UK co-operation. Then his point there is a
5 supervening point of national interest at stake. Then the
6 following main points were made.

7 LORD JUSTICE MOSES: I did not understand the point supervening
8 that and the British people would regard these as higher
9 interests. That has nothing to do with the rule of law.

10 MS ROSE: No.

11 LORD JUSTICE MOSES: That is why lawyers protect the rule of law.

12 MS ROSE: Yes.

13 LORD JUSTICE MOSES: Because people will always say, well, I would
14 much rather you dropped this and lives are at stake.

15 MS ROSE: Of course, most people would say "I would rather that
16 you dropped this and we will have the jobs and the money".

17 LORD JUSTICE MOSES: Of course they could.

18 MS ROSE: It was quite a popular decision.

19 LORD JUSTICE MOSES: That is why, of course, politicians, that is
20 why we have separation of powers as the note records the
21 Attorney saying "due regard to the need for separation between
22 the law and public policy".

23 MS ROSE: The third bullet point on 177:
24 "It was important that the government did not give
25 people reason to believe that threatening the British system

1 resulted in parties getting their way but the government also
2 needs to consider the damage done to the credibility of the
3 law in this area by a long and failed file trial and its good
4 reputation on bribery and corruption issues compared with many
5 of its international partners."

6 My Lords, we submit that is a completely inadequate
7 analysis of the rule of law problem because the damage done by
8 giving into threats is simply contrasted with the risk of the
9 trial failing, in other words it is the Attorney General's
10 point that the evidential threshold is not going to be met.
11 This does not grapple at all with the situation and the
12 circumstances in which the final decision was actually taken
13 which is, "we think there is enough in the evidence to justify
14 continuing with the investigation but nevertheless we will
15 give into that". That situation is never confronted abreast
16 or discussed by the Attorney, the Prime Minister or the
17 Director of the SFO.

18 Then the final paragraph on 177, the Prime Minister sums
19 up and then he says that this was the clearest case for
20 intervention in the public interest he had seen. As your
21 Lordships know it is our submission that the Prime Minister
22 steps over the boundary in this meeting between a permissible
23 Shawcross exercise and impermissible attempts to influence or
24 dictate the decision on the investigation by expressing his
25 view that this was the clearest case for intervention in the

1 public interest he had seen. It goes too far.

2 So then there is a meeting between the Attorney General
3 and the Director on 13th December and we have Helen Garlick's
4 note of that meeting at 176:

5 "In the last few days the representations on public
6 interest have been made with renewed and increasing force by
7 (unclear) Ambassador", in other words they are not different
8 representations, they are the same but they are just made with
9 increasing force: "A further investigation will cause such
10 damage to national and international security he accepts it
11 was not going to be in the public interest. What he could not
12 accept was that there was insufficient evidence to continue."

13 So there is a clear difference of view and ultimately
14 the Director simply giving in to the proceedings.
15 Helen Garlick says that the SFO had never sought to place the
16 interests ----

17 LORD JUSTICE MOSES: It is slightly curious because he wished to
18 have time to consider any reservations and then counsel's name
19 is Mr. Langel's advice, and it is slightly curious as to why,
20 I mean, it may be that somebody would have said, well,
21 actually the Attorney has a point about this principal aging
22 problem and let us look at it again because, in the light of
23 what we are now told about the consequences you, counsel, have
24 to be very confident that you are right about this, but it did
25 not happen because it all happened overnight.

1 MS ROSE: The following morning the decision was made. Of course
2 no consideration here at all of what steps could be taken to
3 mitigate the threat, whether approaches would be made to the
4 Saudis, whether there were other steps that the United Kingdom
5 could do to mitigate or lesson the implications if the Saudis
6 did stop co-operating, that is not considered at all.

7 LORD JUSTICE MOSES: That may be because there was not a full
8 appreciation as a matter of law of the correct test if you are
9 right that they thought national security was just a sort of
10 ----

11 MS ROSE: It trumps everything.

12 LORD JUSTICE MOSES: Rather than that the imminence, the necessity
13 of the duress point without which there is no respectable
14 protection of the rule of law.

15 MS ROSE: I respectfully agree that that does appear to be what
16 has happened. It is, if you like, the Mrs. Collins J analysis
17 national security trumps all which we submit is inadequate.

18 MR. JUSTICE SULLIVAN: I am bound to say, if you wanted to
19 encapsulate the answer to the question, what is going to be
20 the effect on relations with Saudi Arabia if we do this? You
21 have a jolly good answer, it would result in the end of
22 Saudi/UK co-operation. I mean fair and square, bang plum in
23 the centre of Article 5 as far as one can tell, unless there
24 is some sort of ----

25 MS ROSE: Implicit.

1 MR. JUSTICE SULLIVAN: ---- implicit bracket, unless there is some
2 sort of security issue raised. I say this perhaps for the
3 benefit of Mr. Sales in due course, but I do not quite
4 understand where, if it is said that somehow national security
5 issues are outwith Article 5, if it is put that way rather
6 than the way my Lord puts it, clearly they are in it but you
7 can have a defence of duress, necessity, whatever you call it
8 if you are forced to act contrary to the treaty effectively,
9 but at what point do national security considerations kick in?
10 I mean are they always excluded from Article 5, i.e. mild
11 repercussions but some security implications are threatened,
12 are they outwith Article 5 or do we only get outside Article 5
13 if the threat is so great that the threat to security is very
14 substantial? I do not quite understand where it fits in.

15 LORD JUSTICE MOSES: The answer may be that is not for us because
16 it is a tenable view that it is outside. It does not matter
17 in this case in this high flown argument because Wardle says
18 "the reason I took this decision was I had no choice".
19 Question, it is not a question of second guessing, but whether
20 that is ----

21 MS ROSE: What have they considered?

22 LORD JUSTICE MOSES: That that has properly been made out.

23 MS ROSE: To take up my Lord's, Sullivan J's, point, that is
24 particularly pertinent in relation to the second ground that
25 is relied on, which is simply damage to our strategic policy

1 objectives in the Middle East if we are not co-operating with
2 Saudi Arabia. That could be said in relation to any foreign
3 state of any significance that if there is damage done to your
4 relations with that foreign state that will affect your
5 foreign policy objectives in that region. It is completely
6 tautologous. That, in my submission, would make Article 5 a
7 complete dead letter.

8 The other point to make, and I will come back to this,
9 is that this implicit exclusion of national security from
10 express obligations in treaty articles is something that the
11 United Kingdom has argued before without success and your
12 Lordships will see the Sirdar case in which the European Court
13 of Justice rejected the notion that question of national
14 security fell outside the ambit of the EC Treaty.

15 The final point I want to make on this document is at
16 179 right at the end where he we see the final comment from
17 the Attorney General:

18 "Throughout the meeting he made it clear that whilst he
19 had wished to test the SFO case" in other words on the merits
20 "he was committed to supporting it provided it was viable
21 whatever the outcome might be. He was extremely unhappy at
22 the implication of dropping it now."

23 I submit that that does suggest that the
24 Attorney General remained very uncomfortable with the ----
25 LORD JUSTICE MOSES: We will be able to ask Mr. Sales to spell out

1 the implications about which the Attorney was unhappy.

2 MS ROSE: Yes. As your Lordships know the following day the
3 decision was made and we have already looked at the decision
4 and the announcement that was made.

5 There are just two further documents I would like to
6 show your Lordships before you leave the facts which are the
7 United Kingdom's representations to the OECD, a part of the
8 fall out of this decision. In the core bundle page 255,
9 behind tab 14, there are two sets of representations here.
10 The first is on 12th January 2007 so shortly after the
11 decision was taken, paragraph 10. We can see it is said here:

12 "The SFO and the Attorney General at all times had
13 regard to the requirements of the OECD anti-bribery
14 convention, in particular at the Attorney's statement makes
15 clear the considerations set out in Article 5 of the
16 convention played no part in the SFO's decision to discontinue
17 the investigation."

18 Again we submit that in the light of that assurance
19 given to the OECD it is even more impossible, we have the
20 statement to Parliament, we have the Shawcross exercise, we
21 have that statement from the OECD, all making it crystal clear
22 that this decision was taken on the basis that it was within
23 the scope of the convention that it did not take into account
24 any considerations prohibited by Article 5. In those
25 circumstances we do submit this is a classic Launder case.

1 The second submission, if we go to page 259, this is a
2 submission of 8th March 2007, it is a passage that my Lord
3 Moses LJ has seen before, paragraphs 17 to 18, the
4 United Kingdom addresses the question of the interpretation of
5 the anti-bribery convention. They set forward what their
6 position is on it. Then at paragraph 18 they say:

7 "As anticipated at the working group meeting in January
8 the SFA's decision to discontinue the investigation is now the
9 subject of legal challenge by way of judicial review. This is
10 the process by which the legality of a decision by a public
11 authority such as the SFO can be challenged in court, that
12 case raise the very issue of whether the SFO's decision was
13 compatible with Article 5 of the Convention. That question
14 is, therefore, now likely to be determined by the English High
15 Court. The SFO will vigorously defend the legality of its
16 decision and its comparability with the convention as
17 explained".

18 My Lords, we submit that is significant because the
19 submission is being made to your Lordship that you should not
20 adjudicate on that question and that even if you are permitted
21 to consider it at all you should only consider it on a tenable
22 view basis and it is said that any other basis would prejudice
23 the United Kingdom's diplomatic negotiations with the OECD.
24 We submit that is an impossible submission. It is wrong in
25 law for reasons I shall come to but in any event the

1 United Kingdom has specifically told the OECD that this court
2 will be considering and determining that issue. In those
3 circumstances it is difficult to see why it is said that the
4 English court, doing what the United Kingdom has told the OECD
5 the English court will do, could prejudice the UK
6 United Kingdom and the OECD.

7 Finally, of course, any negotiations that the
8 United Kingdom conducts now as to potentially the amendment of
9 the convention, future provisions in relation to national
10 security can have no effect on the question of what was the
11 proper interpretation of the convention as it stood at the
12 date the decision was made. This is not a question which can
13 be determined by diplomatic negotiations now undertaken by the
14 United Kingdom. It is a question of law.

15 My Lord, that finishes my review of the facts and I now
16 come to the first issue which is the question of Article 5.
17 We can put away the core bundle at this point.

18 Before I come specifically to the convention, very
19 briefly it is common ground in this case that the decision of
20 the Director to stop the investigation is judicially
21 reviewable. The defendant has put a mass of authority in on
22 this point, I am not quite sure why. There are only two cases
23 that we submit are relevant and I do not intend to turn either
24 of them up but simply to give you the references. The first
25 is De Silva(?) that is the de Menezes case which was a

1 judicial review of the decision not to prosecute for
2 manslaughter in that case. It is in volume C, tab 33,
3 paragraphs 20 to 26 which we say is the current state of play
4 on this issue.

5 There is also the case of Brown Antoine(?) which is also
6 at volume C, tab 35. There is just one point I would like to
7 show your Lordships very quickly in that case, it is page 787.
8 This is a judicial review of the decision to prosecute. As
9 your Lordships know courts are very reluctant to entertain
10 judicial review of a decision to proceed with a prosecution
11 because the issues which might arise in such a case are best
12 dealt with at the criminal trial and, therefore, courts are
13 more ready to entertain decisions not to prosecute than
14 decisions to prosecute. Just one point, even in relation to a
15 decision to prosecute, if we go to page 787 at the bottom of
16 the page:

17 "It is well established that a decision to prosecute is
18 ordinarily susceptible to judicial review and surrender of
19 what should be an independent prosecutorial discretion to
20 political instruction or, the board would add, persuasion or
21 pressure is a recognized ground of review."

22 I draw that to your Lordships' attention because it is
23 relevant to our Shawcross point because my learned friend
24 makes the submission that the Shawcross case simply
25 establishes constitutional convention and the conventions are

1 not justiciable.

2 Leaving aside the fascinating legal issue to which that
3 gives rise, we say that is simply is not a problem with which
4 your Lordships have to grapple because we are not seeking to
5 judicially review the Prime Minister for exceeding the
6 Shawcross statement. Our submission is that the exercise of
7 the independent prosecutorial discretion was improperly
8 influenced by excessive pressure by him exceeding the
9 Shawcross principle and that, we submit, is plainly
10 judiciously reviewable.

11 That then brings me to the convention. The first
12 question is whether it is permissible for the court in these
13 proceedings to interpret this international treaty. We have
14 dealt with that in our skeleton argument at paragraphs 35 to
15 38 where we have set out what we submit are the very well
16 established principles developed in *Lauder* and *Kebilene*. I
17 do not intend to take your Lordships in detail to the passages
18 that we have referred to.

19 The defendant's response to this is in his skeleton
20 argument at paragraph 89. If you have a look at these
21 paragraphs, the first points that are made are the trite, with
22 respect, point that international treaties are not part of
23 domestic law. Then *Lauder* is dealt with at paragraph 92.
24 What is said in the second sentence is:

25 "The *Lauder* exception to the ordinary approach may be

1 appropriate in a context where there is a developed
2 authoritative jurisprudence of an international court which
3 the domestic courts can follow and apply, as with the case in
4 the context of the European Convention on Human Rights but is
5 not appropriate outside that context."

6 We submit there is nothing whatsoever in *Lauder* or
7 *Kebilene* to support that submission. The proposition
8 developed by their Lordships initially in *Lauder* and then
9 much more fully in *Kebilene* is simply this, if a
10 decision-maker purports to act on the basis of a particular
11 international instrument and directs himself that he is acting
12 in accordance with that instrument but he misunderstands or
13 misconstrues the instrument then he has taken into account an
14 irrelevant consideration, namely his erroneous understanding
15 of the instrument. That is so whether or not the instrument
16 has the benefit of a developed authoritative jurisprudence.
17 There is certainly no authority cited in that proposition
18 which we submit is simply wrong and contrary to the reasoning
19 in *Lauder* and *Kebilene*.

20 Then they seek to rely on Lord Hope in *Lauder* saying
21 that it was significant that Article 13 required the provision
22 of an effective remedy and that there was no equivalent
23 effective remedy requirement, well, with great respect, that
24 does not form any part of the reasoning at all in *Kebilene*
25 where the reasoning is as I have just submitted to your

1 Lordship. We submit that it is a wholly inadequate basis for
2 distinguishing *Launder* and *Kebilene* in this case.

3 The next point that my learned friend makes and this is
4 the second issue under Article 5, is that even if *Launder*
5 applies in some sense this court should not seek to establish
6 what is the meaning of Article 5. The only enquiry it should
7 make is whether the Director adopted a tenable meaning that
8 there should be a margin of appreciation in relation to the
9 meaning of Article 5. We see that submission developed at
10 paragraph 93 of his skeleton argument.

11 My Lords, we do submit that this is wrong in principle:

12 "Where a decision-maker is either required by domestic
13 statute or chooses voluntarily to act in accordance with the
14 United Kingdom's international law obligations he has no
15 margin of discretion as to what those obligations are. Their
16 content is a matter of law to which there can be only one
17 answer and it is for the national court, when considering
18 whether the decision of the domestic decision-maker is lawful,
19 to determine what is the proper construction of the
20 international legal instrument.

21 LORD JUSTICE MOSES: That all sounds terrific but I mean there is
22 a problem with it. One really has to look at the facts and in
23 a sense their argument makes the very point. I mean a
24 judgment has to be exercised as to what damage to human life
25 is going to be caused by going on with this prosecution

1 because that is why Mr. Wardle says he stopped it. He has to
2 form a judgment about that. However, one is talking about the
3 exception and the meaning of diplomatic relations, one can
4 quite see that there may be dangers in this court sort of
5 saying it means this and this is where you draw the line and
6 this is where you do not because they are all very difficult
7 questions.

8 It is much better, is it not, to look at the facts of
9 this particular case and say whether, absent any attempts to
10 get the threat withdrawn or to remove the sting from it, how
11 can you say you had no choice, because if you do not reach
12 that position you are simply not protecting the rule of law.
13 That sort of avoids all these high flown questions of where do
14 you draw the line between national security and diplomatic
15 relations which have all the difficulties my Lord is so keen
16 on.

17 MS ROSE: My Lord, we may end up there but we need, in my
18 respectful submission, to distinguish between the
19 interpretation of Article 5 and its application. The
20 submission I make now is that Article 5 is a legal instrument
21 which has only one meaning and that it is for this court to
22 determine what its meaning is. The question of its
23 application to any given factual situation is of course a
24 completely different matter.

25 May I just make good as a matter of law the submission

1 that I have made which derives from the case of Adnan(?) which
2 is in volume D of the authorities bundle at tab 67. This was
3 a case in which the Secretary of State was required to
4 interpret the Refugee Convention by statute when making a
5 decision because he had to decide whether or not to grant a
6 certificate that a person could safely be deported to a third
7 country without there being a risk that they would be further
8 (unclear) in violation of their convention rights. That
9 necessarily involved him making a judgment about whether there
10 was likely to be a breach of their convention rights if they
11 were deported to the third country and that, of course,
12 involved interpretation of the convention.

13 I accept that because it is a provision in the statute
14 there is a difference between that and the Launder situation
15 but in my submission it is not a difference in principle. It
16 is a factual difference, but whether or not the decision-maker
17 is bound to have regard to an international instrument by
18 statute, which is the Adnan case, or whether he voluntarily
19 chooses to direct himself in accordance with the international
20 instrument, the Launder case and our case, in my submission
21 the conclusion is the same. The task for the court in
22 deciding whether the decision he has made on that basis is
23 lawful is whether he has correctly construed the international
24 instrument and not whether his construction of it is tenable.

25 At the leading speech here as given by Lord Steyn, if we

1 go to page 515 your Lordships can see issue A at the top of
2 the page: Is there an autonomous meaning of Article 1A(2)?
3 That is 1A(2) of the Refugee Convention.

4 Then the submission at D:

5 "Counsel for the Secretary of State submits that this
6 principle tells us nothing about the particular problem before
7 the House, namely whether there is a true and international
8 meaning of Article 1A(2) of the Refugee Convention or simply a
9 range of interpretations, some of which the Secretary of State
10 may be entitled to regard as legitimate and others not."

11 Then he makes the point that section 2(2)(c) required
12 the Secretary of State to give certification. Then it said:

13 "There is no warrant for applying such word" this is in
14 relation as to whether it is a legitimate interpretation "it
15 is noteworthy that such a legislative technique, expressly
16 accommodating a range of acceptable interpretation is nowhere
17 to be found in respect of multilateral treaties or conventions
18 incorporated or authorized by any United Kingdom legislation.

19 Such a remarkable result would have required clear wording."

20 Then he states: "It follows that the enquiry must be into the
21 meaning of the Refugee Convention approached as an
22 international instrument created by the agreement of
23 contracting states as opposed to regulatory regimes
24 established by national institutions."

25 LORD JUSTICE MOSES: That is because the convention for the

1 purposes of certification is part of the law, it has been
2 implemented for that limited purpose. Although you assert
3 there is no difference where you choose to apply it and where,
4 there may a difference, there may be a difference because for
5 the purpose of certification the Refugee Convention is part of
6 the law of the contract.

7 MS ROSE: My Lord, I accept that but, of course, when the
8 decision-maker elects to make his decision saying "I will in
9 accordance with Article 5 of the OECD Convention" he makes
10 Article 5 of the OECD Convention a relevant consideration in
11 the taking of his decision. If we read on, my Lords, you will
12 see why I say it does not make a difference in principle. He
13 states just below G: "It is necessary to determine the
14 autonomous meaning of the relevant treaty provision. This
15 principle is part of the very alphabet of customary
16 international law." Then there is the point about the
17 autonomous meaning of the treaties.

18 Then at H, page 516 H: "It follows that in a case of
19 other multilateral treaties the Refugee Convention must be
20 given an independent meaning derivable from sources mentioned
21 in Articles 31 and 32" that is the Vienna Convention on the
22 Law of Treaties "and without taking (unclear) from distinctive
23 features of the legal system of any individual contracting
24 state. In principle therefore there can only be one true
25 interpretation of a treaty" the key point, there is only one

1 true interpretation of a treaty: "If there is disagreement on
2 the meaning of the Refugee Convention it can be resolved by
3 the International Court of Justice. It had, however, never
4 been asked to make such a ruling. The prospect of a reference
5 to the International Court of Justice is remote. In practice,
6 it is left to national courts faced with a material
7 disagreement on an issue of the interpretation to resolve it
8 but in doing so it must stay untrammelled by notice of its
9 national legal culture for the true autonomous and
10 international meaning to the treaty and there can only be one
11 true meaning." That is the section that we rely on and we
12 submit is the correct approach.

13 Again going over the page to 518 we see the same point
14 made at D to F. Lord Slynn agrees with that approach,
15 pages 507 and 509. In particular at page 509 your Lordships
16 can see the same approach adopted and Lord Hobhouse at pages
17 529 and 531. If we look in particular at page 529 at C:

18 "When an English court construed an international
19 convention it adopts the same techniques of construction on
20 interpretation as will an international tribunal. It is true
21 there has not been any decision of the international court of
22 justice which will be authoritative but in the absence of a
23 decision of that court the decision of your Lordships' house
24 remains for the purposes of English law and the construction
25 of application of section 2 of the determinative decision."

1 Then at G:

2 "The argument on behalf the Secretary of State contended
3 for a different view based on the submission that there were a
4 range of interpretations which could be legitimately adopted
5 of Article 1 of the convention and the adoption of any these
6 in good faith would satisfy the requirement that the relevant
7 person should not be sent to another country otherwise than in
8 accordance with the convention."

9 Then over the page at D:

10 "It will be apparent from what I have already said I do
11 not agree with the analysis implicit in these statements."

12 Then at 531 C to D:

13 "The wording of the convention must at the end of the
14 day have a meaning ascribed to it and it may be the task of
15 the court to give its decision on what that meaning is or, if
16 the meaning has already been decided by an earlier
17 authoritative decision to give effect to that meaning. It is
18 not right to say that there can only be a range of meanings."

19 The defendant seeks to rely on the CND case in support
20 of his position that the convention is either not justiciable
21 or is only partially justiciable in this case. That is in
22 volume D, tab 51 and they submit that in fact the CND case
23 supports our position because this was a case in which the
24 claimants very ambitiously were seeking an advisory
25 declaration from the court as to whether it would or would not

1 be a breach of international law for the United Kingdom to go
2 to war with Iraq and this in circumstances in which the
3 United Kingdom government had been at great pains, as the
4 court found very deliberately, not to express a view on
5 whether it would or would not be contrary to international law
6 to go to a war with Iraq without a second UN resolution.

7 This is classically not a Launder situation. It was not
8 a situation where there was any decision by a domestic
9 decision-maker relying upon and seeking to apply international
10 law which would bring it into play before the national court.
11 That is precisely the distinction which the court drew in its
12 judgment. If we look in that case, paragraph 15, we see the
13 issue:

14 "Should the court in its discretion entertain the
15 substantive application it is not a challenge, no decision is
16 impugned, neither an existing decision or even a prospective
17 decision, CND must inevitably recognize any future decision to
18 take military action would plainly be beyond the court's
19 purview. It is nakedly an application for an advisory
20 declaration. The court's jurisdiction to grant relief in this
21 form, rarely though it is exercised, cannot be doubted should
22 be it be exercised here." That was the issue.

23 Then if we go to paragraphs 35 to 37 after setting out
24 the claimants arguments it is said:

25 "The defendants arguments I propose to deal with

1 substantially more shortly, not because they lacked anything
2 in the way of thoroughness but to my knowledge ----

3 LORD JUSTICE MOSES: Paragraph?

4 MS ROSE: Sorry, paragraph 35: "... there are really only two of
5 them which need to be considered, each, as I believed,
6 destructive of central aspects of the applicant's case in
7 combination of favourable success. The first goes to the
8 court's jurisdiction to rule on matters of international law
9 unless in some way they are properly related to the court's
10 determination of some domestic law right or interest." So
11 that is the first issue identified.

12 Then over the page at paragraph 36 that issue is
13 addressed. Simon Brown LJ, as he then was, said no, you
14 cannot declare the meaning of an international instrument
15 operating purely on the plane of international law. There is
16 a clear distinction drawn with Kebilene just below the first
17 hole punch:

18 "Launder and Kebilene likewise were cases in which the
19 courts were prepared to examine the position under an
20 international convention but only in the context of review and
21 the legality of a decision under domestic law."

22 As Mr. Sales points out there is in the present case no
23 point of reference in domestic law to which the international
24 law issue can be said to go. There is nothing here
25 susceptible of challenge in the way of the determination of

1 rights, interests or duties under domestic law to draw the
2 court into the field of international law. That is the obvious
3 distinction not only with *Lauder* and *Kebilene* but also with
4 our case.

5 Then your Lordships can see again at paragraph 37, about
6 eight lines down:

7 "What is sought here is a ruling on the interpretation
8 of international instrument, no more and no less. It is one
9 thing that in cases like *Kebilene* and *Lauder* for our courts
10 to consider the application with international treaty by
11 reference to the facts of an individual case that indeed would
12 have been the position in (unclear) itself had the court been
13 prepared to undertake the exercise, it is quite another thing
14 to pronounce generally on a treaty's true interpretation and
15 effect."

16 Then again at paragraph 61 Richards J states:

17 "Also a further objection to claims is to ask the
18 national court to declare the meaning and effect of an
19 instrumental international law" and he analyses the objection.

20 At (iv) he states:

21 "A further exception can arise where a decision-maker
22 has expressly taken into account in international treaty and
23 the court thinks it is appropriate to examine the correctness
24 of the self-direction or advice on which the decision is
25 placed." Citing *Kebilene* and *Lauder*, however, that is not

1 that case.

2 Your Lordships will note again that there is no
3 suggestion there that the principle in Kebilene and Launder is
4 limited to a convention like the Human Rights Convention where
5 there is an established point of international case law. They
6 simply state the principle as clearly enunciated by the House
7 of Lords in those cases with general reference to
8 international law. We in fact rely also on ----

9 LORD JUSTICE MOSES: It is very interesting that he draws, I mean
10 there is no distinction he draws between 3, which is the Adnan
11 situation, statute requires decisions to be taken in
12 accordance with an international treaty and then, as you put
13 it, the correctness of advice on which the decision is based.

14 MS ROSE: My Lord, those are our submissions on justiciability and
15 jurisdiction.

16 That brings me then to the question of proper
17 interpretation of Article 5. It is common ground between the
18 parties that in accordance with Article 31 of the Vienna
19 Convention on the law of treaties the treaty must be
20 interpreted in good faith in accordance with the ordinary
21 meaning to be given to the terms of the treaty in their
22 context and in the light of its object and purpose. Not
23 perhaps the most earth shattering proposition for the
24 interpretation of any legal instrument but that must be the
25 starting point.

Transcript prepared without access to case documentation.

1 LORD JUSTICE MOSES: Another way of saying it is that the
2 important thing is to look at a meaning which does not
3 completely mean that the treaty misfires. I mean it is
4 pointless. If there really is no distinction between
5 diplomatic relations and national security because every time
6 you damage diplomatic relations you made calls of drying up of
7 the source, well, then it is a pretty pointless treaty.

8 MS ROSE: My Lord, we do not put it that way or course. We do not
9 say there is no distinction.

10 LORD JUSTICE MOSES: No, absolutely not.

11 MS ROSE: We do not make the submission that there are no
12 circumstances in which the state could decide not to pursue an
13 investigation in relation to national security. Even just
14 looking at treaties because of course what Article 5 does is
15 to preserve the normal prosecutorial discretion but subject to
16 three express prohibitions, so the question is whether a
17 breakdown in co-operation with another state arising out of
18 the investigation which had an adverse effect on national
19 security falls within the scope of one of the prohibitions in
20 Article 5, that is the issue. It is not whether national
21 security is excluded from the ambit of the treaty because
22 there may be all sorts of other ways that national security
23 arises that have nothing do with international relations. An
24 obvious example is you might have an investigation which
25 cannot proceed without the disclosure of material which would

1 disclose the identity of state agents.

2 LORD JUSTICE MOSES: Or an informant.

3 MS ROSE: Or an informant, indeed, which will mean national
4 security should have nothing whatever to do with relation to
5 the foreign state and therefore would not fall within the
6 prohibition in Article 5. Indeed, that seems to be what the
7 CPS, our prosecutorial code is referring to, a provision which
8 my learned friends relied on but which does not seem to us to
9 have any relevance.

10 LORD JUSTICE MOSES: They did not think of this situation, not
11 surprisingly.

12 MS ROSE: The situation that the CPS code is looking at, it is
13 that sort of situation where you cannot proceed with a
14 prosecution without disclosing material that would in itself
15 be harmful to national security.

16 Our submission is that the considerations which were
17 taken into account by the Director in this case do fall within
18 the expressly prohibited conditions in Article 5, both as a
19 matter of the ordinary meaning of Article 5 and even more
20 emphatically when the purpose of the treaty is considered
21 because we submit that if the defendant is correct and the
22 considerations that were taken into account in this case were
23 not prohibited, then much of purpose and effectiveness of the
24 treaty will be lost because in any case where there is an
25 allegation of bribery of a senior official of a foreign

1 country that has some strategic importance the state will be
2 able to argue that continuing the investigation prejudices
3 national security either directly because of the effect of
4 withdrawal of diplomatic co-operation or indirectly because of
5 the importance of the state in the region and that is the
6 point about the second ground that is relied on.

7 My Lords, may I turn then to the question of the purpose
8 of the OECD Convention and I would like to pick this up in the
9 statement of Mr. Hildyard which is in the core bundle at
10 tab 12.

11 LORD JUSTICE MOSES: Yes.

12 MS ROSE: Mr. Hildyard is the director of Corner House Research
13 which is a very-well established group dedicated to
14 campaigning against international corruption and his evidence
15 on these points has not been challenged by the defendant. He
16 deals in particular in his statement with the impact of
17 international bribery and corruption, both on the world
18 economy and particularly the economy of developing states and
19 on national and international security and terrorism. If we
20 can just look at those passages. I have various different
21 numbering systems here.

22 LORD JUSTICE MOSES: Let us use felt tip numbers.

23 MS ROSE: The felt tip is 222. Under the heading The Impact of
24 Bribery on Trade and Investment, I invite your Lordships to
25 read the whole of the statement but ----

1 LORD JUSTICE MOSES: Well, we did, yes.

2 MS ROSE: To identify the key points, at paragraph 14:

3 "Corruption distorts markets and like other forms of
4 anti-competitive behaviour such as the formation, (unclear)
5 damages all involved in the supply of goods and services."

6 Then a point at paragraph 18:

7 "Although some companies have sought to excuse bribery
8 on the basis that jobs will be lost if bribes are not paid the
9 flip side of the coin is the extent to which companies loose
10 business either because they are unwilling to pay bribes or
11 because they are outbribed by components."

12 Then at 19: "Even if paying bribes wins contracts it
13 also incurs high reputation and other risks to companies."

14 Then in the same paragraph: "Bribe paying, like giving into
15 blackmail has its own dynamic, once a company has a reputation
16 for paying officials will seek an opportunity to levy their
17 share. It is hard to resist when a company's earlier
18 behaviour suggests a willingness to pay."

19 Those are financial implications. Then corruption and
20 security, which is particularly significant in this case:

21 "Corruption has profound implications for national security.
22 This link has been acknowledged by the leaders of all of the
23 G8 countries, including the Prime Minister Mr. Blair."

24 (reads to the words) ".... trust in government and
25 destabilize economies."

1 At paragraph 22: "The Home Office Strategy Document.
2 Bribery overseas can be a factor which supports corrupt
3 governments with widespread destabilizing consequences. We
4 are duty bound to promote high standards of fairness and
5 integrity and to ensure that UK citizens do not contribute to
6 corruption either at home or abroad."

7 LORD JUSTICE MOSES: In a sense we know this because of the 2001
8 Act that extended bribery by means of a statute to attempts to
9 bribe foreign officials.

10 MS ROSE: Of course, as a direct result of the United Kingdom
11 signing up to the OECD Convention.

12 LORD JUSTICE MOSES: So it in a sense is part of our law.

13 MS ROSE: Yes.

14 LORD JUSTICE MOSES: Because that was the trigger for the statute.

15 MS ROSE: Indeed, the statute was a response to the convention.
16 Then the point about failing states: "The Foreign Office
17 acknowledges that weak or failing states are frequently safe
18 havens for terrorists. The connection that has lead former
19 Foreign Secretary Jack Straw to insist that the UK's national
20 security is intimately bound to addressing state failures. We
21 need to remind ourselves that turning a blind eye to the
22 breakdown of order in any part of the world, however distant,
23 invites the direct threats to our national security and
24 well-being."

25 Then the point that Saudi Arabia is ranked 73 out of 146

1 in the failed states index and the criticism of the impact of
2 corruption in Saudi Arabia. Then at 26, the point which is of
3 significance, that corruption by ruling elites in the
4 Middle East has been cited as a factor motivating the
5 leadership of terrorist organizations such as Al-Qaeda. There
6 are a number of well known statements by Osama bin Laden to
7 the fact that one of his key objectives is to depose the
8 corrupt elites in Saudi Arabia in particular. One can at
9 paragraph 28 (unclear) of bin Laden (unclear) as a corrupt
10 gang, refers to defence contracts by Saudi Arabia as evidence
11 of the regime's lack of concern for the increasing economic
12 and social insecurity of citizens."

13 There your Lordships can see the real importance, not
14 just economically but also in terms of national and
15 international security and the fight against terrorism for
16 ensuring that international bribery is not permitted to
17 continue.

18 LORD JUSTICE MOSES: Yes, I mean protection of the rule of law is
19 part of the battle against terrorism.

20 MS ROSE: Exactly. One sees the connection very directly in this
21 evidence. These considerations are what underlay the
22 formation of the OECD anti-bribery convention. We have the
23 convention itself, it is in the legislation bundle at
24 volume E. I am going to refer to it where I have marked it up
25 in volume 1. If your Lordships want to look at it in the

1 legislation budge, it is at tab 1 of the legislation bundle.

2 If we look first at preamble to the convention:

3 "The parties considering that bribery is a widespread
4 phenomenon in international business transactions, including
5 trading investments, which raises serious moral and political
6 concerns undermines good governments and economic developments
7 and distorts international competitive conditions." Your
8 Lordship has seen from Mr. Hildyard what that means.

9 Then further down towards the bottom of the page:

10 "Recognizing that achieving progress in this field requires
11 not only efforts on a national level but also multi-lateral
12 co-operation monitoring follow up and recognizing that
13 achieving equivalents among the measures to be taken by the
14 parties is an essential object and purpose of the convention
15 which requires that the convention be ratified without
16 derogations affecting this equivalence."

17 We submit that is a really important provision of the
18 preamble.

19 LORD JUSTICE MOSES: Really important?

20 MS ROSE: A really important provision because it is in the
21 immediate economic self interest of every state to pay bribes
22 to get big contracts, so states are being asked to deny
23 themselves the opportunity to do something which is in their
24 own immediate economic self interest. That will only work if
25 their competitors sign up to the same discipline because if

1 you have a situation in which the French agree not to pay
2 bribes for contracts to Saudi Arabia but the British do pay
3 bribes for contracts to Saudi Arabia, the whole system is
4 undermined. It will only work if everybody operates the
5 convention to the same standard.

6 In my submission that is significant when you are
7 considering the plausibility of my learned friend's submission
8 that there is some general implicit national security
9 exception which permits you to take into account prohibitive
10 considerations under Article 5 in undefined national security
11 situations. We submit that that is incompatible with the
12 clear statement here that you need equivalence and that you
13 cannot derogate from the provisions of the convention. It
14 also supports the proposition that if it was intended that
15 there should be a specific national security exemption, it
16 would have been spelt out because this is not a convention
17 which permits derogation.

18 We then see at Article 1 that the offence of bribery of
19 foreign public officials is set out in general terms. Then
20 the key provision, Article 5: "Investigation or prosecution
21 of the bribery of foreign public officials shall be subject to
22 the applicable rules of principle of each party. They shall
23 not be influenced by considerations of national economic
24 interest, the potential effect upon relations with another
25 state or the identity of the natural or legal persons

1 involved."

2 So clearly a twofold purpose in Article 5, first, to
3 preserve the normal national prosecutorial functions and
4 investigatory functions but subject to three clear express
5 prohibitions which are not limited by reference to national
6 security.

7 My Lords, that brings us to our submissions on the
8 proper interpretation of the conventions that are set out at
9 paragraph 47 of our skeleton argument. Our first point is
10 that this is a multilateral treaty, this is the equivalence
11 point, a combined and united front. At (b) the difficulty of
12 eliminating cross-boarder corruption because the bribed public
13 official will be senior, able to use the machinery of his
14 state to impose adverse consequences. The foreign official or
15 his associates or agents may be in a position to make threats
16 and apply blackmail. When faced with such threats, the
17 demands of realpolitik mean that bribery prosecutions will
18 often come a poor second. This is a central element of the
19 mischief that Article 5 was intended to prevent or correct.

20 (c) If states capitulate to such threats, the end result
21 is that bribery flourishes. Equally, if all the developed
22 democratic countries that make up the OECD maintain the same
23 common high standard of refusing to abandon bribery
24 investigations on the basis of diplomatic threats (real or
25 bluffed), everyone ultimately benefits. Each state agrees to

1 limit its freedom of action in individual cases in order to
2 secure long-term benefits for all. That is really the core of
3 our submission. The Convention must be construed, we say,
4 with these purposes in mind.

5 We give another example of the Geneva Conventions where
6 states pleaded to behave with restraint involved there because
7 it is in the interests of their own citizen if others do the
8 same.

9 MR. JUSTICE SULLIVAN: I quite understand the submission you
10 construe it with the objects and purposes in mind but it is
11 not as though, as I understand it, you say you need that
12 submission in any event. You just look at the plain words.
13 It does not take a genius to work out whether you are talking
14 about potential effect on relations with another state. There
15 might be all sorts of complicated international concepts in
16 treaties.

17 LORD JUSTICE MOSES: It is where you are drawing the line between
18 what is permissible and what is impermissible. Once you have
19 allow a broad concept of waiving national security and waiving
20 the finger at national security and anybody who ----

21 MS ROSE: You undermine the whole.

22 LORD JUSTICE MOSES: That is why you have to have a limited
23 concept otherwise it just will not work.

24 MS ROSE: So my Lords, just carrying on in our skeleton argument
25 your Lordships have the submission we make at (d).

1 Then at (e) that there is no nation security exception
2 to Article 5. The submission really goes all the way down to
3 (g) and so the same point is being made.

4 Then the question of an implicit national security
5 exception to Article 5. This is at (h) and I want to address
6 the Sirdar case at this point which is volume A of the
7 authorities bundle, tab 7. This case concerned fighting
8 chefs. It was about a woman who was a chef in the army who
9 received a redundancy notice but then was told there were
10 actually vacancies for chefs in the Royal Marines so she
11 applied and then was told that she could not because they only
12 took men as chefs in the Royal Marines. The reason being that
13 in the Royal Marines the chefs have to be ready to fight at a
14 moment's notice, what they called the ----

15 LORD JUSTICE MOSES: All chefs will probably (unclear)

16 MS ROSE: I believe there was actually some battle where the
17 Royal Marines chefs distinguished themselves. I actually
18 argued this case when I was about eight and a half months'
19 pregnant and we called a 22-years' service chef who was at
20 least 24 stone, but in any event he was a fighting chef.

21 LORD JUSTICE MOSES: Yes.

22 MS ROSE: The case went to the ECJ because the government's
23 argument was that the question whether they were entitled to
24 discriminate against woman by not permitting them to be
25 employed in the Royal Marines fell completely outside the

1 scope of the EC Treaty and therefore the Equal Treatment
2 Directive and the Sex Discrimination Act because, it was
3 argued, this was a matter of combat effectiveness which went
4 to national security and there was an implicit national
5 security exception in the EC Treaty. The EC Treaty intended
6 to deal with free movement, with social rights, with equal
7 treatment, sex discrimination, not intended to impinge on the
8 state's sovereign right to protect itself in time of war.
9 That argument was roundly rejected by the ECJ.

10 If your Lordships turn in the judgment which starts at
11 page 160 there was in fact an express national security
12 exception in the EC Treaty which your Lordships can see at
13 Article 224 which related to member states consulting with
14 each other with a view to taking together the steps needed to
15 prevent the function of the common market being affected by
16 measures a member state may be called on to take in the event
17 of serious internal disturbances affecting the maintenance of
18 law and order in the event of war.

19 So there was to that extent a very limited emergency
20 provision, but no other provision in the treaty dealing with
21 national security. Turning to page 162, paragraph 11, the
22 first and second questions:

23 "By its first two questions the national tribunal is
24 asking whether decisions taken by member states with regard to
25 access to employment, vocational training and working

1 conditions in the armed forces for the purpose of ensuring
2 combat effectiveness, particularly with regard to marine
3 commando units, fall outside the scope of community law. The
4 applicant submits that the court's answer should be in the
5 negative. She argues that there is" ----

6 LORD JUSTICE MOSES: Where do you want us to read to?

7 MS ROSE: Sorry, go down to paragraph 19, my Lord.

8 LORD JUSTICE MOSES: Yes, thank you. (Pause) Yes.

9 MS ROSE: As your Lordship can see the critical passages are at 16
10 and 17 where it said it is not possible to infer from the
11 specific exceptions that there is inherent in the treaty a
12 general exception covering all measures taken for reasons of
13 public security. To recognize the existence of such an
14 exception, regardless of the specific requirements laid down
15 by the treaty, might impair the binding nature of community
16 law and its uniform application.

17 Then paragraph 19 dealing with the very limited scope of
18 application of Article 224. We submit that there is a clear
19 analogy there that the ECJ was not prepared to have a general
20 implied national security exceptional treaty. If there is
21 then to the extent that there is a national security exception
22 it is expressed within the treaty.

23 We then go back to my skeleton argument. We have listed
24 a whole series of treaties, unilateral, multi-lateral and OECD
25 treaties where there are indeed specific limited national

1 security exceptions. We say this is the way the treaty law
2 deals with national security, not through some general
3 implicit exception but through specific provision.

4 LORD JUSTICE MOSES: When it does it quite often is incredibly
5 broad anyway because it adds in important public policy or
6 other essential interests so they are the sort of
7 international agreements where everything is up for grabs.

8 MS ROSE: Indeed and one can contrast that with a treaty like the
9 EC Treaty where, of course, uniform application is very
10 important and a treaty like the OECD anti-bribery convention
11 where again uniform application is essential to the success of
12 the treaty. You cannot have individual states just deciding
13 unilaterally that something is contrary to national security
14 so they are not going to comply with their express obligations
15 under the treaty because it defeats the whole purpose.

16 Indeed with a treaty of this nature it is particularly
17 striking that there is not a national security exception
18 because given the nature of the treaty and the nature of the
19 corrupt practises that it is seeking to eradicate the sorts of
20 threats that the United Kingdom has been subject to in this
21 case were only too predictable and one might have thought
22 would have been foreseen by those negotiating the treaty.

23 I do not intend to turn up all these treaties but may I
24 simply give your Lordships the references in the bundle. The
25 first one, the 1994 USA Treaty is at E15, page 18 of the

1 skeleton. Then the 1992 India Treaty is at E4. The 1994
2 agreement with Paraguay is E5. The 1988 Australia Treaty is
3 E6. Then looking at the multilateral treaties, the
4 Geneva Convention at E7, the ICCPR is at E8. It is a
5 particularly interesting example of a human rights treaty with
6 specific national security exceptions. Then Tariffs and Trade
7 is E9. Statute of the International Criminal Court is E10 and
8 then the OECD Convention on Mutual Administrative assistance
9 is E11. Your Lordships of course also have the example of the
10 EC Treaty Article 224 we have just looked at.

11 Our submission at E is that these examples indicate that
12 where the UK and other States have sought to introduce a
13 national security exception into a bilateral or multilateral
14 treaty they have done so explicitly.

15 My Lords, we then have referred to the articles by
16 Professor Rose-Ackerman and Peter Cullen. Again I do not
17 intend to turn those up, I invite your Lordships to read them.
18 They are at F1 and F2 respectively.

19 LORD JUSTICE MOSES: There are quite lot of quotes from Cullen in
20 your chap's written statement.

21 MS ROSE: There are, yes, my Lord. Essentially the position
22 Cullen adopts, we submit, is entirely correct, which is that
23 you cannot invoke national security where it is simply arising
24 out of a deterioration in relation to the foreign state
25 because that falls within Article 5. There may be

1 circumstances which are not within the ambit of the Article 5
2 prohibitions where you could, such as the example I have given
3 your Lordships in relation to non-disclosure of documents.

4 LORD JUSTICE MOSES: I would add the Khaled example, whatever her
5 name was, the Khaled.

6 MS ROSE: That is different, my Lord. I am going to explain to
7 your Lordships. This is a point of subtlety to which I am
8 indebted to Professor Sands but the Khaled example, the
9 necessity ----

10 LORD JUSTICE MOSES: Well, you come to it when you want to.

11 MS ROSE: Yes, but that is not an exception from the provisions of
12 the treaty. That a separate doctrine of state responsibility.

13 LORD JUSTICE MOSES: The state's entitlement to protect itself.

14 MS ROSE: Yes, may breach the treaty.

15 MR. JUSTICE SULLIVAN: We are forced to breach the treaty because
16 of this imminent peril.

17 LORD JUSTICE MOSES: That is why it is so like duress.

18 MS ROSE: Exactly.

19 LORD JUSTICE MOSES: Duress will not run unless you say "I admit I
20 did it, but I had a pistol held to my head".

21 MS ROSE: Exactly. An important distinction, no implicit national
22 security is entered in the treaty but a separate doctrine of
23 state responsibility that enables you to breach the treaty if
24 you really do not have an alternative. In fact I will turn to
25 that point now. We made some other points here about national

1 security not being self judging, but I will leave your
2 Lordships to explore the ----

3 LORD JUSTICE MOSES: That is just another way of saying how can
4 you have uniformity?

5 MS ROSE: Yes. We now come to (vi) at page 24 and this is the
6 state responsibility doctrine which is derived from the
7 International Law Commission Articles. Those are set out at
8 E12 but the relevant one ----

9 LORD JUSTICE MOSES: Sorry, where are we now?

10 MS ROSE: We are at page 24 of my skeleton argument. We have set
11 out Article 25 of the International Law Commissions Articles
12 of State Responsibility dealing with necessity. If you want
13 to look at the complete text it is at E12 but for my purposes
14 what is set out is sufficient.

15 "Necessity may not be invoked by a State as a ground for
16 precluding the wrongfulness of an act not in conformity with
17 an international obligation of that State unless the act:

18 (a) Is the only way for the State to safeguard an
19 essential interest against a grave and imminent peril; and

20 (b) Does not seriously impair an essential interest of
21 the State or States towards which the obligation exists, or of
22 the international community as a whole."

23 So your Lordships can see just how stringent the
24 requirements are, the cumulative requirements in order to
25 invoke necessity. And the Gabcikovo-Nagymaros Project case is

1 the case in which this doctrine has been recognized. That
2 case, sorry, I have lost my reference, it is B21.

3 LORD JUSTICE MOSES: Do you want us to find that case?

4 MR. JUSTICE SULLIVAN: Did you say B21?

5 MS ROSE: Volume B, tab 21. This is the fundamental case that
6 establishes this notion that there is a separate notion of
7 state responsibility, the necessity document. This case
8 concerned an agreement between Hungary and, initially,
9 Czechoslovakia but later Slovakia for the building of various
10 dams and hydro electric projects on the Danube River. Hungary
11 came to take the view that this project was an ecological
12 disaster and wanted to pull out of the treaty, is the
13 essential background.

14 If we start at paragraph 44 in the judgment you will see
15 that some of it is in French, page 34, paragraph 44:

16 "In the course of the proceedings Slovakia argued at
17 length that the state of necessity on which Hungary relied did
18 not constitute a reason for the suspension of a treaty
19 obligation recognized by the law of treaties and it also cast
20 doubt on whether ecological necessity could, in relation to
21 the law of state responsibility, constitute a circumstance
22 precluding the wrongfulness of a pact."

23 If we then go to paragraph 47 your Lordships can see
24 here that the court says this has nothing to do with the
25 Vienna Convention on the law of treaties or the interpretation

1 of the treaty because it said the question of the
2 interpretation of treaty in the law of state responsibility
3 are two branches of international law which obviously have a
4 scope that is distinct.

5 A determination of whether or not a convention is not in
6 force and whether it has or has not been properly suspended or
7 denounced is to be made pursuant to the law of treaties. On
8 the other hand an evaluation of the extent to which the
9 suspension or denunciation of a convention seen as
10 incompatible with the law of treaties involves the
11 responsibility of the state which proceeded to it is to be
12 made under the law of state responsibility. So that is the
13 key distinction between construing the treaty and establishing
14 whether the state is justified in breaching it.

15 Then going to paragraph 49 the question of whether there
16 was a state of necessity. Your Lordships can see that they
17 refer to the International Law Commission. They refer to
18 Article 33, I am told that Article 33 was the original draft
19 of what you now have seen as Article 25 but it is identical,
20 as your Lordships can see, the text is set out and it is
21 identical.

22 Then at paragraph 50 on page 40 looking at the
23 commentary on this article:

24 "Commission defined the state of the necessity as being
25 the situation of a state whose sole needs are safeguarding an

1 essential interest threatened by a brave and imminent peril is
2 to adopt conduct not in conformity without the" ----
3 LORD JUSTICE MOSES: That is what, you see, -- I am sorry, I keep
4 saying it -- Mr. Wardle says, he said "I had no choice".
5 MS ROSE: We submit that is absolutely unsustainable.
6 LORD JUSTICE MOSES: That is a wholly different question.
7 MS ROSE: But when one looks at these documents.
8 LORD JUSTICE MOSES: That is a different question. One point, why
9 is the government bothering to argue these others cases about
10 where it is when actually the defence of this decision is "I
11 had no choice"?
12 MS ROSE: My Lord, in my submission, they do not actually seek to
13 address anywhere the cumulative requirements ----
14 LORD JUSTICE MOSES: Mr. Wardle does.
15 MS ROSE: My Lord, I would respectfully differ. He does not seek
16 to address the cumulative requirements that must all be
17 satisfied in order for the necessity to be made out.
18 LORD JUSTICE MOSES: Quite, yes, absolutely.
19 MS ROSE: The government has certainly never suggested that it
20 falls within this definition and we submit it could not
21 properly do so. If your Lordships will read on at
22 paragraphs 51 and 52. Your Lordships will see finally at the
23 top of page 41 that the conditions of necessity reflect
24 customary international law.
25 We submit that that is the correct enunciation of the

1 doctrine of necessity which the state in this case did not
2 come anywhere remotely near to meeting. There is, of course,
3 a very interesting parallel between that and what I shall be
4 coming on to submit in relation to the rule of law in domestic
5 law context, as one would expect since (unclear) international
6 law is a part of the common law arena.

7 LORD JUSTICE MOSES: This is where, or is it later you bring in
8 Khaled?

9 MS ROSE: Well, we deal with Khaled really under the rule of law
10 but one can bring it in twice because the concept in relation
11 to duress or necessity is similar in both cases. The contrast
12 between that situation and this situation is, we submit, very
13 clear. There were other routes available. There was not a
14 situation where lives were going to be lost within the next
15 few hours unless you acted in a particular way.

16 LORD JUSTICE MOSES: There may not have been other routes, but
17 what is dispiriting, you submit, is that they do not seem to
18 have even been tried, nobody said, will this work? I mean the
19 answer from the Ambassador is, "do not be so silly. They know
20 perfectly well how our system works and you will just make it
21 worse" but they do not say that.

22 MS ROSE: Indeed, they do not submit to this court that there were
23 no other routes. Indeed, they submit that it is irrelevant
24 and that they did not even need to take into account the fact
25 that the Saudis, if they implemented their threats, would

1 themselves be in breach of international law. They submit
2 that that was an irrelevant consideration that they were not
3 about to take into account. We submit that cannot be right
4 because if you are looking at a situation where a state has to
5 say, we cannot do this unless we have no alternative, surely
6 they should be looking at what recourse they might have
7 against Saudi Arabia on the international level at the UN.
8 Yet they say they did not even need to take that into account.
9 We submit that makes it impossible for them to sustain their
10 case.

11 MR. JUSTICE SULLIVAN: The position, in your submission, is if
12 they correctly self-directed themselves as to the ambit of
13 Article 5 they would have had to acknowledge that what they
14 were indeed taking account of was within Article 5.

15 MS ROSE: Yes.

16 MR. JUSTICE SULLIVAN: Then they would have to direct themselves,
17 effectively, as to this doctrine of necessity here rather than
18 being able to say, "oh, well, it is just national security,
19 its a magic card". It is because they, as it were, did not
20 maybe that is an explanation in answer to my Lord's question
21 as to why no action was taken to test.

22 MS ROSE: They did not think they needed to.

23 MR. JUSTICE SULLIVAN: Yes, they did not feel they needed to.

24 MS ROSE: Returning to our skeleton argument, we have analyzed
25 Gabcikovo-Nagymaros Project case and we then come on at

1 page 26 to consider the advisory opinion of the ICJ in
2 relation to Palestinian wall. That is in volume B at tab 20.
3 Now, this is particularly interesting because this is a
4 situation in which the ICJ did not accept that Israel was
5 entitled to rely on doctrine of necessity as a justification
6 for building the wall even in circumstances in which Israel
7 was experiencing regular suicide attacks and had concluded
8 that the only effective way of preventing regular suicide
9 attacks on the civilian population was to build a wall. The
10 court did not accept that that was sufficient for the doctrine
11 of necessity to be satisfied. That, we submit, is an
12 indication as to how extreme the circumstances must be.

13 If we go to tab 20, paragraph 140, this is after the
14 court has concluded that what Israel has done is in breach of
15 various international treaties. It is at page 62 at the
16 bottom and page 194 at the top, I do not know why that should
17 be but paragraph 140:

18 "The court has, however, considered whether Israel could
19 rely on the state of necessity which would preclude the
20 wrongfulness of the construction of the wall. In this regard
21 the court is bound to note some of the conventions at issue in
22 the present instance includes qualifying clauses of the rights
23 guaranteed or provisions of" ----

24 LORD JUSTICE MOSES: Do you want us to read down to the bottom of
25 142?

Transcript prepared without access to case documentation.

1 MS ROSE: Yes, the bottom of 142, my Lords.

2 LORD JUSTICE MOSES: (Pause) It is slightly curious that it does
3 not say what else they are supposed to do.

4 MS ROSE: Indeed.

5 LORD JUSTICE MOSES: I am wondering whether they are thinking that
6 actually what you do is you make the attacks worse and create
7 further risks to national security if you prevent half of your
8 population from surviving and earning a living. That, of
9 course, would have a resonance in this case but you are
10 actually making national security worse.

11 MS ROSE: If you permit bribery on a massive scale.

12 LORD JUSTICE MOSES: They just do not actually condescend to say
13 ----

14 MS ROSE: It is an indication of the narrowness of the necessity
15 ----

16 LORD JUSTICE MOSES: Yes.

17 MS ROSE: Returning to the skeleton argument at paragraph 49, your
18 Lordships have this point already, that national security in
19 any event was not the only ground. There was also strategic
20 foreign policy objectives and we say on any view that is
21 clearly squarely within the Article 5 ----

22 LORD JUSTICE MOSES: Except Mr. Wardle says "I put those out of my
23 mind and all I was concerned about was the imminence of the
24 threat".

25 MS ROSE: Except, my Lord, that, of course, is inconsistent with

1 what the Attorney General told the House of Lords.

2 LORD JUSTICE MOSES: So what? He did not make the decision;
3 Wardle made the decision. We have to be very careful under
4 the Bill of Rights to start questioning quite how in the very
5 tense situation that there was then. It does not detract from
6 your point about there is no true distinction anyway.

7 MS ROSE: No. May I now turn to the defendant's case in relation
8 to the construction of Article 5?

9 LORD JUSTICE MOSES: Yes.

10 MS ROSE: If we take it up in the defendant's skeleton argument at
11 paragraph 60 and in particular at paragraphs 69 to 73, the
12 defendant argues that restrictions on the freedom of action of
13 states, the restrictions on the sovereignty of state, if you
14 like are not to be presumed or implied. We say this wholly
15 misses the point because we are talking about an express
16 restriction under Article 5.

17 In particular at paragraph 73 the defendant rather oddly
18 relies on a dissenting opinion from the case of the ss
19 Wimbledon, an old case. We say that is quite striking because
20 when you look at the majority opinion we submit it actually
21 supports our position. That was a case which concerned the
22 Keel Canal under the Treaty of Versailles Germany was placed
23 under an obligation to allow foreign ships to pass through the
24 Keel Canal. It interfered with the passage of the ss
25 Wimbledon because it said that this was a breach of an

1 agreement of neutrality that it had made in relation to the
2 Russian/Polish War that was going on at the time and this
3 defence was rejected.

4 If we take up the Wimbledon case which is at bundle C,
5 tab 40, at page 21 under the heading The Law your Lordships
6 can see Article 380 of the Versailles Treaty set out which
7 places the express obligation on Germany. Then at page 22,
8 second hole punch:

9 "The court considers the terms of Article 380 are
10 categoric and give rise to no doubt. It follows the canal has
11 ceased to be a material national navigable waterway."

12 Then at page 24, third paragraph:

13 "In order to dispute the right of the ss Wimbledon to
14 free passage through the Keel Canal the argument has been
15 urged on the court that this right really amounts to a
16 servitude by international law resting on Germany and that
17 like all restrictions or limitations on the exercise of
18 sovereignty this servitude must be construed as restrictively
19 as possible and confined within its narrowest limites, more
20 especially in the sense it should not be allowed to affect the
21 rights consequent on neutrality in an armed conflict."

22 That argument is rejected because what the court says
23 towards the bottom of the page:

24 "Yes, there is a sufficient reason for restrictive
25 interpretation, in case of doubt the clause which produces

1 such a limitation but the court feels obliged to stop at the
2 point where the so-called restrictive interpretation would be
3 contrary to the plain terms of the article and would destroy
4 what has been clearly granted."

5 So you cannot use that argument to undermine the whole
6 purpose of the treaty. Then further down at page 25 between
7 the two hole punches:

8 "The court declines to see in the conclusion of any
9 treaty by which the state undertakes to perform or reframe
10 from performing a particular act and abandonment of its
11 sovereignty. No doubt any convention creating an obligation
12 of this kind places a restriction on the exercise of the
13 sovereign rights of the state in the sense that it requires
14 them to be exercised in a certain way but the right of
15 entering into international engagements is an attribute to
16 state sovereignty."

17 We submit that is the misunderstanding that the
18 defendants are making. They say, "oh, well, to deny us the
19 opportunity to stop the investigation of these (unclear)
20 interferes with the United Kingdom sovereignty, it cannot be
21 taken to have done that", but of course it has done precisely
22 that by entering into the provisions of Article 5. That was
23 in itself an exercise of the United Kingdom sovereignty for
24 the international good for the benefit of all. So we submit
25 that argument goes nowhere.

1 Returning to the skeleton argument of the defendants,
2 paragraph 66 of that skeleton argument really illustrates the
3 fundamental difference of approach between the claimants and
4 the defendant in this case because the way that the defendant
5 seeks to characterize it is that considerations of national
6 security are permissible matters to be taken into account by
7 the investigating prosecutorial authorities and it will be
8 extraordinary if they became impermissible by a side-wind,
9 which we say is completely the wrong approach. Relations with
10 a foreign state are impermissible by the express terms of
11 Article 5 and it will be extraordinary if they suddenly became
12 permissible simply because they have an impact on national
13 security in the subjective opinion of the state.

14 That paragraph really illustrates the different ends of
15 the telescope through which the claimants and the defendant
16 approach the construction of Article 5 in this case.

17 Then paragraph 78 ----

18 LORD JUSTICE MOSES: It is the way they wander in and out of what
19 they are really saying within the parenthesis "in terms of the
20 point of substance is there a risk to the right to life or to
21 national security?"

22 MS ROSE: Yes.

23 LORD JUSTICE MOSES: Now the two things are not the same.

24 MS ROSE: No, of course not.

25 LORD JUSTICE MOSES: National security is a much vaguer thing. Of

1 course, if there is a risk to right to life it may be talking
2 about something else.

3 MS ROSE: Even then imminence and all the other points that we
4 have discussed.

5 At paragraph 78 of their skeleton argument they seek to
6 rely on the commentaries on the OECD Convention. We submit
7 that there is nothing in those commentaries which is
8 inconsistent with our approach. If one looks at the quote set
9 out here at paragraph 78:

10 "Article 5 recognizes the fundamental nature of national
11 regimes of prosecutorial discretion" ----

12 LORD JUSTICE MOSES: Sorry, where is that?

13 MS ROSE: I am looking at the quote.

14 LORD JUSTICE MOSES: Yes, I have it.

15 MS ROSE: We agree, that is correct. It recognizes as well that
16 in order to protect the independence of prosecution such
17 discretion is the exercise on the basis of professional
18 motives and is not to be subject to improper influence by
19 concerns of a political nature. My Lords, that is precisely
20 what has happened in this case, improper influence from the
21 Saudis by concerns of a political nature. We cannot see how
22 that supports the defendant.

23 MR. JUSTICE SULLIVAN: They will stop co-operating with us.

24 MS ROSE: Yes, and they will threaten to do so improperly, thereby
25 applying pressure and impeding the prosecutorial independence.

1 They make much out of saying, "this was a discretion exercised
2 on professional motives", one sees that at paragraph 81, they
3 seize on professional motives. Of course, we are not
4 suggesting that the Director acted in bad faith, but his
5 motives were not professional in the sense that they were
6 dedicated to concerning the upholding of the rule of law and
7 the legitimate public interests concerns. He was in a
8 situation where he was being pressured by ----

9 LORD JUSTICE MOSES: If you yield to a threat you are, by
10 definition, giving up your independence because you are saying
11 "I cannot exercise my choice. I am forced to do something
12 contrary to what I would otherwise have done".

13 MS ROSE: Contrary to my better judgment. We know in this case
14 that Mr. Wardle's better judgment was that there was a good
15 case that needed to be pursued.

16 LORD JUSTICE MOSES: Well, there was a case worth pursuing.

17 MS ROSE: Yes, a case that was worth investigating, and that he
18 maintained that position in the face of the Attorney General's
19 disagreement.

20 LORD JUSTICE MOSES: Which raises another thing that puzzles me.
21 Why were not the Saudi Arabians told, well, hang on a minute,
22 this is only an investigation. For all we know there will not
23 in fact be a prosecution. Let us wait and see because it may
24 be that we will not get sufficient evidence.

25 MS ROSE: The concern appears to have been that the route of the

1 money through Switzerland will become known. That was the
2 anxiety of the Saudis, that final destination of the funds.
3 LORD JUSTICE MOSES: That is what is so odd because that is a real
4 Braer Rabbit, you know, "do not search the cabbage patch". I
5 mean, anything more likely to make one want to have a peep!
6 MS ROSE: One can feel Mr. Wardle's pain in not having been able
7 to have a peep.
8 LORD JUSTICE MOSES: It is all all right now, everybody else has
9 had a peep.
10 MS ROSE: No, now the Swiss and the Americans are investigating,
11 apparently without any imminent threat to their national
12 security.
13 LORD JUSTICE MOSES: That is because the breach of trust point,
14 for the Americans and for the Swiss to prosecute or
15 investigate is not a breach of trust and that stems back to
16 the point you have earlier made, a complete misunderstanding,
17 "look, it is not us gov, we are the government, we do not,
18 that is why we have abolished the Lord Chancellor".
19 MS ROSE: Yes. They then seek to rely, if we go to paragraph 82
20 and what they call subsequent practice in the application of
21 the OECD Convention, well, the first ----
22 LORD JUSTICE MOSES: I did not understand paragraph 82 I have put
23 a question mark there.
24 MS ROSE: It is perhaps not the best point in one of the many not
25 very best points in the skeleton argument because they only

1 identify three states out of the 37 that are signatories to
2 the OECD Convention. One of those three states is the
3 United Kingdom. Of course the United Kingdom is currently the
4 subject of investigation by the OECD under the phase two
5 (unclear) process. A Delegation is coming over I believe in
6 March or April to investigate the question precisely whether
7 the United Kingdom is properly complying with Article 5 of the
8 OECD Convention. It is pretty hard to rely on that as a
9 demonstration of what Article 5 means.

10 They also seek to rely on Germany, but if one looks at
11 the reference it is at volume 4, page 1795, it does not
12 support what they say.

13 LORD JUSTICE MOSES: Can we just, before we look at it, I am not
14 sure that I have understood the point which you are seeking to
15 answer. None of the states reviewed specific provisions
16 governing the prosecution to the bribery of foreign public
17 officials.

18 MS ROSE: That is irrelevant of course.

19 LORD JUSTICE MOSES: I do not know what that had to do. The
20 United Kingdom does, it is the 2001 Act.

21 MS ROSE: I think the point they are making is the next one, that
22 three of the countries that have been reviewed expressly
23 include a reference to consideration of the national security
24 interests and their ordinary statements governing exercise of
25 prosecutorial discretion. It is impossible to see how that

1 can be a guide to the interpretation of Article 5 anyway. One
2 of the three states they refer to is the UK which is under
3 investigation.

4 LORD JUSTICE MOSES: I think all they are saying is that if you
5 refer to prosecutorial independence and it is a legitimate
6 ground of pulling a prosecution, said query but let us accept
7 and also an investigation public interest, why then you may
8 bring in under that national security grounds, I think they
9 are saying as to which in a sense no dispute, but since the
10 prosecutor has to act lawfully and since you cannot just stop
11 unless there is an imminent threat it actually does not get
12 you much further.

13 MS ROSE: My Lord, it may be that we do not need to linger on this
14 point.

15 LORD JUSTICE MOSES: Anyway you wanted us to look at volume 4.

16 MS ROSE: If one looks at Germany, it is volume 4, 1795.

17 LORD JUSTICE MOSES: Yes.

18 MS ROSE: In the middle of the page between the two hole punches,
19 your Lordship can see the paragraph that starts "in addition
20 Germany explains". The point is made that the convention has
21 become German domestic law:

22 "The danger is serious" (reads to the words) "....
23 considerations within Article 5." Then they say: "It is only
24 possible to discontinue proceedings in accordance" (reads
25 to the words) ".... involving national security interests."

1 My Lord, again that tells one nothing about the
2 interpretation of Article 5.

3 They then seek to rely at paragraph 83 of the skeleton
4 argument on the right to life. Again, my Lords, we say that
5 this takes them nowhere, not least because of the proposition
6 that has already been explored concerning a doctrine of
7 necessity. There is certainly no provision in international
8 law that says those conventions have to take precedence over
9 the OECD Convention.

10 My Lords, those essentially are the points that the
11 defendant makes in support of his construction.

12 LORD JUSTICE MOSES: I mean does it come down to this, that at the
13 end 85, after a fairly lengthy passage, duty to preserve life
14 is plainly a higher and more important law. I expect you to
15 say, well, do not worry about hierarchies, we accept that.

16 MS ROSE: It depends what you mean.

17 LORD JUSTICE MOSES: It all depends what you mean.

18 MS ROSE: It all depends on the circumstances because of course
19 this is something that, we are going to look at some domestic
20 case law in a minute, but the national courts grapple with
21 this daily, that you have a witness who says "I fear for my
22 life. I dare not attend at court because my life is going to
23 be put at serious risk". The court does not just say, "oh,
24 well, your right for life trumps this prosecution, I must
25 immediately stop the prosecution". The court considers what

1 steps can be taken to protect the witness and allow the
2 prosecution to go ahead. You do not just say the right to
3 life trumps the rule of law. That is precisely the inadequacy
4 in the defendant's analysis.

5 LORD JUSTICE MOSES: Yes.

6 MS ROSE: Those are basic submissions on Article 5. I do just
7 want to address the point about the decision will be the same
8 anyway before I leave Article 5 because the defendant seeks to
9 argue either the application for judicial review shall be
10 dismissed or relief shall be refused because of the evidence
11 from Mr. Wardle that he would have taken this decision anyway
12 even if it had been a breach of the convention. We deal with
13 this in our skeleton argument, paragraphs 39 to 40. The first
14 point that we make is that it is now clear, we regret it was
15 not clear from my learned friend's pleadings but it is clear
16 from Mr. Wardle's witness statement that he did not give any
17 consideration to this question at the time he made his
18 decision and he does make that clear in his witness statement
19 so that we are talking here about entirely ex post facto
20 reasoning.

21 Your Lordships will be familiar with the case law
22 concerning the caution with which such reasoning should be
23 treated. We set out the principles here, I do not need to
24 take your Lordships to it. The point that we make is that
25 Mr. Wardle simply is not in a position to say whether the

1 decision would have been the same if he had correctly
2 understood the scope of what his obligations were under the
3 convention, not least because the consequences both nationally
4 and internationally of the United Kingdom publicly
5 acknowledging that it was acting in breach of the
6 OECD Convention will have been entirely different from the
7 consequences of the government being able to say "we are
8 stopping the prosecution, this is not a breach of the
9 convention", it would have been completely different a
10 situation.

11 Your Lordships have seen that all the contemporaneous
12 documents show that both the Director and the Attorney General
13 throughout gave the greatest importance to Article 5 of the
14 OECD and were indeed clearly very determined that they were
15 not going to breach it.

16 An analogy can be drawn with a situation that arose in
17 the case about the Parliament ombudsman. This is the case
18 about the misleading statements that were made to all the
19 pensioners who were told that their occupational pensions were
20 safe then they turned out not to be. One of the arguments
21 that was made by the Secretary of State was that even if it
22 was correct that maladministration should have been accepted
23 by the Secretary of State the individual pensioners who lost
24 their money were not in a position to show that they had
25 actually suffered any financial losses as a result. That the

1 Secretary of State, in rejecting the recommendation to
2 compensate the pensioners, had done so on the basis that he
3 did not accept that they had suffered any losses as a result
4 of his conduct and that in those circumstances the judicial
5 review was futile because what was said was, even if the
6 Secretary of State should have accepted that there was
7 maladministration, given his conclusion on causation, which is
8 not challenged, the rejection of the recommendation would be
9 the same.

10 Your Lordships can see how the High Court dealt with
11 this, it is in volume B, tab 19. This case has now been
12 upheld by the Court of Appeal although this particular issue
13 was not before the Court of Appeal. It is volume B, tab 19,
14 paragraphs 84 to 85. I invite your Lordships to read those
15 two paragraphs.

16 LORD JUSTICE MOSES: (Pause) Yes.

17 MS ROSE: In fact what happened after that decision is that the
18 High Court found that the Secretary of State was wrong to
19 reject the finding of maladministration and that causation was
20 not established, nevertheless the Secretary of State did then
21 agree to pay more money.

22 MR. JUSTICE SULLIVAN: I wonder whether you really needed this. I
23 mean, the fact is that what has happened here is of such
24 importance and concern that if it was unlawful at the time the
25 fact that it can be justified now is neither here nor there;

1 it is very important that everybody should know where they
2 stand.

3 MS ROSE: I will move on in that case. That then takes me to what
4 we can now call the second ground, which is rule of law. This
5 is developed in our skeleton argument starting at
6 paragraph 77. As your Lordships you, I know, appreciate this
7 is an alternative analysis which is wholly independent of the
8 analysis relating to the OECD Convention and is purely a
9 matter of domestic public law, but what is of interest is that
10 in fact the strands are markedly similar. The reasoning,
11 whether one looks at it from an international law perspective
12 or domestic perspective, is remarkably similar.

13 Our submission is that it was unlawful for the Director
14 to submit to the Saudi threats and on that basis to decide to
15 stop the investigation. The starting point is that we do
16 submit that the rule of law is clearly a basic constitutional
17 principle and recognized as such. It is now in fact
18 recognized by statute and your Lordships have the
19 constitutional format at volume E, tab 3. We do not need to
20 go to it because it is set out at paragraph 78: "This Act
21 does not adversely affect ... the existing constitutional
22 principle of the rule of law" .

23 LORD JUSTICE MOSES: What it is saying, the whole point of that
24 Act was to make explicit the separation of powers, the
25 promotion of the judges as having responsibility for

1 protecting the rule of law. The whole statute was about that.

2 MS ROSE: Yes.

3 LORD JUSTICE MOSES: Therefore, it merely re-enforces the
4 viability of whatever you mean by the rule of law and all
5 those difficulties, what are the content? You do not have to
6 look into that because here is the logically prior question of
7 how do you protect it?

8 MS ROSE: Your Lordships will have seen that one of the arguments
9 made against us by the defendant is to deny that the rule of
10 law is constitutional principle and we submit that that is
11 unsustainable. The defendant says, well, this is just
12 judicial review, the concept of the rule of law adds nothing
13 to the analysis and we submit that is plainly wrong. It is
14 recognized as a basic constitutional principle, recognized by
15 statute as such, recognized in a multitude of cases and many
16 of which we have cited as being such and, therefore, it is a
17 consideration which goes beyond simply questions of
18 Wednesbury.

19 LORD JUSTICE MOSES: Bennett is the most obvious, I mean, you now,
20 the good old common law.

21 MS ROSE: Your Lordships also, I know, have seen the article by
22 Lord Bingham at F8.

23 LORD JUSTICE MOSES: A lecture.

24 MS ROSE: A lecture, yes, my Lord. I do not intend to take your
25 Lordships to it but to refer particularly to pages 68, 69 and

1 73, where keen components of the rule of law are set.

2 LORD JUSTICE MOSES: Where do we find it?

3 MS ROSE: At F8.

4 LORD JUSTICE MOSES: We need not look at it.

5 MS ROSE: We can turn it up if your Lordship wants.

6 LORD JUSTICE MOSES: No, all I am saying or putting to you for
7 your response is that in a sense the analysis of what it
8 means, what is contained or what its effect is, perhaps more
9 accurately, in a sense in this case does not matter. One can
10 see lots of effects the purity of that principle has, for
11 example in the right to a fair trial and so on and so forth.

12 MS ROSE: Indeed.

13 LORD JUSTICE MOSES: But, it does not matter. We are talking
14 about how do we stand up for it? How do we protect it in our
15 battle against terrorism?

16 MS ROSE: Exactly, you do not stand up to it by giving way to
17 threats.

18 LORD JUSTICE MOSES: Well, you might have to.

19 MS ROSE: You might have to if you have absolutely no alternative.
20 In fact the case which we submit comes closest to the sort of
21 analysis that we would suggest is appropriate is the Phoenix
22 case which is in file D, tab 68. As your Lordships may recall
23 this was the case about the transport of live animals,
24 particularly veal calves, where there there had been violent
25 protests at a number of ports by protestors seeking to stop

1 the lawful but, they felt, morally undesirable export of veal
2 calves. The ports reacted to the threats and violent protests
3 by banning the export of the veal calves.

4 One of the issues in the case was whether they had a
5 duty or simply a discretion to permit the trade to continue
6 and the court found that they had a duty. They then came on
7 to consider the question of the rule of law. Your Lordships
8 see at page 58 that they set out some basic formulations of
9 the rule of law including classically from Blackburn, another
10 case which cited the one about the failure to enforce gambling
11 laws:

12 "The law must be principally interpreted in reflecting
13 the intention of Parliament. The police must (unclear) the
14 rule of law must prevail."

15 Then there is a citation from Lord Bridge in the case of
16 Singh(?) extraneous threats to instigate industrial action
17 could only exert an improper pressure on the Secretary of
18 State and if he allows himself to be influenced by them he
19 will be taking into account wholly irrelevant considerations.

20 LORD JUSTICE MOSES: Sorry, where did you read that? I am so
21 sorry in Singh.

22 MS ROSE: Yes, Singh.

23 LORD JUSTICE MOSES: Yes.

24 MS ROSE: Then at G it is recorded that the city councils and the
25 harbour board argue against any absolute principle that the

1 rule of law must prevail. Unlawful disruptive activity cannot
2 simply be ignored, will on occasion justify or require the
3 suspension of lawful pursuits. Then you get the example of
4 closure and airport following a bomb threat. The question
5 becomes what are the permissible limits within which a public
6 authority may properly respond to unlawful action.

7 Then going over the page, I invite your Lordships to
8 read the whole of the passage right down to the bottom of
9 page 62. Indeed, that might be a convenient moment if I
10 invite your Lordships to do that.

11 LORD JUSTICE MOSES: Yes, we will do that. How are you doing?

12 MS ROSE: I am doing all right because ----

13 LORD JUSTICE MOSES: I meant timewise! (Laughter)

14 MS ROSE: So did I! I think I am doing all right because I am
15 now, as it were, in the second half of my submissions.

16 LORD JUSTICE MOSES: Yes, thank you very much. Well, we will go
17 away and read that, we will have read that by 2 o'clock.

18 (Adjourned for a short time)

19 MS ROSE: My Lords, I would like to turn to some paragraphs in the
20 skeleton argument and to some particular cases and then come
21 back and identify what I would submit are the right principles
22 to be applied both from the Phoenix case and the other cases
23 when considering the implications of the rule of law in this
24 context.

25 If we return to the skeleton argument, paragraph 83, we

1 make the point that respect for the rule of law may require
2 steps to be taken which increase the difficulties of
3 preventing and detecting terrorism. That is paragraph 83.

4 LORD JUSTICE MOSES: Absolutely.

5 MS ROSE: We make the point here about MB. That is the fair trial
6 case that if you have a situation where the closed evidence
7 means that the detainee is deprived of a fair trial you cannot
8 keep him in detention.

9 LORD JUSTICE MOSES: It is inevitable, that is what all the
10 torture(?) case is about.

11 MS ROSE: Exactly.

12 LORD JUSTICE MOSES: That is what it is all about.

13 MS ROSE: Exactly.

14 LORD JUSTICE MOSES: I mean obviously, if you want to maintain
15 security you just pull anybody who looks a bit dodgy off the
16 street.

17 MS ROSE: Exactly.

18 LORD JUSTICE MOSES: And we would be safer. The reason we do not
19 do that is because of the rule of law.

20 MS ROSE: Precisely, so that the rule of law necessarily entails
21 that society is put at greater risk of harm from terrorists
22 because that is the price that you pay for liberty and law.
23 We do not need to turn the case up because the relevant
24 passage is set out here at paragraph 83 but the reference in
25 the bundle is A12 if you want to look at it.

1 We have referred to a speech given by Lord Goldsmith in
2 French Cour de Cassation where he makes similar points. Again
3 the reference to that is at bundle 4, tab 51, page 2059 but we
4 do not need to turn it up.

5 Then the point in the context of criminal proceedings,
6 the role of the rule of law assumes particular importance for
7 obvious reasons, partly because of the importance of the
8 protects of the right of liberty of the individual, but also
9 because of the need to protect society against arbitrary or
10 unfair justice.

11 Here is the Bennett case to which your Lordship was
12 referring. Again we set out the relevant passages and the
13 place in the bundle is at A13. That is the forced expedition
14 case.

15 Perhaps even more striking is the Mullen case at
16 paragraph 86 because this was a case of a convicted IRA
17 terrorist where it was conceded that the irregularities in his
18 forced expedition did not deprive him of a fair trial, that he
19 was rightly convicted of assisting in terrorism and yet
20 nevertheless the conviction was quashed. If your Lordships
21 look at the citations at page 535 G and 540 F the court came
22 to the conclusion that the conviction must be quashed
23 notwithstanding the fact that he was actually rightly convicted
24 on the evidence and that was not disputed.

25 LORD JUSTICE MOSES: Mullen is where?

1 MS ROSE: Mullen is at A14. A further aspect of this is that
2 citizens may be required to put their lives at risk in order
3 to assist with the process of justice. We see this both in
4 relation to witnesses and in relation to defendants. In
5 relation to witnesses there is the case of Yusuf, that is A15.
6 Again your Lordships have the relevant passage set out in the
7 skeleton argument. It is a sad reflection on our society in
8 many cases, witnesses, commonly prosecution witnesses, are
9 fearful of the consequences if they do attend court, but in
10 most cases they do their duty and come to court; if they did
11 not, the alternative would be anarchy.

12 My Lords, we do submit that it is far too simplistic for
13 my learned friend to say, "oh, the right to life trumps
14 everything". The right to life does not trump everything. It
15 is a factor that the risk to life goes into the mix along with
16 the need to uphold the rule of law and does not supersede it.
17 A particularly striking case on this is the case of D which we
18 do need to look at, that is in volume C, tab 37. That case
19 concerns a defendant who was an informer and who was accused
20 of participating in the drug deal on which he had also been
21 informing. He submitted that the prosecution should be
22 stopped because if it went ahead his associates would realize
23 that he was an informer and he would be at grave risk to his
24 life.

25 If we look at paragraph 13 we can see the way that it

1 was put at the end of paragraph 13:

2 "It is his belief that he has now been placed in an
3 impossible situation which is not one of his choosing. He is
4 terrified about it. If his informant position is exposed to
5 his co-defendants or anyone associated with him he will be
6 killed. He says a man called B, along with his brother,
7 probably the most feared and powerful heroin dealer in Europe,
8 he is also aware that E has recently been shot and understands
9 the reasons for this are because of a renewed association with
10 two people (unclear) and B."

11 So serious evidence of credible and very serious threats
12 to his life if he were to stand trial. Then at paragraphs 15
13 to 19, explanations of how decisions to prosecute were taken.
14 The consideration of the evidential test. The prosecutor had
15 taken into account the fact that the defendant was a
16 registered informer.

17 Looking at paragraph 16, this is the quotation for the
18 prosecutor:

19 "It is contrary to the public interest that a defendant
20 should be able to avoid trial and conviction by raising his
21 informant status and then insisting the consequences of this
22 being made public should render him immune from process. It
23 is also contrary to public interest that the trial of a
24 co-defendant should be saved."

25 Your Lordships can see there how directly this raises

1 the question of the rule of law. Obviously a different but
2 analogous context to the prosecution.

3 Then at 18: "It was incumbent on Mr. Magill to take
4 account of the risk to the claimant and members of his
5 family." Then Mr. Magill sets out what he did about that.
6 Then at the bottom of the page the critical passage is that he
7 satisfied himself that measures can be taken that will provide
8 protection for the defendant and his family. There can, of
9 course, be no absolute protection for the claimant or his
10 family or indeed for any other member of the public in respect
11 of whom a risk is identified. What is clear is that
12 Mr. Magill is satisfied that adequate protection can be
13 provided. He concluded any remaining risk was outweighed by
14 the public interest in proceedings."

15 There your Lordships see the right approach being taken.
16 Instead of simply saying "there is a risk to life, therefore
17 we stop the prosecution", the prosecuting authority correctly
18 considers what measures can be taken to mitigate the risk, not
19 to eliminate it, the risk will remain, but to mitigate it.

20 Then at paragraph 19:

21 "Prosecutors have a continuing duty to keep the future
22 of the prosecution under review. It is possible, albeit
23 unlikely, that circumstances could change so that adequate
24 protection could for some reason not be provided. The
25 prosecutor would then have to reconsider the position."

Transcript prepared without access to case documentation.

1 We will come to what the prosecutor would have to do in
2 that situation because the court expressly leaves it open.

3 LORD JUSTICE MOSES: That is something that Mr. Tyrie I think was
4 asking in committee, "well, why can you not look at it again
5 if the risk diminishes?" The answer was not "we cannot", it
6 was just that "there may be other difficulties due to other
7 principles".

8 MS ROSE: Yes, and one must say that would be quite a difficult
9 point to sustain. In fact that arises in one of these cases,
10 I cannot remember which, where it is suggested you could not
11 prosecute now because you told ----

12 LORD JUSTICE MOSES: I am not sure about that.

13 MS ROSE: Yes, but in any event. At paragraph 26:

14 "What is the obligation of a prosecutor? In my judgment
15 it is to be aware that proceeding with the trial is going to
16 create a significant risk or increased risk to life or limb of
17 the defendant and his family. He should then ask himself what
18 measures can be taken to minimize that risk. In this case
19 that involved obtaining the necessary information from NCIS
20 and the prison service; that he has done. Once satisfied an
21 adequate level of protection could be provided the obligation
22 is met."

23 Then at paragraph ----

24 LORD JUSTICE MOSES: It is only partly analogous because of course
25 if there is a risk that somebody is going to cause an outrage

1 here and were dependent on information from there to find,
2 there is nothing you can do to protect yourself. What you can
3 do though is perhaps to say, please withdraw that threat.

4 MS ROSE: Yes, or you can hold them to account internationally
5 before the UN and say "you are in breach of your obligations
6 if you maintain that".

7 LORD JUSTICE MOSES: That will make them even less likely to
8 co-operate, would it not?

9 MS ROSE: My Lord, one does not know that that was not even
10 considered as an option.

11 LORD JUSTICE MOSES: No, it is rather insulting to suggest that,
12 insulting to suggest to our allies that they will not comply
13 with their international obligations.

14 MS ROSE: If they are threatened not to, one may have this
15 alternative, but, of course, they may not want the public
16 (unclear) of being publicly exposed as not complying. I mean
17 the dynamics, of course, are endless but these are all options
18 that could have been pursued.

19 If we go to paragraph 31 they say:

20 "We do not have to decide what should happen in such a
21 case where, for whatever reason, adequate protection cannot be
22 provided. The present case does not involve the question
23 whether if adequate protection cannot be provided the
24 prosecutor must, whatever the importance of public interest in
25 proceeding with the case (unclear) prosecution."

1 They specifically do not decide that point. Then there
2 is an interesting point towards the end distinguishing this
3 case from Jahal(?) of course, that being the case where you
4 cannot deport someone to a country where they are at risk of
5 torture. If we look at page 7:

6 "Mr. Blake poses the question whether the claimant would
7 be exposed to a real risk of human treatment against which
8 there is no adequate guarantee of safety. In Jahal there was
9 no adequate guarantee of safety, the court concluded a
10 potential breach of Article 3. As was pointed out by my Lord,
11 Pitchford J, in argument in deportation cases the state
12 absolved itself from the ability to protect but that is not
13 this case. Here there are organs of the state whose job it is
14 to provide adequate protection. The difference between this
15 case and Jahal is that in Jahal the European court was
16 satisfied that he would not have adequate protection in
17 India."

18 Again one sees the key distinction that if you are
19 talking about a functioning democracy that has proper organs
20 of state, a proper police force, proper security services, it
21 is a big thing to say that that state cannot adequately
22 protect its civilians against criminal attack and terrorist
23 attack is, after all, simply a criminal attack. It will be a
24 big thing for the government to be saying that they really are
25 saying that.

1 LORD JUSTICE MOSES: There is nothing we can do. I mean in a
2 sense, yes, but you cannot second guess. Their judgment was
3 that we need this information.

4 MS ROSE: You see, my Lord, they did not make this judgment
5 because they never asked themselves this question. All the
6 government did was to say, if the Saudis stop co-operating
7 that will have a serious adverse effect on our national
8 security because it will give us significantly less
9 information. End of story, end of prosecution. They never
10 asked themselves the question "would we be able to mitigate
11 that effect by measures we could take domestically, by
12 measures we could take internationally, by representations we
13 could make to the Saudis?" They never went on to ask
14 themselves any of those questions, they simply were not
15 addressed.

16 LORD JUSTICE MOSES: I thought there was something in one of the
17 memos attached that said there was no alternative source of
18 such importance.

19 MS ROSE: It was said that relying on American intelligence was
20 not an adequate substitute, but that does not meet the point.
21 It does not meet the point what steps could you take through
22 domestic intelligence and law enforcement to mitigate the
23 effect of not having this intelligence. What steps could you
24 take internationally to mitigate the effect or persuade the
25 Saudis to change their mind. Those questions were never asked

1 or answered because they did not appreciate that was the test
2 should be applied. The tests they were applying was simply
3 this has an adverse effect on national security, therefore the
4 investigation must stop.

5 Returning to the skeleton argument we next make the
6 point that the rule of law requires that no prosecutor has an
7 unconstrained discretion as to what matters must be taken into
8 account when deciding whether to prosecute and that is the
9 Blackburn case which is at A16 where the Court of Appeal were
10 appalled by the policy of not prosecuting gambling
11 establishments.

12 LORD JUSTICE MOSES: I was rather upset you did not cite my case
13 about the spliff, I cannot remember what it was called.

14 MS ROSE: My Lord, I am equally upset.

15 LORD JUSTICE MOSES: That was where they cautioned someone for
16 smoking a reefer then somebody said, oh, well, you cannot, I
17 think ... Oh no, he was about to say that.

18 MS ROSE: It is the same point.

19 LORD JUSTICE MOSES: It is the same thing.

20 MS ROSE: You cannot have a group of people who are immune from
21 prosecution or indeed one person. Equally you cannot have a
22 person who has a powerful foreign protector who will make
23 threats that prevent him from being prosecuted. We have set
24 out the relevant passages from Blackburn at paragraphs 89 to
25 91.

1 Then at 93 the point that the prosecutor must act
2 without fear or favour. We have quoted again from the
3 Attorney General's speech:

4 "A fundamental safeguard to fairness is the independence
5 of the prosecutor. National and international standards
6 recognise the importance of the independence of the prosecutor
7 ..."

8 LORD JUSTICE MOSES: Is that the same speech?

9 MS ROSE: My Lord, it is, yes. Oh, it is a different speech, I
10 beg your pardon. Sorry, it is the 13th Annual (unclear) I
11 will get you the reference, my Lord:

12 "A fundamental safeguard to fairness is the independence
13 of the prosecutor. National and international standards
14 recognise the importance of the independence of the
15 prosecutor; the ability to exercise the prosecutor's
16 discretion independently and free from political interference;
17 to perform their duties without fear, favour or prejudice
18 ..."

19 Of course we say this is the performance of duty with
20 fear.

21 LORD JUSTICE MOSES: Well, one has to be a bit careful how far one
22 goes because one has to allow for the Khaled result.

23 MS ROSE: Yes.

24 LORD JUSTICE MOSES: It is all very well to be brave but if
25 someone else is going to get shot it is slightly easier than

1 if it is yourself.

2 MS ROSE: My Lord, to sum up, these are the principles that we say
3 flow from the case law. The first is as a matter of general
4 principle extraneous threats exert improper pressure on a
5 decision-maker and that if a decision-maker allows himself to
6 be influenced by threats he takes into account irrelevant
7 considerations, that is the first general proposition derived
8 from the Phoenix case.

9 Secondly, where a decision-maker is engaged in deciding
10 whether to continue to investigate serious crime it is of
11 particular importance that he does not succumb to threats
12 because if he does so he fundamentally undermines the rule of
13 law because the implication is that the more determined and
14 powerful a criminal or his associates is the less likely he is
15 to be prosecuted and that undermines the fundamental
16 principle, cannot be tolerated by (unclear) founded on law.

17 Then the third principle is this. Where threats are
18 made that pose a risk to life the state's obligations under
19 Article 2 of the European Convention are engaged but it does
20 not follow from this that the prosecution must be stopped.
21 The state's duty is to take proper measures to mitigate the
22 risks, not so as to guarantee safety but so as to ensure
23 adequate safety. The risk is likely to be remain and may very
24 well be higher than it would have been if there had been no
25 prosecution. It does not follow that the prosecution should

1 be stopped. In general courts and prosecutors are entitled to
2 proceed on the basis that a functioning democracy has
3 available resources that are capable of affording adequate
4 protection to its citizens. Pausing there, of course the
5 Bloody Sunday cases also, we say, support that principle.

6 Then the caveat. We say, however, there may be cases of
7 emergency or necessity where a decision-maker has no
8 alternative but to respond to a threat. Your Lordships will
9 have seen in the Phoenix case the distinctions made between
10 submitting to a threat and responding to a threat and they
11 say, well, it is not always very easy to say what the
12 difference is but you know it when you see it.

13 LORD JUSTICE MOSES: You may be deprived of any choice.

14 MS ROSE: Yes.

15 LORD JUSTICE MOSES: It is this concept of duress and why it is so
16 important is that allowing for that situation is not in any
17 way undermining the rule of law because it is part of the rule
18 of law recognizing that there are circumstances when people
19 cannot make conscious decisions at all.

20 MS ROSE: Precisely. We submit that the conditions for that type
21 of situation to arise are analogous to those that apply to the
22 principle of necessity when you are looking at state
23 responsibility and international law but they are similar
24 types of conditions. The Leyla Khaled case is an example of
25 that situation.

1 LORD JUSTICE MOSES: Whatever happened, what is end of the story
2 in that? She was sent back to where?

3 MS ROSE: I am just going to ask.

4 LORD JUSTICE MOSES: Somebody will know.

5 MS ROSE: There is one interesting post script which is that three
6 months later a multilateral treaty was entered into by which
7 states all agreed to prosecute hijack. In fact there is some
8 suggestion that the Americans were not happy with the way that
9 the British dealt with the Leyla Khaled case. Even though we
10 are prepared for present purposes to accept that that was a
11 case of necessity, the Americans, it would appear, took a
12 different view.

13 The final point is this, and this again comes from
14 Phoenix where your Lordships will have noted that the court
15 said that where there is a case of succumbing to threats that
16 must be examined by a judicial review court with particular
17 rigour.

18 LORD JUSTICE MOSES: I mean that is what is so important about
19 this case, it is because we are not interfering with some
20 political decision. We are exercising our primary function
21 which is to protect the rule of law.

22 MS ROSE: Exactly. The Phoenix case says you must apply a
23 standing of particular rigour. This is not the situation
24 where there is a margin of discretion or deference to the
25 judgment of the decision-maker. In particular, we submit, you

1 must consider whether this truly was an emergency where there
2 was no alternative, where alternative means of lessening the
3 risk were properly considered and whether the implications of
4 stopping the prosecution for the rule of law were properly
5 considered at all.

6 May I turn to the defendant's response on the rule of
7 law? This is dealt with in the defendant's skeleton at
8 paragraphs 30 to 54. First of all the defendant disputes that
9 the rule of law is a constitutional principle at all. Your
10 Lordships see this at paragraph 36 where it said that there is
11 no established well-recognized and fundamental constitutional
12 principle or right in issue. We would respectfully beg to
13 differ. So they essentially say this is a normal public law
14 case, you are simply looking at ordinary judicial review,
15 there is no engagement of any constitutional principle.

16 LORD JUSTICE MOSES: I think it is (unclear) actually, I think you
17 are being slightly unfair. What they are saying is what
18 happened here does not engage some well-recognized and
19 constitutional principle. I do not think they can say that
20 there is no constitutional principle in Section 1 ----

21 MS ROSE: My Lord, I think they are saying that.

22 LORD JUSTICE MOSES: ---- because that is not what the statute
23 says.

24 MS ROSE: Well, they simply say that there is a broad statutory
25 discretion to prosecute the wide perception of the public

1 interest. They do not accept that the principle of legality
2 applies because they say correctly applying Lightfoot that the
3 principle of legality only applies where the constitutional
4 principles engage and they say there is not a constitutional
5 principle engaged.

6 MR. SALES: My Lords, at paragraph 43 we accept that there is a
7 principle of the rule of law and we say what substantive
8 content it has in this context.

9 LORD JUSTICE MOSES: Yes.

10 MS ROSE: Well, if that is right then it is, with respect, even
11 more difficult to understand what they mean in paragraph 36
12 because on that basis there is ----

13 LORD JUSTICE MOSES: All will be revealed.

14 MS ROSE: Yes, indeed.

15 LORD JUSTICE MOSES: As I say, I mean I just at the moment cannot
16 understand why it matters what the content of it is when we
17 are talk about protecting it.

18 MS ROSE: Yes. My Lord, then they rely on the code of prosecutors
19 and the wide discretion to prosecute. Well, none of that is
20 in dispute but we submit it is wholly irrelevant for the
21 reasons that your Lordships fully appreciate. None of that is
22 inconsistent with our case. There is then a factual premise
23 argument which we discussed this morning which is frankly
24 bizarre and we will wait and see whether they develop that.
25 They then give ----

Transcript prepared without access to case documentation.

1 LORD JUSTICE MOSES: I think they have made it clear now that we
2 are to proceed on the basis that you asserted.

3 MS ROSE: Yes, so we can perhaps assume that that is not going to
4 be proceeded with.

5 LORD JUSTICE MOSES: In a sense it has just invited your response,
6 "well, nobody has ever suggested that the Director was
7 personally threatened, but so what?"

8 MS ROSE: Exactly, then they refer to the Leyla Khaled case.

9 LORD JUSTICE MOSES: Yes.

10 MS ROSE: Of course we say, yes, absolutely ----

11 LORD JUSTICE MOSES: It is a very helpful analogy.

12 MS ROSE: It does not undermine our case. So my Lords, that is
13 their response on rule of law which again we submit does not
14 in any way undermine the arguments that we have made to your
15 Lordships.

16 May I now turn briefly to the remaining issues.

17 LORD JUSTICE MOSES: I mean in a sense they have to be fairly
18 careful because Lord Goldsmith in, I mean it really
19 encapsulates, I mean people say, we do not quite understand
20 what an attorney is and (unclear) and separation of powers.
21 When he said in Parliament "my job is to ensure that the
22 government complies with the rule of law", "ensure". I mean
23 it is marvellous and it is not just empty words. That is what
24 he is there for and that is what he was trying to do.

25 MS ROSE: Yes. My Lords, may I now briefly sweep up the remaining

1 points. The failures to take into account relevant
2 considerations. Of course, that submission must be read in
3 the light of the principles that we have set out, both in
4 relation to international law and in relation to the rule of
5 law and your Lordships I think have the substance of our
6 points here. There are two points that were picked up in
7 particular. The first is Saudi Arabia's own international
8 obligations. The second is the risk to the United Kingdom's
9 national security arising from stopping the investigation with
10 the result that other countries get to understand that the
11 United Kingdom succumbs to threats. So those are two
12 particular considerations, relevant both to Article 5 and to
13 the rule of law which, we submit, were not taken into account.

14 If we deal first with the Saudi breaches of
15 international law, those are dealt with in our skeleton
16 argument at paragraphs 50 to 55. We have identified in
17 particular security council resolution 1373 of 2001. If you
18 can turn that up, that is in file E, tab 13. This is the
19 resolution entered into immediately after the attack on the
20 Twin Towers, 28th September 2001. Your Lordships will see in
21 the preamble calling on states to work together urgently to
22 prevent and suppress terrorist acts, including through
23 increased co-operation and full implementation of the relevant
24 international conventions relating to terrorism.

25 Then over page the substance of the decision, Article 2,

1 "All states shall", then at (b):

2 "Take the necessary take the necessary steps to prevent
3 the commission of terrorist acts, including by provision of
4 early warning to other states by exchange of information."

5 Then at (f):

6 "Afford one and other the greatest measure of assistance
7 in connection with criminal investigations or criminal
8 proceedings relating to the financing or support of terrorist
9 acts including assistance and obtaining evidence in their
10 possession necessary for the proceedings."

11 Then Article 3(c):

12 "Co-operate particularly through bilateral and
13 multilateral arrangements and agreements to prevent and
14 suppress terrorist attacks and take action against
15 perpetrators of such acts."

16 We rely in particulars on Article 2(b) which we submit
17 plainly would be inconsistent with the sort of threats the
18 Saudis appear to have made. Action could have been taken
19 through the counter terrorism committee of the UN of which the
20 United Kingdom is a member. The defendant's position is that
21 this was not a consideration that they were required to take
22 into account.

23 LORD JUSTICE MOSES: Do I need to understand about the counter
24 terrorism committee of the UN? Is that dealt with in your
25 skeleton?

Transcript prepared without access to case documentation.

1 MS ROSE: My Lord, it is not, perhaps Professor sands can explain
2 more of that if you need to know.

3 LORD JUSTICE MOSES: He is not on our timetable.

4 MS ROSE: That is true, he is not but I will encompass him within
5 my own.

6 LORD JUSTICE MOSES: It does not matter. I think the response is
7 going to be, "look, we had to trust our Ambassador and doing
8 that would just make things worse".

9 MS ROSE: But they never asked about whether doing that would make
10 things worse.

11 LORD JUSTICE MOSES: It is all a bit vague because there is no
12 note of meeting.

13 MS ROSE: No, but they say they were under no obligation to take
14 this into account. They do not say they did take it into
15 account and discounted it.

16 LORD JUSTICE MOSES: Did they say that? I will find it.

17 MS ROSE: Anyway, then the risk to national security of stopping
18 the investigation. We deal with this in our skeleton at
19 paragraphs 59 to 64. This, as your Lordships will recall,
20 arises out of the evidence that given by the Director to the
21 Constitutional Affairs Committee of the House of Lords. The
22 evidence itself is set out in the core bundle at page 201, but
23 we have the relevant exact here where David Howarth asked the
24 obvious question, he said:

25 "Does that also apply to the obvious problem which would

1 flow from Mr. Tyrie's question, if other countries get to know
2 that Britain gives in to this sort of pressure, that in itself
3 could be a threat to our national security. Was that risk
4 taken into account in the decision?" Mr. Wardle says, "no, it
5 is not expressed in the risk."

6 It was then suggested by the defendant in the ----
7 LORD JUSTICE MOSES: May we deal with his answer because it is
8 also picked up by the Attorney General when he says, oh, well,
9 you have given lots more money to the Serious Fraud Office and
10 lots of other investigations.

11 MS ROSE: It does not answer the question.

12 LORD JUSTICE MOSES: It seems to me -- I must be careful -- it
13 completely does not answer the question. In those cases
14 nobody is suggesting that somebody involved marched in and
15 said drop it or else.

16 MS ROSE: Exactly. Resourcing the SFO to pursue bribery
17 allegations against weak countries that cannot make serious
18 threats does not address the problem that Britain's position
19 has now been weakened in relation to countries that can make
20 serious threats.

21 LORD JUSTICE MOSES: Any self-respecting briber will make sure he
22 only bribes countries who are in a position, in an important
23 strategic position where it is going to matter to us if they
24 issue a threat.

25 MS ROSE: Precisely.

1 LORD JUSTICE MOSES: Any self-respecting country will issue that
2 threat.

3 MS ROSE: Of course, my Lord, the risk to national security, of it
4 becoming known that Britain gives in to pressure, does not
5 only relate to the prosecution of bribery. It may have other
6 significant international implications as well. There may be
7 other situations in which Britain is seeking to put a point
8 across to another strategically important country, and if the
9 other country knows that a threat delivered at the right time
10 in the right manner is likely to make the British back off,
11 that could seriously implicate our national security
12 (unclear).

13 LORD JUSTICE MOSES: There are a whole lot of other things and I
14 think the Attorney well understood it, that is what he meant
15 by the implications.

16 MS ROSE: That may be so.

17 LORD JUSTICE MOSES: How can we support those judges and lawyers
18 who are imprisoned or threatened? How can we set an example?

19 MS ROSE: Absolutely. It is shameful. So there is an admission
20 there by Mr. Wardle that he did not take that matter into
21 account. In the detailed grounds we wrongly say here the
22 summary grounds, it is actually the detailed grounds, if you
23 look at paragraph 61 it deals with the threat to national
24 security. There reference to this is core bundle, tab 4,
25 page 84. What is said here is that in fact this matter was

1 taken into account at the meeting of 11th December between the
2 Prime Minister and the Attorney General.

3 Then in the second half of this extract it said that the
4 possibility that discontinuing the investigation would lead to
5 such a perception was taken into account by those who provided
6 the advice on national security which informed the Director's
7 decision, but it was assessed that the position in relation to
8 Saudi Arabia was clearly exceptional and it was not considered
9 any such perception would in itself harm national security.

10 Now, in fact, my Lords, there is no evidence at all to support
11 that assertion.

12 LORD JUSTICE MOSES: Which assertion, that it was taken into
13 account?

14 MS ROSE: The assertion that the possibility that discontinuing
15 the investigation would lead to such perception is taken into
16 account by those who provided the advice and that they
17 assessed that it would not have an adverse effect, there is no
18 evidence to that effect.

19 The only evidence on this point is in Mr. Wardle's first
20 statement at paragraph 58. We can turn that up in the core
21 bundle, tab 5, page 102. I invite your Lordships to read
22 paragraph 58. Your Lordships will note first of all there is
23 nothing in that paragraph to support the assertion that is
24 made in the detailed grounds.

25 Secondly, that the only thing that Mr. Wardle relies

1 upon is the note of the meeting of 11th December.

2 Thirdly, that he admits that he himself did not see this
3 and was not aware of it at the time he made his decision.

4 Fourthly, when one looks at the note it does not
5 actually support the contention that this risk was properly
6 evaluated. We looked at the note this morning. If we briefly
7 turn back to it, it is behind tab 9, page 176. Your Lordships
8 will recall that I criticized this point when we looked at
9 this this morning. The relevant passage is page 177, the
10 third bullet point, where all that is said is, yes, it is
11 important that we do not give the impression that we give in
12 to threats but it is also important we do not have a failed
13 trial which is not even beginning to address the problem.
14 There is no consideration at all of whether or not the
15 perception that the United Kingdom gives into threats might
16 itself have an adverse impact on our national security. That
17 question is not formulated or addressed.

18 MR. JUSTICE SULLIVAN: The second point after the query,
19 credibility of the law, effect on it by a long and failed
20 trial, is effectively saying, well, we are not quite as bad as
21 some others. A good reputation compared with many of its
22 international partners, i.e. some are worse than us, but
23 whether that is a good reason.

24 LORD JUSTICE MOSES: It gets worse than that because the bottom of
25 page 176, "British people would regard these as higher

1 interests is exactly why we have a rule of law". It is not
2 about what a focus group thinks; it is about those who are not
3 accountable like judges but who are there to protect the rule
4 of law and, therefore, not answerable to what people think.

5 MS ROSE: My Lords, we do submit this was a fundamentally
6 important question and Mr. Wardle was right in the answer that
7 he originally gave to the committee which was that it was not
8 taken into account.

9 The final two points I want to turn to are what we say
10 was the flawed Shawcross exercise and the tainted advice. The
11 Shawcross point is dealt with at paragraphs 65 to 76 of our
12 skeleton argument. My Lords, I am going to take this very
13 briefly because the material is set out in considerable detail
14 in our skeleton argument. History of the Shawcross statement,
15 which is indeed a fascinating question, is dealt with in
16 Edwards and that is that is at F4, tab 4. My learned friend
17 has sought to devalue what is said in evidence. He says at
18 paragraph 156 of his skeleton argument that when Edwards says
19 that it is not proper for a minister to express his view of
20 whether the prosecution should go ahead that Edwards was only
21 looking at the text of the Shawcross statement.

22 That is manifestly incorrect because when one looks at
23 Edwards, Edwards says specifically that he had access to the
24 cabinet papers and he looked at the history and genesis of the
25 Shawcross statement and identified that it was a response to

1 precisely that kind of inappropriate political pressure, that
2 what Shawcross was saying in that statement was back off to
3 the cabinet, "yes, I will ask your opinion about whether there
4 are facts that I should be taking into account when I take my
5 decisions, but it is not for anybody else to suggest to me
6 what my decision should be".

7 LORD JUSTICE MOSES: I do not regard it as an analysis of
8 Shawcross. The fact is that if you are going to have
9 separation of powers you have to have a system that prevents
10 the executive interference with the rule of law.

11 MS ROSE: Yes.

12 LORD JUSTICE MOSES: This is one method why you do it. The
13 government has to be made to understand that with all their
14 pressures they cannot express a view about the decision.

15 MS ROSE: We submit that the Prime Minister, with great respect,
16 crossed the line in the memo of 8th December and in the
17 meeting of 11th December because on both of those occasions,
18 in particular the meeting, he said "this is the strongest case
19 for interference in the public interest that I can remember".

20 LORD JUSTICE MOSES: I would not mind, I mean speaking for myself
21 and I am only thinking aloud, that would be fine if somebody
22 had written back saying, "steady on, back off. I have to
23 decide what is the public interest. I know what you think",
24 just something on sort of record as to, you know, where the
25 line is to be drawn for next time.

1 MS ROSE: We submit that the vice of that becomes even clearer
2 when one considers the context in which those interventions
3 were made. Your Lordship saw the factual context this
4 morning -- this is the tainted advice point -- that at the
5 beginning of December the Saudis had delivered an ultimatum
6 that they would pull the Typhoon contract and had been to
7 Paris to court the French. This and Bandar's arrival on
8 5th December to meet with the Foreign Office appears to have
9 been the immediate trigger for the Prime Minister's personal
10 intervention.

11 LORD JUSTICE MOSES: I think the tainted advice point really, I
12 mean, again one cannot go behind the good faith of what is
13 sworn in these statements but the point is as a matter of
14 perception, unless you draw these lines clearly no one will
15 ever be able to be confident that impermissible considerations
16 like economics did not influence the manner in which you
17 described the other elements that are permissible. I mean
18 that is the danger. You can swear till you are blue in the
19 face saying it was only national security. If you express
20 your sufficiently like this nobody is ever going to believe
21 you.

22 MS ROSE: When you look at the course of the events and the way
23 that it happened, the suspicion that the Typhoon contract may
24 have inflated the degree of anxiety that was expressed about
25 national security cannot be eliminated. Whether it was

1 conscious or subconscious.

2 LORD JUSTICE MOSES: The other factor, I do not need to go into
3 any detail, is of course as was acknowledged at the meeting, I
4 think it was Helen Garlick said, well, neither you, the
5 Attorney, unless you have some other source of information,
6 nor the Director can evaluate the security and therefore it is
7 very important. They, therefore, have no mechanism of
8 assessing whether what they are being told by government is
9 not in fact influenced by very powerful other considerations,
10 they just cannot judge it. Unless they go back and say try
11 again.

12 MS ROSE: The final point on this, at paragraph 73 of our skeleton
13 argument we refer to the witness statement of Mr. Jones, the
14 Director General of the Attorney General's office who
15 suggested it is constitutionally proper for ministers to
16 express a view including a view in very strong terms as to
17 what the prosecutor's decision should be and we respectfully
18 disagreed with his perception of what is or is not
19 constitutionally proper.

20 LORD JUSTICE MOSES: Those of us who have prosecuted in the past
21 were always told exactly the opposite.

22 MR. JUSTICE SULLIVAN: It does seem to be that there are
23 conventions and conventions. There are not too many
24 conventions which are actually spelt out in terms by an
25 attorney to Parliament who says he has consulted previous

1 attorneys. Presumably he meant what he said when he said it.

2 MS ROSE: Yes, my Lord. It is interesting from that consideration
3 that there is of course an issue here about the justiciability
4 of conventions. Your Lordships have my submission that we do
5 not need to go there because what we are considering is not
6 the justiciability of what the Prime Minister did but the
7 justiciability of what the Director did and there is no doubt
8 that that is judicially reviewable and that if that was
9 tainted by improper conduct then that decision also may be
10 tainted.

11 LORD JUSTICE MOSES: I just sort of feel slightly, again speaking
12 for myself, that if you lost on all your other points you are
13 not going to win on this.

14 MS ROSE: Well, let us hope it never comes to that, my Lord.
15 Before I do leave the point, to take up what my Lord,
16 Sullivan J, said about the very clear terms in which it was
17 expressed by Shawcross, this is a point that is taken up by
18 Allen in the academic writing, this is in F, it is tab 6,
19 turning to page 256 when he is considering the justiciability
20 of conventions and he states at 256 the first main paragraph:
21 "A decision to instigate legal proceedings taken for
22 reasons of party advantage or even ideological conviction
23 would today be widely considered improper. If the uncertainty
24 of conventional requirements or their limits be thought a
25 barrier to legal enforcement as is often suggested the speech

1 of Sir Harvey Shawcross in the House of Commons in 1951 serves
2 as sufficient response."

3 This is a very clear and specific convention. Then over
4 the page at 257:

5 "It is none the less wrong to deny the possibility in
6 principle of a judicial remedy as in other cases where
7 statutory or prerogative power affects the interest of
8 individuals it is hard to accept without qualification the
9 view expressed by Wilson J in the High Court of Australia that
10 the courts and community must rely heavily on the integrity of
11 the Attorney General for the faithful discharge of
12 properties(?) and privilege leaving his actions to be
13 questioned in Parliament".

14 My Lords, would you give me one moment. My Lord, unless
15 I can be of any further assistance those are my submissions.

16 LORD JUSTICE MOSES: Thank you very much. Yes, Mr. Sales.

17 MR. SALES: My Lords, the defendant in this case had a very
18 difficult decision to make. He gave full weight to the
19 importance of the rule of law but he felt driven to the
20 conclusion that external circumstances outside his control and
21 outside the control of the British State meant that in the
22 exercise of his professional judgment the investigation had to
23 be discontinued for compelling reasons of the public interest,
24 those reasons arising from the threat to national security.

25 My Lords, I emphasize that this was outside the control

1 of the British State since that is the crystal point of
2 distinction in our submission between the present situation
3 than in Phoenix Aviation, volume D, tab 68, and the
4 authorities reviewed in that case, also is the D case,
5 volume C at tab 37 and the Blackburn case.

6 The Director and the United Kingdom were confronted with
7 a situation in which the government and director assessed that
8 there was a serious and imminent threat to national security
9 arising out of the likelihood that Saudi Arabia, yes, a
10 friendly state but with strong interests of its own which it
11 made clear it would pursue, that Saudi Arabia would withdraw
12 co-operation vital to maintaining national security and the
13 safety of the British public and servicemen.

14 It has been suggested principally by my Lord, Moses LJ,
15 today, that nothing was done to test the risk and see whether
16 the Saudi Government would accept that the investigation was
17 simply outside the control of the United Kingdom Government
18 because of our own internal doctrines of the separation of
19 powers. My Lord, that has never been a case pleaded against
20 my clients and it would not be fair or safe for the court to
21 proceed on the basis of any such assumption.

22 My Lords, I add this in parenthesis, it is also, with
23 respect, not a realistic assumption. May I show my Lords a
24 brief passage in the judgment of Simon Brown LJ in the CND
25 case where he makes the point. This is in volume D, tab 51,

1 paragraph 43 where he is dealing with evidence from
2 Mr. Ricketts.

3 "Mr. Ricketts' statement, of course, is directed rather
4 to the reasons why the government for its part should not be
5 required to state its position on the meaning of resolution
6 1441 and to why the court should not grant an advisory
7 declaration on the point. Clearly, however, the one follows
8 from the other. The logic is inescapable. On the
9 international plane, as a matter of practical international
10 politics other states do not make nice distinctions between
11 legal assertions by government and declarations of law by
12 national courts."

13 My Lord, the point being made there is that it is all
14 very well for the United Kingdom to try to explain to other
15 governments that there is an important distinction in terms of
16 the separation of powers within our state as to what different
17 entities within the state do, but other states do not always
18 accept that that is the position.

19 LORD JUSTICE MOSES: They do not always, no, but, I mean, you
20 criticize me for raising the point. It emerges from the
21 second Wardle statement where he says he has no choice. If
22 you assert no choice you have to lay the foundation for saying
23 "there was nothing else we could do". You may be right that
24 think would not listen, you may be right that they would
25 listen but would not understand, you may be right that they

1 would listen, understand full well and take no notice, all of
2 that I am perfectly happy to accept, but the notion that
3 friendly, intelligent people would not understand the answer,
4 "look, I am very sorry but there is nothing we can do because
5 the Director is independent of government", I, at the moment,
6 find incredibly difficult to understand.

7 MR. SALES: My Lord, in my submission, this is a point which goes
8 to whether a proper assessment was, made of the national
9 security risk. Mr. Wardle's evidence goes to his own position
10 of course. That assessment has never been criticized on this
11 basis or by reference to any suggestion that the Saudi threat
12 to withdraw security co-operation should be regarded as
13 anything other than real ----

14 LORD JUSTICE MOSES: Absolutely. It is not an attack on the
15 assessment of the risk. Whoever it was who issued the threat,
16 I am perfectly, speaking for myself, happy to accept that
17 those who know about these things like the Foreign Office
18 would say, yes, he will carry it out or he will get others to
19 carry to out to more accurate, but that is not the point. It
20 is to do with, can you get them to withdraw the threat by
21 persuasion, by explaining that they might find it equally of
22 an affront if you march into a country and say, "look, will
23 you kindly stop your systems of punishment", for example.
24 They would be outraged at that attack on the sovereignty of a
25 foreign state.

1 What one so singularly finds lacking and no doubt you
2 will be able to show me, is any expression of outrage at an
3 attack on one of the fundamental features of sovereignty,
4 namely the power to control one's own domestic criminal
5 system. That is what was being attacked. Nobody said "you
6 cannot talk to us like that", did they?

7 MR. SALES: My Lord, there is no evidence on that point because it
8 is not an issue in the case. My Lord, even if there were an
9 attempt made to reformulate the case in that way it would lead
10 directly into the court seeking to consider the assessment
11 made by the British Government, not the Director on this
12 occasion but the British Government, as to what they should do
13 in the course of the conduct of international relations. That
14 would take the court directly into the area which is covered
15 by binding authority where it is not appropriate for the
16 courts to second guess the assessments made by the government
17 officials, particularly the Foreign Office in their dealings
18 with foreign states. May I give my Lords the references, I
19 will not take up time on this point. The references are, in
20 particular, Obassey(?) volume D, tab 58, in particular at
21 paragraph 106 and Alwari(?) volume D, tab 56, paragraphs 132
22 to 134 and 148.

23 MR. JUSTICE SULLIVAN: I am sorry, I could not get those down.

24 MR. SALES: I am so sorry, my Lord, Alwari D/56. My Lord Obassey
25 D58, paragraph 106.

1 MR. JUSTICE SULLIVAN: I got that far, yes.

2 MR. SALES: Alwari volume D, tab 56, paragraphs 132 to 134 and
3 148.

4 MR. JUSTICE SULLIVAN: Thank you.

5 LORD JUSTICE MOSES: All of that I can accept if one is applying
6 the right principles of law in one's international relations,
7 but if one thinks that merely talking about national security
8 is enough, it is argued against you that you have not applied
9 the right test, that you cannot give way to threat other than
10 in circumstances where there is no realistic alternative. Of
11 course, if you have it wide enough if any threat, however
12 eminent, and there is nothing you can do, you are absolutely
13 right, but if you are wrong, well, then none of these
14 authorities and principles are in point.

15 MR. SALES: My Lord, it has never been our case to rely upon
16 article 25 of the draft articles on state responsibility. Our
17 case, in relation to Article 5 of the OECD Convention, is a
18 simple question of construction of that convention together
19 with our arguments about the effect of the Launder principle.

20 LORD JUSTICE MOSES: Yes.

21 MR. SALES: As I understand the case that we actually have to
22 meet, there are arguments of domestic law which I will deal
23 with primarily under the heading rule of law, but also
24 specific points of failure to take into account material
25 considerations which I have to deal with and do deal with.

1 There is argument as to the proper interpretation of Article 5
2 of the OECD Convention which we deal with and as to the
3 operation of the Launder principle.

4 All those arguments of law I am in a position to deal
5 with. The point that was being taken against me and, with
6 respect, my Lord it was not a criticism for what my Lord had
7 said but my learned friend's adoption of that way ----

8 LORD JUSTICE MOSES: (Unclear)

9 MR. SALES: My Lord, what was being put against me was that
10 somehow the answer to our arguments of law resided in the fact
11 that evidence had not been put in about what approaches and
12 assessments have been made in relation to Saudi Arabia.

13 LORD JUSTICE MOSES: They may have done, but the decision-maker,
14 we have the notes of the meeting of the decision-maker, we
15 know what the Attorney said supervising, we know what
16 Director General said and what one singularly does not see is
17 any suggestion from the Director that he said, "well, steady
18 on, what else have you tried? Have you spoken to them about,
19 on the face of it, the criminal offence committed that
20 triggered these whole events off at the end of 2006? Was it
21 explained?" You see, they are not lawyers. The person who
22 the person went to see that triggered it all off is not a
23 lawyer, probably never thought of an attempt to pervert the
24 course of justice.

25 What would have happened if it had been explained in

1 civilized terms, "well, before you go on you had better come
2 and see the Secretary of State for Justice because he will
3 explain to you about what our attitude in this country is to
4 threats made to life to stop a prosecution. If somebody says
5 stop it or else they are guilty of a criminal offence. Did
6 you appreciate that before you put that into effect?"

7 MR. SALES: My Lord, my submission is ----

8 LORD JUSTICE MOSES: We know that did not happen because we have
9 the notes.

10 MR. SALES: With respect, my Lord, you do not have a full set of
11 the underlying materials for the very specific reason that we
12 have ensured that there be disclosure of matters which are
13 relevant to the issues pleaded against us in this case. My
14 Lord, it is not right for the court to proceed upon the
15 assumption that points going to this particular issues, which
16 my Lord is now raising with me, were not raised in the course
17 of ----

18 LORD JUSTICE MOSES: By the Director.

19 MR. SALES: My Lord, I would need to take direct instructions on
20 that.

21 LORD JUSTICE MOSES: The Director has given a description of these
22 meetings, first to the Ambassador and then with the Attorney
23 and then with the others. I am just very surprised he did not
24 say, "well, I tried, but I was told it would do no good it
25 would just make matters worse".

1 MR. SALES: My submission is that the Director, on his evidence,
2 was confronted with an assessment of what the likely position
3 of the Saudi Arabian government would be and, my Lord, the
4 evidential position and the pleaded position is that the case
5 proceeds to argument on the law on the basis that such an
6 assessment was made and is not the subject of criticism other
7 than in the pleaded respects in these proceedings.

8 My Lord, the last time we were before my Lord, Moses LJ,
9 on the directions hearing I made it clear I do not mind what
10 case we have to meet. I am used to meeting cases but I do
11 like to know in advance what pleaded case we have to meet.
12 That was particularly important in this case because of the
13 difficulties, as my Lord knows, of ensuring both that we
14 complied with our duty to the court of hearing a full and
15 frank disclosure of all material relevant to the pleaded case
16 while at the same time having to have regard to considerations
17 of public interest immunity, confidentiality and so on.

18 LORD JUSTICE MOSES: So the position is, and it is not a criticism
19 but I want to make sure of the position, when Mr. Wardle says
20 in his second statement "I had no choice", we just have to
21 accept that as read.

22 MR. SALES: My Lord, in my respectful submission, you have to
23 accept that that was his state of mind in the light of the
24 assessments that he had been given about the likelihood of the
25 Saudi Arabian government acting on the threats that my Lord

1 has already ----

2 LORD JUSTICE MOSES: Oh that, it is the logically prior question.

3 It is not a question of acting on the threat, nobody has
4 suggested that they did not mean what they said, it is the
5 prior question of when you say no choice what steps have been
6 taken for them to withdraw the threat or to take it away. You
7 say actually he says that but we, the government, of course,
8 we will not, we are mindful of our international obligations.

9 MR. SALES: My Lord, in my submission, the assessment of the
10 threat and the reality of the threat comprehends assessments
11 as to whether or not the threat can be removed. If the threat
12 can be removed then that course would be followed. That would
13 be the way in which one could avoid a threat to national
14 security altogether.

15 With the greatest of respect I do not accept the logical
16 point that my Lord is putting to me, that there is a
17 distinction to be drawn between assessment of the risk to
18 national security arising out of the threats and the question
19 of whether or not the threats could be obviated by other
20 means. In my respectful submission, on the evidence in this
21 case and the way that the case has been put forward, the
22 position is that there were threats that could not be obviated
23 sensibly by other means and that the Director who, of course,
24 is not responsible for the conduct of international relations
25 and has to rely upon the assessments of others in that regard,

1 was confronted with a position where, in his assessment, he
2 was operating in a situation where there was no other choice
3 available.

4 My Lord, the great weight, in our submission, that the
5 Director gave to the importance of the rule of law speaks
6 through his actions as well as his careful explanation of his
7 approach to the court in his first and second witness
8 statements. When concerns about the relationship with
9 Saudi Arabia were raised in 2005 a Shawcross exercise took
10 place, representations were made about the national security
11 interests, but the Director did not regard them as showing an
12 immediate or compelling risk and he decided the investigation
13 should continue. This was not a man who was taking dictation
14 from politicians. He was exercising his own judgment and
15 giving, as I have said, great weight to the importance of the
16 rule of law.

17 Again, as the evidence shows, he and his office took a
18 highly sceptical approach to the representations made by BAE
19 and even in the light of the new national security assessment
20 in late 2006 the Director did his utmost to explore whether it
21 might still be possible to secure a conviction of the BAE even
22 if only by way of seeking to secure.

23 MR. JUSTICE SULLIVAN: Sorry, may I note that down, did his utmost
24 to what?

25 MR. SALES: Did his utmost to explore whether it might still be

1 possible to secure a conviction of BAE even if only by way of
2 seeking to secure a plea to a charge. My Lords, the evidence
3 on that is in Wardle 1, paragraph 29, so that is in the core
4 bundle behind tab 5.

5 LORD JUSTICE MOSES: This is prior to the threat?

6 MR. SALES: My Lord, this is at a time where there are concerns,
7 it is prior to immediately setting out of the threat.

8 LORD JUSTICE MOSES: Absolutely, yes.

9 MR. SALES: My Lord, Shawcross exercise, 2005, coordinated through
10 Cabinet Office. Sorry, my Lord, I am now taking you, forgive
11 me, this is after the threat, forgive me. I have made my
12 point on what happened on the Shawcross exercise in 2005, the
13 Director stands up and gives weight to the rule of law and the
14 investigation continues.

15 What then happens is you have a renewed Shawcross
16 exercise in effect in 2006 that is based on assessment of the
17 threats. When one comes then to paragraph 29 it is in the
18 light of those threats, one picks that up perhaps from
19 paragraph 28, does my Lord have that, page 94 in the bundle:

20 "On 30th November 2006 I had the first of three meetings
21 with the Ambassador. A range of people attended the meeting,
22 including the Permanent Under Secretary of State for the
23 Foreign and Commonwealth Office. We discussed the
24 practicalities of seeking evidence from relevant persons in
25 Saudi Arabia. At the same time the Ambassador directly

1 confirmed to me that the threat to national and international
2 security were very grave indeed and were as represented by the
3 Cabinet Secretary's letter of 29th September 2006, as he put
4 it to me British lives on British streets were at risk."

5 My Lord, that is the up to date assessment that threats
6 are being made of withdrawal of co-operation and they are
7 reel. Then at 29:

8 "At the beginning of December 2006 my case team and I
9 contemplated the viability of approaching BAE with a view to
10 exploring whether they might consider entering a plea of
11 guilty to corruption on a limited basis. At a meeting on 5th
12 December 2006 I discussed this possible approach with the
13 Attorney. Shortly after meeting his office confirmed that he
14 had no objection to our approaching the company. We arranged
15 a visit with the solicitors for the company the following
16 afternoon.

17 Then on the evening of 5th December 2006 Jonathan Jones
18 at the Attorney General's office telephoned me. In view of
19 the Shawcross representations that had been made he was
20 concerned that we ought to brief the Prime Minister before
21 approaching the company. The Prime Minister was under the
22 impression the next step we were considering was an approach
23 to the Kingdom of Saudi Arabia via the Ambassador.
24 Jonathan Jones did not want the Prime Minister to be misled.
25 I agreed that we should brief the Prime Minister.

1 On the morning of 6th December 2006 Jonathan Jones and I
2 agreed that what he should say to the Prime Minister's Private
3 Secretaries. Later that day Jonathan Jones telephoned me to
4 confirm that he had approach the Prime Minister's office and
5 had been told that the Prim Minister would wish to make
6 further representations to the Attorney before the approach to
7 the company. The Minister was due to fly to Washington
8 shortly so was not able to make his representations that day.
9 The Attorney and I decided we should put off the SFO visit to
10 the company to enable the Prime Minister to make
11 representations. "

12 Then, my Lords, one has the representations and you have
13 seen this evidence. The consequence was that the Director
14 came to a conclusion that he had to discontinue the
15 investigation and could not pursue the possibility of even
16 approaching the company.

17 My Lord, he also deals with this in his second witness
18 statement at paragraph 22, page 112:

19 "Following my first meeting with the Ambassador I
20 considered inviting BAE to plead guilty to certain offences in
21 the hope that it will be possible to avoid serious damage to
22 UK national security without the need to drop the case, but
23 following further discussions with the Ambassador and the
24 Prime Minister's minute it became apparent to me that unless I
25 stopped the investigation it was likely that UK national

1 security would be seriously damaged and lives would be put at
2 risk."

3 My Lords, there was active consideration by the Director
4 whether there could an approach to BAE, as he put it, on a
5 limited basis, that is seeking a plea. Even that he
6 considered, in the light of the representations he had to take
7 into account, could not be pursued. In other words, that
8 option was also foreclosed by the same national security
9 considerations.

10 LORD JUSTICE MOSES: Or by the same threat.

11 MR. SALES: Yes, my Lord.

12 LORD JUSTICE MOSES: Somebody had said "drop it or else" and you
13 are not going to meet that threat by getting BAE to cop a
14 plea. Anyway BAE would be a bit silly to do it. For all they
15 knew the whole thing was going to be dropped.

16 MR. SALES: Yes, my Lord can put to me all the time "by that
17 threat" and I will agree. My submission, which I have already
18 made, is that it is not possible to distinguish out the threat
19 from the national security considerations which then had to be
20 taken into account.

21 LORD JUSTICE MOSES: The threat was, "We will sit quiet. If we
22 learn that somebody is going to blow you up we will sit quiet
23 and will not tell you who it is in the circumstances where we
24 know", that was the threat, was it not?

25 MR. SALES: My Lord, the threat, if one is using that language

1 ----

2 LORD JUSTICE MOSES: Well, why is one not using that language?

3 MR. SALES: Very well, I am using that language, as my Lord puts
4 it to me. The threat was of a withdrawal of co-operation, not
5 just in the form my Lord has put to me but more widely as
6 well. There is a very clear assessment of the importance of
7 that wider co-operation as well as the specific form of
8 co-operation that my Lord has put to me. The assessment of
9 those in central government was that this was a matter of the
10 very greatest weight and of very critical importance to our
11 ability to safeguard our national security in the light of the
12 Islamist terrorist threat.

13 My Lord, in the light of the Saudi Arabian threats, the
14 words in my notes which I now use, and the compelling nature
15 of the threat to national security which arose out of them,
16 there was no other viable choice available to the Director
17 than to accept with very great reluctance that the
18 investigation should be stopped. In my submission that was a
19 decision wholly available to him within the proper and lawful
20 parameters of the wide discretion conferred on him under the
21 Criminal Justice Act 1987 and in conformity with a mass of
22 authority emphasizing the width of the discretion available to
23 prosecutors in taking prosecution decisions and, my Lord, I
24 add a fortiori in relation to decisions in relation to
25 investigations in the phase before deciding on prosecution.

1 LORD JUSTICE MOSES: I am having real difficulty, but I do not
2 want to interrupt you because you are sort of early on, in
3 understanding the relevance of the width of discretion. We
4 are not talking, I mean nobody is going to dispute that. We
5 are here talking about the rule of law or Article 5, it does
6 not matter which. It does not matter how wide the discretion
7 is. The one thing that no lawyer can do is yield to a threat,
8 stop it or else unless compelled to do so. If that is the
9 right principle then I do not understand why the width of
10 discretion has to do with anything.

11 MR. SALES: My Lord, the width of discretion goes directly to the
12 point that my Lord has raised under the heading rule of law.
13 In my submission, when one analyses the case, having regard to
14 the principles of rule of law, the Director was not precluded
15 from taking account of the threats made by the Saudi Arabian
16 Government which were, on the assessment of the
17 British Government, likely to be materialize in serious and
18 imminent harm to the British national security interests.

19 LORD JUSTICE MOSES: If there was an imminent risk to life as
20 witness Leyla Khaled, nobody is going to say that he is doing
21 anything other than complying with the rule of law. Question:
22 If it is less than that how is it any different from any
23 villain coming along and saying, "unless I stop this
24 prosecution I am going to end up with 25 years in prison. I
25 am going to do my utmost to do it". It is exactly the same

1 thing.

2 MR. SALES: With respect, my Lord, it is not.

3 LORD JUSTICE MOSES: Why is it not?

4 MR. SALES: Because Saudi Arabia was not the villain in my Lord's
5 example. Saudi Arabia was not itself the subject of a
6 possible ----

7 LORD JUSTICE MOSES: No, they were not the villain; they were just
8 protecting the villain.

9 MR. SALES: My Lord will express himself however he feels it is
10 appropriate to do so and, my Lord, in submission ----

11 LORD JUSTICE MOSES: How else, I am very sorry, I mean there is no
12 point in weasel words about this, someone issued a threat to
13 protect somebody else from being investigated. That was the
14 point of the threat, to provide protection.

15 MR. SALES: My Lord, on the evidence the point of a threat from
16 the point of view of Saudi Arabia in so far as one can
17 speculate about what they had in mind when they made the
18 threat was a feeling of outrage that confidential material, as
19 they regarded it as between them and the British Government,
20 should not be made the subject of formal investigations by
21 British authorities.

22 LORD JUSTICE MOSES: Because they did not understand the
23 separation of powers.

24 MR. SALES: My Lord, for whatever reason because from their point
25 of view, again I emphasise I am speculating, but in my

1 submission my Lord's question invites, from their point of
2 view they took very seriously that the British Government, not
3 making a distinction in terms of separation of powers should,
4 on their view, take the confidentiality of matters agreed to
5 be confidential between governments with much greater
6 seriousness and treat that as overriding on other matters.

7 LORD JUSTICE MOSES: That I will come to but then when questions
8 are asked by the United States authorities and the great
9 question then arises, should we answer then, the distinction
10 is made, ah well, it is not the government providing this
11 information, it is some other authority. At the moment I have
12 not understood why that same argument was not advanced at this
13 stage. It is not us. It is not a central government, as you
14 put it; it is an independent prosecutor over whom in respect
15 of those sorts of issues we have no control. Indeed we have
16 no control over them because he is independent.

17 MR. SALES: My Lord, two points if I may:

18 (1) In my respectful submission I have already addressed
19 that point. This is not part of the way the case has been
20 pleaded against us. We do not have evidence on it. In my
21 submission this point that my Lord has raised with me goes to
22 a question of the assessment of the credibility of a threat
23 and whether it is likely to be carried out.

24 (2) My Lord, I have probably already said more than I
25 should have done even by way of speculation about what it is

1 that has motivated the Saudi Arabian government. I do not
2 appear for them. I feel deeply uncomfortable trying to
3 address my Lord's questions on that particular topic. My
4 Lord, I do not feel that I can take further the question of
5 speculation about what it was that was motivating the
6 Saudi Arabian government to adopt the position that it has.

7 LORD JUSTICE MOSES: I am not speculating, nor are you; we have
8 evidence because it was the evidence of Mr. Wardle, both in
9 his witness statement and to Parliament, that what they
10 objected to was the breach of trust. We have that written
11 down, I cannot remember the page number. Leading to that was
12 why then was it not explained to them "we are not doing this,
13 this is somebody else".

14 MR. SALES: My Lord, perhaps if I can return to a submission of
15 law which is to go back to the point that my Lord was putting
16 to me, that this case does not involve questions of the ambit
17 the discretion. In my respectful submission it precisely
18 involves questions of the ambit of the discretion for the
19 reason, in effect, that my Lord was putting to me. What my
20 Lord put to me was that in a Leyla Khaled situation one could
21 understand why the Attorney General, whoever is the
22 prosecutor, could take such a threat into account
23 legitimately, but my Lord was putting to me, essentially by
24 implication, why should the same be true in relation to the
25 former threat in this case? It is my submission that the

1 width of the discretion available to the Director in this
2 case, prosecutors in other cases, is so wide as to permit the
3 taking into account of threats of both characters. That is
4 the Leyla Khaled case, but also the case with which we are
5 dealing here. That is my submission of law.

6 My Lord, that is a point which goes directly to the
7 ambit of the discretion of the Director, either it is
8 permissible for him as a matter of domestic law to take
9 account of a threat to national security based on threats from
10 the Saudi Arabian Government in the way that we have seen or
11 it is not as a matter of domestic law. That I understand to
12 be the point of the rule of law argument on my learned
13 friend's case. My Lord, I was going to deal with that first.
14 It may be appropriate if I move to do so now.

15 LORD JUSTICE MOSES: Yes.

16 MR. SALES: This is the most fundamental of the arguments of law
17 that the Director now faces because if on a proper
18 construction of domestic law he was disabled by taking into
19 account the threat to national security which arose in this
20 case, that is an end of the matter. It would not be open to
21 the Director to reconsider this decision. It would simply be
22 unlawful as a matter of domestic law.

23 In my submission -- I remind you I am addressing the
24 domestic law argument -- this case is completely
25 unsustainable, this case of my learned friends. For all, if I

1 may respectfully say so, the rhetoric and fine-sounding
2 references to the rule of law, in my submission there is no
3 doctrine of the rule of law in domestic law which would begin
4 to establish that the Director's prosecutorial discretion was
5 limited as the claimants now contend.

6 My Lord, may I take you then to our skeleton argument on
7 this point, picking it up at paragraph 34, page 12?

8 LORD JUSTICE MOSES: Yes.

9 MR. SALES: My Lord, in essence, and this is very much taking a
10 point that my Lord, Moses LJ, put to us on the last occasion,
11 that the argument would flow out of the principle of legality
12 as explained in the cases, our submission is at paragraph 34
13 that the principle of legality does not affect the
14 interpretation of Section 1 of the Criminal Justice Act 1970
15 which is in wide terms. In our submission the principle of
16 legality is concerned to ensure that legislation that
17 overrides fundamental common law principles or rights can
18 clearly be appreciated as such at the time of its passage.

19 My Lord, Simms(?) which although familiar, it is, in my
20 respectful submission, worth reminding ourselves precisely how
21 the principle of legality works, it is at volume B, tab 25 and
22 in particular page 131. The speech of Lord Hoffmann explains
23 it. One sees at 131 just above letter E:

24 "I add only a few words of my own about the importance
25 of the principle of legality in a constitution which like ours

1 acknowledges the sovereignty of Parliament. Parliamentary
2 sovereignty means that Parliament can, if it chooses,
3 legislate contrary to fundamental principles of human rights.
4 The Human Rights Act will not detract from the power. The
5 constraints upon its exercise by Parliament are ultimately
6 political and not legal but the principle of legality means
7 that Parliament must squarely confront what it is doing and
8 accept the political cost. Fundamental rights cannot be
9 overridden by general or ambiguous words. This is because
10 there is too great a risk that the full implications of their
11 unqualified meaning may have passed unnoticed in the
12 democratic process.

13 In the absence of express language or necessary
14 implication to the contrary the courts therefore presume that
15 even the most general words were intended to be subject to the
16 basic rights of the individual. In this way the courts of the
17 United Kingdom, though acknowledging the sovereignty of
18 Parliament apply principles of constitutionality little
19 different from those which exist in countries where the
20 powerful legislature is expressly limited by a constitutional
21 document.

22 The Human Rights Act will make three changes to the
23 scheme of things. First, the principles of fundamental human
24 rights which exist at common law will be supplemented by a
25 specific text, namely ..." ----

1 LORD JUSTICE MOSES: Where do you want us to read to?

2 MR. SALES: My Lord, if you could read to the end of that
3 paragraph, please.

4 LORD JUSTICE MOSES: Yes. (Pause) Yes.

5 MR. SALES: My Lord, one sees from that both the way in which the
6 principle of legality works as a principle of statutory
7 construction, and just to be absolutely clear about it, I
8 accept that if the principle of legality applies by reference
9 to some specific identified common law fundamental principle,
10 that it can have the effect of cutting down wide general
11 language such as one gets in Section 1 of the Criminal Justice
12 Act. The legal issue at this stage of the argument is to
13 identify whether there is such a principle.

14 The second point to make is that it is of significance,
15 in my submission, that the primary example of such a case
16 identified by Lord Hoffmann and indeed by Lord Steyn is of
17 fundamental individual rights with which, of course, we are
18 not dealing here. Now, in my submission ----

19 LORD JUSTICE MOSES: Is the exercise of the rule of law not the
20 individual right of each and every citizen of this country?

21 MR. SALES: Either in the sense that my Lord is in effect putting
22 it to me, rule of law which excludes ----

23 LORD JUSTICE MOSES: Unfairness at trial. As Lord Brown said (as
24 he now is), when you ensure the fairness of a trial, you know,
25 the closed (unclear) so on and so forth, you are upholding the

1 rule of law, but these things derive from the rule of law, do
2 they not?

3 MR. SALES: Yes, and very specifically you are upholding the
4 individual human rights of the person who is subject to that
5 process, that was the point that I was seeking to make.

6 My Lord, when one turns to the claim that Corner House
7 bring in this case, they are not seeking to invoke any
8 individual human right of their own; they are seeking to
9 invoke some wider principle.

10 LORD JUSTICE MOSES: Well, the human rights of each and every
11 citizen, the rights to ensure that, subject to some compelling
12 reason to the contrary, you would say, well, be careful about
13 compelling, subject to some reason to the contrary, that
14 criminal cases are investigated.

15 MR. SALES: My Lord, in my respectful submission there is not an
16 individual human right to that effect.

17 LORD JUSTICE MOSES: It is probably (unclear)

18 MR. SALES: That is the point that I am seeking to make. Now,
19 they are not shut out from argument, I do not want my Lord to
20 be alarmed they are not shut out from argument ----

21 LORD JUSTICE MOSES: You know me too well!

22 MR. SALES: ---- that there may be a principle. The only point I
23 was making specifically there is they cannot point to a
24 fundamental human right of theirs which can be called into
25 play to support them on this argument of construction.

1 Therefore, they have to point to some other principle and
2 identify it as an equivalent fundamental principle. The point
3 that I was making is that I do make the submission that it is
4 significant that Lord Hoffmann treats individual fundamental
5 human rights as the paradigm case for application of the
6 principle of legality and, moreover, draws attention to the
7 fact that one can point to a ready table of them, particularly
8 now in domestic law but always in international law as set out
9 under the convention.

10 That is going to be significant in the submissions that
11 I move to in terms of whether one can say that Parliament is
12 clearly on notice of a particular fundamental principle such
13 that it can plausibly be said that when Parliament has
14 legislated using wide language and on the face of it conferred
15 a wide discretion it must in fact be taken to have intended
16 that discretion to be read down by reference to the
17 fundamental principle to which the principle of legality
18 attaches.

19 My Lord, that is why in our paragraph 34 I am concerned
20 to emphasize that the principle of legality is a principle of
21 interpretation to assist in understanding what Parliament's
22 true intention was in promulgating a statutory provision which
23 operates as an aid to construction of legislation. My Lord,
24 this is the point which I wish to emphasize when we are
25 analysing the matter as a legal problem, the principle of

1 legality has no application if the necessary contextual
2 backcloth of a relevant basic common law principle is absent.

3 That is made very clear by Lord Steyn this time in
4 volume B tab 26 in Stafford. My Lord sees from the very
5 summary headnote for that case, it is about release on-licence
6 of a mandatory life sentence a prisoner where there has been
7 expiry of the punitive element of the sentence and risk of
8 violent reoffending assessed as minimal but the Secretary of
9 State refuses to direct release. The question was whether
10 that refusal was unlawful.

11 My Lords, the context was exercise of a discretionary
12 power by the Secretary of State. The argument was that he had
13 exercised his discretion unlawfully because he had not
14 properly interpreted his discretionary power, since it should
15 be read subject to the principle of legality. My Lord, the
16 relevant passage in Lord Steyn's speech is at page 47 H
17 through to 49 F. My Lords, it may be simplest if I invite my
18 Lords to cast their eyes over that. My Lords may care to
19 note that the passage that we have quoted, which is the nub of
20 it, is at 49 F.

21 LORD JUSTICE MOSES: (Pause) Yes. I found the sentence itself
22 quite difficult, but I think what he is saying is, well, there
23 is actually no identifiable principle that you can say applies
24 post tariff period.

25 MR. SALES: Yes, that is right.

1 LORD JUSTICE MOSES: I mean what is this principle? You cannot
2 just say, oh, it is a principle of proportionality (a) that is
3 not a principle that has application and (b) anyway it does
4 not apply post tariff anyway.

5 MR. SALES: My Lord, the important point that I am trying to get
6 over is the relevant analysis that applies when one is looking
7 at this sort of case. One has, on the face of it, wide
8 general words conferring a general discretion. The issue then
9 becomes whether that wide general discretion is cut down by
10 reference to the principle of legality which, if the principle
11 of legality applies, it can be, I have already acknowledged
12 that; the question is under what circumstances does the
13 principle of legality apply?

14 This is an example both of demonstrating the nature of
15 the legal analysis, if one cannot identify the clear
16 fundamental common law right or principle then the doctrine
17 does not apply and, my Lord, is an example of an argument of
18 the character that my learned friend is advancing now which
19 fails. So the question, in my submission, on this part of my
20 learned friend's case is whether she can identify a relevant
21 fundamental principle with the content which she requires it
22 to have for the purpose of her argument of domestic law on
23 this part of her case.

24 Now, my Lord, in paragraph 35 of our skeleton argument
25 we submit that the principle of legality operates within

1 narrow parameters for powerful constitutional reasons. The
2 effect of the application of the principle is to change what
3 appears to be the natural meaning of a legislative provision
4 by a process of reading down. My Lord, hence the comparison
5 that Lord Hoffmann drew with Section 3 of the Human Rights
6 Act.

7 LORD JUSTICE MOSES: Do you understand the concept of reading
8 down?

9 MR. SALES: Do I?

10 LORD JUSTICE MOSES: Yes. People use it because it sounds so
11 posh, I have never quite really understood what it means. I
12 mean I know what its effect is but I never quite know what it
13 means.

14 MR. SALES: My Lord, on my understanding and submission ----

15 LORD JUSTICE MOSES: You forget your junior because it is her
16 (unclear)

17 MR. SALES: I am not sure that is fair because where Section 3 of
18 the Human Rights Act applies and, I would accept, where the
19 principle of legality properly applies in common law the
20 effect is the same, there may be an effect either to read down
21 as the shorthand goes or to read in as the shorthand goes.
22 Reading down on my submission operates where one has wide
23 general language, a wide general discretion but the width of
24 that discretion is taken to being subject ----

25 LORD JUSTICE MOSES: Is cut down.

Transcript prepared without access to case documentation.

1 MR. SALES: Is cut down, so reading down one has wide general
2 words but in effect as matter of statutory construction one
3 reads (but not to be operated in these identified
4 circumstances).

5 LORD JUSTICE MOSES: Why is that reading down?

6 MR. SALES: Because you are cutting in ----

7 LORD JUSTICE MOSES: (Unclear) reading in a qualification.

8 MR. SALES: I was going to say that the difference between reading
9 down and reading in my break down on more detailed analysis,
10 but one can see at least some sense in the notion of reading
11 down where you have a wide discretion which is then cut down
12 by a process of interpretation. A process of reading, it is
13 probably spectrum so it is not a huge divide ----

14 LORD JUSTICE MOSES: It may be adding.

15 MR. SALES: It may be adding, so when one thinks of the Lister(?)
16 case, if my Lord can remember that, back in 1990 because of
17 course one gets the same doctrine applicable where you have EC
18 rights, in the Lister case, I cannot remember how many words
19 the House of Lords read into the particular provision but
20 essentially they read words in to make sure that it should be
21 interpreted in conformity with, in that case ----

22 LORD JUSTICE MOSES: Yes, now I have understood for the first time
23 ----

24 MR. SALES: My Lord, that my, no doubt, imperfect understanding.
25 I am not going to improve trying to explain that.

1 LORD JUSTICE MOSES: Now I know.

2 MR. SALES: My Lord, I was seeking to make what is, in our
3 submission, a very important point in paragraph 35 that the
4 principle of legality is all well and good where one can be
5 confident that Parliament knew that there was an identified
6 fundamental common law right or principle with identified
7 content. What is important to understand is that the effect
8 of the application of the principle is to change what appears
9 to be the natural meaning of the legislative provision by a
10 process of reading down or reading in, however you want to
11 describe it. It is only, in my submission, where there is an
12 established well-recognized and fundamental common law
13 principle or right which can be clearly identified as being
14 applicable at the time the legislation is passed that it can
15 be said that Parliament cannot be taken to have intended to
16 infringe that principle all right by the use of general
17 language in a statutory provision.

18 My Lord over the page:

19 "However, if Parliament cannot be taken to have been
20 squarely on notice of the existence of such a principle or
21 right then the process of reading down or modifying the
22 natural meaning of the words used would undermine rather than
23 promote Parliament's intention as expressed in the
24 legislation."

25 My Lord, I emphasize that what the principle of legality

1 is driving towards is a proper interpretation of Parliament's
2 true intention in the particular matter.

3 My Lord, this particular point, the constitutional
4 point, is, if we may respectfully say so, forcefully made by
5 Laws J in the Lightfoot case and because this is so important
6 I think that we should look at it, it is volume B, tab 27. As
7 my Lords will be aware, Laws J then, Laws LJ now is one of the
8 major exponents of the principle of legality particularly in
9 his landmark decision in the Wither(?) case.

10 My Lord, Lightfoot was a case where it was sought by the
11 applicant to take the Wither-identified fundamental common law
12 principle and apply it in a different context. My Lords may
13 find it helpful to cast your eyes over the headnote to get the
14 context, which was insolvency bankruptcy context.

15 LORD JUSTICE MOSES: (Pause) Yes.

16 MR. SALES: Then if one goes forwards first of all to Laws J's
17 judgment at first instance at page 608, perhaps one should
18 pick it up at 607 at D. I own up to the fact that the
19 submissions I am making now were the submissions I made, in
20 effect, on that occasion at D: "I turn then to the main
21 question, has the applicant been deprived by the order of 1986
22 of her constitutional right to access to the Queen's courts?
23" (reads to the words) ".... access to the court as
24 surely as was Mr. Wither."

25 So one sees that the applicant in this case was seeking

1 to rely upon the same identified fundamental common law right
2 as in Witham. One then has a section from my skeleton
3 argument taking issue with that.

4 Over the page Mr. Allen's(?) riposte was to submit that
5 ex parte Witham must be taken to demonstrate that access to
6 justice and access to the court mean the same thing and the
7 former is denied(?) wherever the latter is denied. Then at B:

8 "Much of the difficulty has, I think, arisen over the
9 use of the term right" so Laws J identified that what is in
10 issue in this case is can one identify a fundamental right
11 with the requisite content that would do what Mr. Allen on
12 that occasion wished it to do.

13 Then, my Lords, could I invite you to read down to 609
14 at E?

15 LORD JUSTICE MOSES: Yes.

16 MR. SALES: I am grateful.

17 LORD JUSTICE MOSES: (Pause) Yes.

18 MR. SALES: My Lord, there were various twists and turns in the
19 argument in this case but may I show you what happened in this
20 particular aspect of the argument in the Court of Appeal, this
21 time in the judgment of Simon Brown LJ at page 623. My Lords,
22 just for context for the passage I am about to show you, 622
23 at H one sees in the Court of Appeal Mr. Allen criticising the
24 judges' approach relying on ex parte Witham. So you see it is
25 the Witham argument that we are dealing with this point.

1 Then if I could invite my Lords' attention to page 623
2 the paragraph begin just below the letter C and, my Lords, if
3 you would be good enough to go to 624 at G just below G.

4 LORD JUSTICE MOSES: (Pause) Where do you want us to go to?

5 MR. SALES: So just below letter G on 624, my Lord.

6 LORD JUSTICE MOSES: Yes.

7 MR. SALES: I am grateful. The two point I would emphasize on
8 that particular passage are first of all it is again
9 demonstrates the nature of the legal analysis that applies in
10 this sort of case. Secondly, one sees that this was a
11 judgment against the background of a clear and identified,
12 identified by Laws J in Witham, constitutional fundamental
13 right. Even then one sees Simon Brown LJ at 624 at G saying:

14 "There must come a point at which a constitutional right
15 of a character identified in ex parte Witham shades into no
16 more than a highly desirable social interest. That is the
17 point that has been reached here.

18 The legal analytical consequence of that is the doctrine
19 of legality, principle of legality does not apply. The
20 ordinary natural meaning of the statutory provision prevails
21 with a wide discretion.

22 LORD JUSTICE MOSES: I mean all of this is, if I may say so, to
23 use the back the words used, I mean it sounds very good but
24 nobody is denying and certainly your client does not deny that
25 he is obliged to uphold the rule of law.

Transcript prepared without access to case documentation.

1 MR. SALES: My Lord, yes, but that leads one back to the legal
2 question: What is the construction of the width of the
3 discretion which my client enjoys under Section 1 of the
4 Criminal Justice Act ----

5 LORD JUSTICE MOSES: He has got as wide as he likes as long as he
6 does so in a way that protect and upholds the rule of law.
7 That does not provide the answer to this case.

8 MR. SALES: My Lord, in my respectful submission, my Lord puts it
9 to me "as long as he upholds the rule of law"; the discretion
10 in prosecutors allows them to have regard to a range of
11 matters, not purely matters going to upholding the rule of
12 law.

13 LORD JUSTICE MOSES: No, but there are limits, such as he cannot
14 say, well, I am only going to prosecute those with red hands
15 or I am not going to prosecute him because he is a friend of a
16 friend.

17 MR. SALES: Yes, my Lord, there are limits and we are precisely,
18 if I may respectfully say so, debating the ambit of those
19 limits in this case.

20 LORD JUSTICE MOSES: Yes, exactly.

21 MR. SALES: My Lord puts to me that things must be done so long as
22 they uphold the rule of law. In my submission, things must be
23 done so long as they fall properly within the ambit the
24 discretion given by Section 1 of the Criminal Justice Act.
25 What is then in issue is to what extent reference to a

1 concept, the rule of law, then cuts down the ambit of that
2 discretion.

3 My Lord, in my submission, what my learned friend is
4 seeking to do is to rely upon a variant of the principle of
5 legality in order to say that there is a principle in domestic
6 law, the rule of law which is of such force that Parliament
7 when it enacted the wide words in Section 1 of the Criminal
8 Justice Act must be taken to have enacted that subject to that
9 principle so as to exclude the lawfulness of the Director
10 having regard to, specifically, the threat to national
11 security arising out of threats made by the Saudi Arabian
12 government in this case.

13 LORD JUSTICE MOSES: I am not sure it is really quite put that
14 way. It is just saying that when you consider the threat to
15 national security you have to bear in mind your obligation to
16 protect and uphold the rule of law. It is more a question of
17 approach and I am not at all sure there is anything in between
18 you other than its application to what happened in this case.
19 I mean you are not going to be saying it does not have to
20 uphold to protect the rule of law; you are saying that is
21 exactly what he was doing.

22 MR. SALES: Yes, with respect, I think that there may be something
23 between myself and my learned friend on this because the
24 evidence is clear that Mr. Wardle did have regard to the rule
25 of law as a most weighty consideration to be taken into

1 account by him in deciding what do in relation to ----

2 LORD JUSTICE MOSES: Is it a consideration or is it just something
3 that is there that is not susceptible to any derogation? The
4 rule of law is something that is not to be balanced against
5 anything, not to be diminished in any way, but what you are
6 saying is that it is entirely consistent with protection of
7 the ruling of law that in this terrible situation there was
8 nothing else he could do.

9 MR. SALES: My Lord, even to put it in the terms that my Lord puts
10 it to me is to, in effect, invoke a principle, the rule of
11 law, query what its content is in a given situation and to say
12 that that principle must be taken to qualify in some way the
13 apparently wide discretion given to the Director under
14 Section 1 of the Criminal Justice Act as a prosecutor.

15 In my submission analytically, although my learned
16 friend may seek to put the point in different ways, my Lord
17 puts it to me in a slightly different way, that does come dawn
18 to essentially the argument by analogy from application of the
19 principle of legality. It is because, it is being said, that
20 the principle of the rule of law is so important and its
21 contents so clear that Parliament must be taken to have
22 intended that the Director should have exercised his
23 discretion by reference to it so as to exclude taking into
24 account the threat from the Saudi Arabian Government giving
25 rise to a peril to national security but, it is said on the

1 other side, that the Director has erred in law by having
2 regard to that threat and that risk to national security in
3 way that he has.

4 Now, in my respectful submission that is very directly a
5 point of law arising on the proper construction of Section 1
6 of the Criminal Justice Act. If the terms of Section 1 of the
7 Criminal Justice Act are to be read down, and I use that
8 language because that is the essence of the argument on this
9 part of the case that we have face, read down in the sense
10 that the Director cannot lawfully under domestic law have
11 regard to threats from Saudi Arabia and the risk to national
12 security, if it is to be read down in that way one needs to
13 identify how.

14 In my submission, the available mechanism analytically
15 is through recourse to the principle of legality. If the
16 principle of legality does not assist my learned friend in
17 showing that having regard to a factor of the kind which on
18 the evidence clearly the Director did have regard to, he said
19 he did, if my learned friend cannot show that that offends a
20 fundamental principle of the rule of law such that his wide
21 prosecutorial discretion under Section 1 is to be taken as
22 limited by reference to it, then, in my submission, we are
23 left in a position where the Director is entitled to have
24 regard to that risk to national security in taking into
25 account the public interest test which we all know is part of

1 the code for the Crown prosecutors and has been for a very
2 long time.

3 The issue of law is whether the wide range of matters
4 which can be taken into account by the prosecutor under the
5 public interest test when deciding whether to prosecute or
6 continue with an investigation have been cut down in the way
7 that my learned friend contends on this part of her case under
8 domestic law.

9 My Lord, my submission so far as that is concerned is at
10 paragraph 36. In the present context not only is there no
11 established well-recognized and fundamental constitutional
12 principle or right in issue which excludes the Director or any
13 prosecutor from having regard to matters affecting national
14 security of the kind relevant in this case, there was in fact
15 an established and recognized practice at the time the
16 1987 Act was enacted indicating the prosecutorial discretion
17 could be exercised by reference to a very wide conception of
18 the public interest, including to protect national security
19 interests such as those at issue in the present case -- that
20 is going to be a reference to the Kalil case which I will come
21 to. So far from Parliament thinking that it was excluding
22 reference to such aspects of public interest in the exercise
23 of prosecutorial and investigatorial discretion under
24 Section 1, in our submission, it would positively have
25 expected the wide language used in that provision to bear its

1 natural wide meaning.

2 Moreover, the continuation of that practice in relation
3 to the exercise of such discretion, without any criticism in
4 (unclear) reforms confirms the absence of any relevant
5 fundamental constitutional principle of the kind the claimants
6 seek to rely upon. My Lord, we will come to it but that is a
7 reference forwards to the code for Crown prosecutors which
8 makes reference to a very wide range of public interest
9 considerations which a prosecutor is legitimately, on the face
10 of that document, entitled to take into account. We do make
11 the submission that the arguments advanced by the claimants on
12 domestic law of the case do not meet these very basic
13 objections to their case under this heading.

14 My Lords, we then refer to Lord Bingham's lecture
15 article, the rule of law. My Lord, what one takes from that
16 in my respectful submission is the fact that the rule of law
17 has no single determinate content so far as English domestic
18 law is concerned, it is a general concept which has a number
19 of facets and means different things in different contexts.

20 LORD JUSTICE MOSES: But whatever it means it must be protected by
21 the courts.

22 MR. SALES: My Lord, it must be protected by the courts. The
23 question is whether there has been any infringement of the
24 legal obligations placed upon the Director of the Serious
25 Fraud Office in this case. If there has been legal

1 infringement by the Director of his statutory duty, if he has
2 had regard to a matter which on a proper construction of
3 Section 1 he was not entitled to have regard to, the rule of
4 law will be preserved by this court quashing his decision and
5 saying "you have misconstrued Section 1 of the Criminal
6 Justice Act, your decision must stand as nought".

7 I emphasize again, if it is on that basis that the court
8 decides the case the court would also be deciding that the
9 Director is not entitled to have regard to that consideration
10 as a matter of domestic law when he looks at the matter again.
11 Accordingly, the rule of law will be completely upheld by this
12 court in the requisite sense, namely properly construing the
13 relevant statutory provision and authoritatively determining
14 its meaning and quashing any conduct of the Director which is
15 not in compliance with the law of the land as determined by
16 this court. Nothing I say in any way calls in question the
17 operation of the rule of law in that sense which is the sense
18 that my Lord just put to me.

19 At paragraph 39 the claimants refer to *ex parte Bennett*
20 in which the House of Lords held that the High Court had a
21 responsibility for upholding the rule of law where on the
22 assumed facts of the case the appellant had been forcibly
23 returned to the United Kingdom in disregard of the ordinary
24 procedures governing extradition and in violation of
25 international law. My Lords, I apprehend that my Lords will

1 generally recall the case but it may be helpful to have a look
2 at it to see precisely what was in issue in that case. My
3 Lords, it is in volume A, tab 13.

4 My Lords, I think for my purposes I can take it from
5 headnote because I want to compare and contrast it both with
6 our case and with the following case of Marten(?) My Lord, may
7 I invite the court to read the headnote.

8 LORD JUSTICE MOSES: Yes, certainly. (Pause) Yes.

9 MR. SALES: My Lord, we say that that principle does not begin to
10 touch upon the present case. My Lord, it is also a principle
11 which has its own limitations even in the context of the
12 institution of court proceedings where it is alleged that an
13 abuse of process has occurred. As far as that is concerned we
14 rely upon the Marten case which we refer to at paragraph 40.
15 Marten is in volume B, tab 28. My Lord, first of all getting
16 the facts from the headnote:

17 "The appellant who is a civilian aged 17 was charged
18 with the murder of a young woman in Germany. His father, an
19 army corporal, was serving with the British forces in Germany
20 and the appellant was, as a member of his family, subject to
21 military law. He was accordingly charged with having
22 committed a civil offence of murder. The German government
23 waived its right to exercise jurisdiction" and so on. Then at
24 the end of the paragraph:

25 "At his trial in Germany the appellant's admission that

1 the court martial had no jurisdiction on the ground that it
2 was an abuse of process to try a young civilian by court
3 martial in Germany rather than by a jury in England was
4 rejected and the appellant was convicted."

5 My Lords, if you turn forward to page 927 at letter E in
6 the speech Lord Lloyd, my Lords, if I could invite you to read
7 927 at E through to 928 at A.

8 LORD JUSTICE MOSES: (Pause) What was the reference to a higher
9 authority? What had the commanding officer done? What was
10 the higher authority?

11 MR. SALES: Sorry, my Lord, ----

12 LORD JUSTICE MOSES: Sorry, it is my fault, 927 at H, the decision
13 not to stay but to refer the case to higher authority.

14 MR. SALES: Under the Army Act, I am being told from behind, it is
15 the next level of prosecutorial assessment.

16 LORD JUSTICE MOSES: So the headnote refers to higher authority,
17 is that the Attorney?

18 MR. SALES: I think it is not the Attorney but the equivalent of
19 the DPP within the army, but my Lord, ----

20 LORD JUSTICE MOSES: It may be the Advocate General.

21 MR. SALES: No, the Advocate General is a judge within the army.

22 LORD JUSTICE MOSES: Sorry, yes.

23 MR. SALES: My Lord, we think it is the army prosecuting authority
24 which is in fact a person and he fulfills a role equivalent to
25 the DPP in civil proceedings. My Lord, we have not quite

1 found the bit in the judgment which explains that but will
2 continue looking.

3 LORD JUSTICE MOSES: Somebody other than the commanding officer
4 said that for all the reasons and sanctioned by the Attorney
5 it is much better to have this trial in Germany because that
6 is where all the witnesses are, I think.

7 MR. SALES: Yes. I think that I am right in saying that the army
8 prosecuting authority, like the Director in this case and like
9 the DPP, operate subject to the superintendence of the
10 Advocate General.

11 LORD JUSTICE MOSES: Attorney General.

12 MR. SALES: Attorney General, forgive me.

13 LORD JUSTICE MOSES: There is no human right to trial by jury.

14 MR. SALES: No.

15 LORD JUSTICE MOSES: Still less basic human right to trial where
16 you are the son of an army corporal in the UK rather than in
17 Germany. So, Lord Lloyd is saying, well, what is the basis on
18 which this was said an unlawful decision?

19 MR. SALES: Yes, and what is significant in the passage I have
20 invited you to read is that he distinguishes the *ex parte*
21 Bennett case, if one looks at the 927 at F at the end of that
22 paragraph, "in that case there had been a deliberate abuse of
23 extradition procedures". There is nothing of that kind in the
24 case that we are looking at, Marten, but also, in my
25 submission, nothing of that kind arises in the current context

1 either. The reason that I am going to this is to show the way
2 in which the House of Lords itself has interpreted the
3 operation of the Bennett principle.

4 LORD JUSTICE MOSES: What it looked at and then there was the
5 Hong Kong case, something, I think it was Lord Lowrie that
6 offends the conscience of the court.

7 MR. SALES: Yes, absolutely.

8 LORD JUSTICE MOSES: To steal, to kidnap somebody to get in before
9 the court, the courts had to do something about.

10 MR. SALES: Yes, and offends the conscience of the court in a very
11 specific way with a high threshold. So, for example, in the
12 Mullen case that my learned friend also referred to, there was
13 a deliberate effort to avoid ordinary extradition procedures
14 in Zimbabwe.

15 LORD JUSTICE MOSES: Well, a deliberate breach of the law. I mean
16 you have expedition treaties and they are brought into force
17 under domestic law and there is the deliberate defying of
18 them.

19 MR. SALES: Deliberate defying of them by the state agents where
20 it is the state which is then seeking to bring the prosecution
21 arising out of its own deliberate disregard of the law. That
22 is the context in which the Bennett principle and the Mullen
23 principle arises. My Lord, the only reason that I am going to
24 these cases is to distinguish them from the present case
25 because my learned friend seeks to rely upon them and say,

1 well, these cases demonstrate the principle that she needs to
2 rely upon for the purpose of construction of the ----

3 LORD JUSTICE MOSES: I think she just relies upon it to show how
4 astute the court must be to protect the authority of the law.
5 The rule of law does not, as you have been at pains to point
6 out, tell you what the content of the effect of that is. I
7 think she only relied upon it for the limited purpose of
8 showing how responsible all lawyers are for protecting it.

9 MR. SALES: Yes. My Lord, I go to them then for the purpose of
10 showing what they are actually about which was to prevent
11 abuse by the state consisting in deliberate disregard of the
12 law in order to bring someone to a criminal prosecution. That
13 is the feature of Bennett which is emphasized in Marten and,
14 in my submission, that is the true ratio of the case and it
15 has nothing whatsoever to do with the topic under discussion
16 in these proceedings.

17 My Lord, so far as control of administrative action is
18 concerned, this is paragraph 41 of our skeleton, relevant
19 aspects of the rule of law are reflected in Lord Bingham's
20 formulation in the rule of law but not in the way that my
21 learned friend suggests. My Lords, since we have set them
22 out, the bundle reference is F, tab 8 and I think it is
23 page 78 that these come from but since they are set out here I
24 wonder if I could invite the court to cast their eye over
25 that.

1 LORD JUSTICE MOSES: Yes (Pause) Yes.

2 MR. SALES: In my submission these points precisely encapsulate,
3 if I may respectfully say so, the answer I gave to my Lord
4 when he taxed me with how the rule of law should operate in
5 the context of this case. The answer I gave was that the rule
6 of law will be fully satisfied by this court construing
7 Section 1 of the Criminal Justice Act and if it determines
8 that the Director has misdirected himself by reference to that
9 statutory provision as properly construed by this court and
10 has, in consequence of doing so, improperly taken into account
11 matters which were not lawful matters for him to take into
12 account, the court will quash his decision. That is what the
13 rule of law requires and my client fully subscribes to it, she
14 says that that is what the court should do.

15 What, of course, it calls into question is whether the
16 Director has misunderstood the proper legal effect of
17 Section 1 of the Criminal Justice Act. The point that I seek
18 to emphasize is that a mere appeal to the rule of law does not
19 supply the answer to that question. That is a question of
20 statutory construction of general language which confers a
21 wide discretion upon the Director, subject to any operation of
22 the principle of legality on which I have made my submissions
23 already.

24 The principle of legality operates, as we know, where
25 you have statutory provisions which purports to oust the

1 jurisdiction of the court. If there was an ouster clause in
2 the Criminal Justice Act that said that the courts could not
3 judiciously review any decision of the Director, that would be
4 a clause which would be read subject to the rule of law as
5 properly understood and explained by Lord Bingham and that, we
6 know, is precisely what the courts do do when faced with
7 ouster clauses. They read them down in precisely that way so
8 as to preserve the judicial review jurisdiction of the court.

9 My Lords, in my submission, when one is debating the
10 rule of law in the present context one needs to identify with
11 precision what it is that is said to be the rule of law which
12 now qualifies the interpretation of Section 1 of the Criminal
13 Justice Act. In my submission ----

14 LORD JUSTICE MOSES: I think one is sort of missing the point if
15 one talks about the context of it or may be. The rule of law
16 says that it must be respected, it must be protected. One has
17 all different examples like the third rule and the sixth rule,
18 the effect when it is not. The primary thing is what is
19 necessary in order to protect it?

20 MR. SALES: My submission is that it is not, with respect, to miss
21 the point to concentrate upon what the content of the rule of
22 law is in the present context. This case is precisely, in my
23 submission, about how Section 1 of the Criminal Justice Act
24 should be interpreted ----

25 LORD JUSTICE MOSES: It may or may not be ----

1 MR. SALES: ---- having regard to that principle.

2 LORD JUSTICE MOSES: What is perturbing me is, whatever its
3 content if it yields to threats the danger is unless it is in
4 confined circumstances when it has to, you say here the
5 threat, risk of life assessed to real and imminent, unless it
6 is limited in that way it is actually the antithesis of the
7 rule of law because you cannot have the rule of law if it is
8 susceptible to threats, to fear. That is what I think is
9 being said against you and your answer to it, as I understood,
10 was but of course it can in circumstances where the threat to
11 life is so imminent and real.

12 MR. SALES: My Lord, my submission is wider than that. It is that
13 the prosecutorial discretion when one comes on to look at the
14 code for Crown prosecutors and to look at the cases, the
15 prosecutorial discretion is very wide as is emphasized by the
16 courts and is capable of allowing prosecutors to have regard
17 to a very wide range of factors bearing upon a general public
18 interest assessment whether prosecution should be brought or
19 not.

20 MR. JUSTICE SULLIVAN: Looking at Lord Bingham's formulation,
21 however wide the power it has to be exercised for the purpose
22 for which it is conferred. I suppose the real question in
23 this case, stripping aside all the abstract points is, could
24 Parliament really have conferred this wide discretion on the
25 Director so as to enable him to succumb to unlawful threats?

Transcript prepared without access to case documentation.

1 MR. SALES: Well, my Lord puts it in terms of ----

2 MR. JUSTICE SULLIVAN: I am so sorry, where he himself believes
3 the prosecution or an investigation jolly well ought to
4 continue, it is perfectly clear he said. Someone comes along
5 and makes an unlawful threat to him and says if you do that,
6 this will happen. Can Parliament really have conferred a
7 discretion on him to enable him to say, OK ----

8 MR. SALES: My Lord says it is an unlawful threat. Two points on
9 that. First of all we are looking at what Saudi Arabia has
10 done. My Lord ----

11 LORD JUSTICE MOSES: I thought it was issued in the
12 United Kingdom. The threat was issued in the United Kingdom,
13 was is not?

14 MR. SALES: I do not know where my Lord took that from. When I
15 say an lawful threat ----

16 LORD JUSTICE MOSES: The man referred to who was called upon was
17 in the United Kingdom when he was called upon.

18 MR. SALES: My Lord, I will check the position.

19 LORD JUSTICE MOSES: You had better check in these documents
20 because the scenario that I saw was X marched in and spoke to
21 Y and Y was in the United Kingdom.

22 MR. SALES: My Lord, our case is that it is a threat from the
23 state. It is not an individual that is making this threat.
24 This is a threat by the Saudi Arabian state. It could not be
25 otherwise because, as my Lord has already put to me, we are to

1 proceed on the basis that this is a threat by a friendly power
2 and in relation to a matter of co-operation where the
3 circumstances of the co-operation are in the gift of that
4 power, not in the gift of individuals.

5 If I may swiftly return to seek to answer my Lord
6 Sullivan J on the question of lawfulness, the first point is
7 it is not accepted that what was being threatened was
8 unlawful, that is going to be part of my argument in relation
9 to the extent to which one gets into UN security council
10 resolution and the extent to which the courts may do so.

11 Secondly I go back to a point with which I opened my
12 submissions that the critical difference between cases of
13 unlawful threats of the kind in my respectful submission that
14 is a proper use of the term, as my Lord puts to me, for
15 instance, the Phoenix Aviation case, is that you are dealing
16 with threats which arise completely within the control of the
17 state where I would accept that where the state is in a
18 position itself to take action to control those threats it may
19 do so. The courts will expect the ordinary processes of the
20 state, the police and so on to do precisely that, but we are
21 not dealing that situation.

22 When one goes back to the question of what Parliament
23 must be taken to have intended, in my submission the question
24 is what should Parliament be taken to have intended where you
25 have a threat, query lawful, one, in my submission, is not

1 entitled to make that assessment and I will be making that
2 submission in due course ----

3 LORD JUSTICE MOSES: Sorry, which assessment?

4 MR. SALES: Query whether the threat made by Saudi Arabia is
5 lawful, I will be making the submission that it is not for
6 this court to make an assessment of that. What you have is a
7 threat made by a foreign power which can be seen to bear
8 directly upon the national security interests of this country.
9 Is that a matter which Parliament must be taken to ----

10 LORD JUSTICE MOSES: Sorry, somebody made a noise.

11 MR. SALES: Is that a matter which Parliament must be taken to
12 have intended to exclude from the consideration of the
13 Director or any prosecutor when considering the public
14 interest test in relation to whether a prosecution should be
15 brought. That is the true nature of the question as a matter
16 of law.

17 LORD JUSTICE MOSES: There is a secondary question, even if it is
18 effectively taken into consideration, whether the conclusion
19 was, however you dress it up, irrational.

20 MR. SALES: Well, so far as that is concerned that is put at a
21 high level of generality. My learned friend has her points on
22 irrelevant matters taken into account.

23 LORD JUSTICE MOSES: Yes, that is what I meant by it.

24 MR. SALES: I am not seeking to say the point that I am on opens
25 and closes the domestic law case, I am not seeking to say

1 that.

2 LORD JUSTICE MOSES: This is obviously the first, this is the
3 highest level.

4 MR. SALES: My Lord, if I may say so, identified this as perhaps
5 the most fundamental issue in the case the last time we were
6 here, and it is because, for reasons that I have already
7 given, if my learned friend is right on the proper
8 construction of Section 1 of the Criminal Justice Act, well,
9 that is an end of it. Let the sky fall. There must be an
10 investigation. It is not open to the Director to decline to
11 go forward with it. I have run on a little bit, I apologize.

12 LORD JUSTICE MOSES: No, it is very interesting.

13 MR. SALES: My Lord, I think we are doing very well on time.

14 LORD JUSTICE MOSES: I think we are. I mean, what about ten
15 o'clock?

16 MR. SALES: Yes, ten o'clock, I actually feel comfortable at 10.30
17 but that may be a little ----

18 LORD JUSTICE MOSES: Let us say 10 o'clock to allow for my Lord to
19 intervene, as he has so often throughout the day! Thank you
20 very much.

21 (Adjourned till 10 o'clock tomorrow morning)

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