In The House of Lords

ON APPEAL

FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION OF HER MAJESTY'S HIGH COURT OF JUSTICE (ENGLAND AND WALES)

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

BETWEEN:

THE QUEEN

on the application of
CORNER HOUSE RESEARCH and CAMPAIGN AGAINST ARMS TRADE

Respondents

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Appellant

-and-

BAE SYSTEMS PLC

Interested Party

-and-

JUSTICE

Intervener

CASE FOR THE INTERVENER

INTRODUCTION

1. This is the printed case submitted on behalf of JUSTICE, which has been given permission to intervene in writing. JUSTICE was founded in 1957 as an independent human rights and law reform organisation. Its 1957 Constitution declares that it was founded 'to uphold and

strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible: in particular, to assist in the administration of justice and in the preservation of the fundamental liberties of the individual'. It is the British section of the International Commission of Jurists.

2. As a third party intervener, JUSTICE does not seek to address the particular facts of this case nor all of the issues arising from it. Instead, its submissions focus upon the paramount importance of the rule of law in the exercise of prosecutorial discretion (specifically to halt a criminal investigation in response to a threat) and the proper weight to be given to the UK's obligations under international law in that context.

3. For JUSTICE, the central concern in the domestic part of the appeal is the content of the rule of law in circumstances where a prosecutor surrenders to a threat made by a person outside the control of the courts or public authorities of the United Kingdom – Issues 1 and 3 in the Statement of Facts and Issues **[65]**. These issues proceed on the basis that there is "no alternative course open to the prosecutor".

4. Accordingly, this written case is divided into two parts. The first Part addresses the domestic legal principles by which the legality of a prosecutor's decision (in this case, that of the Director of the Serious Fraud Office ("Director" and "SFO")) should be assessed. The second part addresses the relevant international obligations at issue, in this case, the OECD Anti-Bribery Convention ("the OECD Convention").

5. Moreover, JUSTICE remains ready to assist Your Lordships House in any way that Your Lordships, having considered these submissions, may subsequently direct, including attendance at the hearing.

PART I: THE DOMESTIC ISSUES

6. This case raises two issues of profound importance:

(1) when, if ever, is a prosecutor justified in law in arriving at a decision he or she would not have reached but for the fact that a third party has threatened to do some act unless that decision is taken?

(2) is the analysis of this question materially altered by the fact that: (a) the party issuing the threat is a sovereign state; or (b) the threat has ramifications for national security?[1]

7. In the present case the Director decided that:

(1) He would not discontinue the investigation into the activities of BAE Systems Plc ("BAE") on merits grounds (1st w/s Wardle at [41]) ("the Merits Decision"); but

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(2) It was not in the public interest to continue with the investigation as "*continuing the investigation risked real and imminent damage to the UK's national and international security and would endanger the lives of UK citizens and service personnel*" ("the Discontinuation Decision"). (*ibid*, at [42]).

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Indeed, his Discontinuation Decision was explained as being one in which "*It has been necessary to balance the need to maintain the rule of law against the wider public interest*". Ultimately, the Director concluded in 1st w/s Wardle at [50] that: "*the threat to the UK's national and international security to be of such compelling weight that it was imperative that I should halt the SFO investigation at this point, in the public interest. It was this feature of the case which I felt left me with no choice but to halt the investigation…*" (emphasis added). In those circumstances, but for the threats being

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[1] This is the factual basis upon which the Divisional Court approached the case. JUSTICE does not think it appropriate, given its limited role as intervener, to enter the fray as to whether or not that factual assessment is in fact correct.

made by the Saudi authorities (and the feared consequences of those threats, if carried through), it is clear that the Director would have continued the investigation against BAE.

8. In the interests of consistency and clarity these submissions refer to this combination of pressure and demand as a "threat" and to autonomous or free-standing hazards posed to the security of United Kingdom as "risks" or "dangers".[2]

9. JUSTICE suggests that these are questions upon which little authority bears directly save for ***R v Coventry City Council, ex parte Phoenix Aviation*** [1995] 3 All ER 37 ("***Phoenix Aviation***") and ***Sharma v Brown-Antoine*** [2006] UKPC 57 [2007] 1 WLR 780 ("***Sharma***"). But JUSTICE believes that these questions can and should be answered largely by considering high-level legal principle.

10. JUSTICE will contend, for the reasons more fully set out below, that in the present case:

    (1) The rule of law, and in particular the principle of equality before the law, requires there to be both general and context-specific controls over prosecutorial considerations. Whilst it is appropriate for the Court to accord a very wide latitude to prosecutorial decisions about the weight of evidence or particular case-specific factors prevailing in any case, it does not follow that similar latitude is to be afforded in all cases where broader public interest considerations are invoked to justify non-prosecution of a viable charge: see section (a) below.

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[2] The Director's written case and evidence refers to what are in truth "risks" as "threats" (see e.g. 1st w/s Wardle at [40] referring to the "real threat to UK lives") and what are in truth "threats" as "risks" (see e.g. 1st w/s Wardle, at [40] referring to "the risk that Saudi Arabia would withdraw its cooperation", [48]). This leads to confusion between the two matters which JUSTICE submits are in truth quite distinct, albeit related (in that a party making a threat may not in fact carry it out). In particular, where a party intimates (by whatever means) that a consequence/pressure will happen if a certain course of conduct is taken, such is in truth an implied threat: see, for instance, the reference at 1st w/s Wardle [38] to "warnings".

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(2) Although it may be possible to draw a distinction between lawful and unlawful threats in other administrative contexts (e.g. a threat to strike), no such distinction is possible in the context of prosecutorial decision. Any threat directed at a prosecutor in the exercise of his discretion to prosecute is unlawful.[3] (Moreover, a threat directed at a criminal investigation generally must be taken to be a threat to the prosecutor per se, even if it is not addressed to him). It follows that any prosecutorial decision taking account of such a threat is necessarily unlawful, because any unlawful threat is a necessarily irrelevant consideration. Any decision acceding to the threat, because it is perceived to be one of such seriousness as to leave the prosecutor with no rational choice but accession to it, is also one that impermissibly delegates decision-making power. Where unlawful threats or unlawful pressure are suspected (still more where they are admitted) then particularly intense judicial scrutiny is warranted, for such is the appropriate judicial response to any factor threatening to compromise the rule of law or any other constitutional principle: see section (b) below.

(3) No different principles apply simply because the party making the threat is a sovereign nation. See section (c) below.

(4) There is no "defence" of necessity or duress to justify otherwise unlawful prosecutorial conduct. Such a defence may be available to a prosecutor operating *bona fide* under a threat from a claim of misfeasance or from any of the number of criminal pressures that potentially lie against public officials deliberately misusing their powers. But even the successful raising of such a defence would itself be incapable of rendering the coerced decision lawful: see section (d) below.

[3] JUSTICE doubts that it is helpful when analysing the content of the rule of law, to attempt some distinction between "unavoidable submission" and "an unlawful surrender" (Issue 2).

(5) But it does not follow that the Courts are bound to grant relief to the applicant in every case where a prosecutorial decision was unlawful because it was found to be coerced. General recourse to considerations of "public interest" may not justify what is clearly unlawful but those considerations may give rise to persuasive grounds to refuse to grant relief against the unlawful decision (or to stay the question of relief generally). Thus if satisfied that a prosecutor indeed had no other option to him but to discontinue the prosecution (having applied a high degree of scrutiny, in view of the circumstances of the decision) the Court may simply pass judgment identifying the illegality of the decision: see section (e) below.

(6) Because decisions taken in such circumstances are necessarily unlawful the prosecutor is obliged to come to Court so that: (a) such unlawful decisions are identified; and (b) there can be judicial scrutiny of the case to ensure that there is in fact no alternative course of lawful action available (or no decision-maker that can operate free from the threat). Where there is no interested party such as the respondents willing to assume the burden of testing the lawfulness of the decision in question, the Court should appoint an advocate to the Court, to protect the public interest by ensuring the point is properly ventilated: see section (f) below.

(7) Applied to the present case, the above principles show that the threats made by Saudi Arabia were unlawful. The Director's Discontinuance Decision plainly turned upon those threats. Had they not been made and taken into account, the prosecution of BAE would have continued. There was no national security threat independent of such threats. The fact that the Director felt he had no choice but to accede to them is not an indicator of his independent choice, but rather a rational recognition of the fact that the effect of the threat had operated to take the real choice out of his hands. The precise relief that the Court feels it

appropriate to grant is matter of argument between the parties: see section (g) below.

(a) Prosecutorial discretion and the rule of law

11. The Director contends at §§28(1) and 30 of his Printed Case that consideration of the rule of law "adds nothing" to the legal analysis appropriate in the present case. On the contrary, JUSTICE submits that – where threats have been uttered against the integrity of the criminal justice system – respect for the rule of law requires more than mere conformity with the law governing administrative decision-making. The rule of law has substantive as well as procedural components, two of which are of particular relevance for the present case.

12. First, the rule of law requires the legal boundaries of powers and duties to be respected by those upon whom powers or duties have been conferred. Duties must be performed according to their terms. Powers must only be used for the purposes for which they were conferred. In particular, discretionary powers are to be exercised in accordance with:

(1) express Parliamentary limitations placed thereon, either directly (by the relevant Act itself) and indirectly (e.g. by another constitutional Act such as the European Community Act 1972 or the Human Rights Act 1998);

(2) common law constraints, such as the court-made principles of fairness, rationality and legality. Such common law constraints are themselves the distillate of judicial reasoning itself premised upon a rule of law analysis. JUSTICE contends that the principles embedded in core value attached to the rule of law continue to inform how the common law will, in general, approach questions of legality and which factors it will identify (in the absence of Parliamentary stipulation) as legitimate or illegitimate consideration for the decision-maker.

13. Secondly, the rule of law requires the Courts to safeguard the general principle of equality before the law and, thereby, the integrity of the law itself. Since the abolition of the excesses and arbitrary power of the Star Chamber and the absolute monarchy effected by the events leading to and culminating in the English Civil War, English courts have consistently and jealously protected the principle that all subjects are equal before the law and none shall enjoy special immunity from the law. It is of particular importance that the equal application of the law should not be subverted by threats or corruption, and nowhere is this principle of integrity more important than in relation to the criminal law. All citizens should be subject to the same criminal laws; the application and enforcement of such laws to such citizens should be blind as to race, creed, politics, wealth, power, friends or other forms of influence.[4]

14. JUSTICE cannot improve the summary of such principles in §14(1) and (2) of Lord Bingham of Cornhill's speech for the Appellate Committee of the Privy Council in *Sharma v Brown-Antoine* [2007] 1 WLR 780 where he stated:[5]

> *"(1) The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed.*
>
> *(2) It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional*

[4] The image of blind justice weighing all in its scales is a powerful emblematic embodiment of this principle. It has a particularly powerful resonance in the criminal context, being the statue atop the Central Criminal Courts. It is also, uncoincidentally, JUSTICE's logo.

[5] The balance of the dicta in *Sharma* need to be read in context and with care. The case concerned a challenge to a decision to prosecute, rather than a refusal to prosecute. Defendants are afforded a number of other "in trial" safeguards that adequately protect their interests, such as the ability to apply to dismiss on the evidence, the ability to apply for the quashing of an indictment as being flawed in law (as in the recent *Norris/GG* litigation before the House of Lords), and right to apply for a stay on grounds of abuse of process. For these reasons challenges to decisions to prosecute truly should be exceptional, as much for reasons of deference to the trial judge as the appropriate tribunal before which to advance such arguments.

> *judgment on the facts of each case. It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted. Those suspected of terrorism, hijacking or child abuse are obvious examples. This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecutions do not allow their awareness of political or public opinion to sway their professional judgment. It is a grave violation of their professional and legal duty to allow their judgment to be swayed by extraneous considerations such as political pressure."*

15. Both of these rule of law principles have hard-edged corollaries. In the case of the first principle, that of adherence to legal duties and powers, the corollary is the requirement for effective judicial scrutiny, as demonstrated by the well-known hostility of the common law and/or judiciary to Parliamentary or executive attempts at ouster of judicial review or other forms of judicial scrutiny. This reflects the fact that ouster is considered unconstitutional precisely because it seeks to prevent the Courts ensuring that executive powers are exercised in accordance with the rule of law.

16. In the case of the second principle, the corollary is and must be equivalent judicial scrutiny of anything that is or might be a departure from the principle of equality before the law, or otherwise impugn the integrity of the law itself. In particular, it is well-established that courts have an inherent jurisdiction to protect what Lord Steyn in *R v Latif* [1996] 1 WLR 104 called "*the public interest in the integrity of the criminal justice system*" (p 113), whether by staying trials for an abuse of process, barring the use of evidence obtained by torture, or by punishing for contempt of court. JUSTICE submits that role of the courts is not limited simply to preventing positive misuse (e.g. by way of a wrongful prosecution) but extends also to ensuring that decisions not to prosecute do not themselves undermine "*the integrity of the criminal justice system*". It is not enough that the courts "*not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained*" (*A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 per Lord Hoffman at §86). The courts must be mindful, too, of the potential for unlawful

acts and decisions that may prevent prosecutions from being brought in the first place.

17. Potential conflict with the principle of equality before the law can arise from two sources:

(1) legislation/executive action that is targeted at one group over another. In our modern legal system such problems are typically addressed using applicable specialist discrimination law (whether Article 14 ECHR read with other Convention rights, EC discrimination law or common law principles of equality); and

(2) legislation/executive action that provides a power to dispense or immunise an individual (whether formally or informally) from the ordinary application of the law. In short, there should be no special treatment of a particular person that is not rationally, consistently and fairly related to the facts of their case.

Of course, where such dispensation or immunity is granted on a discretionary basis, and especially where wrought by threats or other unlawful pressure, then such a decision engages the rule of law on two planes.

18. Any system adhering to the rule of law should, for this reason be particularly concerned about immunities (whether formal or *de facto*) from the ordinary reach of the criminal law. JUSTICE submits that courts must give particularly anxious scrutiny to any claim for such immunity,[6] for it is otherwise a demand for the disapplication of the

[6] One of the very few areas where limited immunity from the criminal justice system is generally recognised is in the field of diplomatic relations. Diplomatic immunities are governed by exhaustive Treaty law: for instance those of diplomats (as opposed to consular officials) are covered by the relevant Vienna Convention, as comprehensively implemented by legislation such as the Diplomatic Privileges Act 964. Even then such personal immunities are very limited (being immunity from arrest alone) and merely temporary or suspensive in effect – the immunity terminates with the ending of diplomatic status, such that the individual may be prosecuted for an offence committed whilst a diplomat. Beyond this area domestic and/or international law neither demands nor recognises any claim to a personal immunity from a state's law based upon the exigencies of international relations.

law. Exceptions of this kind can only be justified by reference to some other aspect of the rule of law (e.g. the protection of another fundamental right or the maintenance of some public good), and only if granted in accordance with the rule of law. To this end, such immunities (or powers to grant immunities) must be clearly and expressly conferred by legislation and, where discretionary in nature (as with, say, immunity granted to competition whistleblowers under s.190(4) of the Enterprise Act 2002) such immunities must be based upon clear and predictable criteria (legal certainty being the relevant governing principle of the rule of law). The granting of an immunity by a prosecutor in response to a threat meets neither of these criteria.

19. Prosecutors may weigh many factors in considering the decision to prosecute and, most often, these will be the types of factor that prosecutors are best placed to assess in the circumstances of the particular case: e.g. the vulnerability of a witness, the state of the available evidence, the amount of resources a particular investigation is likely to involve. That is not to say there is no role for judicial review where the challenge is mounted on a basis other than erroneous judgemental appraisal. The Court must continue to ensure, for instance, that a prosecutor understands the relevant law[7] and/or does not mount a prosecution that contravenes some legal right or standard.[8] As explained in Section II below such relevant law may include relevant public international law.

20. However, wherever a case has passed the evidential threshold, then the extent of a prosecutor's discretion to discontinue prosecution for general public interest considerations is context-specific and must be variable depending upon the nature of the public interest and its consequences:

[7] As where a prosecutor has a policy of not prosecuting in the mistaken belief that the constituent elements of the offence are A, B and C, whereas in fact they are X, Y and Z.

[8] E.g. a prosecution in breach of the guarantees contained in Article 6 ECHR (as was contended in ***R(Kebilene) v DPP*** [2000] AC 326, a challenge rejected because there was no breach and/or because there was a remedy in the criminal process), or for an offence which is contrary to Community law (as in ***R v Kirk*** [1985] 1 All ER 453) are examples.

(1) First, factors that may be relevant and weighty in one context are potentially unlawful or irrelevant in others. For instance, a non-prosecution decision may be taken as to what is the "public interest" from a purely national perspective in one context, but in another case (because the offence at issue implements a European law obligation, say a Directive, requiring an effective criminal pressure) such a purely domestic (as opposed to Community) perspective is impermissible.

(2) Secondly, and more fundamentally, certain putative criteria are obviously generally impermissible and where suspected call for anxious scrutiny of the prosecutorial decisions. This must be particularly so when the putative public interest competing with prosecution is one that contravenes the rule of law. Even before recent equality legislation it would have been the case that a (non-)prosecutorial policy that was racially discriminatory would be unlawful. It is inconceivable that the Courts would accord any wide latitude to the Director or other prosecutors to introduce a policy of that kind. No doubt it is for precisely such reasons that the Code of Practice for Crown Prosecutors ("COP") notes at §2.2 (emphasis added):

> *"Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions. <u>They must not be affected by improper or undue pressure from any source</u>."*

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(3) Thirdly, insofar as it is permissible to undertake any balance between the public interest in prosecution and that in discontinuance, it is plain that the nature and type of offence at issue is of considerable importance: see paragraph 5.9 COP. To this end, it is not without significance that the Code of Crown Prosecutors states in its section dealing with corruption offences:

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> *"Bribery and corruption are extremely serious offences, which strike at the heart of public confidence in administrative and judicial affairs. This factor alone will weigh heavily when considering the public interest in prosecuting and a prosecution will be expected unless exceptional factors apply."*

JUSTICE wholly concurs. Precisely the same logic and reasoning must also apply to like threats directed at administrative and judicial affairs. For instance, the personal blackmail of a judge is an aggravated blackmail on identical grounds. It is because these forms of wrongdoing threaten the rule of law, in particular the essence of the principle of equality before the law, that they are such serious matters.

(4) JUSTICE would submit that such is the modern, principled underpinning for some of the instinctive dicta in cases such as *R v Commissioner of the Metropolitan Police, ex parte Blackburn* [1968] 2 QB 118. A general policy on the part of the police not to enforce a particular law, with no countervailing public interest (other than, say, convenience), is obviously bad and unlawful. Were a prosecutorial policy approached in such a way, it would also be unlawful. But competing public interest justifications, such as the need to budget for the allocation of scarce resources, may justify partial or non-enforcement: see e.g. *R v Chief Constable of Sussex, ex parte International Ferry Traders* [1999] 2 AC 418 ("*ITF*"). Similarly, JUSTICE accepts that in an appropriate case general considerations of public interest may justify non-prosecution of even the most serious crimes. For instance, the decision not to prosecute an individual against whom there is compelling evidence of serious criminality (e.g. participation in terrorism-related offences) may be justified by reference to the fact that the source of the evidence is classified material, and any trial would inevitably

lead to its public disclosure which would, in turn, seriously compromise national security.[9]

21. JUSTICE would submit these three distinct categories of factor are of real significance in analysing the true meaning and scope of the cases on prosecutorial discretion. The authorities relied upon by the Director is at §12 of his Printed Case largely concern evidential challenges:

(1) *R v DPP, ex p C* [1995] 1 Cr APP R 136 was an evidential case, concerning a decision not to prosecute because of a mistaken treatment of the case as consensual as opposed to non-consensual buggery. The decision not to prosecute was quashed for failure to take into account a relevant consideration. *R v DPP, ex p Manning* [2001] 1 QB 330, the authority seen as being the leading case in the field, was an evidential threshold case. The challenge was to a conclusion that the evidence did not justify prosecution. The oft-cited dictum of Lord Bingham of Cornhill CJ at [23] must be viewed in that context, as the contents of that passage make expressly clear. Likewise, *R(Da Silva) v DPP* [2006] EWHC 3204, a case concerning the refusal to prosecute the police officers responsible for the unlawful shooting of Mr de Menezes in Southwark Tube Station, was also an eventual threshold case: see [18]-[19].

(2) It is perhaps for this reason that Buxton LJ commented in the Divisional Court in the case of *R v DPP, ex p Jones* [2000] IRLR 373 (Buxton LJ in the Divisional Court) that:

> "*25. … There are significant limits on the extent to which this court can intervene in respect of a decision of this type*

[9] Cases truly falling in this category are narrower than may be supposed. So long as intercept evidence is inadmissible in law, such cases fail for evidential reasons. Cases where evidence cannot be relied upon without exposing a source to danger are also in fact evidential cases, because Article 2 ECHR may render unlawful any decision to tender evidence exposing the identity of a source. The cases truly falling within the national security exception are probably most frequently those involving non-vulnerable sources (typically states) whose co-operation would cease with publication of the material supplied and "secret methods" exceptions (i.e. where revealing the materials would reveal sensitive information about how they had been obtained).

taken by the Director. Although, as was properly agreed, the test remains that of the ordinary judicial review jurisdiction, clear guidance has been given in earlier cases as to the way the court should approach that jurisdiction. In particular, we were taken, amongst other cases, to R v Director of Public Prosecutions, ex parte C [1995] 1 Crim. App R and the observations at page 139G of that report. Intervention should be "sparing" and only on the grounds of (a) unlawful policy, (b) failure to act in accordance with policy and (c) perversity.

26. We have, of course, given very careful regard to that guidance and to similar guidance in other cases. We have to say, however, that those warnings seem to us to have been largely or mainly directed at concerns about the weight that should have been given to certain elements of the evidence, the assessment of weight of evidence being plainly a matter of professional judgement with which this court would be very unlikely to interfere. But, as Mr Turner QC who appeared for the Director properly agreed, none of the statements in earlier authorities can have been intended to exclude from this court's consideration other fundamental aspects of the judicial review jurisdiction, for instance, as at least potentially relevant to our present case:

(1) has the decision-maker properly understood and applied the law?

(2) has he explained the reasons for his conclusions in terms that the court can understand and act upon? and

(3) has he taken into an irrelevant matter or is there a danger that he may have done so?"

(3) *R (Birmingham) v SFO* [2007] QB 727 was a slightly different case which concerned the unsuccessful attempt to force the SFO to adopt what were, in effect, principles of *forum conveniens* as to the proper place of prosecution (UK or US?), in circumstances where there was no doubt that the Defendants should be prosecuted in one jurisdiction. It has no bearing on the present case.

(4) *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 concerned the amenability of a *nolle prosequi* decision to judicial review (in circumstances where the DPP was contending no such challenge was possible): see [13]. The paragraph the Director quotes, [18], was in fact cited as being

"the essence of the appellant's argument" under a section headed "The argument". It is not *ratio*. The ratio of the Board is found in [21] which says no more than that such prosecutorial decisions are amenable to judicial review, whilst endorsing the case of *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 ("*Matalulu*") (a decision of the Supreme Court of Fiji) as "*an accurate and helpful summary of the law as applicable in Mauritius*" (no doubt by reason of the similarity of their constitutional provisions). Notably, the Board did not grapple with the underlying merits in any fashion.

(5) The Director cites and runs together two passages from the *Matalulu* decision in his submissions. But the passage omitted between the quotes throws a somewhat different light upon the Court's reasoning. The passage in full (the bold being that omitted) reads:

> *"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.* ***This approach subsumes concerns about separation of powers.***
>
> ***The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:***
>
> ***1. In excess of the DPP's constitutional or statutory grants of power— such as an attempt to institute***

proceedings in a court established by a disciplinary law (see s 96(4)(a)).

2. ***When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review.***

3. ***In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.***

4. ***In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.***

5. ***Where the DPP has fettered his or her discretion by a rigid policy— e.g. one that precludes prosecution of a specific class of offences.***

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. *But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."*

JUSTICE submits that seen as a whole the approach of the Court in *Matalulu* is a carefully balanced but non-exhaustive one. The Court's reference to "great width" is a recognition of the prosecution's wide discretion when dealing with evidential issues or with issues that turn upon the particular personal circumstances of the accused: see paragraph 19 above. The Court is careful to emphasise the great difficulties in any ordinary challenge to a prosecutorial decision (of the kind epitomised by *Manning* or *Da Silva*). It justifies such a reserved approach on the principle of separation of powers (as Courts dictating, by

reference to the merits, which cases should be brought to them poses a distinct threat to the rule of law) whilst indicating that it is aware of some obvious, non-exhaustive exceptions to such a doctrine of principled restraint. But it does not follow that the normally "great width" of prosecutorial discretion is immutable or of equivalent width when dealing with a proposal to take a course of action that is problematic from the perspective of the rule of law. Yet, these exceptions are obviously premised upon the rule of law. Exception 2 is particularly notable for present purposes. It encompasses decisions tainted by political persuasion/instruction or the decision-maker acting under "*the direction or control of another person*". Such features are very strongly analogous to a decision-maker acting pursuant to an overbearing threat.

(b) Threats to the exercise of prosecutorial discretion

22. Secondly, JUSTICE submits that it is necessary to distinguish between lawful and unlawful threats, before going on to consider whether, in the specific context in which the Director operates, threats to him can ever be lawful.

23. An example of a lawful threat can easily be illustrated by analogy to industrial relations. The threat of or effect of a strike may bring pressure of such magnitude to bear upon an employer as to compel it to accede to the striker's demands. Yet the striker's right to demand more pay is, as a matter of general principle, legitimate as is the ability to threaten to withdraw labour; and it is equally legitimate for a public-sector decision-maker threatened with such withdrawal to decide to award more pay.

24. In such contexts, the law may nonetheless regulate the legality of both the demand and the pressure. For instance, the pressure may be controlled by legislation: imposing conditions as to how a strike may be lawfully called for; limiting lawful picketing; and/or applying "no strike" rules to particularly sensitive industries/sectors where

continuity of work is vital. Similarly, the demand may be controlled, for instance: by requiring pay deals to have a certain duration (to give continuity) or to have certain form; by capping the pay permissible and so forth; or by imposition of budgetary discipline or limits.

25. Against the backdrop of such regulation of demand and pressure by the law, it would be unlawful (as a matter of administrative law) for a public decision-maker: (a) to take account of an unlawful pressure or to accede to it; or (b) to grant an unlawful demand. In short, JUSTICE submits that:

(1) if either the pressure or the demand is unlawful there will be a unlawful threat; and

(2) an unlawful threat may not lawfully be taken account of or acceded to.

26. To this end there is a direct parallel with the crime of blackmail (now contained in s.21 of the Theft Act 1968, which replaced similar offences in the various Larceny Acts) which criminalises the making of an unwarranted demand with menaces (i.e. the threat of pressure, whether lawful or not).

27. That such unlawful threats are impermissible considerations for decision-makers generally, is borne out by the case-law. None of the case-law tolerates the notion that a decision-maker can: (a) take account of or accede to an unlawful threat or pressure; or (b) accede to any form of pressure (lawful or otherwise) in order to do what is unlawful. Instead it must do all in its powers to resist. Thus:

(1) In *R v IAT, ex parte Singh* [1986] 1 WLR 910, a case concerning the relevance of certain wider public interest considerations taken into account by the immigration adjudicator, Lord Bridge commented at p.919 as follows:

> *"Mr. Laws, in the course of his argument, asked rhetorically where the line is to be drawn once the appellate authorities are permitted to cross the boundary which separates personal and private considerations affecting the person liable to deportation from public and political considerations affecting society at large. The latter, he submitted, are not within the competence of the appellate authorities and are matters which the Secretary of State alone is able to assess. To illustrate the argument, he took the example of threatened industrial action in the event of a particular individual being deported. The Secretary of State, he said, could consider it; the appellate authorities could not.*
>
> *The only matters which the law requires, or indeed permits, to be taken into consideration either by the Secretary of State or by the appellate authorities in deciding whether or not in any particular case to make a deportation order are matters relevant to the proper exercise of the statutory discretion. Extraneous threats to instigate industrial action could only exert an improper pressure on the Secretary of State and if he allowed himself to be influenced by them, he would be taking into account wholly irrelevant considerations."*

The case is a clear illustration of the fact that illegitimate pressure (i.e. that not lawfully and rationally linked to the decision in hand) is an illegitimate consideration.

(2) These points were illustrated most clearly by the situation facing the Court of Appeal in *R v Coventry City Council, ex parte Phoenix Aviation* [1995] 3 All ER 37 ("*Phoenix Aviation*"). The case concerned protests by animal welfare protesters outside ports and airports involved in the export of live veal calves (which were probably destined for veal crates abroad). The protesters were split between those protesting lawfully and unlawfully e.g. by the use of violence. In short, lawful and unlawful pressures were being used. The protesters' common demand was that the live veal calf export trade be stopped from the ports/airports concerned. One port and one airport barred the veal trade in response to the protests. Judicial review proceedings were brought against them by the affected traders. A third judicial review was brought by Plymouth City Council

to attempt to require its own harbour authority to ban the trade (again in response to protests). The lead judgment of the Court of Appeal was given by Simon Brown LJ (as he then was) who concluded first that the ports were ordinarily obliged to give access to all forms of lawful trade: see Question 1 at p.41D to E; and pp.50-57. Next, the learned judge considered the impact of the unlawful protest. He put the issue as follows at p.58:

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

Having reviewed authority he concluded at p.62:

> *"Even, however, if the port authorities are to be regarded as having a discretion to determine which legal trades to handle, then in our judgment they could not properly exercise it here in favour of this ban.One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated. Of course, on occasion, a variation or even short-term suspension of services may be justified. As suggested in certain of the authorities, that may be a lawful response. But it is one thing to respond to unlawful threat's, quite another to submit to them--the difference, although perhaps difficult to define, will generally be easy to recognise. Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour--this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role.*
>
> *Turning briefly to the present cases, all of them to our mind have one thing in common, a consideration that brings small credit to any of the three authorities concerned to bar this trade. None of them, it appears, gave the least thought to the awesome implications for the rule of law of doing what they propose."*

(3) Lord Slynn, in the linked, later *ITF* case summarised the distinct facts of *Phoenix* as follows at p.433-4:

> *"There a local authority (Coventry), the operator of an airport, suspended flights on aircraft transporting livestock; a harbour authority (Dover) refused to allow cross-Channel services for the export of live animals; in the third case a local authority (Plymouth) challenged the decision of a statutory body operating a dock not to ban the export of live animals. In all three cases what was relied on to justify imposing a ban was the activity and size of the disruptive protests. The Divisional Court held that none of the bans was lawful under the body's statutory power but each was, or would have been, unlawful. The authority had given in to unlawful threats. "None of them, it appears, gave the least thought to the awesome implications for the rule of law of doing what they propose." This was contrary to "the thread [which] runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups:" per Simon Brown L.J., at p. 62, with whom Popplewell J. agreed."*

In short, the *Phoenix Aviation* case was distinguished from the facts of *ITF* on the basis that there had been an accession to the unlawful demands of the protesters in *Phoenix* but such features were not present in the *ITF* case (where the Constable was conscientiously trying to control the protest, whilst acting within his budget). Nothing in any of the speeches suggested that, on that basis, *Phoenix Aviation* was viewed as anything other than correctly decided.

(4) Equally, in *R(L(A Minor)) v Governors of J School* [2003] 2 AC 633 Lord Walker plainly viewed with distaste the use of industrial action (lawfully agreed upon and undertaken), and the severe coercive effect it had, to persuade the head teacher of the school to adopt (in his discretion) special non-contact measures in relation to an allegedly violent pupil it had excluded, but whom the independent appeal panel had ordered should be reinstated. However, having drawn the analogy with *Phoenix Aviation* at [75] Lord Walker was persuaded that because the pressure (industrial action) and demand (the form of exclusion

in fact decided upon) were lawful, the decision could not be impugned.

(5) A public (or other) body threatened by an illegal pressure is entitled to (and, where appropriate must) call upon the police to use all lawful powers at their disposal to prevent such illegal behaviour, so as to remove the unlawful threat to the best of its ability. Thus, in *R v Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board* [1982] QB 458 the Court was astute to emphasise the unequivocal nature of the obligation of the police to uphold the law in such circumstances. Lawton LJ stated at pp.472 473:

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

How far the police may in fact be able to remove such threat may be a function of their resources (as the *ITF* case shows), but the proposition that they are under a duty (albeit not an absolute one) to address the threat cannot be doubted.

(6) Similarly, where the police have no criminal powers but the Courts do have civil powers (e.g. in the field of industrial relations, where the criminal law has largely been taken out of play) a public body threatened by unlawful (but not illegal/criminal) action should seek the assistance of the Courts (e.g. by obtaining injunctive relief and then, absent compliance, committal for contempt): see, by parallel, the case of *John Fairfax*

Ltd v Australian Postal Commission [1977] 2 NSWLR 124, cited in *Phoenix Aviation*.

28. That such principles carry over to a discretionary decision such as the Discontinuation Decision made by the Director is also clear from authority:

(1) In *Sharma v Brown Antoine* [2007] 1 WLR 780, Lord Bingham recognised at p.788A at [14(5)] that:

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

(2) As seen above, the Supreme Court of Fiji in case of *Matalulu*, relied upon by the Director (and cited with approval by the Privy Council in *Mohit*) made much the same observation.

(3) It is impossible to see why *external* pressure, applying persuasion or pressure by other means (i.e. threats) and which has precisely the same unwarranted effect (namely to interfere with or alter a supposedly independent decision) should be treated any differently.

29. JUSTICE accordingly concludes from the above analysis that the discretion a prosecutor is given by Parliament is to be exercised by him or her personally, on the basis of the relevant considerations fixed by Parliament, as ascertained by the Courts. Any unlawful threat will always be an irrelevant consideration. Equally, wherever the decision-maker rationally concludes that he or she has "no choice" but to accede to the threat, the effect of the threat is also to change the real maker of the decision to a party not contemplated by Parliament. The notional decision-maker is simply acting, however rationally, to the dictates of the third party.

30. Moreover, as the quote from *Phoenix Aviation* demonstrates, where such action pursuant to an unlawful threat is suspected, then the Court is required to scrutinise any potentially suspect decision (i.e. a decision potentially induced by a threat) "*with particular rigour*".

31. A "more interventionist approach" is adopted where an unlawful threat is directed at a prosecutorial decision precisely because basic constitutional principles, namely: (a) equality before the law; (b) the integrity of the criminal justice system; and (c) exercise of executive powers for the purposes they were conferred by the parties upon whom they were conferred, are thereby jeopardised. Quite apart from the particular case of threats illustrated by *Phoenix Aviation* such heightened scrutiny is visible in, say, the threat to the principle of equality before the law posed by the discriminatory anti-terrorism legislation at issue in *A v Secretary of State for the Home Department* [2005] 2 AC 68, or in the approach taken to other constitutional rights, whether protected by the common law (such as the right of access to a Court) or by the ECHR (as given effect by the HRA 1998).

32. To conclude, whilst it may be possible to distinguish between lawful and unlawful threats in other contexts, JUSTICE submits that no such distinction is possible in the context of prosecutorial decision because such a threat is inimical to the rule of law. A threat-based demand to cease an investigation will be unlawful. Any decision to accede to such threat will also always be unlawful.

(c) No different principles where the party making the threat is a state

33. Thirdly, JUSTICE can see no reason why different principles should apply in respect of threats made by states so long as something about such threats bring them within the competence of domestic courts. Threats made purely on the plane of international relations, for instance a threat not to grant a concession A in Saudi Arabia if the UK does not sign Treaty B, does not engage such competence. By contrast, a threat directed at a central and fundamental feature of the municipal criminal justice system, namely the principle of equality

before the law, is a case which municipal courts are not only competent to consider but duty bound to guard against. International law provides no excuse or shield behind which to hide, as it recognises the unfettered sovereignty of states to organise their internal criminal justice affairs as they chose (so long as basic international legal principles such as state and diplomatic immunity are given effect).

34. Once within the competence of the national courts, the feature that the party making the threat is a foreign sovereign state is relevant only to the factual question of what, if any, alternative responses the law can insist upon.

(d) The putative defence of necessity

35. Unless the statutory context of a discretion or power is such as to make an unlawful threat a relevant consideration (as will only typically be the case in the context of policing powers or other powers giving control over the general public),[10] JUSTICE agrees with the Director that the defence of necessity has no or no substantial role to play in relation to prosecutorial decisions tainted by consideration of or accession to threats, at least so far as questions of legality of the decision in question are concerned.

36. That is not to say that considerations of duress and/or necessity are without relevance. They are pertinent in two key respects. First, duress or necessity may be relevant to the potential consequential criminal and/or tortious liability of the maker of the unlawful decision. Necessity or duress plays the following role:

[10] This is the answer to the "bomb in the school" type of argument touched on in *Phoenix Aviation* and a number of other cases. Whilst there may be a public duty upon a decision maker continuously to provide schools/airports/postal services, such duty must be read in parallel with other general duties (whether or not derived from the same legislation), such as that to keep users of the airport/school/post safe, free from danger of death or injury. More particularly, some duties will be actively or implicitly designed to provide powers to respond lawfully to unlawful threats: a central public fund to make payments for ransom demands would be a hypothetical example. Prosecutorial discretion seems fundamentally inapt for and unlike such a threat-responsive power or duty.

(1) In criminal law, it may be a defence where the defendant can show he or she had no choice but to act in a criminal fashion: see *R v Z (Hasan)* [2005] 2 AC 467, 489, at [17]-[19] per Lord Bingham of Cornhill for the Appellate Committee.

(2) In private law, for instance in tort, necessity or duress may logically also constitute or inform a defence (e.g. by negativing any allegation of bad faith or impropriety in a claim of misfeasance) or play a role in negativing consent that would otherwise constitute a defence. Duress is also a basis for rendering a contract, deed or other private transaction (e.g. a gift, trust etc) voidable and, in the law of restitution, is a recognised category pursuant to which benefits conferred may be recovered.

(e) Necessity and relief

37. Secondly, and more fundamentally, JUSTICE submits that the true role of the concept of necessity and/or duress in public law is as considerations that may persuade the Court not to grant or to modify the relief it would otherwise grant against the unlawful decision. Whilst the law can never be expected to bless as lawful decisions taken pursuant to a threat that leaves no rational alternative but to accede to the unlawful threat, the law must respond pragmatically to such consequences in exceptional circumstances, whether by refusing relief (which is ultimately discretionary) or by simply staying the question of relief pending a change of circumstances (most obviously removal or attenuation of the threat).

38. JUSTICE accordingly contends that any accession to an unlawful threat is, as a matter of principle, automatically unlawful unless clearly authorised by Parliament. JUSTICE does however accept that, in exceptional circumstances, the Courts will recognise the impossibility of doing other than acceding to such threat by refusing to grant relief. Such is not a threshold that can be easily passed. In many circumstances the Court will expect a public body faced with an

unlawful threat to do all in its power to have it removed, whether by invoking the criminal law against a blackmailer, applying to the Court for injunctive relief (as with, say, an unlawful strike) or removing from the decision an individual threatened by a personal dispute.

(f) Effective judicial protection of the criminal justice system

39. A central question in this appeal, at least for JUSTICE, is how, where such an unlawful threat is suspected, the Court is able to ensure that it can (to use the language of *Phoenix*) scrutinise "with particular rigour" the decision to act as required by the threat (and, therefore, unlawfully).

App Pt. I p. 252

40. Moreover, the Divisional Court, at [99], identified the following principle:

> *" …submission to a threat is lawful only where it is demonstrated to a court that there was no alternative course open to the decision-maker."*

41. For the reasons set out above, JUSTICE doubts that this statement of principle is correctly formulated. If, as JUSTICE submits, it is accepted that it is always unlawful for a prosecutor to abdicate his/her duty to investigate and prosecute crime by surrendering to a threat, the question then arises as to whether or not there is a duty imposed on a prosecutor, intending to act unlawfully, to bring his concerns to the attention of the courts so that the Court can itself consider whether or not there is no choice but to accede to the threat (and thus what relief, if any, to grant).

42. In the current proceedings, the Director's decision and decision-making process, was only brought before the court by reason of an application for judicial review by the two campaigning respondents. But that is happenstance.

43. JUSTICE respectfully agrees with the Divisional Court that "threats to the administration of public justice within the United Kingdom are the

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concern primarily of the Courts, not the executive" [60],[11] but submits that there must be an obligation imposed on a prosecutor (absent a challenge) to bring that "concern" to the attention of the court. The submission is also made even if JUSTICE's primary position is wrong, and there can be a lawful submission by a prosecutor to a threat. In either situation, there must be a mechanism whereby the prosecutor's decision to submit to the threat is explained to, and justified before, a court of law.

App Pt. I p. 60

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44. Taking civil proceedings as an example (equivalent mechanisms no doubt exist in criminal law when the problem presents itself in a "trial on indictment") the Civil Procedure Rules provide for such a mechanism – see CPR 40.24, and (in public law proceedings) CPR 54, read with section 31(1) of the Supreme Court Act 1981. The case of *Islington LBC v Camp* [2004] BLGR 58 provides an illustration of the type of exceptional case in which the Court contemplates proceedings that do not conform to the typical adversarial model. The public interest in ensuring that, wherever possible, lawful decisions should be taken would be served (in the absence of NGOs like the Respondents willing and able to assume that mantle) by the appointment of an advocate to the Court See also, for discussion, particularly in public law proceedings, Clive Lewis *Judicial Remedies in Public Law* 3rd Edition (paragraphs 7-009 to 7-036), Zamir and Woolf *The Declaratory Judgment*, 3rd Edition (paragraphs 4-043 to 4-052, and 9-04) and De Smith's *Judicial Review*, 6th Edition, paragraphs 18-038 to 18-044.

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45. What would be regrettable is if the prosecutor could surrender to a threat *without* the courts being involved, if only for the Court to be satisfied (after informed argument) that the circumstances are such that, at least for the present, the prosecutor's unlawful actions would

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[11] In his Printed Case [17] the Director refers to the decision relied on by the Divisional Court, namely *Phoenix Aviation* as "not remotely analogous". But that dismissive statement misses the point of the reference (in paragraphs 60 and 79 of the judgment). Simon Brown L.J., after referring to the "ringing judicial dicta vindicating the rule of law" (page 58) was identifying the "one thread" that "runs consistently throughout all the case-law".

App Pt. I pp 244 & 24

not attract mandatory relief, or any order of the court compelling the continuation of the investigation

(g) The threats made in the present case

46. Turning briefly to the facts of the present case. The demand made of the United Kingdom Government and/or the Director was unlawful (both on the plane of international law and domestic law, both of which apply) because:

(1) it was a straightforward interference with UK sovereignty, impermissible in international law, to demand that well-founded domestic criminal proceedings against private parties within the jurisdiction of the state in question be discontinued. If domestic political influence is impermissible, it is *a fortiori* that foreign political influence is somehow permissible, particularly in the context of a consideration of whether to prosecute an offence of international corruption (where it is inherently likely that the parties corrupted will be officials of foreign states, and, as such, that foreign state influence will be brought to bear, so far as it can, to prevent prosecution); and

(2) such a request cuts at the heart of one of the key strands of the rule of law, namely equality before the law, in that most sensitive area, the criminal justice system. Any other approach is likely to provide a *de facto* immunity to those involved in high level international corruption. The more powerful those they have corrupted, the more likely it is that such clients will bring foreign political pressure to bear to prevent prosecution.

Such reasons require the law to identify these forms of demand as inherently and inescapably illegitimate and unlawful. Such a stance

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is, moreover, a self-protecting one. Permitting a defence of necessity is merely likely to incentivise the use of such defences.[12]

47. Moreover, the threat of withdrawal of co-operation was unlawful (assessed on the plane of international law) because of Saudi Arabia's obligations under UN Security Council Resolution 1373 (2001). The Director contends (at [17] AWC) that "*Saudi Arabia was not threatening to do anything that it was not lawfully entitled to do*". That may well be true as a matter of Saudi Arabian domestic law – Justice is in no position to comment. But it is not true as a matter of international law, which is the relevant level of analysis when considering a threat of this kind.

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48. JUSTICE does not accept that any different analysis should apply simply because the threat has implications for the effective maintenance of national security. As a matter of principle this is a factor that bears solely upon the question of relief. Whilst it is true that the Courts show very considerable deference to the executive on the assessment of national security issues, no such assessment is in issue. Rather the issue is whether it is ever lawful (or lawful without express Parliamentary sanction) to compromise a basic feature of the criminal justice system under compulsion from a threat with national security. However tempting to confuse these two distinct issues the invitation should be refused. As Lord Bingham put it in his essay "*The Rule of Law*" [2007] CLJ 65, at p.79:

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> "*[The tension between judges and the executive] is greater at times of perceived threats to national security, since governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed. This is a fraught area, since history suggests that in times of crisis governments*

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[12] JUSTICE has deliberately not attempted in this Printed Case to make detailed observations on the facts of this appeal. The legal argument it seeks to advance can be tested against a factual scenario where the merits of a prosecution are strong (even overwhelming), but the prosecutor, only in response to a threat (domestic or international) discontinues the prosecution.

have tended to overreact and the courts can prove somewhat ineffective watchdogs

49. Were any other principle adopted it is difficult to see where boundaries were properly to be drawn, except on the (unprincipled) basis of external exigencies.[13]

50. Precisely what form of relief is appropriate in the circumstances is a matter for argument between the Appellant and Respondent, turning as it does upon a detailed analysis of the facts, in particular the options open to the Appellant other than accession to the threat.

PART II: THE OECD CONVENTION ISSUES

51. Issues 4 and 5 (see the Statement of Facts and Issues) concern the compatibility of a prosecutor's conduct with the OECD Convention, a multilateral treaty which has been ratified by the United Kingdom. JUSTICE makes the following submissions in relation to the matters raised by these issues.

52. In addressing these issues it is necessary to consider:

(1) the status of the OECD Convention in domestic law: where in the sliding scale of treaties (ranging from purely unincorporated treaties to directly incorporated treaties) does it fall?

(2) the relevance of the OECD Convention to exercises of executive discretion under the Criminal Justice Act 1987: is a prosecutor required to exercise his discretion compatibly with the Convention or is he at liberty to include/exclude it from his consideration and, if the latter, is a self-direction by him on the Convention judicially reviewable?

[13] Would accession to a demand from a foreign state for the UK civil courts to decide certain civil litigation in favour of its sovereign wealth fund or to award a contract to a favoured supplier notwithstanding the requirements of procurement law be lawful if the demand was backed up by a threat having implications for national security?

(3) the interpretation and application of Article 5 of the OECD Convention: is the interpretation of the Convention justiciable and, if so, what does Article 5 mean?

(a) The status of the OECD Convention in domestic law

53. The status of a treaty in domestic, English, law may fall anywhere within a wide-ranging spectrum which includes, for example, in ascending order of status: treaties which the UK has neither signed nor ratified; treaties signed by the UK; treaties ratified (or acceded to) by the UK; treaties ratified by the UK which are of general relevance to domestic statutes (e.g. where they address similar subjects/issues); treaties ratified by the UK which are given effect (in whole or in part) by statutory provisions, where the statute does not expressly refer to the treaty but where the connection is evident from extrinsic material; treaties ratified by the UK which are given effect (in whole or in part) by statutory provisions, where the statute expressly so provides (e.g. in the long title of the statute); treaties ratified by the UK which are indirectly "incorporated" (in whole or in part) into domestic law by statutory provisions (for example, the European Convention on Human Rights ("ECHR"; by the Human Rights Act 1998) and the Geneva Convention on the Status of Refugees (by the Asylum and Immigration Appeals Act 1993)) and treaties ratified by the UK which are expressly and directly incorporated (in whole or in part) into domestic law by statutory provisions (for example the European Communities Act 1972).

54. The status of a treaty in domestic law will determine whether it is justiciable (i.e. capable of being interpreted and applied by domestic courts) and the extent of its relevance in a domestic context.

55. The OECD Convention falls mid-way in this spectrum. It is neither a purely unincorporated treaty nor an incorporated treaty. It is given effect, in part, by statutory provisions. The statute in question**,** the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), does not expressly refer to the OECD Convention but the connection is

evident from a consideration of the terms of the Convention (Articles 1 and 4); the statute, (sections 108 and 109) and from other material. Thus, the White Paper which preceded the 2001 Act: "Raising Standards and Upholding Integrity: the Prevention of Corruption" (CM 4759, June 2000) provides, at §4.1**:**

> *"The United Kingdom is active in addressing corruption internationally as well as domestically through its participation in international instruments both within the EU and more widely. Since the Law Commission published its proposals the UK has become party to a number of international instruments designed to tackle corruption including the OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention) and the Council of Europe Criminal Law Convention on Corruption. (The UK is now playing an active role as a member of the Group of States against Corruption (GRECO) set up to monitor the implementation of this Convention). The UK has also ratified the EU Corruption Convention and the Corruption Protocol to the EU Fraud Convention, and is involved in work in the G8 …and the UN. In considering the reforms suggested by the Law Commission, the working group took full account of these agreements. The proposals set out in this paper are intended to take due account of the UK's international obligations under these agreements.*
>
> *The Government believes that its proposals to amend the law of corruption meet in full its obligations under the international agreements on tackling corruption to which it is a party.*"

56. This status of the OECD Convention is important in relation to both the extent of its relevance to exercises of statutorily conferred discretion and the extent to which it can be interpreted and applied by domestic courts.

(b) Executive discretion and the OECD Convention

57. Unincorporated treaty obligations may be relevant in at least three ways when considering the exercise of statutorily conferred executive discretion.

58. First, there is a presumption that statutorily conferred executive discretion must be exercised compatibility with unincorporated treaty

obligations provided (a) this is not displaced by express statutory provisions to the contrary and (b) provided that this would not constitute judicial importation of international law into the domestic field in circumstances where Parliament has resisted that importation.

(1) The presumption of compatibility has long been part of English law. It provides that ambiguous provisions in primary or subordinate legislation should be interpreted in a way that is compatible with the UK's international law obligations, insofar as that is possible in the light of express statutory provisions. The underlying premise is that Parliament intends to legislate compatibly with the UK's international law obligations (it is therefore erroneous to assume that unincorporated treaty obligations can be ignored absent an express legislative direction to take account of an unincorporated treaty: see Director's Printed Case, §46).

(2) *R v SSHD ex p Brind* [1991] 1 AC 696 is authority for the proposition that the presumption of compatibility does not apply to general words conferring executive discretion where application of the presumption would constitute judicial importation of international law into the domestic field in circumstances where Parliament has resisted that importation (see Lord Bridge at 748). *Brind* does not mean that general statutory conferrals of executive discretion are always, and absolutely, immunised from the application of the presumption of compatibility.

(3) That is why Dyson J in *R v SSHD ex p Norney* (1995) Admin LR 861 did not consider that *Brind* required him to ignore the ECHR when considering the lawfulness of the SSHD's exercise of discretion under s.34 of the Criminal Justice Act 1991, where s. 34 was responsive to *Thynne, Wilson and Gunnell v UK* 13 EHRR 666 (871):

> *"where it is clear that the statutory provision which creates the discretion was passed in order to bring the domestic law into line with the Convention, it would in my judgment be perverse to hold that, when considering the lawfulness of the exercise of the discretion, the court must ignore the relevant provisions of the Convention."* (871)

(4) It is not necessary, however, for the application of the presumption of compatibility, that the statutory provision creating the discretion must have been passed in order to bring domestic law into line with the international law obligation in question.

(5) Rather, *"it is legitimate … to assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of this country": R v SSHD ex p Venables* [1998] AC 407 at 499F – provided, of course, that this would not constitute judicial importation of international law into the domestic field in circumstances where Parliament has resisted that importation. Thus, in *Venables*, Lord Browne-Wilkinson took into account Articles 3(1) and 40(1) of the UN Convention on the Rights of the Child, an unincorporated treaty, in considering the SSHD's exercise of discretion under s.53 of the Children and Young Persons Act 1933. Those Articles were consistent with domestic statutory provisions which emphasised the need for courts to have regard to the welfare of children (s.44 of the 1933 Act) and which provisions were accepted as relevant in guiding the SSHD's exercise of discretion (499A-B).

(6) Factors relevant in considering whether or not prohibitive judicial importation of international law is involved are, for example, (i) whether there is an extant informed position maintained by Parliament in relation to the unincorporated treaty in question (as there was re the ECHR, pre-HRA); (ii) whether the unincorporated treaty has been given effect (whether on the face of the statute or not) in domestic statutory provisions, and

(iii) whether the consequences of importing international law into domestic law sound in obligations for public authorities or private persons.

59. Secondly, on the facts of a particular case, unincorporated treaty obligations may be a relevant consideration (or *"so obviously material")* in the exercise of executive discretion, so as to make unlawful a failure to take (proper) account of the unincorporated treaty obligation in question: *R (Hurst) v London Northern District Coroner* [2007] UKHL 13 [2007] 2 AC 189 §§57-58 (Lord Brown).

60. Thirdly, where an executive decision-maker voluntarily takes into account unincorporated treaty obligations that self-direction is susceptible to judicial review: *"If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the [ECHR] which he himself says he took into account, it must surely be right to examine the substance of the argument"* (*R v SSHD ex p Launder* [1997] 1 WLR 839 at 867F (Lord Hope)). There is no principled reason for interpreting *Launder* as being restricted to human rights (cf. Director's Printed Case, §49). Nor can a *Launder*-type review be excluded where the decision-maker claims (or it is the case) that the conclusion on the treaty issue is not factually determinative of the decision in question (cf. Director's Printed Case, §49). It is manifestly in the public interest that executive decision-makers direct themselves properly in law. Thus, the only relevance of the status of the self-direction (i.e. whether it is determinate or not of the decision in question) is that it may affect the appropriate remedy in a given case.

61. On the facts of the present case, the Director has statutorily conferred discretion to, inter alia, *"investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud"* and *"institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and … take over the conduct of any proceedings at any stage."* (Criminal Justice

Act 1987, ss.1(3) and (5)). This discretion must be exercised compatibly with the UK's international law obligations in the OECD Convention for the following three reasons:

(1) First, this is required by the presumption of compatibility. There are no express statutory provisions which displace such a presumption. Nor would the application of this presumption constitute judicial importation of international law into the domestic field in circumstances where Parliament has resisted such an importation. This is evident from the facts that (i) the Government's stated position is that the amendments made to the domestic law of corruption, via the 2001 Act, *"meet in full its obligations under the international agreements on tackling corruption to which it is a party"* (see White Paper, above, including – expressly – the OECD Convention; (ii) the OECD Convention has been given effect, in part, in the 2001 Act, (iii) the 2001 Act and the OECD Convention are crucial contextual elements in the Director's exercise of discretion regarding bribery/corruption cases and (iv) in this context, the presumption of compatibility imposes obligations on a public official (not a private person).

(2) It is therefore incorrect to assert, as the Director does, that a prosecutor's discretion cannot be read subject to an implied requirement to the effect that he is obliged to consider or act in accordance with provisions of the OECD Convention when exercising his statutory discretion (Director's Printed Case, §45).

(3) Secondly, the OECD Convention is an important relevant consideration (*"so obviously material"*) in a prosecutor's exercise of discretion in the context of a corruption/bribery case so as to make unlawful a failure to consider and properly apply the OECD Convention.

(4) Thirdly, where a prosecutor claims to have directed himself in accordance with the OECD Convention, that self-direction must have been properly informed and exercised regardless of whether or not it was determinative of his ultimate decision.

(c) Interpretation and application of Article 5, OECD

62. The orthodox position is that domestic courts have no jurisdiction to interpret or apply unincorporated treaties, see, e.g. *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976, §27 (Lord Hoffmann).

63. Such jurisdiction does exist, however, where interpretation and/or application of an unincorporated treaty is relevant in order to determine rights and obligations in domestic law: *R (CND) v The Prime Minister* [2002] EWHC 2777 (Admin) [2002] All ER (D) 245 (Dec), §36 (Simon Brown LJ); *JH Rayner (Mincing Lane) v Department of Trade and Industry* [1990] 2 AC 418, 500D-F (Lord Oliver).

64. It follows, from the status and relevance of the OECD Convention, set out above, that in this case there is no justiciability bar precluding the court from interpreting and applying the Convention. Nor is the process of interpretation hampered or precluded (cf. Director's Printed Case, §§51-52) by the fact that the OECD Convention is

(1) a multilateral treaty

(2) which provides for monitoring and follow-up by the Working Group (Article 12).

65. Firstly, English courts are accustomed to interpreting and applying provisions of multilateral treaties, *"drafted by representatives of States with a variety of legal systems, significantly different constitutional arrangements …[with] terms [that] have to be applied to legal systems operating in different languages and based on different concepts.."* (Director's Printed Case, §51). Indeed, so rife is

case law with examples of treaty interpretation that it may be said to have become an unexceptional occurrence. Thus, it is well established that:

(1) Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") embody the fundamental principles relevant for treaty interpretation.

(2) Although these provisions have not been incorporated into domestic law, they are reflective of customary international law and, therefore, able to be applied by domestic courts (see, e.g. *R (ERRC) v Immigration Officer at Prague Airport* [2004] UKHL 55 [2005] 2 WLR 1, §18 (Lord Bingham).

(3) Articles 31 and 32, VCLT, have been commonly used and applied by domestic courts when interpreting treaties (see, e.g. *Fothergill v Monarch Airlines* [1981] AC 251, 290C (Lord Scarman); *R v SSHD ex p Adan* [2001] 2 AC 477, 509F-G (Lord Slynn); 516D-E (Lord Steyn) and 530C (Lord Hobhouse).

(4) Domestic courts have frequently referred to the need to distinguish treaty interpretation from statutory interpretation (*James Buchanan v Babco* [1978] AC 141, 157D-E (Viscount Dilhorne)), to refrain from using domestic law concepts in treaty interpretation (*James Buchanan*, 152C (Lord Wilberforce) and 158B (Viscount Dilhorne); *Fothergill*, 281G-282A (Lord Diplock)) and to ensure that treaty provisions are given an autonomous interpretation (*Adan*, 515G-516B (Lord Steyn)).

66. English courts, seasoned as they are in treaty interpretation are unlikely, therefore, to be hindered by the Director's concern, that *"the search for a single objective and authoritative meaning is likely to be elusive, particularly for the domestic courts of a single State Party"* (Director's Printed Case, §51). Indeed, domestic courts are used to interpreting treaties such as the Refugee Convention (see, e.g. *Adan*)

and the ICCPR (*R (Mullen) v SSHD* [2004] UKHL 18 [2005] 1 AC 1), which have in excess of 100 parties (cf. the OECD Convention which has 37 parties).

67. Secondly, the purpose of the Working Group is to facilitate the parties' co-operation "*in carrying out a programme of systematic follow-up to monitor and promote the full implementation*" of the OECD Convention. A domestic court, interpreting a provision of the Convention in order to determine rights and obligations in domestic law, will not hamper, obstruct or preclude either (i) the work of the Working Group or (ii) the policy of the UK executive with respect to the approach to be adopted to the implementation of the Convention (cf. Director's Printed Case, §52). In so suggesting, the Director erroneously elides the domestic law plane with the international law one. The error is illustrated by the observation that English courts have not been prohibited from interpreting and applying the Refugee Convention or the ICCPR – both of which enable bodies to interpret and apply the treaty: the UN High Commissioner for Refugees (Article 35) and the UN Human Rights Committee (Article 41) respectively.

68. Accordingly there is no inappropriateness or justiciability bar preventing domestic courts from interpreting the OECD Convention on the facts of the present case.

69. A treaty must be interpreted in context. Part of the relevant context is the preamble (Article 31(2), VCLT). The preamble to the OECD Convention refers to the "*widespread*" nature of bribery and its many harmful consequences: it "*raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.*"

70. Article 1 of the Convention requires parties to create, as a criminal offence, the bribery of a foreign public official. The UK has given this provision effect in the 2001 Act.

71. Enforcement is provided for by Article 5:

(1) The language of a treaty provides the starting point for interpretation (Article 31(1), VCLT). Article 5 of the OECD Convention provides

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

(2) In order to determine whether the investigation and prosecution of a bribery offence has been properly undertaken, the initial steps are to determine (i) which factors have been taken into account and (ii) whether they are to be classified as "excluded considerations" or not.

(3) In many cases it will be clear whether the factor in question is an excluded consideration or not. In other cases it will not. Neither of those scenarios applies in the present context. However, JUSTICE observes that the most anxious scrutiny will need to be used to ensure that the "excluded considerations" are properly construed and applied so as to prevent, for example, national economic interests masquerading as national security concerns.

(4) Rather, the situation here is that there is more than one factor which has been taken into account, one of which is an excluded consideration and one of which it will be assumed, for the sake of argument is not (national security). The question is whether a prosecutor may properly assert that he has acted compatibly with Article 5 where he has taken account of such a (legitimate) factor which he says is the consequence of an excluded consideration and not the excluded consideration itself. The answer is no (cf. Director's Printed Case, §§41; 59(4)): if a

prosecutor were able, compatibly with Article 5, to explain a decision by reference to the consequences of the consideration, rather than the consideration itself, then this would enable the easy evasion of the excluded considerations. Their inclusion would be rendered meaningless and the object and purpose of Article 5 and the OECD Convention, which underpins the point of the excluded considerations, would be subverted. The Director's interpretation cannot, therefore, be right (Director's Printed Case, §59).

CONCLUSION

72. At the beginning of this Printed Case, JUSTICE referred to "domestic legal principles". This is no doubt the correct description, but it is perhaps too parochial. The correct resolution of the present dispute and the proper role for the rule of law therein are questions of general principle that are likely to reverberate throughout the common law legal systems.

73. JUSTICE respectfully submits that: any threat to a prosecutor is unlawful; and any surrender to such an unlawful threat is itself unlawful. The central issues, therefore, for resolution upon the facts are whether this court will intervene by granting relief against the Director, and how in future a case akin to the present is to be brought to the attention of the court.

74. In relation to the OECD Convention, JUSTICE respectfully submits that, as an international treaty that has been given effect in domestic statutory law, it can be both interpreted and applied by domestic courts. This is particularly so where, as here, an executive decision-maker purports to have voluntarily directed himself in accordance with it. Even absent such a self-direction, however, he would be required to exercise his statutorily conferred discretion compatibly with the Convention since (a) there are no statutory provisions which displace such a presumption; nor would the application of the presumption constitute judicial importation of international law in the

domestic field in circumstances where Parliament has resisted such an important and (b) the Convention is an important relevant consideration.

75. Should Your Lordships House wish any further assistance from JUSTICE in developing any of these submissions (in particular so far as they are not reflected in the written cases filed by the Appellant or Respondent) then JUSTICE remain happy and willing to attempt to provide that assistance orally.

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IN THE HOUSE OF LORDS

ON APPEAL

FROM A DIVISIONAL COURT OF THE QUEEN'S BENCH DIVISION OF HER MAJESTY'S HIGH COURT OF JUSTICE (ENGLAND AND WALES)

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

BETWEEN:

THE QUEEN

on the application of
CORNER HOUSE RESEARCH and CAMPAIGN AGAINST ARMS TRADE

Respondents

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Appellant

-and-

BAE SYSTEMS PLC

Interested Party

-and-

JUSTICE

Intervener

CASE FOR THE INTERVENER

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