
PRESS RELEASE



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**THE
CORNER
HOUSE**

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High Court reopens BAE-Saudi corruption investigation

The High Court today formally quashed the Serious Fraud Office's (SFO) decision to drop its corruption investigation into arms deals between BAE Systems and Saudi Arabia. This follows the Court's ruling on 10th April that the SFO, acting on government advice, acted unlawfully in stopping its investigation in December 2006 following a threat from Saudi Arabia.

The decision to quash was made by Lord Justice Moses and Mr Justice Sullivan, who also today gave the SFO permission to appeal to the House of Lords against their ruling of 10th April. Campaign Against Arms Trade (CAAT) and The Corner House, recognising the public importance of the legal issues, did not oppose the SFO's application for permission to appeal.

The judges expressly thanked The Corner House and CAAT for bringing the judicial review of the SFO decision because important matters of public interest would not otherwise have seen the light of day, in particular, privileged access to 10 Downing Street and threats to an independent prosecutor.

In granting the appeal, Lord Justice Moses said that this was a "paradigm case" that concerns "the way this country is governed and a basic constitutional principle".

The judges ordered the SFO to pay the costs of the judicial review so far and, recognising the public service that The Corner House and CAAT are performing, also ordered the SFO to pay all the reasonable costs of the House of Lords appeal, regardless of the outcome.

CAAT spokesperson Symon Hill said:

"The High Court's quashing of the SFO decision has confirmed that neither BAE nor Saudi Arabia have the right to bully Britain. The Court today pointed out that the case had revealed vital issues about access to Downing Street. For the sake of British democracy, security and interest, arms companies' influence in the corridors of power must end. It is increasingly clear that the public will not be fooled by either weak assertions about national security or naive claims about jobs."

Sarah Sexton of The Corner House said:

"We remain confident of the strength of our case in the House of Lords. The principle that no one is above the law is fundamental to justice, as the High Court has clearly stated. It is now essential that the government abandons its draft legislation to give the attorney-general the power to cancel a criminal investigation or prosecution by claiming 'national security' with no meaningful parliamentary or judicial oversight."

Notes

1.

Campaign Against Arms Trade (CAAT) works for the reduction and ultimate abolition of the international arms trade. The Corner House is an environmental and social justice NGO. Leigh Day & Co has represented them throughout the judicial review process, along with counsel from Blackstone Chambers.

For more information, please visit:

<http://www.controlbae.org>

<http://www.caat.org.uk>

<http://www.thecornerhouse.org.uk>

2.

The judgment of the High Court was handed down on 10th April 2008 by Lord Justice Moses and Mr Justice Sullivan, following a judicial review brought by The Corner House and CAAT. They ruled that the Serious Fraud Office (SFO), on the advice of the government, had acted unlawfully by terminating an investigation into BAE's Saudi arms deals on 14th December 2006, following lobbying by BAE and Saudi representatives. The Saudi regime had threatened to cancel an arms deal and withdraw diplomatic and intelligence co-operation. This was described by the judges as a "successful attempt by a foreign government to pervert the course of justice in the United Kingdom".

Full judgment: <http://www.thecornerhouse.org.uk/pdf/document/JR-Judgment.pdf>

Summary of judgment:

<http://www.thecornerhouse.org.uk/pdf/document/CHsumJRjudgment.pdf>

3.

For a time line, arguments and evidence presented during the judicial review, go to <http://www.controlbae.org>.

4.

Costs

The costs of the judicial review were capped and agreed at a Directions Hearing on 17th January 2008. The Court limited the amount that CAAT and The Corner House's legal team could recover from the SFO if they won to £95,000 plus an uplift (or

success) fee to reflect the fact that they had agreed to take the case on a 'no win, no fee' basis, and compensate them accordingly. The total amount is likely to be in the region of £170,000. The Court based the £95,000 figure on the costs of "modest" representation by one solicitor and one junior counsel. Despite these restrictions, the legal team agreed to continue to act on this limited basis.

The estimated cost of the SFO's BAE-Saudi investigation as of December 2005 was £1 million.

The UK's Export Credits Guarantee Department, which is underwritten by the UK taxpayer, has insured BAE's supply of defence equipment and services to Saudi Arabia under the Al Yamamah contracts for £1 billion.

5.

National security

Lord Justice Moses stressed said the ruling on 10th April had categorically *not* removed the right of prosecutors to halt investigations on the grounds of national security or in submission to a threat. Rather, it had made clear that this should be done only as a last resort, and when there was no alternative course open to the decision-maker, and that this should be demonstrated to a court:

"[S]ubmission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker." (paragraph 99).

Several further sentences and paragraphs in the ruling expand upon the discretion for a prosecutor and for the executive (government) to invoke national security.

The ruling stressed, for example, that the discretion open to the Director of the Serious Fraud Office as to whether or not to prosecute is wide and that "the courts have traditionally been most reluctant to interfere with the exercise of his discretion". The discretion whether to investigate, they acknowledged, is "even more *open-ended* than the decision to prosecute" (para 51, emphasis in original).

Given this discretion, the ruling held that it would seem at first glance to be unrealistic and impractical to argue against the Director's decision to stop the BAE Saudi investigation if to continue it "would be to imperil national security".(para 52)

Moreover, prosecutors are explicitly allowed to invoke national security:

"The decision [to stop the BAE Saudi investigation] is subject to the Code for Crown Prosecutors which, since the fourth edition (published in 2000) makes specific reference to national security. . . The Code lists a wide range of public interest factors in favour and against prosecution [including] the danger that: 'details may be made public that could harm sources of information, international relations or national security'." (para 52)

The judges accepted:

"that the Director's discretion is of sufficient width to entitle him to take into account risk to life and to national security in deciding whether to continue an investigation. . . . Article 2 of the ECHR [European Convention on Human

Rights] requires the Director and a government in a democratic society to protect and safeguard the lives of its citizens." (para 54)

The judges also accepted that the Director "may lawfully accord appropriate weight to the judgment of those with responsibility for national security who have direct access to sources of intelligence unavailable to him" (para. 55).

In addition, the judges indicated that the government (or executive) is responsible for matters of foreign policy and relationships with foreign states, not the courts or prosecutors:

"The separation of power between the executive and the courts requires the courts not to trespass on . . . a decision affecting foreign policy. In a case touching foreign relations and national security, the duty of decision on the merits is assigned to the elected arm of government. Even when the court ensures that the Government complies with formal requirements and acts rationally, the law accords to the executive an especially wide margin of discretion."(para 56)

They went on to outline some of the circumstances in which a prosecutor might abandon an investigation or prosecution:

"[W]e acknowledge that there may be circumstances so extreme that the necessity to save lives compels a decision not . . . to prosecute." (para 82)

"Both in domestic and in customary international law . . . the law recognises the defence of duress and, in some circumstances the justification of necessity." (para 83)

"We readily accept that in 2006 and even now there is a serious risk of unpredictable terrorist attack, the greater the sources of intelligence the better that may be avoided." (para 85)

The judges also considered the circumstances in which a country may break international laws:

"Associated with the right of a state to take those measures which it considers necessary to protect its citizens, is the importance of those international norms which protect human rights and, in particular, the right to life. . . . The right to life is expressed in Article 3 of the Universal Declaration of Human Rights 1948, Article 6 of the International Covenant on Civil and Political Rights (1996) and, of course, Article 2 of the ECHR. The obligation of a government in a democratic society to protect and safeguard the lives of its citizens . . . [is] essential to the preservation of democracy." (para 127)

In considering whether the SFO Director could stop the investigation on the grounds of national security but still comply with the OECD Anti-Bribery Convention, the judges noted that:

"the doctrine of necessity in customary international law . . . is recognised as excusing a state from a breach of its international obligation or . . . as

precluding the wrongfulness of an act not in conformity with an international obligation." (para 144)

The doctrine or principle of necessity refers to a situation so extreme that a prosecutor is left with absolutely no alternative. The judges stressed, however, that:

"[T]his doctrine of necessity only arises where a state has not acted in conformity with an international obligation. The doctrine does not provide that there has been no breach, but that the state is not responsible for that breach. Thus the conditions under which a state may escape the consequences of its breach of an international obligation are narrowly defined. It applies only to exceptional cases where:

“The only way a state can safeguard an essential interest threatened by grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency.” (para 145)

Having stressed that prosecutors can halt investigations or prosecutors on the grounds of national security or in submission to a threat, the judges went on to consider this particular BAE-Saudi case.

They stated clearly that:

"it is for the courts to decide whether the reaction to a threat was a lawful response or an unlawful submission. . . . And it is for the courts, in drawing the line between unavoidable submission and unlawful surrender, to review *with particular rigour* a decision and rule whether the decision-maker yielded *too readily*." (para 82, emphasis in original)

They also pointed out that "the law demands that the means used to resist terrorism must be lawful". (para 97)

From all the evidence put forward by the SFO Director (including evidence that the Government decided was not in the public interest to be disclosed and for which it issued Public Interest Immunity certificates but that was seen by Lord Justice Moses), the judges concluded that:

"It is unnecessary for this court to attempt to identify those circumstances in which necessity may justify submission to a threat. . . . There is no reported case of so blatant a threat.(para 84)

"[T]here was no specific, direct threat made against the life of anyone." (para 85)

"Apart from the absence of a specific, immediate threat there is another significant feature. In order properly to scrutinise the decision taken to submit, the courts are bound to question whether all the steps which could reasonably be taken to divert the threat had been pursued." (para 86)

In returning to the principle that submission to a threat is lawful but "only when it is demonstrated to a court that there was no alternative course open to the decision-maker" (para 99), the judges identified two merits of the principle in this case:

1) "restricting the circumstances in which submission may be endorsed as lawful" (para 100)

"If one on whom the duty of independent decision is imposed may invoke a wide range of circumstances in which he may surrender his will to the dictates of another, the rule of law is undermined." (para 100)

2) not submitting too readily to a threat so as not to "give rise to the suspicion that the threat was not the real ground for the decision at all" but rather "a useful pretext." (para 101)

"[I]n future cases, absent a principle of necessity, it would be all too tempting to use a threat as a ground for a convenient conclusion. We fear for the reputation of the administration of justice if it can be perverted by a threat. . . . (para 101)

6.

Basis of appeal to House of Lords

The SFO did not seek to appeal against any identified errors of law in the judgment, but to appeal only on the basis that the judgment raised issues of public importance upon which it is in everyone's interests that the highest Court in the UK, the Lords, conclusively and definitively rules. Decisions from the House of Lords bind all lower courts, and there is no further route of appeal.

To be granted, an appeal to the Lords must fulfil two requirements:

- first, it can be brought only on a point of law; and
- second, the point of law must be of public importance.

Two specific points of law for appeal have been agreed, each having two parts.

The **first** concerns the lawfulness (or otherwise) of a prosecutor submitting to a threat by someone outside the courts' control, such as someone based outside the UK. As the judges ruled on 10th April, "had such a threat been made by one who was subject to the criminal law of this country, he would risk being charged with an attempt to pervert the course of justice" (para 59).

1.

(i) Is it unlawful for a prosecutor to surrender to a threat made by a person outside the control of the courts or public authorities of the United Kingdom for the purpose of halting a criminal investigation or prosecution, unless there is no alternative course open to the prosecutor?

(ii) If so, in reviewing the question whether the prosecutor's reaction was unavoidable submission or an unlawful surrender, to what extent must the prosecutor satisfy the court as to whether there was an alternative course open to the prosecutor?

The **second** point of law relates to UK compliance with the OECD Anti-Bribery Convention:

2.

(i) Is the court entitled to construe an unincorporated treaty in circumstances where the prosecutor has publicly asserted that in deciding not to proceed he has acted in compliance with the treaty?

(ii) If so, is consideration of national security permitted under Article 5 of the Convention on Combating Bribery of Foreign Officials in International Business Transactions 1997 only in circumstances which would be regarded as justifying the defence of state necessity in international law, or in other and if so, what circumstances?

The UK Courts do not generally consider that they have jurisdiction to determine points of law arising under an international treaty unless the treaty has been incorporated by an Act of Parliament, which gives it domestic legal effect. The European Convention on Human Rights, for example, was incorporated by the 1998 Human Rights Act. Before this Act, UK judges and lawyers could not invoke the Convention unless they pleaded their case at the European Court of Human Rights, based in Strasbourg. Similarly, the four Geneva Conventions governing the treatment of civilians and prisoners of war during conflict have been incorporated by the 1957 Geneva Conventions Act.

The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (known as the OECD Anti-Bribery Convention) is a multilateral treaty aiming to ensure that all OECD countries present a combined and united front against bribery and corruption of foreign public officials. In UK legal terms, however, it is an unincorporated treaty (even though the UK signed it in 1997) and in theory, therefore, has no legal effect within the UK.

But Section 109 of the 2001 Anti-Terrorism, Crime and Security Act, which makes bribing a foreign official a criminal offence, was, as the judges ruled, "brought into force for the very purpose of complying with the UK's obligation under Article 1" (para 121). They noted that "Parliament has chosen to honour the UK's international obligation under Article 1 and the decision of the Director ought to be considered in that context." (para 121) They also stated that, given this is the case, "the exercise of discretion, whether to continue to investigate or to prosecute in a manner which undermines the very purpose for which the criminal offence was created, seems to us a matter susceptible to the review of the courts."(para 121)

Furthermore, and critically, where a UK public authority voluntarily submits to the terms of an international treaty in making a decision, the UK Courts review such a decision under ordinary domestic law principles. In this instance, the Director of the SFO and the Attorney General both publicly avowed that the decision to discontinue the investigation was taken with the OECD Anti-Bribery Convention in mind and, crucially, that the decision was permitted under the Convention. In these

circumstances, the Court held that it was open to them to consider the construction and meaning of the Convention.

Article 5 of the OECD Anti-Bribery Convention makes various provisions to enforce Article 1. It rules out the termination of corruption investigations on grounds other than the merits of the case. Signatory governments undertake not to be influenced "by the potential effect [of an investigation or prosecution] upon relations with another State." Article 5 also prevents signatories from being "influenced by considerations of national economic interest" in deciding whether to terminate an investigation.

7.

Timing of appeal

The Serious Fraud Office has 14 days from 24 April 2008 in which to lodge its formal appeal document. No date has been set for the House of Lords appeal, but CAAT and The Corner House lawyers will ask that the process be speeded up so as not to prejudice any further the SFO BAE-Saudi investigation by ongoing delays and because of the public interest in reaching a final determination, particularly in light of the government's draft Constitutional Renewal Bill (*see* note 9 below).

8.

A criminal case

An appeal against a court's ruling usually goes from the High Court to the Court of Appeal and only then to the House of Lords. In criminal cases, however, the Court of Appeal has no jurisdiction, and appeals "leapfrog" by going directly to the Lords, provided they are of public importance. The SFO's appeal will be heard directly in the House of Lords, not in the Court of Appeal, because the case in question (the SFO investigation into alleged BAE-Saudi corruption) is a criminal rather than civil one.

9.

Draft Constitutional Renewal Bill

The Corner House and CAAT are calling on the Government and Parliament to await the decision of the House of Lords before passing the draft Constitutional Renewal Bill, published on 25 March 2008. Several clauses in the draft Bill are expressly aimed at preventing the judiciary from reviewing future Government decisions for which the government invokes "national security" or "international relations" as its rationale. In effect, this removes any checks and balances on the Government when it cites national security or international relations.

See Corner House press release, "Government proposes legislation to make BAE-Saudi corruption judicial review impossible in future", 4 April 2008,
<http://www.thecornerhouse.org.uk/pdf/document/PRConsRenBill.pdf>

And "Note on draft Constitutional Renewal Bill for OECD", by the legal team acting for CAAT and The Corner House,
<http://www.thecornerhouse.org.uk/summary.shtml?x=561252>