



Corruption versus National Security: what role for the Rule of Law?

R (Corner House Research and others) v Director of the Serious Fraud Office [2008] UKHL 60

By Tristan Jones

The December 2006 decision to discontinue the corruption probe into BAE Systems Plc over the Al Yamamah arms contract plunged the Serious Fraud Office into political controversy. However, whilst the recent House of Lords judgment upholding the decision may help bring the political fallout to an end, the legal fallout has only just begun.

British lives on British streets

The first issue was whether, in discontinuing the investigation, the Director had unlawfully “surrendered to a threat”. The threat in question was relayed to the Director by, in particular, the UK Ambassador to Saudi Arabia and the Prime Minister. The Prime Minister’s view was that, unless the investigation was dropped, there was an immediate risk of a collapse in UK/Saudi security, intelligence and diplomatic co-operation, which was likely to have serious consequences for national security. The Ambassador, not quite conforming to diplomatic stereotype, put it more bluntly. There was, he said, a risk to “British lives on British streets”.

Moses LJ, in the Divisional Court, was alarmed by the prospect of what he saw as the undermining of the rule of law by surrendering to threats. Whilst he accepted that, in some circumstances, surrender may be the only option (and therefore lawful), he did not accept that those circumstances arose in this case. In particular, not enough had been done to persuade or pressurise the Saudis to withdraw their threats.

In Lord Bingham’s view, “these findings and contentions overlook the important fact that the Director was a prosecutor with no diplomatic access to representatives of the

Government of Saudi Arabia. He was, as the Divisional Court rightly held, obliged and entitled to rely on the expert assessments of others.”

The OECD Convention

The second issue, which will have more wide-reaching consequences, was whether the Director could be held to his claim that he had acted in accordance with the OECD Convention on Combating Bribery of Public Officials in International Business Transactions. Article 5 of that Convention states that bribery investigations shall not be influenced by “the potential effect upon relations with another State”. The claimants argued that this includes the sorts of threat in this case.

The claimants relied on a line of authority suggesting that, where a decision-maker purports to be acting consistently with an unincorporated treaty, the court should review the compatibility of the decision with the treaty (*R v Secretary of State for the Home Department, ex p Launder* [2007] 1 WLR 839, *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326). Were it otherwise, the decision maker may rely on a misdirection in international law.

Their Lordships did not decide this question. Instead, they accepted the Director’s statement that he would have made the same decision even had he believed it to be incompatible with the Convention.

However, their Lordships made extensive *obiter* comments on the supposed principle in *Launder* and *Kebilene*. Lord Bingham distinguished those cases on the basis that in *Launder* there was no issue as to the interpretation of the treaty and in *Kebilene* there was an established body of jurisprudence on the question. In this case, however, there was no relevant authority. Moreover, it was undesirable that a national court should construe treaties, particularly where the treaty itself establishes a non-judicial forum for resolving differences.

Lord Brown went further. In his view, a national court should not determine such a question “save for compelling reasons”. The appropriate intensity of scrutiny of an international instrument may depend on the context. In this context, the furthest the court should go was to ask whether the Director’s view of the Convention was “tenable”. This apparent introduction of a sliding scale of review for decisions which

invoke international treaties will, as Lord Brown acknowledged, “require further consideration on a future occasion”.

The following members of Chambers appeared in this case: David Pannick QC, Dinah Rose QC and Ben Jaffey (for Corner House Research and others); and Thomas de la Mare and Shaheed Fatima (for Justice, intervening).