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Analysis

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UK High Court Al-Yamamah Decision Signals Debate On Role Of Prosecutorial Discretion In Anticorruption Investigations

On Dec. 14, 2006, the director of Britain's Serious Fraud Office (SFO) (the UK agency responsible for the investigation and prosecution of suspected cases of serious or complex fraud) terminated an investigation, initiated in July 2005, of allegations of bribery by BAE Systems plc in relation to a series of military fighter jet contracts with the Kingdom of Saudi Arabia (the contracts are collectively known as "Al-Yamamah," which is Arabic for "the Dove"). The UK government, then led by Prime Minister Tony Blair, justified the decision on the basis that proceeding with the investigation would cause serious damage to Britain's security, intelligence and diplomatic cooperation with Saudi Arabia, which could in turn have serious negative consequences for national security and the implementation of Britain's foreign policy objectives in the Middle East.

The decision generated concern among circles within the UK and internationally, on the ground that the SFO may have terminated the investigation based on impermissible considerations, including threats from the Kingdom of Saudi Arabia government and the bilateral trade relationship between the UK and Saudi Arabia. The decision prompted two public interest groups, Corner House Research and Campaign Against Arms Trade, to seek judicial review.

On April 10, the English High Court of Justice, Queens Bench Division Administrative Court, ruled that the SFO director's decision to halt the investigation constituted an unlawful exercise of his prosecutorial discretion under English domestic law. The Court also offered views, in dictum, on the standards for exercising prosecutorial discretion under the Organisation for

Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which the UK has signed and ratified.

The High Court decision is now on appeal to the English House of Lords, with a hearing scheduled for the first week of July.

Background—The SFO investigation into Al-Yamamah commenced July 30, 2004. It arose from allegations that unlawful payments, under English foreign bribery laws, attributable to BAE had been made to officials of the government of Saudi Arabia to secure the Al-Yamamah contracts.

In October 2005, BAE sought to persuade the attorney general and the SFO to terminate the investigation on the basis that the investigation would affect relations between Britain and Saudi Arabia and would prevent Britain from securing a potential contract to supply Typhoon aircraft to the Saudi government. UK government ministers made similar representations, but the attorney general and the director determined, at that time, that the public interest was best served by continuing the investigation.

In July 2006, the SFO was on the verge of obtaining access to Swiss bank records as part of its investigation when, according to news reports (accepted by the High Court, without objection from the government, as evidence for purposes of the litigation), the prime minister's chief of staff received a specific threat from Prince Bandar bin Sultan bin Abdul Aziz al-Saud that if the investigation was not stopped, there would be no contract for the export of Typhoon aircraft, and intelligence and diplomatic relations between the UK and the Kingdom of Saudi Arabia would cease.

Subsequently, the SFO director held several meetings with the British ambassador to Saudi Arabia, who confirmed that the threats to international security were genuine. The ambassador put it to the director that the lives of British citizens in Britain were at risk, describing the risk that Saudi Arabia would withdraw cooperation with Britain on counterterrorism as "real and acute."

In a personal minute to the attorney general, the prime minister urged him to consider the public interest in the pursuit of the investigation. It was the prime

minister's view that continuing the investigation risked seriously damaging Saudi confidence in Britain as a partner and that such damage risked endangering British national security, both directly in protecting citizens and service people, and indirectly by impeding Britain's efforts towards peace and stability in the Middle East.

The director ultimately concluded that to continue 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." Accordingly, the director terminated the investigation on Dec. 14, 2006. In reaching that conclusion, the director noted that the SFO did not take into account commercial risks to the UK, and expressed the view that discontinuing the investigation was compatible with the OECD Convention. Section 5 of the OECD Convention provides: "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 relations with another State or the identity of the natural or legal persons involved."

The Holding of the High Court—The principal issue for the High Court's consideration was whether it was permissible, under English domestic law principles associated with prosecutorial discretion, for the director to accede to the stated Saudi threat. The issues before the Court did not, notably, address the viability of the allegations of corruption against BAE. The Court noted that the SFO did not cite the presence or absence of evidence against BAE as a basis for discontinuing the investigation. The Court also operated with the premise that the SFO director had not considered UK economic benefit in reaching his decision.

The Court began by acknowledging that the SFO's prosecutorial discretion under English law is wide. Although a prosecutor's decision to bring an action is susceptible to judicial review, English courts traditionally have been reluctant to interfere with the exercise of prosecutorial discretion. The Court also cited the Code for Crown Prosecutors, which provides a series of factors weighing in favor of or against prosecution, including the danger that "details may be made public that could harm sources of information, international relations, or national security." The Court recognized, therefore, that the SFO director's discretion was "of sufficient width to entitle him to take into account risk to life and national security in deciding whether to continue an investigation."

However, the Court found that the circumstances of the Al-Yamamah matter warranted careful judicial scrutiny because the director decided to terminate the investigation in response to a threat that had the specific intent of terminating the investigation and, therefore, challenged the fundamental integrity of the English criminal justice system. The Court permitted that there could conceivably be cases in which submission to an outside threat intended to undermine the criminal justice system could be a valid exercise of prosecutorial discretion, but it identified two key failings in the director's decision that warranted judicial intervention.

First, the Court found that the director had not shown that he had considered whether the threat could be mitigated or withdrawn. There was no evidence before the Court that attempts to resist the Saudi threat were made, to test whether submitting to the threat was the only means of safeguarding the state's identified national security concerns.

Second, the Court found that the director had not properly evaluated the damage to national security and to the rule of law that could be caused by submission to a threat that was aimed at the administration of justice. The Court found that the director, by his own admission, had failed to fully evaluate the risk that, if the UK developed a reputation for submitting to threats of this nature, broader national security risks could emerge through the compromising of English criminal enforcement mechanisms.

The director claimed that acceding to the Saudi threat would not present a significant risk to national security because the Al-Yamamah case was exceptional, and he noted that the SFO was continuing other investigations of foreign bribery allegations. The Court dismissed the evidence of other investigations as irrelevant because there was no indication in those other matters that the SFO was proceeding in the face of threats similar to those presented in the Al-Yamamah investigation ("[a] failure to resist a threat cannot be excused by demonstrating a willingness to prosecute absent such a threat").

In conclusion, the Court enunciated a general principle that "submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decisionmaker." In the absence of evidence that the SFO director had met that standard, the Court found that the director's termination of the investigation was inconsistent with English law.

High Court Interpretation of OECD Convention—Despite having concluded that the director's

decision to terminate the investigation was unlawful under English domestic law, the Court went on to consider, in dictum, whether the director's decision was compatible with Article 5 of the OECD Convention, given that the director noted in his justification that he considered compliance with Article 5. As noted above, Article 5 provides that prosecutorial discretion should not be influenced by national economic interest or political relations considerations. This issue is of particular interest because the OECD has not spoken at length on Article 5's balance of the exercise of prosecutorial discretion, which Article 5 purports to preserve ("subject to the applicable rules and principles of each Party"), against impermissible considerations of political or economic relations.

The Court began by observing that the OECD Working Group on Bribery in International Business Transactions (the OECD's peer review mechanism) had evaluated the applicable prosecutorial rules of several countries, including the UK's, which provide for national security interests to be considered in determining whether to bring actions, and the working group had not indicated that those measures contravene Article 5. The Court acknowledged the absence of a specific "national security" exemption in the OECD Convention and its related commentaries, but found that "[s]ince the wide discretion of the prosecutor is preserved in the opening sentence of Article 5, there was, in our view, no need for specific reference to national security." The Court cited broader international law principles, including the right to life expressed in the Universal Declaration of Rights and other concepts, to support the view that national security should be a valid basis for terminating a prosecution under the OECD Convention *in at least some instances*.

The critical question, however—which the Court readily acknowledged—was how to balance a national security exception against Article 5's *prohibited* bases for terminating an investigation, including "considerations of national economic interest" and "the potential effect upon relations with another State." The Court concluded that the purposes of Article 5 could be best achieved, consistent with preserving the consideration of "national security" in the exercise of prosecutorial discretion, through the customary international law concept of "state necessity," which excuses a country from international law obligations if such action is "the only way for the State to safeguard an essential interest against a grave and imminent peril," and "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the interna-

tional community as a whole." Under this approach, the Court posited that a prosecutor could discontinue an investigation or prosecution on national security grounds only "in circumstances where that was the only means of protecting the security of its citizens."

The Court offered the "state necessity" theory as a means to render uniform the OECD Convention parties' implementation of Article 5. The Court noted, however, that the enunciation of standards for the interpretation of Article 5 has been vested in the OECD Convention Working Group on Bribery, and it deferred to the working group to consider the question on a more definitive basis, along with the question of whether the SFO director's decision to terminate the Al-Yamamah investigation was consistent with the UK's obligations under the OECD Convention (apart from domestic English law).

Potential Impact of High Court Decision and Steps Forward—On April 24, the High Court granted leave to the SFO to appeal the High Court decision to the English House of Lords, Britain's highest court. That appeal is due to be heard in early July, and a decision is expected within six to eight weeks thereafter (assuming the House of Lords' typical turnaround rate holds true in this instance). The House of Lords will, of course, have the final say as to whether the SFO director's decision to terminate the investigation complied with English law, and it may also offer views on the OECD Convention issues addressed by the High Court. If the House of Lords upholds the High Court judgment, the SFO must either reopen the investigation, or reassert its decision to terminate the investigation with evidence that satisfies whatever legal standard emerges from the House of Lords judgment.

In addition, legislation is currently pending in Parliament that, if enacted, would empower the attorney general to direct a prosecutor to discontinue an investigation or prosecution if he is satisfied that doing so is necessary to protect interests of "national security." The legislation could gain momentum if the House of Lords upholds the High Court judgment.

On a separate track, the OECD Working Group on Bribery is expected to evaluate whether the SFO's conduct has been consistent with Article 5. That process should interest observers both in the UK and among other OECD Convention members states, including the U.S., because the working group may take the opportunity to articulate standards for parties to differentiate between a permissible "national security" justification for terminating an investigation and the prohibited factors enumerated in Article 5. Whether the working group

will endorse the High Court's "state necessity" approach or some other theory remains to be seen.

As a consequence of the Al-Yamamah matter, the British government has received heightened criticism for a perceived weakness in anticorruption law enforcement. Even before the Al-Yamamah investigation the UK government was noted by a number of non-government organizations for a relative lack of foreign bribery enforcement actions, as compared to the U.S. and certain other OECD countries. The tenor of the High Court decision has undoubtedly contributed to that sentiment (the decision opens with the stark observation, describing the SFO's reaction to the Saudi threat, that "[s]o bleak a picture of the impotence of the law invites dismay, if not outrage").

However, the High Court decision, and the Al-Yamamah issue in general, should be understood in context. The concept of a focus on national security considerations in the exercise of prosecutorial discretion is, as the High Court noted, already reflected to a certain extent in UK law, as well as in the laws of other OECD Convention parties. The central legal question addressed by the High Court was less whether such a standard is, in the abstract, appropriate, but what evidentiary threshold should be established to limit the standard in implementation. In addition, it would be speculative to draw broad conclusions from the Al-Yamamah inves-

tigation, either regarding the SFO's past willingness to bring anticorruption cases or its likely response to the High Court judgment (again, assuming the judgment is upheld). There are no public indications that "national security" considerations have been utilized by the SFO as a basis for foregoing prosecutions in other anticorruption investigations, and it would seem unlikely that the threats cited in the Saudi context could represent a wide-ranging tactic for defining the exercise of prosecutorial discretion, even under a broad understanding of a "national security" factor. (Among other things, the case would have to involve a country with a sufficiently critical role in international security relations and a willingness to utilize its leverage to make threats that would relate to the investigation.) Consequently, to the extent the OECD Working Group on Bribery considers the UK government's overall commitment to anticorruption law enforcement, that discussion will likely be driven largely by issues and circumstances beyond the experience of the SFO in the Al-Yamamah investigation or the English judicial review.



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