

Introductory Note by Francis Bennion

The following article is my fourth JP article in two months which corrects errors about the prosecution system in England and Wales. This one refutes four erroneous assertions thrown up by the recent Al Yamamah incident concerning bribery allegations in relation to an arms order involving Saudi Arabia, namely-

- that discontinuance of the investigation, and consequent stopping of the prosecution against the alleged wrongdoers, was ordered by the government;
- that it is unlawful or improper for the authorities not to prosecute whenever there is evidence sufficient to make a conviction more likely than not;
- that to institute a prosecution in this case would not be against the public interest, as officially alleged; and
- that the discontinuance contravenes the rule of law.

See *R (on the application of Corner House and another) v Director of Serious Fraud Office (BAE Systems plc, interested party)* [2008] EWHC, 714 (Admin); [2008] UKHL 60; [2008] 4 All ER 927.

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Prosecutions: the Al Yamamah incident

FRANCIS BENNION*

And So It Goes On

The prosecution saga continues. My reason for returning to it yet again is that there has been a further major development. An announcement by the Attorney General on December 14 caused a media frenzy, and brought forth several assertions that appear mistaken and need correcting. The announcement was that the investigation by the Serious Fraud Office (SFO) into BAE Systems plc had been brought to a sudden end without being completed.

The investigation had been into alleged bribes paid in relation to the Al Yamamah weapons programme involving the government of Saudi Arabia. It had been expected that charges would be brought in relation to this under the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act) Pt 12, which extends the pre-existing law of corruption to the bribery of overseas officials.

The SFO was set up by section 1 of the Criminal Justice Act 1987, following the recommendations of the 1986 Roskill Report. The section says that the SFO shall be constituted for England and Wales and Northern Ireland, that the Attorney General shall appoint a person to be the Director of the SFO, that the Director of the SFO shall discharge his functions under the superintendence of the Attorney¹, and that the Director may

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¹ This language echoes that of the Prosecution of Offences Act 1985 s 3(1) in relation to the office of Director of Public Prosecutions.

investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.

The uproar that followed the Attorney's announcement revealed confusion, from the Prime Minister Tony Blair down, about the way the English prosecution system

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operates. I explained aspects of this in three recent articles.² Now, with a view to throwing further light on it, I will endeavour to refute four assertions thrown up by the Al Yamamah incident which seem to be mistaken. These are:

- that discontinuance of the investigation, and consequent stopping of the prosecution against the alleged wrongdoers, was ordered by the government;
- that it is unlawful or improper for the authorities not to prosecute whenever there is evidence sufficient to make a conviction more likely than not;
- that to institute a prosecution in this case would not be against the public interest, as officially alleged; and
- that the discontinuance contravenes the rule of law.

The Attorney's Announcement

The announcement in the House of Lords on December 14 2006 by Lord Goldsmith QC, the Attorney General, started by saying that the SFO had issued the following statement.³

“The Director of the Serious Fraud Office has decided to discontinue the investigation into the affairs of BAe Systems plc as far as they relate to the Al Yamamah defence contract. This decision has been taken following representations that have been made both to the Attorney General and the Director concerning the need to safeguard national and international security. *It has been necessary to balance the need to maintain the rule of law against the wider public interest.*⁴ *No weight has been given to commercial interests or to the national economic interest.*^{5”}

Lord Goldsmith said that, given the intense interest in the issue and its market sensitivity, he had decided to make the present statement.

The SFO, he said, had divided its investigation into three periods: (1) from the mid-1980s until the coming into force of the 2001 Act; (2) the period covering payments made at about the time of the termination of the arrangements under which payments had previously been made by BAE (before the passing of the 2001 Act); (3) the longer period (after the passing of the 2001 Act) in relation to which there was little hard evidence that payments were made.

In the SFO's view, said Lord Goldsmith, there was no guarantee that the investigation would lead to prosecution. To complete the investigation, significant further inquiries would be necessary, which would last a further 18 months. So the SFO had concluded that the potential damage to the public interest which such a further period of investigation would cause is such that it should discontinue that investigation now. He added:

“I agree that there are considerable uncertainties that a prosecution could be brought; indeed, my view goes somewhat further as I consider, having carefully considered the

² See “*Jones v Whalley: Constitutional Errors by the Appellate Committee*” (2006) 170 JPN 847; “*Déjà Vu, or the Judge Addresses the Society*”, (2006) 170 JPN 888; “*The Prosecution Circus Continued*”, (2006) 170 JPN 944.

³ Lords Hansard, 14 December 2006, cols. 1711-1713.

⁴ Emphasis added. The question whether the rule of law was breached is examined below.

⁵ Again, emphasis added. The question whether commercial and economic interests ought to have been included in the weighing process is discussed below.

present evidence, that there are obstacles to a successful prosecution so that it is likely that it would not in the end go ahead.”

Lord Goldsmith said that there was a strong public interest in upholding and enforcing the criminal law, in particular against international corruption, which Parliament specifically legislated to prohibit by the 2001 Act.

“In addition I have, as is normal practice in any sensitive case, obtained the views of the Prime Minister and the Foreign and Defence Secretaries as to the public interest considerations raised by this investigation. They have expressed the clear view that continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment.”

Lord Goldsmith added that Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions precludes him and the SFO from taking into account considerations of the national economic interest or the potential effect upon relations with another state, “and we have not done so”.⁶ He concluded by saying that the company and individuals involved deny any wrongdoing.

Replying for the Opposition, Lord Kingsland said⁷:

“It is important to stress at the outset that that decision has been made by the prosecutorial authority and by that authority alone. It is true, of course, that the . . . Attorney-General has supervisory powers over that authority and will have given that authority the benefit of his views when asked, *but the decision is its alone*⁸; it is not a political decision . . . In such an international matter, assessing public interest is inevitably complicated, and many diplomatic and other factors are taken into account. The . . . Attorney General has outlined those factors in making the statement this afternoon. They are inevitable factors, which are within the unique knowledge of executive authorities. I am in no position to make a judgment about them and it is right in our constitutional system that, unless we have compelling reasons to believe otherwise, we accept the judgment *made by the government*⁹. The . . . Attorney-General is, after all, accountable to Parliament for making that judgment, and there the matter should rest.”

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Was The Discontinuance Ordered By The Government?

From the various statements made by a number of people, one had difficulty in knowing whether this important decision was truly taken by the Prime Minister, the Attorney General, the SFO, or Uncle Tom Cobleigh. The following newspaper report appeared:

“The government should be stripped of its power to stop prosecutions in the national interest, a professor of law at Cambridge University said yesterday. John Spencer called the power to halt cases ‘the sort of thing you find in countries where the rule of law is not respected, and where criminal justice is instrumentalised [used] by the government as a stick to beat its political enemies, while its friends are allowed to flout the law with impunity’.

⁶ Article 5 is discussed below.

⁷ Col. 1713.

⁸ Emphasis added. This phrase is discussed below.

⁹ Emphasis added. It seems that (incorrectly) Lord Kingsland does not distinguish any difference between the Attorney General and the government here.

Professor Spencer, a criminal law expert, said it was unacceptable that the power should exist in the UK. ‘It is only because the power exists that the Saudis were able to lean on the government to exercise it. The government could only resist the improper pressure by refusing to exercise it. If it didn’t have the power, it would have to reply “Sorry, but we can’t help you – as it does, for example, when democratic countries complain to our government about hostile coverage in the press.”¹⁰

Hostile coverage in the press about other countries does not usually originate with the government; whereas prosecutions do originate with the state. They do not however originate with the government. As I have pointed out in previous articles, under our constitution the prosecutive power resides in the Attorney General acting independently of the government in a quasi-judicial manner.

This was confirmed (if confirmation was needed) in a radio interview with the former Attorney General Lord Lyell (better known as Sir Nicholas Lyell) on December 15.¹¹ Speaking of the decision to terminate the Al Yamamah investigation, Lord Lyell said:

“The whole way that this has been handled is absolutely astonishing. You started your broadcast with the Prime Minister saying that he took responsibility for the decision. It has nothing to do with the Prime Minister. We have an independent prosecuting authority under the Attorney General . . . The person who adjudicates is the Attorney General. He is the ultimate prosecuting authority, and he is the guardian of the public interest . . . There have been other occasions when the Prime Minister does not seem to understand our constitution, and this is a bad example. He seems to be stepping in and seeking to rule the roost. He should have made representations to the Attorney General and left it to the Attorney.”

Another notorious occasion when the Prime Minister did not seem to understand our constitution was the unsuccessful attempt by Mr Blair on June 12 2003 to abolish the ancient office of Lord Chancellor by a press release.¹² However the Lord Chancellor was later stripped by a Blair-dominated Parliament of his judicial functions.¹³ This has thrown additional burdens on the Attorney General.

So we conclude that the government do not in fact possess the power that Professor Spencer is reported as saying should be stripped from them, though sometimes members of the government mistakenly act as if they did.¹⁴

Is It Improper Not To Prosecute Whenever There Is Sufficient Evidence?

In the above report Professor Spencer says the government should be stripped of its power to stop prosecutions in the national interest. As I have explained, it is not the government that possesses this power but the Attorney General acting independently of the government. It would require legislation to remove the power. The Prosecution of Offences Act 1985 s 10(1) expressly recognises that a prosecution may be discontinued, and requires the Attorney General to give guidance on the matter. This would need to be amended, as would other enactments. The ancient prerogative power of the Attorney to stop a prosecution on indictment by *nolle prosequi* would have to be removed by legislation.

Such amendments would constitute a major change in our prosecution system. Prosecutions are known as pleas of the Crown, and it has always been within the royal prerogative to refrain from prosecuting an offence, or halt a prosecution, if that was what the public interest

¹⁰ *The Guardian*, December 16 2006, p. 5. I assume that the report accurately reflected Professor Spencer’s views since it was not corrected in subsequent issues.

¹¹ BBC Radio 4, “The World Tonight” with Robin Lustig.

¹² See F A R Bennion. “Requiem for the Lord Chancellor?”, *Commonwealth Lawyer* Vol. 12 No. 2, August 2003, p. 31, <http://www.francisbennion.com/2003/003.htm>

¹³ Constitutional Reform Act 2005 Pt. 2.

¹⁴ One notorious incident was when in 1970 the Heath government was involved in the decision not to prosecute the hijacker Leila Khaled so that she could be exchanged for prisoners.

required. To alter the system so that no one had the power to terminate a prosecution even though to continue it was judged contrary to the public interest would surely be inappropriate. The current Code for Crown Prosecutors issued under the Prosecution of Offences Act 1985 s 10(1) says:

“In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: ‘It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution’. (House of Commons Debates, volume 483, column 681, 29 January 1951.)”¹⁵

The Code goes on to give nine different grounds on which it may be decided that, although the evidence is sufficient for a conviction, the public interest demands that no prosecution be brought. Similar factors apply to the stopping of a prosecution which is already in progress.

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Would It Be Against The Public Interest To Prosecute In *Al Yamamah*?

This question has been answered already in the extracts given above. A further answer is provided by a report in the *Observer*, a respected newspaper with a reputation for truth. This revealed that the government of Saudi Arabia had threatened to stop sharing vital intelligence – particularly intercepted communications between al-Qaeda members active there – unless Britain suspended its investigation. The Saudis warned that they would also expel British military and intelligence personnel based in the country. The intelligence threats seem to have been made after months of commercial threats had failed to get the desired result. One senior intelligence expert said that the Saudis’ contribution to the battle against al-Qaeda could not be underestimated:

“The Saudis are very, very important. Mucking up that relationship is something you do not do.”

The fight against terrorism itself could have been at risk, the report concluded, adding that the Director of the SFO, Robert Wardle, said that he was convinced to drop the case by national security considerations..¹⁶

There have been constant reports in recent months of Saudi resentment and anger at the activities of the SFO in this case. There is nothing unconvincing about the Attorney General’s statement that to continue with the investigation and follow it with a prosecution would be contrary to the public interest. Lord Kingsland’s assertion quoted above, is plainly correct – though he was mistaken in saying we should accept the judgment *made by the government*. What he should have said was that we accept the judgment made by the Attorney in the light of the information communicated to him by the government and others.

Is Discontinuance Contrary To The Rule Of Law?

This incorrect statement is swiftly disposed of. The SFO statement given above included the following sentence:

“It has been necessary to balance the need to maintain the rule of law against the wider public interest.”

Lord Goldsmith endorsed this by including it in his own statement to the Lords. Critical commentators fastened on it. For example Polly Toynbee wrote:

“. . . the Attorney General himself proclaims that politics trump the law, halting the investigation into BAE’s possible bribery of Saudi princes for political/employment/security reasons. The chief law officer casts aside the law as a

¹⁵ Paragraph 5.6.

¹⁶ See *The Observer*, 17 December 2006, p. 4.

political inconvenience – but with the Tories, the unions and the CBI all hailing this as judicious prudence, who was left to rouse public outrage?”¹⁷

The answer is that rousing public outrage was left to journalists like Polly Toynbee, showing their ignorance of the constitutional rules governing prosecutions. The excuse they can offer is that in endorsing that sentence from the SFO statement the Attorney was himself showing ignorance. For the fact is that *the rule of law allows for the discontinuance*. The discontinuance was not contrary to the rule of law because the law permits, indeed requires, discontinuance where it appears that an ongoing prosecution would not be in the public interest. Unfortunately this is not the first time I have had to accuse Lord Goldsmith of not knowing his job.¹⁸

Article 5 of the OECD Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into effect in the United Kingdom on 15 February 1999. The 2001 Act implementing it came into force on 14 February 2002. Article 5 of the Convention runs as follows:

“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.”

Neither the 2001 Act nor the official explanatory notes on it mention Article 5, so it is clear it has no legislative effect. Its terms are contradictory. Among “the applicable rules and principles” of United Kingdom law is the rule that a prosecution should be instituted or allowed to continue only where the public interest so requires, and for this purpose the public interest comprehends both “considerations of national economic interest” and “the potential effect upon relations with another State”. Lord Goldsmith’s statement that in deciding to discontinue the Al Yamamah investigation he had not been influenced by the latter consideration is clearly incorrect. Britain’s relations with Saudi Arabia were a central factor in the decision to terminate the investigation.

In the absence of legislation upholding Article 5 it seems, for the reasons just stated, that because it is contrary to our law it must be treated as ineffective in relation to the United Kingdom.

Later

A treaty cannot of its own force abrogate a rule of our law, especially when that rule explicitly protects the public interest. Such abrogation requires Parliamentary approval, which in this case it did not receive. [The last two sentences derive from FB’s letter to similar effect published in the *New Law Journal* on 16 March 2007. See FB’s website at www.francisbennion.com/2007/012.htm.]

¹⁷ *The Guardian*, December 22 2006, p. 29.

¹⁸ For a previous example see F A R Bennion, “Does the Attorney General Know His Job?”, 169 JPN (April 2, 2005) 248, <http://www.francisbennion.com/2005/015.htm>