

JUDICIAL REVIEW N463 (03.02)
Application for urgent consideration

This form must be completed by the Claimant or the Claimant's advocate if exceptional urgency is being claimed and the application needs to be determined within a certain time scale.

The Claimant, or Claimant's solicitors must serve this form on the Defendant(s) and any Interested Parties with the N461 Judicial Review Claim Form.

To the Defendant(s) and Interested Party(ies): Representations as to the urgency of the claim may be made by Defendant or Interested Parties to the Administrative Court Office by fax – 020 7947 6802

In the High Court of Justice Administrative Court	
Claim No.	
Claimant(s)	(1) Campaign Against Arms Trade (2) Corner House Research
Reference	JB/RS/CAAT(6)
Defendant(s)	Director of the Serious Fraud Office
Interested Parties	(1) BAE Systems Plc (2) Count Mensdorff-Pouilly

Section 1

Reasons for urgency

Need for urgency

1. The claimants seek urgent consideration of this application for judicial review in order that their application for interim relief namely an injunction preventing the SFO from taking any further steps to prosecute BAE Systems plc (BAE) in respect of offences under s. 221 of the Companies Act 1985, can be considered before it is too late and pleas are entered by BAE.

The challenge

2. The claimants challenge, inter alia, the decision of the Defendant to enter into a plea agreement with BAE systems. See paras 2-15 of the Detailed Statement of Fact and Grounds for more detail.
3. On 5 February 2010 the SFO announced a "settlement" with BAE over its criminal investigation into alleged corrupt practices. Its press release read:

"The SFO has today reached an agreement with BAE Systems that the company will plead guilty in the Crown Court to an offence under section 221 of the Companies Act 1985 of failing to keep reasonably accurate accounting records in relation to its activities in Tanzania. The company will pay £30 million comprising a financial order to be determined by a Crown Court judge with the balance paid as an ex gratia payment for the benefit of the people of Tanzania.

In conjunction with this agreement the SFO has taken account of the implementation by BAE Systems of substantial ethical and compliance reforms and the company's agreement with the DoJ announced today, and has determined that no further prosecutions will be brought against BAE

Systems in relation to the matters that have been under investigation by the SFO."

4. The claimants' claim that the decision to enter into this plea agreement was unlawful. The SFO were obliged to charge BAE with an offence that reflects the seriousness and extent of the offending and gives the court adequate powers to sentence.
5. Later on 5 February the SFO released a second press statement announcing that criminal charges against Count Alfons Mensdorff-Pouilly would be withdrawn and concluding:

"This decision brings to an end the SFO's investigations into BAE's defence contracts"

6. The intention of the defendant is to charge BAE under s221 of the Companies Act 1985 and then bring BAE before a Crown Court so that the charge can be put and a guilty plea entered. As can be seen from the above statements this would then close the SFO's investigations into BAE.

SFO refusal to delay prosecution

7. On Wednesday 10th February 2010 a letter was sent on behalf of the claimants to the defendant giving him notice that a letter before action would shortly be served and asking him to:

"confirm by return that no steps will be taken to bring the matter before the Crown Court for the time being. If you are not prepared to give this assurance, please confirm by return that you will give us at least 7 days notice of the date of any proposed hearing in the Crown Court in this matter."

8. No response was received.
9. On Friday 12th February 2010 a letter before claim was sent on behalf of the claimants to the defendant, in accordance with the pre-action protocol for judicial review. In the letter the Director was asked again to confirm that the criminal proceedings would not be brought before the Crown Court or alternatively to agree to provide at least 7 days notice.
10. On 16 February 2010 the claimants' solicitor received a response from the Director. In relation to the requested stay of the criminal proceedings he said the following:

"You have asked if I would delay the Crown Court proceedings to give your clients the opportunity to consider their position. You will appreciate that it would not be right for me to do that. It is important that criminal cases are brought to the Crown Court as speedily as possible. I can certainly keep you informed of timing in the way that you have suggested but, in the absence of a court order, it would not be right for me to allow any delay to take place in the criminal proceedings. At present, it is likely that the criminal proceedings will commence in very late February or early March. I

should add that I need to reserve the right in any judicial review proceedings to address the court on the legal issues arising from the redress you are seeking here."

11. On 22 February 2010 the claimants solicitors' wrote to the Director in the following terms:

"We note your assurance that you will keep us informed of the timing of the criminal proceedings. Please inform us by return of the present position in this regard, and confirm that you will not take any further steps in the proceedings pending the determination of our clients' claim for judicial review of your decision. In the absence of such an undertaking, our clients will be compelled to seek interim relief staying the criminal proceedings pending the outcome of the proposed judicial review."

"In the circumstances, if you are not prepared to give us the undertaking we seek, please confirm that you will give 7 days notice of any Court hearing in the criminal proceedings".

12. No such assurances have been received and the Defendant has indicated (letter of 25 February) that the criminal proceedings will be before the magistrates' court in the week beginning 1 March 2010. The claimants understanding remains therefore that the criminal proceedings are liable to commence imminently.

13. Copies of the correspondence are found in the essential reading.

Interim relief

14. The claimants seek an interim injunction prohibiting the defendant from taking any further steps in its prosecution of BAE for offences under s221 of the Companies Act 1985 until the claimants' application for judicial review of the SFO's decision has been determined or further order.

15. Applications for interim injunctions fall to be considered under the *American Cyanamid* guidelines (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396). It is submitted that the judicial review claim form clearly discloses a serious issue to be tried – i.e. the lawfulness of the defendant's prosecution decisions – that neither the defendant nor BAE will suffer prejudice from a delay in the criminal proceedings and that damages would clearly not be an adequate remedy for the claimants.

16. The crucial question is where the balance of convenience lies.

17. It is imperative that BAE is not charged under s221 or given an opportunity to enter a guilty plea before the judicial review claim has been considered for the following reasons:

- a. If the judicial review is successful the defendant is likely to charge BAE with more serious offences relating to corruption. There is a significant risk that once the charge under s221 is made or a guilty plea entered the

SFO would be barred from charging BAE with more serious offences because to do so would amount to an abuse of process (see for example *R v Townsend* [1997] 2 Cr App R 540 & *R v Bloomfield* [1997] 1 Cr App R 135). This would frustrate the purpose of the judicial review because it would prevent the defendant being able to reconsider its decision whether to charge and what charges to prefer.

- b. Even if a further prosecution was not barred as an abuse of process, it would be more just and more in keeping with the overriding objective (*Criminal Procedure Rules, rule 1*) for all the charges to be heard together. In particular, it would enable the case to be dealt with “efficiently and expeditiously” and would be more fair to BAE because it would not be put through two separate sets of proceedings.
18. No prejudice will be suffered by the defendant or BAE in delaying the criminal proceedings. It has been investigating BAE since 2004. It is unrealistic to suggest that a further short delay in charging the company would have any effect over and above the inconvenience of having the matter stand in abeyance for a short time.
19. In light of the long running and public investigation into allegations of corruption against BAE Systems, it is submitted that any prejudice caused to them by a short delay would be very minor, and entirely proportionate in light of the likely frustration of the judicial review claim that would occur if the criminal proceedings went ahead. Furthermore, the Court can minimise the delay by ensuring that the claim is expedited. The claimants’ have included a request for expedition in the proposed timetable.
20. The claimants thus submit that the balance of convenience lies in favour of granting the interim relief.
21. In light of the defendant’s refusal to put the Crown Court proceedings on hold and the imminent commencement of those proceedings it is imperative that interim relief is granted in accordance with the proposed timetable.

Section 2

Proposed timetable

(tick the boxes and complete the following statements that apply)

- (a) The application for interim relief should be considered within 24 hours
- (b) Abridgment of time to 14 days for the lodging of Defendant’s Acknowledgment of Service.
- (c) The Court consider the application for permission by 20 March 2010.