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***KBR v SFO* – Another specific and limited breach of international law?**

The Supreme Court's decision is a timely reminder of the limits to the extraterritorial application of UK law, and the importance of comity in maintaining the international order. Christopher Houssemayne du Boulay considers the impact of R (on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent) [2021] UKSC 2.

When the Secretary of State for Northern Ireland, Brandon Lewis MP, admitted in October 2020 that the UK Government's Internal Market Bill would break international law in a "*specific and limited way*" it provoked a domestic and international backlash with warnings that it would ruin Britain's reputation around the world.

On 5 February 2021 the Supreme Court delivered a quieter, but nonetheless powerful, rebuke of another attempt by the State to push at the boundaries of international norms.

The Court was considering a 'section 2 notice' which had been served by the Serious Fraud Office (SFO) on an officer of KBR, Inc, seeking to compel the company to produce documents which the SFO said were relevant to one of its investigations.

Section 2 notices are the bedrock of the SFO's investigatory powers and are commonly used to obtain documents from a company. What made this notice unusual was that both the documents and the company in question were located outside of the UK.

When UK law enforcement agencies wish to obtain evidence from abroad they must ordinarily rely upon the process of 'mutual legal assistance', a system based upon international treaties negotiated by participating states. This process can be slow and cumbersome, but it enables each country to determine its own domestic procedures for dealing with foreign evidence requests. Safeguards can also be built into the process, such as judicial oversight and restrictions on collateral use of disclosed material.

The SFO sought to bypass this process by elevating its domestic evidence gathering powers to the international stage. It argued that as its section 2 powers were capable of compelling a British company to produce relevant documents held abroad,[1] those powers must also extend to foreign companies holding similar documents.

[1] This point was not in dispute before the Supreme Court and was not directly relevant to the facts under consideration. On full argument it is possible that the Court may determine the matter differently, but its comments will no doubt be considered highly persuasive: "*A UK company would be required to produce here a document it holds overseas. It would simply be required to bring that document into the jurisdiction in order to produce it*."

While this may seem like a limited extension of its powers, the problem for the SFO was that the relevant Act made no mention of section 2 having an extraterritorial scope. Such an application would also run roughshod over the safeguards of the carefully crafted international mutual legal assistance treaties.

The Supreme Court found that it was "*inherently improbable*" that Parliament would have refined the mutual legal assistance process as it did while also intending there to be a parallel process which could "*operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the State where the evidence was located and without the protection of any of the safeguards put in place*".

The Supreme Court reinforced the longstanding presumption that legislation does not have extra-territorial effect, unless the contrary intention is clearly expressed or to be inferred. The Court also explained that this presumption is "*rooted in the concept of comity*", the neighbourliness and mutual respect between states, and the requirement of international law that one State should not seek to infringe the sovereignty of another.

While the safeguards and protections of the mutual legal assistance legislation may perhaps have seemed cumbersome and unimportant to the SFO, the Supreme Court found that they were of "*critical importance*" to the functioning of the international system and were "*fundamental to the mutual respect and comity on which the system is founded*".

It is, of course, this same international system and these same safeguards which protect British nationals and companies from unwarranted probes by foreign law enforcement agencies, some of which may be acting for far more nefarious purposes.

Just as the threats of international repercussions eventually forced the Government to remove the most controversial clauses from its Internal Markets Bill, the SFO would perhaps be wise to take heed before stepping again on its neighbours' toes.

17 February 2021

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