

N462

# Judicial Review Acknowledgment of Service

Name and address of person to be served

<b>name</b> Leigh Day
<b>address</b> Priory House 25 St. Johns Lane London EC1M 4LB

In the High Court of Justice Administrative Court	
<b>Claim No.</b>	CO/1306/2016
<b>Claimant(s)</b> <i>(including ref.)</i>	Campaign Against Arms Trade (CAAT)
<b>Defendant(s)</b>	The Secretary of State for Business, Innovations and Skills
<b>Interested Parties</b>	

## SECTION A

Tick the appropriate box

- I intend to contest all of the claim  } complete sections B, C, D and F
- I intend to contest part of the claim  }
- I do not intend to contest the claim  complete section F
- The defendant (interested party) is a court or tribunal and **intends** to make a submission.  complete sections B, C and F
- The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.  complete sections B and F
- The applicant has indicated that this is a claim to which the Aarhus Convention applies.  complete sections E and F
- The **Defendant** asks the Court to consider whether the outcome for the claimant would have been **substantially different** if the conduct complained of had not occurred [see s.31(3C) of the Senior Courts Act 1981]  A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

**Note:** If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

## SECTION B

Insert the name and address of any person you consider should be added as an interested party.

<b>name</b> BAE Systems (Operations) Limited	
<b>address</b> Farnborough Aerospace Centre Farnborough Hants. GU14 6YU	
<b>Telephone no.</b>	<b>Fax no.</b>
<b>E-mail address</b>	

<b>name</b> Raytheon Systems Limited	
<b>address</b> The Pinnacles Elizabeth Way Harlow Essex CM19 5BB	
<b>Telephone no.</b>	<b>Fax no.</b>
<b>E-mail address</b>	

**SECTION C**

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

The summary grounds for contesting this claim are contained in a separate document enclosed with this form.

**SECTION D**

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

For the reasons indicated in the enclosed Summary Grounds:

1. Refuse permission for judicial review and order the Claimant to pay the Defendants' costs associated with preparing the acknowledgement of service (a schedule of costs in form N260 to be filed separately).
2. If permission is granted, refuse the request for expedition.
3. If permission is granted, refuse the application for a protective costs order.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

**SECTION E**

Response to the claimant's contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim?  Yes  No

If Yes, please set out your grounds for denial in the box below.

**SECTION F**

<i>*delete as appropriate</i>	<del>*(I believe)</del> (The defendant believes) that the facts stated in this form are true. *I am duly authorised by the defendant to sign this statement.	(if signing on behalf of firm or company, court or tribunal)	<b>Position or office held</b> Caseholder for the Treasury Solicitor
<i>(To be signed by you or by your solicitor or litigation friend)</i>	<b>Signed</b> FOR THE TREASURY SOLICITOR		<b>Date</b> 30 March 2016

Give an address to which notices about this case can be sent to you

<b>name</b>	Simon Ramsden
<b>address</b>	One Kemble Street London WC2B 4TS
<b>Telephone no.</b>	020 7210 4533
<b>Fax no.</b>	020 72103410
<b>E-mail address</b>	simon.ramsden@governmentlegal.gov.uk

If you have instructed counsel, please give their name address and contact details below.

<b>name</b>	(1) James Eadie QC (2) Jonathan Glasson QC (3) Amy Sander	
<b>address</b>	(1) Blackstone Chambers, London EC4Y 9BW (2) Matrix Chambers, London WC1R 5LN (3) Essex Court Chambers, London WC2A 3EG	
<b>Telephone no.</b>		<b>Fax no.</b>
<b>E-mail address</b>		

**Completed forms**, together with a copy, should be lodged with the Administrative Court Office (court address, over the page), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

## **Administrative Court addresses**

- **Administrative Court in London**

Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

- **Administrative Court in Birmingham**

Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

- **Administrative Court in Wales**

Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

- **Administrative Court in Leeds**

Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

- **Administrative Court in Manchester**

Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN  
on the application of  
CAMPAIGN AGAINST ARMS TRADE

*Claimant*

-and-

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

*Defendant*

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SUMMARY GROUNDS  
OF THE SECRETARY OF STATE

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*References below are to the Application Bundle provided by the Claimant and are given in the form [tab letter/ page number].*

INTRODUCTION

1. These Summary Grounds respond to the Claimant's Statement of Facts and Detailed Statement of Grounds dated 8 March 2016. The Claimant challenges the Secretary of State's decisions not to suspend extant export licences for the sale or transfer of arms and military equipment to the Kingdom of Saudi Arabia ("KSA"); and to continue to grant new licences for the sale or transfer of arms or military equipment to KSA.
2. Three grounds of challenge are advanced: that the Secretary of State:
  - a. has failed to ask correct questions and make sufficient enquiries;
  - b. has failed to apply the "suspension mechanism";

- c. has irrationally concluded that the test set out in criterion 2(c) of the Consolidated EU and National Arms Export Licensing Criteria (“the Criteria”)<sup>1</sup> is not met.
3. It is submitted that permission should be refused on the basis that none of the claims advanced is properly arguable for the following reasons developed more fully below:
  - a. The Secretary of State has asked himself the relevant questions (as specified in criterion 2(c), and taken into account the key factors identified in the EU User Guide produced by the General Secretariat of the Council of the European Union<sup>2</sup>). He has taken reasonable, and on any view rational, steps to obtain and consider the information necessary for him to take his decisions;
  - b. He has rationally concluded that he is in possession of sufficient information to conduct the requisite risk assessment pursuant to criterion 2(c) and that therefore the suspension mechanism does not apply;
  - c. His conclusion that there is not a clear risk that UK licensed items might be used in the commission of a serious violation of International Humanitarian Law (“IHL”) pursuant to criterion 2(c) is also rational. There is no proper basis for the inference of irrationality the Claimant seeks to draw.

## THE CONTEXT

### FACTUAL

#### The conflict in Yemen

4. The military operations conducted in Yemen by the coalition of nine states (“the Coalition”) were commenced following the express request of the Yemen President to provide support “by all necessary means and measures, including military intervention, to protect Yemen and its people from continuing aggression by the Houthis”.<sup>3</sup> The KSA has formed a key part of the Coalition.<sup>4</sup>

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<sup>1</sup> [E(UK)5 - E(UK11)].

<sup>2</sup> General Secretariat of the Council of the European Union “User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment”, 20 July 2015 COARM 172 CFSP/PESC 393 (“EU User Guide”) at [C/115-C/269 at C/168].

<sup>3</sup> UN Security Council Resolution 2216 (2015), citing the letter dated 24 March 2015 from the Permanent Representative of Yemen, to the United Nations, transmitting a letter from the President of Yemen (President Hadi) [E(INT)/123 - E(INT)/129].

<sup>4</sup> The UK is not a party to the Yemen conflict and is not a member of the Coalition.

5. There is currently a de-escalation of the Yemen conflict: a de-escalation was agreed at the KSA border on 4 March 2016 and has been extended indefinitely, resulting in a sharp decrease in airstrikes. On 17 March 2016 KSA declared that it plans to scale back military operations in Yemen. The UN Special Envoy of the Secretary General to Yemen, Ismail Ould Cheikh Ahmed, has announced a nationwide cessation of hostilities in Yemen, scheduled to begin at midnight on 10 April 2016. Peace talks are scheduled to begin on 18 April 2016 in Kuwait.

### Licensing

6. The Export Control Organisation ("ECO") issues licences for controlling the export of strategic goods, including arms. The ECO is part of the Department for Business, Innovation & Skills. Licences have been granted by the ECO for the supply to KSA of arms and military equipment that might be used in the conflict in Yemen.<sup>5</sup>
7. Licences for the export of arms and military equipment to KSA have not been, and will not be, issued if to do so would be inconsistent with any provision of the Criteria. This includes criterion 2(c) i.e. where there is a clear risk that the items to be licensed might be used in the commission of a serious violation of IHL.

### The Committees on Arms Export Controls

8. The Parliamentary Committees on Arms Export Controls ("CAEC") comprises members of the Defence, Foreign Affairs, Business, Innovation and Skills and International Development Committees. Its remit is to examine the Government's expenditure, administration and policy on strategic exports, specifically the licensing of arms exports and other controlled goods. On 10 March 2016 CAEC launched an inquiry into the use of UK-manufactured arms in the conflict in Yemen.<sup>6</sup> In particular CAEC will examine: *"if weapons manufactured in the UK have been used by the Royal Saudi Armed Forces in Yemen, if any arms export licence criteria have been infringed and discuss what action should be taken in such cases."* The Government will provide written evidence to the

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<sup>5</sup> The Claimant refers to *"military improvised explosive devices"* (§5 of the Claimant's Grounds). Licences have not been and would not be granted for such devices.

<sup>6</sup> See *R (oao Hasan) v Secretary of State for Trade and Industry* [2007] EWHC 2630 (Admin), which was a challenge to the failure to publish reasons for arms exports license decision making: *"In principle, judicial review is a remedy of last resort and is only needed if appropriate redress cannot be obtained by another route. Parliament has set out the means whereby the lawfulness of licensing decisions such as those with which the claimant is concerned should be monitored. Thus there is in my judgment the necessary transparency and insofar as the defendant fails to comply with it, the Committee will comment and the ultimate judge will be Parliament."*

inquiry during April 2016 and several Ministers are scheduled to appear on 27 April 2016 to provide oral evidence.

## LEGAL

9. Regarding section D of the Claimant's Grounds (legal framework), three points are to be noted.
10. **First**, with respect to criterion 2(c), there are two requirements that must be addressed - a "clear" risk and a "serious" violation of IHL. The Claimant's Grounds do not engage with the standard set by this threshold of "clear risk" and "serious violation". The Claimant simply asserts criterion 2(c) sets a "low" threshold, with reference to the term "might".<sup>7</sup> The clarity of the risk and the seriousness of the violation of IHL are deliberate, integral and important components in the standard set by criterion 2(c). They indicate a higher threshold or standard than is presented by the Claimant.
11. **Secondly**, the relevant rules and principles of IHL must be correctly identified.<sup>8</sup> In particular, the obligation is to take "all feasible precautions" in attack.<sup>9</sup>
12. **Thirdly**, regard must be had (and is had) to the EU User Guide. It is to be noted however that this is non-binding guidance designed to assist in addressing the question of whether there is a clear risk that licensed items might be used in the commission of serious violations of IHL, with reference to three key factors.<sup>10</sup> The application of the series of subsidiary questions identified in the EU User Guide as assisting in answering that key question and considering those three key factors is context specific.<sup>11</sup>

## THE THREE GROUNDS OF CHALLENGE

- (1) The Claimant's case that the Secretary of State has failed to ask correct questions and make sufficient enquiries (Claimant's Grounds §§ 7a and 43-51)

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<sup>7</sup> Claimant's Grounds §§46 and 56.

<sup>8</sup> Cf Claimant's Grounds §39.

<sup>9</sup> Cf to the Claimant's Grounds at §§12, 25, 27, 45.6 and fn 42 referring to "precautions".

<sup>10</sup> Namely, (i) an inquiry into the recipient's past and present record of respect for IHL (ii) the recipient's intentions as expressed through formal commitments and (iii) the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

<sup>11</sup> Cf to the Claimant's rigid approach set out at §38 of the Claimant's Grounds "must follow it unless there is a good reason not to do so".



13. For the reasons set out below, the Secretary of State asked himself the right question and took reasonable (and on any view rational) steps to obtain and consider information bearing on that question.

#### **The question asked by the Secretary of State**

14. The relevant question for the Secretary of State is whether there is a clear risk that the items to be licensed might be used in the commission of a serious violation of IHL. That was the question addressed by the Secretary of State.
15. In addressing that question, the Secretary of State has considered (and continues to consider) the three key factors identified in the User Guide (at §2.13)<sup>12</sup> namely:
  - a. the recipient's past and present record of respect for IHL;
  - b. the recipient's intentions as expressed through formal commitments;
  - c. the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with IHL and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

#### **The information obtained by the Secretary of State**

16. The assessment undertaken by the Secretary of State pursuant to criterion 2(c) with respect to the licensing of arms for export to KSA is carried out on a case by case basis.<sup>13</sup> It is made by reference to expert advice from both the Foreign and Commonwealth Office ("FCO") and the Ministry of Defence ("MOD"). The situation is kept under careful and continual review. Joint working with other government departments ensures that the Secretary of State is able to keep the situation under regular review. The FCO chair fortnightly meetings on military, humanitarian and political developments in Yemen with attendance including BIS, MOD and DFID officials.
17. The Secretary of State's assessment is particularly informed by three strands of information and analysis:
  - a. a considered analysis by MOD of all incidents of alleged IHL violations by the Coalition in Yemen that come to its attention;
  - b. an understanding and knowledge of KSA military processes and procedures, notably by reference to information provided from UK Liaison Officers located in KSA Air Operations Centre (Riyadh). This

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<sup>12</sup> [C/115-C/269 at C/168]. See the Defendant's letter dated 16 February 2016 at §16.

<sup>13</sup> Cf to the Claimant's Grounds at §8 which suggests a blanket decision to "grant new licences" has been taken.

understanding and knowledge is also informed by logistical and technical support and training provided to KSA and engagement with the Saudi targeting process on the strategic, operational and tactical levels;

- c. ongoing engagement with KSA and post-incident dialogue, including with respect to investigations.

Each strand takes into account a range of sources and analyses, including (unsurprisingly) those of a sensitive nature to which the third parties cited by the Claimant do not have access.

*a. Analysis of allegations of violations of IHL*

18. The MOD monitors and analyses allegations of IHL violations arising from air strikes in Yemen conducted by the Coalition. There are two branches conducting this process: the Operations Directorate (“Ops Dir”) and the Permanent Joint Headquarters J3 (Current Operations) (“PJHQ”). They are assisted in this process by MOD’s lawyers.
19. All allegations that come to the attention of the MOD are recorded by Ops Dir. Allegations are identified from a range of sources. This includes the sources cited by the Claimant (UN agencies and officials, European Parliament and reports of NGOs such as Amnesty International and Human Rights Watch). It also includes additional sources such as open source media reports including social media, foreign governments, the FCO, the British Embassy in Riyadh and DFID and classified reports. Once an allegation of an IHL violation is identified and listed by Ops Dir, PJHQ will analyse it.
20. In the five annexes to the Claimant’s Grounds<sup>14</sup> there are 72 “*potential serious breaches of [IHL]*” described as either “*committed by*” or “*attributed to*” the Coalition.<sup>15</sup> Of those allegations, there are 14 duplicate reports<sup>16</sup> and 14 examples of general statements as opposed to specific examples of an individual allegation.<sup>17</sup> Of the remaining 44 allegations, which relate to Coalition activity, not exclusively that of KSA, these were all included in the current MOD list of allegations being tracked and assessed, with the

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<sup>14</sup> The annexes are organized according to the source: Annex I (UN organs), Annex II (European Parliament), Annex III (Médecins Sans Frontières), Annex IV (Amnesty International) and Annex V (Human Rights Watch).

<sup>15</sup> Annex I uses the term “*committed by*” in its heading. The other four Annexes use the term “*attributed to*”.

<sup>16</sup> There is a great degree of cross-reporting of incidents across third party reports. The MOD tracker lists incidents chronologically which assists in identifying such duplicate reporting.

<sup>17</sup> Annex II at p. A48 references the expulsion of the UNHCHR from Yemen. This was a decision taken, and then reversed, by the Government of Yemen and is unrelated to the Coalition and its IHL compliance.

exception of three allegations which have now been added to the list. It is noted that MOD is monitoring a greater number of allegations than are listed in the five annexes to the Claimant's Grounds.

21. In carrying out its analysis the MOD has access to a wide range of information to which the third parties relied upon by the Claimant do not have access including:
  - a. Coalition operational reporting data passed to the UK Liaison Officers;
  - b. Imagery, including from satellite and aircraft - this represents a more comprehensive and immediate picture than that provided by third party commercial imagery; and
  - c. Other reports and assessments, including UK Defence Intelligence reports and some initial battle damage assessment (BDA) which makes an assessment of the impact of a strike on the intended target.

Much of this information is sensitive and necessarily cannot be referred to in detail for national security and/or foreign relations reasons.

22. The third party reports cited by the Claimant are often prepared relying on interviews with eyewitnesses and photographs.<sup>18</sup> By their nature, such evidence is often limited in the scope (including as to the circumstances of an incident). Moreover, witness interviews need to be treated with inherent caution and witnesses may draw conclusions without sufficient insight into all relevant information.
23. On the basis of all the relevant information available to it, MOD then assess so far as possible (sharing its analysis both within MOD and with the FCO as appropriate):
  - a. whether the alleged event occurred as reported. In particular steps are taken to identify the location and date of the allegation, for example by requesting GPS co-ordinates and by UK intelligence analysis of the range of satellite imagery available;
  - b. who was responsible for the event and whether the strike was the result of a Coalition airstrike. Each allegation is categorised as either "*likely coalition*", "*unlikely/not coalition*" (i.e. where no evidence of damage is identified or where the incident is assessed as likely to be caused by something other than a Coalition airstrike, for example the Houthis), "*not known*" (i.e. where the allegations are not specific enough to investigate further due to a lack of information as to the

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<sup>18</sup> As noted in the Claimant's Grounds at fn 5.

- location or date, or where all the evidence available is inconclusive) or "tbc" (where investigations are still underway);
- c. whether a legitimate military object is identified and whether any concerns are raised by the strike;
  - d. whether the strike was carried out using an item that was licensed under a UK export licence.

*b. Knowledge of KSA military processes and procedures*

24. The UK has considerable insight into the systems, processes and procedures that the KSA has in place. **First**, the UK Liaison Officers located in KSA Air Operations Centre, Royal Saudi Air Force HQ and Ministry of Defence increase the flow of information between the UK and KSA to give the UK a better degree of insight into KSA's processes. Specifically in relation to KSA's targeting processes, the liaison officers are given insight via:
  - a. access by a Liaison Officer to the Saudi MOD in Riyadh (where pre-planned targeting is conducted and the process can be monitored);
  - b. access by the Royal Air Force's Chief of Air Staff Liaison Officer (CASLO) to the RSAF HQ in Riyadh (where senior RSAF intent and routine training engagements are carried out);
  - c. access to the Saudi Air Ops Centre (SAOC) Riyadh (where air operations are coordinated and the liaison officers have access to post strike mission reporting);
  - d. access to the Royal Saudi Naval Force HQ Riyadh and Royal Saudi Navy Western Fleet Command Jeddah, notably with respect to Maritime Force levels, post event interdiction operations and linkage to the Maritime Coalition Coordination Cell (MCCC) and the UK Maritime Component Commander (UKMCC) in Bahrain;
  - e. reporting of choice of weapons used for strikes and use of precision guided munitions.
25. **Secondly**, in addition to the role of the Liaison Officers, the UK's insight into KSA targeting processes is supplemented by the following:
  - a. The Defence Attaché (British Embassy Riyadh) together with PJHQ, and CASLO monitor and analyse targeting processes conducted by KSA.
  - b. The MOD has knowledge of targeting guidance issued by KSA to reduce civilian casualties. That knowledge includes the Special Instructions (SPINS) which set out time sensitive, regularly updated relevant Air Operational information and includes (a) guidance on criteria for the use of unguided weapons, (b) procedures for pre-planned targeting approvals and (c) special rules and procedures for

engagements in populated areas. Operational lawyers are present in the Saudi Ministry of Defence and at the Air Operations Centre and provide reviews of specific targets and investigations into civilian casualties.

- c. The Defence Attaché and Liaison Officers have also noted examples of restraint, and concern to minimise civilian casualties, being exercised in fact in pre-planned targeting processes.<sup>19</sup> This is illustrated by (a) improved incorporation of collateral damage estimation into the planning process, (b) utilisation of twin source intelligence, (c) cancellation of strikes, (d) changes being implemented to restrict the release of weapons under certain circumstances and (e) changes to the seniority of those to whom powers to make the decisions on strikes are delegated. For example, at a meeting on 1 March 2016 between the British defence representatives in Saudi Arabia and senior Saudi military officers, the senior Saudi planning officer present provided three examples where the Saudi MOD had ceased planning against a target in the previous few days due to IHL concerns, namely (a) a Houthi command post in Sa'dah that was near to a school (b) a Houthi Training camp in Sana'a near to a UN compound (c) hospital in Al-Hudayda District that was being used as a command post/barracks by the Houthis.

26. **Thirdly**, logistical and technical support is provided to KSA:

- a. UK personnel working for the Ministry of Defence Saudi Armed Forces Projects team (MODSAP) ensure that the supply of modern military aircraft, naval vessels, weapons, training and associated support services by BAE Systems and its sub-contractors is in accordance with KSA Armed Forces' requirements. MODSAP staff also advise the KSA Armed Forces of relevant technical developments in UK systems and on the development of professional training within the UK Armed Forces;
- b. UK personnel work for the Saudi Arabia National Guard Communications Project team who acquire and support modern communications capabilities for the Saudi Arabia National Guard;
- c. RAF staff seconded to BAE Systems provide training and technical maintenance support to the RSAF;
- d. KSA has invited UK and US targeting experts to their military headquarters to better understand its targeting processes. Officers from KSA military have subsequently worked with the UK and the US to implement the recommendations in reports.

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<sup>19</sup> As referred to in the 16 February 2016 letter at §§21 and 23.

27. **Fourthly**, UK training is provided to KSA personnel, including training on targeting and the importance of IHL compliance. Specifically:
- a. A three week International Targeting Course provided approximately 90 hours of targeting training to approximately 20 RSAF pilots and targeteers. It was held in the UK at RAF Cranwell on two occasions (July/August 2015 and January 2016) and in KSA on a third occasion (October 2015). This is a continuing activity with a new course planned for June/July 2016.
  - b. In January – February 2016 a seven man short term training team of UK gunners provided training in weapons locating radar and field artillery to Saudi Artillery units in KSA.
  - c. Individual training in the use of specific UK supplied munitions is provided.
  - d. Two RSAF Typhoon pilots are currently undertaking the Qualified Weapons Instructor’s Course in the UK. They are due to graduate in April 2016. A further two places will be provided on the next course starting in October 2016.
  - e. There is a continuing process of inviting Saudi service personnel onto UK run training courses.
28. By virtue of the fact that the UK is not a party to the Yemen conflict and is not a member of the Coalition, the access of the liaison officers will be to some extent moderated and controlled by KSA. There are also obvious limits to the ability of the UK to know precisely whether processes are in fact being complied with on the ground. However:
- a. The UK has been given extensive access, far in excess of what would normally be provided to a non-member of a military coalition.
  - b. The UK has friendly and mutually important relations with the KSA. This has led to the extensive access just referred to and informs the UK’s approach to information provided to it by the KSA.
  - c. The Liaison Officers have post-event access to the locations of where both pre-planned targeting is conducted and dynamic targeting is controlled, including access to post strike mission reporting.
  - d. Incidents are assessed by the MOD in the light of all the information available to it.

*c. Ongoing engagement with KSA and post incident dialogue*

29. There has been ongoing and extensive engagement with KSA with respect to the conduct of operations in Yemen including IHL compliance, in particular by Her Majesty’s Ambassador to the KSA and the Defence Attaché to the UK Embassy in the KSA.

30. The KSA has mounted investigations into incidents of concern including specifically the investigation into the incident of 25 October 2015 as reported in the press conference of 31 January 2016. The Secretary of State is aware of a number of other investigations that are currently underway. The DA has also been briefed on the findings of several preliminary investigations conducted by KSA. These investigations are considered to indicate a preparedness on the part of the KSA to learn lessons from incidents of concern, including specifically those in which civilian casualties occurred.
31. On 1 February 2016, KSA issued a statement reaffirming its respect, commitment and compliance with the rules of IHL, reaffirming that “*all possible measures*” are taken to protect all civilians in Yemen, and noting the establishment of an independent high level team of civilian and military experts to assess reported incidents of civilian casualties, investigation procedures and mechanisms of precision targeting.<sup>20</sup> An additional investigation team is currently being established to liaise with the Yemeni National Committee, as detailed in the statement of the Saudi Permanent Mission to the UN on 1 February 2016.<sup>21</sup>
32. On 15 March 2016, the Coalition committed to investigating an attack on the marketplace in Mastaba, Haijah province.<sup>22</sup>

#### *Statements by KSA officials*

33. The Secretary of State has also noted and taken into account statements and commitments made by senior officials of KSA during the course of this ongoing engagement and dialogue. Such statements and commitments are just one factor considered in a wider context, as part of an overall assessment.<sup>23</sup> The Claimant refers to this as follows “*Saudi Officials have offered the government an assurance that SA will seek to adhere to IHL in the conflict in Yemen*”, citing the 31 January 2016 press conference (Claimant’s Grounds §26). In fact (i) there has been a series of statements and commitments made by senior KSA officials at regular intervals (ii) the statements and commitments have not been limited to an aspirational statement of “*seeking*” to adhere to IHL, but to a commitment to such adherence.<sup>24</sup>

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<sup>20</sup> UN/2016/301 [D/69 - D/70].

<sup>21</sup> A copy of this statement is at [D/69 - D/70].

<sup>22</sup> <http://www.middleeasteye.net/news/least-65-killed-after-saudi-led-warplanes-hit-yemeni-market-reports-1496546013>

<sup>23</sup> As stated in the 16 February 2016 letter at §§21 and 28.

<sup>24</sup> The Claimant contends that they “*must be treated with great caution*”. The Secretary of State does not accept the need for “*great caution*” but emphasises that they are but part of a number of different factors that are taken into account in his overall assessment.

## The Claimant's specific criticisms about obtaining information

34. The Claimant relies primarily upon the following:
- a. that certain questions referred to in the EU User Guide have not been considered by the Secretary of State;<sup>25</sup>
  - b. two sentences reportedly stated by Brigadier Assiri which the Claimant asserts discloses targeting practices incompatible with IHL;<sup>26</sup>
  - c. the alleged failure of the Secretary of State to consider adequately the risk of diversion of weapons.<sup>27</sup>

### *a. Questions referred to in the EU User Guide*

35. The User Guide is non-binding guidance. However, as already noted, the Secretary of State considered the three key factors identified in §2.13 of the guidance (see §15 above).
36. The specific questions selected by the Claimant from the User Guide are subsidiary questions identified by the General Secretariat as assisting in addressing the three key factors, the application of which are dependent on the context. For example, whether there are domestic procedures in place for the prohibition and punishment of violations of IHL may inform an assessment of the recipient's record of respect for IHL. In the present case, as a matter of fact, KSA does have such procedures in place. But the focus of the Secretary of State's enquiry in assessing respect for IHL by KSA in the particular context of the conflict in Yemen was (correctly and on any view lawfully) on the actual incidents of concern and the utilization of the range of sources at the UK's disposal for assessing the situation on the ground.

### *b. The two statements of Brigadier Assiri*

37. The Claimant relies upon two sentences reportedly stated by Brigadier Assiri on 8 May 2015 and 1 February 2016 respectively,<sup>28</sup> and asserts that these two sentences indicate that KSA rules of engagement in a 12 month military campaign are flawed, specifically that it fails to distinguish between civilians and combatants.
38. In response, **first**, the two sentences do not establish a clear risk that UK licensed items might be used in the commission of serious violations of IHL.

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<sup>25</sup> Claimant's Grounds §45.

<sup>26</sup> Claimant's Grounds §50.3.

<sup>27</sup> Claimant's Grounds §48.

<sup>28</sup> The 8 May 2015 statement is cited at Claimant's Grounds §§14.4, 50.3 and 59. The 1 February 2016 statement is cited at Claimant's Grounds §§15, 50.3 and 60. The original transcripts are not provided.



An overall assessment must be undertaken, with regard to the factors outlined above, including the detailed understanding of processes in place, how the rules of engagement are operated in practice and the facts on the ground.

39. **Secondly**, there are many concrete examples of the principle of distinction being respected by KSA, including (i) selectivity in the choice of weapons against legitimate targets (ii) incorporation of collateral damage estimation into the planning process (iii) implementation of high standards for positive identification, including utilisation of twin-source intelligence whenever practicable (iv) targeting restraint.
40. **Thirdly**, and in any event, the two sentences must be placed in their proper context:
  - a. With respect to the 8 May 2015 statement, Brigadier Assiri was referring to the fact that the Coalition, through media platforms and leaflets distributed in both Sa'ada and Ma'aran, had put the civilians in those two cities on notice to evacuate. An initial investigation was carried out into strikes in Sa'ada on the first two days following leafleting on 7 May 2015 (i.e. 8 and 9 May 2015) which indicated that all strikes within Sa'ada City could be linked to a plausible military target. The campaign in Sa'ada is under ongoing review.
  - b. With respect to the 1 February 2016 statement, at the time of the interview, Houthi/Saleh forces were targeting KSA with ballistic missiles, supported by rocket and artillery strikes, sniper fire, IEDs, laying of mines, raids and deliberate attacks on Saudi positions. The constant attacks have led to hundreds of Saudi military and civilian fatalities, the majority incurred by the Royal Saudi Land Forces (RSLF) and Border Guard, as well as seeing a large amount of RSLF and Border Guard equipment, weapons and ammunition captured. In the context of the interview, Brigadier Assiri is talking about the general principle of bearing arms against the Saudi border which will see a strong KSA response.
  - c. Brigadier Assiri has made clear the Coalition's commitment to IHL in a series of engagements, conferences and interviews which are not cited by the Claimant. For example, in his 31 January 2016 press conference he cited details of Saudi processes, including no strike lists, illustrating the principle of distinction. Further, on 29 February 2016, Brigadier Assiri spoke to the Royal United Services Institute<sup>29</sup> audience about the efforts made by the Coalition to avoid civilian casualties.

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<sup>29</sup>An independent think tank on international defence and security.

*c. Diversion of weapons*

41. The Claimant alleges that “*the Defendant does not appear to have considered adequately the risk of diversion of weaponry in Yemen*”.<sup>30</sup> There is no basis for this speculation and it is not correct:
- a. In assessing any licence, the Secretary of State, having considered advice provided by FCO and MOD, considers the risk of diversion of weaponry pursuant to criterion 7, including in the specific case of licences issued to KSA. There are a series of factors to which regard is had in making this assessment including:
    - i. Does the end-user have a legitimate need for this equipment? (E.g. who are they, what activities are they known to be involved in, who are they linked to, have they purchased this equipment before, etc.)
    - ii. Is the end-use credible? (Are the goods designed for the stated-end-use; are they of the right technical specification?)
    - iii. Are the quantities reasonable/proportionate to the stated end-use?
    - iv. Does all the information in the application and supporting documentation tell a consistent story? Are there doubts about the veracity of any of the information or documentation?
    - v. Does the end-user have proper means to safeguard the equipment? Does the recipient state have proper controls over possession, transfers, exports (as appropriate)?
    - vi. Does corruption in the destination country indicate a higher risk of diversion?
    - vii. Are the type of goods known to be subject to illicit procurement? Are there known or suspected illicit procurement channels in the country or region? Is there any evidence of past diversion from this end-user / country?
    - viii. Are any intermediaries involved? What is known about them?
  - b. There are instances where licences were refused because of a risk of diversion to undesirable end users:
    - i. In 9 April 2015, 3 Standard Individual Export Licences<sup>31</sup> (“SIELs”) were revoked and Yemen was removed as a

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<sup>30</sup> Claimant’s Grounds §48.

<sup>31</sup> These licences permit a named exporter to export specific items to specific end-users in specific destinations.

permitted destination from one Open Individual Export Licence<sup>32</sup> ("OIEL").

ii. In March 2016, 7 individual trade control licences (SITCL) to supply ammunition and arms to KSA were refused.

c. The risk of diversion of the air launched precision guided munitions and supply and service of aircraft including air platforms licensed for export to KSA is assessed as being very low, given their very high value, size, the need for considerable additional equipment, the requisite resources to support the platform, as well as sophisticated technical knowledge and training in order to operate them.

**(2) The Claimant's case that the Secretary of State has failed to apply the suspension mechanism (Claimant's Grounds §§7b and 52-55)**

42. The Secretary of State's policy to consider suspending licensing and extant licences is triggered where, in the light of new evidence and information, it would be considered that a proper risk assessment against the Consolidated Criteria would be difficult. Special caution and vigilance is also in fact exercised with respect to approving licences for the export of items to KSA pursuant to criterion 2.

43. As to the application of that policy, there are some gaps in the UK's knowledge, as is inevitable in a conflict to which the UK is not a party. Nevertheless, the Secretary of State considers that he is in possession of sufficient information to conduct the requisite risk assessment pursuant to criterion 2(c). As set out above, a regular flow of information is received from a range of sources, including from within Government, through the Embassy in Riyadh, through the UK Liaison Officers, ministerial engagement, foreign governments, as well as open sources including NGOs and international organisations and the media. His conclusion that he has sufficient information for this purpose is one he was entitled to reach.

44. Specifically:

a. The Secretary of State does not accept that "*without knowing the results of [KSA] investigations the Defendant cannot properly form its own view*" as to whether criterion 2(c) has been satisfied.<sup>33</sup> The fact of investigation is important in its own right. The results of an investigation could be taken into account if known; but are not a

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<sup>32</sup> These licences permit a named exporter to export multiple shipments of specific goods to specific countries; the end-user does not normally need to be specified at the time an application is made.

<sup>33</sup> As asserted by the Claimant (see Claimant's Grounds §55).

precondition to satisfaction of criterion 2(c). However, in any event, the results would only be one factor in an overall, balanced assessment under criterion 2(c) taking into account the range of factors as identified above.

- b. The Secretary of State does not accept that he is *"not in a position to assess whether the finding of the UN Panel of Experts (or other UN agencies) following their investigations, can be rejected so as to conclude that there is no "clear risk" that the Coalition "might" use UK equipment in serious violation of IHL"*.<sup>34</sup> For the reasons already set out above, the Secretary of State is in a position to assess the findings of UN agencies (including by reference to range of sources to which such agencies do not have access).

**(3) The Claimant's case that the Secretary of State has irrationally concluded that the test set out in criterion 2(c) is satisfied (Claimant's Grounds §§7c and 56-61)**

45. The Claimant places central<sup>35</sup> reliance on the reports of third parties (namely UN officials and agencies), the European Parliament and NGOs (AI and HRW) and asserts that *"the Government does not challenge the findings of these organisations nor does it offer any reasonable basis to suggest that the findings of these bodies.....are wrong"*.<sup>36</sup>
46. However, criterion 2(c) imposes no burden on the Secretary of State to find or explain why views expressed by these or any other third parties are wrong. The fact that those views have been expressed and the bases for such views are matters which would naturally be, and have been, taken into account when making the overall assessment required by criterion 2(c). However, they are to be considered alongside all of the information available to the Secretary of State – some of which, as already noted, may not be publicly available.
47. The Claimant seeks to create a false legal position – asserting that the views and conclusions of these agencies either (a) creates an inference of irrationality; or (b) casts a burden of public explanation on the Secretary of State.
48. As to (a):
  - a. Civilian casualties, although deeply regrettable, are not determinative of a violation of IHL. The principle of distinction between legitimate

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<sup>34</sup> As asserted by the Claimant (see Claimant's Grounds §55).

<sup>35</sup> The Claimant also relies on Brigadier Assiri's statements and the User Guide. These have been dealt with above in answer to the first Ground.

<sup>36</sup> Claimant's Grounds §57.

military targets and civilians is precisely that – a principle of distinction; not a guarantee that in military conflict civilians will not be killed, or that accidents and unintended consequences resulting in such deaths will not occur.

- b. Furthermore, even if isolated incidents of IHL violations were identified, this does not equate to the finding of a “clear risk” that UK licensed items might be used in the commission of “serious violations” of IHL pursuant to the forward-facing test required under criterion 2(c), as expressly acknowledged in the EU User Guide. As it acknowledges: “isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern”.<sup>37</sup>
- c. In any event, as already noted, the Secretary of State has carefully considered these reports alongside the wide range of other information and analyses available to him. The lawfulness of his substantive decision is to be judged on that basis.

49. As to (b), there is no such burden (and nor is one created by these proceedings). The law requires in this context that the decision be rational. There is no legal requirement to provide reasons to the Claimant or in public. Accountability is ensured as noted in *Hasan* by the existence and operation of the Parliamentary processes, including specifically the CAEC. Indeed, in many contexts involving allegations of this kind, it will not be possible to provide reasons, or at least full reasons, because of e.g. national security and/or international relations concerns. These Summary Grounds have indicated sufficiently the basis on which, and processes by which, the decisions under challenge were taken. It is submitted that that indication undermines any suggestion that irrationality should be inferred.

50. In fact,

- a. The Secretary of State, with the assistance of other involved Departments and on the basis of all the relevant information before him, properly considered the application of criterion 2(c). The situation is kept under careful and continual review.
- b. He reached a rational conclusion that the significant standard in criterion 2(c) had not been met. He recognised that the equipment in question might be used in the Yemeni conflict. However, he

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<sup>37</sup> It should also be noted that claims of IHL breaches by both sides are made as part of information warfare.

concluded in the light of all the matters referred to above that there was no clear risk that KSA might use it to commit serious violations of IHL. In particular, the Secretary of State considered that: (1) the Coalition are not targeting civilians; (2) KSA processes and procedures have been put in place to ensure respect for the principles of IHL; (3) KSA is investigating incidents of concern, including those involving civilian casualties; (4) the KSA has throughout engaged in constructive dialogue with the UK about both its processes and incidents of concern; (5) the KSA has been and remains genuinely committed to IHL compliance.

51. The Claimant then jumps from the fact that the conclusions of certain investigations being conducted by KSA have yet to be provided and that the MOD is “monitoring” the situation to concluding that “it follows that” the Secretary of State cannot “confidently say that the numerous alleged violations of IHL are erroneous or mistaken”.<sup>38</sup> That reasoning is flawed:
- a. This claim implicitly mischaracterises the test to be applied by the Secretary of State for all of the reasons already set out – including specifically that, in order to escape irrationality, the Secretary of State needs to be able confidently to say that the allegations of violation of IHL made in these reports are erroneous or mistaken.
  - b. The investigations being conducted by KSA are just one factor to be taken into account. So is the fact that they are occurring.
  - c. In any event, to describe the MOD as simply “monitoring” the situation is an inaccurate shorthand. As set out above, MOD engages in a considered analysis of each and every incident of an alleged breach of IHL violation that comes to its attention, including the allegations cited by the third party reports listed by the Claimant, with reference to a range of sources to which those third parties do not have access.

### EXPEDITION

52. The Secretary of State does not accept that the claim is suitable for expedition (an issue which would only arise if permission were to be granted):
- a. As noted above, there is a de-escalation of the conflict. There is nothing to suggest that there is an urgent need to determine this claim. The UN Special Envoy of the Secretary General to Yemen, Ismail Ould Cheikh Ahmed, has announced a nationwide cessation of

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<sup>38</sup> Claimant’s Grounds §58.

hostilities in Yemen, scheduled to begin at midnight on 10 April 2016.  
Peace talks are scheduled to begin on 18 April 2016 in Kuwait.

- b. The Secretary of State's approach to granting export licences is the subject of an inquiry currently being conducted by CAEC.

#### **PROTECTIVE COSTS ORDER**

53. The Claimant application for a protective costs order should be rejected:
  - a. The claim is not properly arguable.
  - b. The burden to the public purse of defending this claim would be substantial. In the circumstances, it is not fair and just to make the Order.
  - c. Regarding resolution of the issues raised, as noted above, the Secretary of State's approach to granting export licences is the subject of an inquiry currently being conducted by CAEC.
  
54. Alternatively, there should be a reciprocal costs capping order, limited to £40,000.

**JAMES EADIE QC  
JONATHAN GLASSON QC  
AMY SANDER**

**30 March 2016**

