Claim No. CO/1306/2016

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

CLAIMANT'S REPLY TO THE DEFENDANT'S SUMMARY GROUNDS

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1. This document answers the Defendant's summary grounds. It explains why permission should be granted.

Background and context

2. The question whether the Kingdom of Saudi Arabia (KSA) has been responsible for breaches of international humanitarian law (IHL) has now been investigated and considered not only by reputable non-governmental organisations (NGOs) but also by international bodies and organisations including the UN Security Council's Panel of Experts on Yemen, the UN High Commissioner for Human Rights, UNESCO, the European Parliament. The conclusions of these bodies are summarised in the Claimant's grounds. They constitute a powerful body of evidence that KSA has, in fact, committed repeated and serious breaches of IHL in Yemen.

3. Under the Government's own policy (the Consolidated Criteria), which implement EU law, it is not necessary for the Government to conclude that arms have in fact been used to commit serious breaches of IHL. It is enough that there is a clear risk that they "might" be so used. It is important to note that the Government does not say that the question whether the Consolidated Criteria are satisfied involves any question of political or foreign policy judgment. The Government accepts that the only legally relevant question is whether there

is, in fact, a clear risk that arms exported under licence from the UK might be used to commit serious breaches of IHL.

4. The Defendant suggests that the Claimant has not grappled with the question whether the breaches of IHL disclosed by the international materials relied upon are "serious": SGR § 10. That is a surprising suggestion, given (i) that the issue was dealt with in express terms in the Claimant's Grounds at (SFG § 56, 5, 11-12, 14); and (ii) the nature of the incidents described.

5. If the materials on which the Claimant relies stood alone, there could be no doubt that this test would be satisfied. Even if the Court were limited to carrying out a *Wednesbury* review (which – as outlined below – it is not), it would be irrational to conclude in the light of this material that there is no clear risk. It is evident from the Summary Grounds that the Government does not seriously dispute this proposition.

6. Why, then, does the Government invite the Court to hold that this claim is <u>unarguable</u> so that permission should be refused?

Evidence from sensitive sources

7. The Government's case in answer to each of the Claimant's grounds depends critically on "information [which] is sensitive" and which "necessarily cannot be referred to in detail for national security and/or foreign relations reasons": SGR §21; see also SGR, §§17, 44 (b), 46, 49. The extent to which it is possible to rely on some of this information is, as the Government acknowledges, qualified. For example, the information given to UK liaison officers is "to some extent moderated and controlled by KSA" and "[t]here are also obvious limits on the ability of the UK to know whether processes are in fact being complied with on the ground": SGR §28. The Defendant then asserts that he has "indicated sufficiently the basis on which, and processes by which, the decisions under challenge were taken" and submits that "that indication undermines any suggestion that irrationality should be inferred": SGR §49.

8. So the Court is being asked to say that a claim that <u>would</u> be arguable on the publicly available material before it is <u>not</u> arguable because of material that is not before it, whose content is not meaningfully described. Such an approach is objectionable in principle.

9. The correct approach is as follows:

    a. It is for the Government to decide how it wishes to defend a claim for judicial review. At the permission stage, it could decide to say that the claim is not arguable even on the publicly available material. Then, assuming the other material available to it does not undermine the Government's case, that other material would not be relevant at the permission stage. If, however, it decides to rely on information that is not publicly available as a basis for arguing that permission should be refused, the documents recording this information become relevant to the issues before the court at the permission stage. The consequence is that the duty of candour applies and the Government is required to disclose the material, unless one of the established exceptions to disclosure applies.

    b. Material, the disclosure of which would have an adverse impact on the UK's international relations, or on national security, may in principle be withheld on the basis of public interest immunity (PII). But any application for PII must be made by a certificate signed by the relevant Minister and must then be considered separately be the court.

    c. If there is relevant material whose disclosure would have an adverse impact on national security, the court may in principle make a declaration under s. 6 of the Justice and Security Act 2013 (JSA), either on the application of the Secretary of State or of any other party, or of its own motion. JSA declarations have been made prior to the grant of permission where the issues before the court at the permission stage depend on material that the Government claims to be sensitive. Once such a declaration is made, the court can consider the sensitive material in a closed material procedure, with the assistance of a special advocate to protect the interests of the excluded party.

    d. Where there is no PII certificate and no JSA declaration, there is no opportunity for the court to test any claim that material must be withheld and no mechanism by which the court can consider whether that material justifies the conclusions drawn from it. In these circumstances, it would be objectionable in principle for the Government to be able to rely on sensitive material without disclosing it.

    e. The correct approach is for the court to consider, on the basis of the material disclosed before it, whether to grant permission. Once permission is granted, the

Government can then consider whether to make a PII certificate or apply for a JSA declaration, and the court can if necessary consider the latter question of its own motion.

10. On the basis of the material before the Court, there is only one conclusion open at this permission stage: it is arguable that it was unlawful to conclude that there was no clear risk that UK arms would be used to commit serious breaches of IHL. Permission should be granted.

The test

11. In any event, as noted above, this is not a case where the Court need consider only whether the conclusion reached by the Government was rational. This is so for two reasons.

12. First, the first ground of challenge is that the Government failed in its duty to gather evidence relevant to its decision (the *Tameside* duty). In general it is true that it is for a decision-maker to decide what is and what is not relevant for these purposes. But in this case, the EU Guidance identifies a number of issues as relevant. The Claimant does not contend that this Guidance had to be followed no matter what. But, given that the Government's own Consolidated Criteria are expressly designed to implement EU law, and the EU Guidance is intended to guide Member States in their interpretation and implementation of EU law, a decision not to follow it would, at minimum, have to be reasoned: R *(Lumba) v Secretary of State for the Home Department)* [2012] 1 A.C. 245, per Lord Dyson at [26]. In this case, the Claimant has identified six discrete issues/questions identified as relevant by the Guidance, which the Defendant appears not to have considered or addressed: Claimant's SFG §§45.1-45.6. These failures are not addressed in the SGR.

13. So there is:
    a. nothing to indicate that the Defendant had regard to these aspects of the EU guidance;
    b. nothing to indicate whether he made any enquiries of KSA to gather information relevant to these issues or, if so, what the result of these enquiries was; and
    c. nothing to indicate that he took a positive decision not to gather information relevant to these issues or, if so, why.

14. Secondly, both the extent of the *Tameside* duty (*R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), per Popplewell J at [121]) and the standard of review of the substantive decision (*Kennedy v Information Commissioner* [2014] 2 WLR 808, per Lord Mance at [51]) depend on context. Here, the context is informed by:

    a. The legal and policy regime; Criterion 2 (b) of the Consolidated Criteria (which, in turn, reflects the requirements of Article 2 of the EU Common Position) provides that the Defendant must "exercise special caution and vigilance in granting licenses... to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union" (emphasis added). The Defendant accepts that Saudi Arabia falls into this category: see GLD's letter of 16 February 2016 at **D46**.

    b. The fundamental nature of the interests at stake, namely serious violations of the laws of war (peremptory, or *jus cogens*, norms of international law) and/or applicable human rights law.

    c. The factual nature of the assessment to be undertaken. The Government does not claim the decision depended to any extent on an assessment of the international relations or national security impact of its decision (matters on which the courts have historically accorded a broader margin of discretion to the Government).

The Government's lack of engagement with the Claimant's evidence

15. The material relied upon by the Claimant includes (among the reports of numerous international organisations mandates for human rights protection) the UN Security Council Panel of Experts on Yemen, which was established by the UN Security Council to investigate claims of breaches of IHL by KSA in Yemen (see summary SFG §§ 14.1-14.7). It found, for example [§ 128]:

    > The coalition's targeting of civilians through air strikes, either by bombing residential neighbourhoods or by treating the entire city of Sa'dah and region of Maran as military targets, is a grave violation of the principles of distinction, proportionality and precaution. In certain cases, the Panel found such violations to have been conducted in a widespread and systematic manner".

16. The Government did not have to agree with the findings of this and other bodies. But if it disagreed with them it was incumbent on it to say why. Again, there is nothing in the SGR to indicate whether, and if so why, of the conclusions of this authoritative body, were rejected. Nor is it an adequate answer to point to the processes supposedly established by the Government and by KSA to prevent and/or monitor violations of IHL in Yemen. Many of the violations of IHL found by the UN Security Council Panel of Experts on Yemen and by other bodies (as set out in the Annex to the Claimant's grounds), post-date the establishment of these mechanisms. UK liaison officers were, for example, first deployed in May 2015.[1]

Expedition: the alleged de-escalation of the conflict

17. The Government say that expedition is not required as there is presently a "de-escalation" of the conflict in Yemen: SGR §§5 & 52. This is wrong. Despite diplomatic manoeuvres to deescalate the conflict, hostilities are ongoing and further alleged violations by the Coalition have been reported, even since the Claimant's grounds were filed. On 17 March 2016, for example, air strikes on a market were reported to have resulted in the deaths of over 100 persons (including 22 children).[2] Moreover, there is no suggestion that a permanent ceasefire has been agreed between the warring parties.

18. In any event, whatever the status of the current conflict, if the challenged decisions are unlawful, a decision to that effect would – on any view – be highly relevant to the likelihood that UK arms might be used by KSA in serious violations of IHL in future, whether in this or other conflicts.

19. There accordingly remains a compelling case for expedition.

MARTIN CHAMBERLAIN QC

CONOR McCARTHY

7 April 2016

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[1] Parliamentary Answer by Earl Howe, 11 February 2016, Yemen: Military Intervention: Written question - HL6205.

[2] http://www.abc.net.au/news/2016-03-18/death-toll-from-saudi-air-strike-in-yemen-rises-to-more-than-100/7256700 (attached).