

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 SKELETON ARGUMENT

Referencing: References to the Application Bundle (AB) are in the format [AB Tab page]. References in the format [§1] refer to paragraph numbers.

Suggested Pre-Reading: Claimant's Statement of Facts and Grounds ("SFG") and attached Annexes (providing chronology of allegations of violations of International Humanitarian Law ("IHL") by Saudi Coalition in Yemen); Common Position 2008/944/CFSP [AB/E(EU)/1-5]; Defendant's SGR [AB/A/110-128]; Claimant's Reply [AB/A/129-134]; Consolidated EU and National Arms Export Licensing Criteria [AB/E(UK)/5-11]; User's Guide to Council Common Position 2008/944/CFSP (Introductory Note and Sections 1, 2 and 7) [AB/C/115-269]; C's Letter's of 9 November 2015 [AB/D/1-9] and 8 January 2016 [AB/D/17-35]; D's Letters of 9 December 2015 [AB/D/11-16] and 16 February 2016 [AB/D/46-56]; Report of UN Panel of Experts on Yemen, 26 January 2016, Sections I, V, VI and Annexes 52-56 and 60-62 [AB/B(UN)/90-150]; UN Report of the Secretary – General "Children and Armed Conflict" [AB/B(UN)/158-197].

A. INTRODUCTION

1. The Claimant is a UK-based non-governmental organisation (“NGO”). Following refusal of permission on the papers by Andrews J [**AB/A/135**], the Claimant renews its application for permission to apply for judicial review of:
 - (a) the Defendant’s on-going failure to suspend extant export licences for the sale or transfer of arms and military equipment to the Kingdom of Saudi Arabia (“KSA”) for possible use in the conflict in Yemen; and
 - (b) the Defendant’s decision, communicated to the Claimant on 9 December 2015, to continue to grant new licences for the sale or transfer of arms or military equipment to Saudi Arabia in respect of such equipment.
2. For reasons set out in the SFG §64 and briefly below, the Claimant seeks expedition if permission is granted. The Claimant also seeks a Protective Costs Order (see separate application [**AB/A/79-84**]). The relief sought is set out in the SFG §8.

B. FACTUAL BACKGROUND

3. The factual background to the present application is set out in detail in the SFG §§9-31 [**AB/A/12-21**] and in the Defendant’s Summary Grounds of Resistance (“SGR”) §§4-8, 16-33 & 41. In summary, a conflict has been going on in Yemen since at least 2015 between opposing groups claiming to constitute the legitimate Yemeni government. Armed forces loyal to the government of Abd Rabbuh Mansur Hadi are presently engaged in hostilities with Houthi forces and militias loyal to the former president Ali Abdullah Saleh. In March 2015 the Saudi Arabia-led coalition (“the Saudi Coalition”) commenced a military campaign, targeting Houthis and allied rebel groups. This military campaign has involved substantial numbers of air strikes against a wide variety of targets. This Saudi Coalition military campaign is on-going. It is not disputed that UK –supplied weaponry has, or is very likely to have, been used by KSA in the conflict in Yemen, including in air raids on targets across the country.
4. The question whether the KSA has been responsible for breaches of international humanitarian law (“IHL”) has now been investigated not only by reputable NGOs but also by international bodies and organisations with a specific international mandate for the

investigation of grave violations of human rights law and IHL. These include the UN Security Council's Panel of Experts on Yemen, the UN High Commissioner for Human Rights, UNESCO the European Parliament and others.

5. Each of these investigations has concluded that the Saudi Coalition has, in fact, committed repeated and serious breaches of IHL in Yemen, including, *inter alia*, indiscriminate targeting, violations of the obligation to respect the distinction between combatants and civilians, inflicting disproportionate death or injury on civilians or damage to civilian property. The authoritative findings of these (and other) bodies are summarised in the Claimant's SFG §§11- 28. Most recently, the UN Secretary General's Report on Children and Armed Conflict, published on 20 April 2016 [AB/B(UN)/158], listed the Saudi Coalition as a perpetrator of grave violations of IHL in respect of children. The Secretary General observed at §228 that "owing to the very large number of violations attributed to the two parties, the Houthis/Ansar Allah and the Saudi Arabia led Coalition are listed for killing and maiming [children] and attacks on schools and hospitals".¹
6. In its SGR, the Defendant does not seek to challenge the findings of any of these bodies. Nor does he offer any basis for rejecting or calling into question these findings. Indeed, the government's own Country Information and Guidance on Yemen (published in April 2016) observes at §2.4.5 [AB/B(UK)/6]:

"There are reports of the use of indiscriminate violence by both sides, including the use of cluster bombs and attacks on civilian homes, hospitals, schools, markets and factories and reports of civilians fleeing air strikes being chased and shot at by helicopters.² In the north, west and centre of the country levels of indiscriminate violence are currently likely to be at such a level that substantial grounds exist for believing that a person, solely by being present there, faces a real risk of harm which threatens their life or person."³

¹ Report of the Secretary General on Children and Armed Conflict, 20 April 2016, [AB/B(UN)/158]. It should be noted that Saudi Arabia has complained to the UN SG in respect of this report's findings. On 7 June 2016, the UN SG announced that the UN would investigate KSA's complaints but stated that he "stands by the report" and that it "contents will not change". He also said it was unacceptable for Member States to threaten to withdraw funding from UN programmes and that scrutiny was an important function of the UN <http://www.independent.co.uk/news/world/politics/un-chief-says-he-removed-saudi-arabia-from-damning-human-rights-report-under-undue-financial-a7073696.html> [AB/B(UN)/215]

² This allegation is contained in the Report of the UN Panel of Experts on Yemen. It is made specifically against KSA helicopter gunships.

³ Home Office COI Report (Yemen), 2015, para 2.4.5 [AB/B(UK)/6].

7. The COI Report records, without criticism, the numerous reports of violations of IHL by UN bodies and human rights organizations.⁴
8. As regards the present state of hostilities in Yemen, in March 2016, the UN Special Envoy to Yemen, Ismail Ould Cheikh Ahmed, announced that the warring parties had agreed a temporary nationwide cessation of hostilities, to take effect from Midnight on 10 April 2016.⁵ Unsurprisingly, the negotiations have not been without difficulty.⁶ This ceasefire has been only intermittently respected. Fighting has also continued between government and rebel forces. Coalition airstrikes have continued albeit with less frequency than prior to the ceasefire.⁷
9. Rather than challenging any of the above findings, the Defendant states that he has access to “a range of sources and analyses, including ... those of a sensitive nature to which the third parties cited by the Claimant do not have access” (SGR §17). On the basis of this undisclosed material, the Defendant concludes that there is no “clear risk” that any of the substantial quantity of UK arms or military equipment exported to Saudi Arabia “might” be used in the violation of international humanitarian law. The Defendant describes, generically, the sources of the information to which he has access – and invites the Court to rely on it for the purposes of refusing permission without (i) exhibiting it, (ii) issuing any public interest immunity (“PII”) certificate or (iii) applying for a declaration under s. 6 of the Justice and Security Act 2013 (“JSA”).
10. Finally, the Claimant has sought clarification from the Defendant of the process by which the government and MOD assesses incidents of potential concern in Yemen as described at §23(a)-(d) of the SGR (see letter of 16 June 2016, annexed to this skeleton argument [AB/D/85]). The Claimant has not yet received a response to these requests for clarification

⁴ The Claimant observes that these reports are prepared by the government for use by immigration officials. In addition, they are relied on evidentially by Home Office representatives in court and tribunal hearing immigration matters.

⁵ <http://www.aljazeera.com/news/2016/03/yemen-warring-parties-agree-april-10-ceasefire-160323173502992.html> [AB/B(P)/36]

⁶ In May it was reported that Yemeni government had announced that it was suspending talks being held in Kuwait with Shi’ite rebels, accusing them of refusing to accept the legitimacy of the country’s internationally recognized president.

⁷ For instance, airstrikes by the Saudi Coalition occurred on 21 May 2016. See Associated Press Report, 23 May 2016. <https://www.bostonglobe.com/news/world/2016/05/22/envoy-cites-progress-yemen-talks-airstrikes-continue/QZDLlq4EmEyDanmp5YhV3N/story.html> [AB/B(P)64]. Yemeni civilians were also reported to have been killed in various Coalition Airstrikes on the Port City of Mokha and separately in the Sahar district, in Yemen on 21 May 2016 <http://www.presstv.ir/Detail/2016/05/21/466639/Saudi-airstrikes-Yemen-Mokha-Taizz-civilians-killed-injured-peace-talks-Kuwait-suspension> [AB/B(P)61]

(see email of 22 June 2016 [AB/D/89]). The Claimant has also written to the Defendant, by letter dated 8 June 2016 [AB/D/83] with regard to recent reports that KSA has used UK-supplied cluster munitions in the conflict in Saudi Arabia.⁸

C. LEGAL FRAMEWORK

11. The legal framework governing the export of military equipment to KSA is set out in the SFG §§32-42. As made clear in the Claimant's Reply §14, the Court is not limited to carrying out a *Wednesbury* review of the Defendant's decisions.

D. SUBMISSIONS

12. Before making more detailed submissions, there is an important general point about the Secretary of State's invitation to the Court to refuse permission on the basis of "information [which is] sensitive", which "necessarily cannot be referred to in detail for national security and/or foreign relations reasons" (SGR §21) and which has not been described in anything more than the vaguest terms.

13. The correct approach was set out in the Claimant's reply Reply §9:

13.1. 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.

13.2. 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

⁸ The use or transfer of such weaponry is contrary to the Convention on Cluster Munitions 2008 [AB/E(INT)/102], to which the United Kingdom is a party. In addition, the use of such weaponry in armed conflict, especially in populated areas, is likely to violate the prohibition on indiscriminate means of warfare, a settled rule of customary international law.

the basis of PII. But any application for PII must be made by a certificate signed by the relevant Minister and must then be considered separately by the court.

- 13.3. 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 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.
- 13.4. 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.
14. Given that there has been no PII application and no application for any declaration under s. 6 of the JSA, the proper 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.
15. On the basis of the open 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 might be used to commit serious breaches of IHL.
16. The individual grounds of challenge are considered below.

(I) Failure to ask correct questions and make sufficient enquiries

17. The Claimant's first ground of challenge is that, in applying the Consolidated Criteria and in assessing whether there exists a "clear risk" that military technology or equipment "might be used in the commission of serious violations of international humanitarian law" the Defendant:

- 17.1. failed to identify and conscientiously consider the questions that it was necessary to consider to reach a lawful risk assessment in accordance with Criterion 2(c) of the Consolidated Criteria. In particular, the Defendant appears to have failed to ask himself (and therefore to consider) a series of important questions identified as relevant by the mandatory EU Guidance⁹ and (in any event) plainly relevant to the proper application of the Criterion 2(c) test.
- 17.2. second, in answering these questions failed to take reasonable steps to obtain any or sufficient information in respect of factual matters with a crucial bearing on this issue. Again, the EU Guidance identified these factual matters in terms.
18. In the SFG, the Claimant highlights six important matters specifically identified as relevant in the EU Arms Export User Guidance (“the EU Arms Export Guidance”) to an assessment as to whether the criteria identified in the Common Position 2008/944/CFSP (and implemented in the government’s Consolidated Criteria) are satisfied (SGF §§45.1- 45.6). These matters include, for example, considerations such as “whether mechanisms have been put in place to ensure accountability for violations of IHL committed by the armed forces... including disciplinary and penal sanctions”.
19. The Defendant, in his SGR, does not assert that any of the matters identified by the Claimant at SFG §45 were, in fact, taken into account. On the contrary, he appears to accept that they were not considered at all: see Defendant’s Response to Letter before Claim p. 10 [AB/D/54-55] and the points made by Claimant regarding the significance of these omissions in SFG §§45.1-45.6.
20. Instead, the Defendant asserts that he considered certain other questions and that this was sufficient to enable a lawful decision (SGR esp. §§14-15 & 34-36). In particular, the Defendant asserts that he considered the issues identified in SGR §15, namely,
- 20.1. the recipient’s past and present record of respect for IHL;
- 20.2. the recipient’s intentions as expressed through formal commitments;

⁹ The Common Position states at Article 13 that the EU Guidance “shall serve as guidance for the implementation of the Common Position”. The EU Guidance sets out [at pp. 50 and 55] a series of “relevant questions to be considered” in appraising the risk that exported arms will be used in the perpetration of violations of IHL. The Defendant does not dispute that it has sought to direct itself in accordance with the User Guide [SGR §15].

- 20.3. 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 IHL.
21. It is right that the factors identified in the Guidance must be applied in a manner which is "context specific": SGR §12. However, the Defendant offers no explanation why, in the circumstances of the KSA and Yemen, the questions the Claimant says had a crucial bearing on the application of the Consolidated Criteria were not relevant : see SGR §14-15 & 35-36).
22. Furthermore, the approach adopted by the Defendant is wrong in principle. For reasons set out in the Claimant's SFG §§45-46, the material omitted by the Defendant from its decision-making process had a crucial bearing on the assessment the Defendant was required to conduct.¹⁰ To take two examples:
- 22.1. Whether KSA has ever prosecuted, disciplined or punished a member of its armed forces for violating IHL is plainly pertinent in assessing "the recipient's past and present record of respect for IHL" (which expressly requires States to prosecute and punish those who perpetrate violations of IHL).¹¹ In pre-action correspondence the Defendant expressly accepted that it had no information on this question.¹² In the light of this, it is hard to see how the Defendant could have considered, properly or at all, KSA's "past and present record of respect for IHL".
- 22.2. Similarly, the Defendant could not lawfully consider KSA's present record of respect for IHL without knowing whether KSA has in place national legislation prohibiting and punishing violations of IHL. Yet, again, the Defendant indicates it was unaware of the position in relation to this at the time of its decision (presumably because it had not even asked this question of KSA).¹³
23. Similar points can be made in respect of the other matters identified by the Claimant in the SFG §§45.1-45.6.

¹⁰ If the Defendant did, in fact, address his mind to all or any of the issues identified by the Claimant (SFG 45.1-45.6) the Claimant invites the Defendant to clarify this forthwith.

¹¹ See explanation of IHL obligations on States to investigate, prosecute and punish violations of IHL, imposed by the four Geneva Conventions of 1949 and customary international law: Claimants' SFG §39.7 [AB/A/8].

¹² Defendant's Letter of Response [AB/D/54-55].

¹³ Defendant's Letter of Response, §65 [AB/D/55].

24. As well as failing to ask himself the right questions, the Claimant contends that the Defendant failed in his duty to gather sufficient evidence/make sufficient enquiries to enable him to reach a lawful decision. As noted above, the EU Guidance identifies a number of issues as relevant (which the Defendant appears not to have considered and does not claim to have considered). To be clear, 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 guidance 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].

25. As things stand there is:

25.1. nothing to indicate whether the Defendant made any enquiries of KSA to gather information relevant to these issues or, if so, what the result of these enquiries was; and

25.2. nothing to indicate that he took a positive decision not to gather information relevant to these issues or, if so, why.

26. Further, the Defendant's position appears to be that he has directed himself in accordance with the EU Arms Export Guidance, not that he departed from it and has a good reason for doing so: SGR §15. In his SFG §§45-47 the Defendant has failed to address the specific respects in which the Claimant contends he has departed from the Guidance.

27. As regards the tests to be applied in this context, the Defendant asserts that he has taken steps which are "on any view rational" to obtain and consider the information necessary for him to take his decision": SFG §3(a). This mischaracterises the duty on the Defendant in this context. 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 Charity Commission* [2015] AC 455 , per Lord Mance at [51]) depend on context. As the Claimant has indicated in its Reply §§14(a)-(c), three specific points should be noted in this regard:

27.1. **First**, 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 [AB/D/46].

27.2. **Second**, the interests at stake are of a fundamental character, namely serious violations of the laws of war (peremptory, or *jus cogens*, norms of international law) and/or applicable human rights law

27.3. **Third**, the nature of the assessment to be undertaken was factual. 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).

(II) Failure to apply the suspension mechanism

28. The Defendant accepts that the government’s policy to suspend licensing and extant licences would be triggered¹⁴ where, “in light of new evidence and information, it would be considered that a proper risk assessment against the Consolidated Criteria would be difficult” (SGR §42). This policy was set out before Parliament on 7 February 2012. The Consolidated Arms Export Licensing Criteria state that “[i]n the application of the above criteria, account will be taken of reliable evidence...” It will also be recalled that “special caution and vigilance” is required in approving licences for the export of arms to Saudi Arabia.

29. The government’s position is that the circumstances of the conflict in Yemen (and KSA’s intervention in that conflict) are not such as to require the triggering of the suspension mechanism and that it has a sufficient, reliable body of evidence to enable it to conclude that there is no “clear risk” that licensed equipment “might” be used in serious violations of IHL in Yemen. The Defendant does not accept that the “difficulty” threshold, identified in its own policy, has been reached.

¹⁴ The Claimant notes that the Defendant characterises the suspension mechanism as a policy “to consider suspending licensing...” In its SGR. This is *different* from the terms of the policy announced to Parliament on 7 February 2012, which states that the license suspension mechanism “will be triggered... when conflict of crisis conditions... make conducting a proper risk assessment difficult”.

30. As things stand:

30.1. There now exists an overwhelming body of evidence and findings by numerous international institutions and officials in respect of the intervention by the Saudi Coalition in Yemen. All of the publicly available evidence points towards a pattern of violations of IHL by the Saudi Coalition. These findings emanate from, *inter alia*, the UN Secretary General, the UN Security Council's Panel of Experts on Yemen, the UN High Commissioner for Human Rights, the European Parliament and others. Many of these bodies have expertise and a specific mandate for the investigation of violations of international humanitarian law and have, overwhelmingly, concluded that the Saudi Coalition has repeatedly and gravely violated IHL in Yemen.

30.2. In these proceedings, the Defendant has not sought to gainsay these findings. He merely says that he takes a different view, based on the material he has considered (but not disclosed or described).

30.3. In doing so, the Defendant does not, it is understood, reach conclusions or form a view as to whether KSA has violated IHL in Yemen in any particular instances. Instead, the government, in particular, the MOD, monitors incidents via the process outlined in the Defendant's SGR §23 [AB/A/110] but leaves it to KSA to investigate matters and to reach conclusions as to whether IHL has been violated in particular instances. In determining whether violations of IHL have occurred in Yemen, the government is therefore largely reliant on fact-finding carried out by the Saudi Coalition (in conjunction with the Yemeni authorities) or third parties like the UN Panel of Experts on Yemen.

31. As things stand, the Claimant understands KSA has not shared the results of its investigations with the government, save in one instance: Response to LBC §§58-59 [AB/D/54].

32. In these circumstances, the "difficulty" facing the government in assessing whether the Consolidated Criteria have been satisfied is clear. The publicly available information overwhelmingly indicates a pattern of grave and widespread violations. In forming a contrary view, the government is reliant, in large measure, on KSA's own investigations (given that the UK cannot investigate the incidents itself and does not form a view, it

appears, as to whether different incidents constitute violations of IHL). However, these have not concluded and findings have not been shared with the United Kingdom.

33. Furthermore, the Claimant notes that independence and effectiveness of KSA's investigations into grave human rights violations by State officials (and the independence and impartiality of its judiciary in dealing with such allegations) has recently been criticized by the UN Committee Against Torture,¹⁵ following a comprehensive periodic review of practices in Saudi Arabia, raising obvious concerns as to the quality and independence of a Saudi investigation into crimes allegedly committed by its armed forces. Allied to this, at the time of granting licences the government did not have crucial information as identified in the SFG §§45-46, including whether KSA has in place legal and procedural mechanisms for the prosecution of violations of IHL (much less whether these arrangements were effective in practice) or whether KSA has ever prosecuted, punished or disciplined military officials for violations of IHL. The Defendant is not, therefore, in a position properly to consider the questions and issues deemed material to the assessment of risk by the EU Guidance on Arms Exports.

34. For all of these reasons, it is plainly arguable that the Secretary of State has erred in concluding that the threshold for suspending arms licences has not been triggered.

(III) Irrationality

35. Further or alternatively, the Claimant submits that the Defendant has unreasonably concluded that the test set out in Article 2, Criterion 2(c) of the Common Position and Criterion 2 of the Consolidated Criteria is satisfied. The Claimant's grounds in this respect are set out in SFG §§54-59. As noted above, the standard of review is dependant on context: *Kennedy v Charity Commission* [2015] AC 455, per Lord Mance at [51].

36. The Defendant's position is that "criterion 2(c) imposes no burden on the Secretary of State to find or explain why views expressed by ... third parties are wrong", as long as they are taken into account: SGR §46.

¹⁵ KSA has been heavily criticized (most recently by the UN Committee Against Torture) for affording impunity to officials accused of grave human rights violations and for a judiciary which lacks independence. See Committee Against Torture, Concluding Observations on Saudi Arabia (2016) INT/CAT/COC/SAU/23913 [**AB/B(UN)/198**].

37. The approach adopted by the Defendant is wrong in principle. Both the Consolidated Criteria (and the EU Common Position it is designed to implement) require the decision-maker, here the Secretary of State:

“to exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, 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).

38. In this context, it is not enough for the Secretary of State merely to reach his own view. The UN Panel of Experts on Yemen is a body established by the UN Security Council (of which the UK is a permanent member) to investigate, and report on, the situation in Yemen, threats to peace in Yemen (including violations of IHL and applicable international human rights law in that state).¹⁶ The legal scheme within which the Defendant exercises his discretion and reaches a decision requires “special caution” to be exercised in the context of such findings. Acting reasonably in this context, and having regard to the policy scheme within which the Defendant exercises his discretion, it is incumbent on him to grapple with these findings and, at the very least, have a reasoned basis for disagreeing with them: see by analogy *Regina (Bradley and others) v Secretary of State for Work and Pensions (Attorney General intervening)* [2007] EWHC 242 (Admin), §51 & 91.

39. Furthermore, insofar as unreasonableness is concerned, the Claimant notes the seeming inconsistency between the position of the Home Office in respect of Yemen (as encapsulated in the Home Office Country of Origin Report, April 2016 [AB/B(UK)/1])¹⁷ and the Defendant’s finding that there is no “clear risk” that UK supplied military equipment “might” be used in violations of IHL in Yemen by KSA. The fact that the Home Office reports, relies on and appears to give credence to the findings the Defendant does not accept, reinforces the need for the Defendant to have, and to be able to point to, a rational basis for rejecting the findings of the UN Panel of Experts among others.

40. Finally, insofar as KSA Major General Assiri’s pronouncements are concerned, the Defendant dismisses these concerns, stating that an overall assessment has to be made. This is

¹⁶ The United Kingdom expressly supported the creation of the Panel of Experts on Yemen and agreed to the adoption of the Security Council resolution which approved their mandate. See Security Council Meeting Record 7119 S/PV.7119. In Security Council resolution 2140 (2014), the Council established a panel of experts to investigate those who engaged in or provided support for acts that threatened the peace, security or stability of Yemen (including violations of applicable IHL/IHRL). The Panel of Experts submitted a detailed, final report to the Security Council on the situation in Yemen, in January 2016.

¹⁷ See, for instance, the observations and findings §§ 2.4.5 and 6.4.2, COI (Yemen) April 2016.

evidently correct. However: (1) Major General Assiri comments cannot be lightly dismissed – he was the official Coalition Spokesman and was speaking in an official capacity when the comments were made; (2) the misunderstanding of IHL indicated by the pronouncements, especially the pronouncement on 8 May 2015, was serious; (3) the Defendant (SGR §40(a)) fails entirely to grapple with the nature of the violation in question. Declaring and treating an entire city or region as a “military target” is plainly incompatible with IHL. Civilians do not lose their immunity from attack simply because they are unable to leave a city or region. The principle of distinction and the prohibition on indiscriminate targeting must be respected; (4) there is no explanation whether, or if so how, these pronouncement were considered as part of its decision-making process. This is significant since the applicable Guidance expressly requires Member States to consider “the recipient’s intentions” in assessing risk.

(IV) Expedition

41. The Claimant applies for expedition in the event permission is granted.

41.1. The conflict in Yemen continues, albeit for the time being at a somewhat lower level of intensity than in the early months of this year. The ceasefire in place is far from permanent (and rests on fraught peace negotiations which are on-going). It has only been intermittently respected. Fighting has also continued between government and rebel forces. Coalition airstrikes have continued albeit with less frequency than prior to the ceasefire.¹⁸ The governments own COI report (Yemen) illustrates that the situation remains fraught.

41.2. 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.

¹⁸ For instance, airstrikes by the Saudi Coalition occurred on 21 May 2016. See Associated Press Report, 23 May 2016. <https://www.bostonglobe.com/news/world/2016/05/22/envoy-cites-progress-yemen-talks-airstrikes-continue/QZDLlq4EmEyDanmp5YhV3N/story.html> [AB/B(P)/64]. Yemeni civilians were also reported to have been killed in various Coalition Airstrikes on the Port City of Mokha and separately in the Sahar district, in Yemen on 21 May 2016 <http://www.presstv.ir/Detail/2016/05/21/466639/Saudi-airstrikes-Yemen-Mokha-Taizz-civilians-killed-injured-peace-talks-Kuwait-suspension> [AB/B(P)61]

41.3. There accordingly remains a compelling case for expedition.

MARTIN CHAMBERLAIN QC
CONOR McCARTHY
23 June 2016