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

SKELETON ARGUMENT OF THE SECRETARY OF STATE FOR PERMISSION RENEWAL APPLICATION

References to the Application Bundle are given as [AB tab/page]

Introduction

1. The Claimant seeks to challenge two decisions by the Secretary of State: the 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 the Kingdom of Saudi Arabia ("KSA") in respect of such equipment; and the decision not to suspend extant export licences for the sale or transfer of arms and military equipment to the KSA for possible use in the conflict in Yemen.

2. The Secretary of State's position is that licences for the export of arms and military equipment have not been, and will not be, issued if to do so would be inconsistent with any provision of the Consolidated EU and National Arms Export Licensing Criteria ('the Criteria') [AB/E(UK)/5-11]. 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 international humanitarian law ('IHL'). The Secretary of State considers decisions of this kind, and considered the decisions under challenge, with care and with the benefit of assistance

from other parts of Government. He also keeps the position under review.

3. As is evident from the nature of criterion 2(c) applied to a context such as the present, the ultimate issue for the Secretary of State is one which is shot through with judgement and prediction. The complexity and range of matters that might potentially feed into that issue is also an essential part of the context – and itself requires judgements to be made as to relative importance and weight. The context is also one in which information bearing on the issue is almost bound to be less than full – assessments are being made as to the conduct of military operations by a foreign sovereign state in another part of the world. These matters are emphasised at the outset for obvious reason. All of those elements serve to highlight the thoroughly ambitious nature of a *Tameside* or an irrationality challenge. At the heart of both public law concepts lies the recognition that substantial leeway or respect is to be afforded to the judgements of the Secretary of State. No doubt in some contexts arguments can be mounted that the leeway is to be narrowed because the issue is a tolerably straightforward one (whether at the point of considering the information/matters feeding into the substantive decision or in relation to the actual decision itself). The present context is as far away from that sort of case as it is possible to imagine.

4. The Claimant was refused permission on the papers by Andrews J [AB/A/135]. Andrews J noted the Secretary of State's position just stated and concluded in summary that, in the light of the Summary Grounds ('SGR')[AB/A/110-128]:

   a. there was no realistic prospect of establishing that the Secretary of State had failed to ask the right questions or conduct sufficient enquiries;
   b. the Secretary of State was entitled to conclude that he had sufficient information to enable him to decide whether or not to invoke the suspension mechanism;
   c. the Secretary of State had applied his policy and taken into account the key factors identified in the EU Guide;
   d. the Secretary of State could properly form a view without knowing the results of KSA investigations;

e. the views of NGOs and other respected bodies had been taken into account by the Secretary of State and on no view made his decision irrational;
f. there was no realistic prospect of the irrationality hurdle being surmounted by the Claimant in the circumstances outlined in the Summary Grounds.

5. It is submitted that, having regard to the matters set out in the Summary Grounds, Andrews J's judgment was correct essentially for the reasons she gave.

6. This skeleton argument responds to five points raised in the Claimant's skeleton argument, as set out below.

(1) <u>The sensitive information</u>

7. It is entirely unsurprising that the Secretary of State should have relied on sensitive material given the context. The Claimant seeks to suggest that it is impermissible to have any regard to that at this stage in these proceedings. The Secretary of State disagrees.

8. The Secretary of State is entitled to rely on the fact that he has based his impugned decisions upon a range of sources and analyses of a sensitive nature, to which neither the Claimant nor bodies on whose reports and views the Claimant relies have access. That fact indicates that no necessary inference of inadequacy of inquiry or irrationality can be founded on such reports and views. The material before the Secretary of State and the material considered by those bodies was different. There is thus no reason why their views or conclusions should have been the same. The validity of this point does not depend on the precise content of the sensitive material in question.

9. The Secretary of State does not, at this stage, make any positive case based on the content of such sensitive material. It is not necessary to do so given the matters upon which it is possible to rely in open (as set out in the SGR); and given the point made in the previous paragraph. If permission is granted, consideration will of course need to be given to the possibility of PII and/or s.6 Justice and Security Act 2013 processes.

(2) Failure to ask the "correct" questions

10. The Claimant contends that the Secretary of State was legally obliged to consider six factors that it has set out in its Statement of Grounds and Facts at §§45.1- 45.6 that are drawn from the non-binding EU Arms Export User Guidance ('the six guidance factors') (Claimant's skeleton argument §§18-27). That contention was rightly rejected by Andrews J:

> *"As to the Tameside duty, the Secretary of State was entitled to conclude that he had sufficient information to enable him to decide whether or not to invoke the suspension mechanism. The Government has its own policy which implements EU law and the Secretary of State has applied that policy and taken into account the key factors identified in the EU Guide."*

11. In *R. (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB); [2015] 3 All E.R. 261 the Divisional Court summarised at §100 and 139 the principles applicable to the *Tameside* duty:

> *"100. … 1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.*
>
> *2. Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R(Khatun) v Newham LBC [2005] QB 37 at §35, per Laws LJ).*
>
> *3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406).*
>
> *4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301; cited with approval by Laws LJ in (R(Khatun) v Newham LBC (supra) at §35).*
>
> *5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark) v Secretary of State for Education at page 323D).*
>
> *6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to*

exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407 at 466G).

....

139. The Tameside test can be formulated as follows: Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same?"

12. The six guidance factors are not mandatory (as appears to be accepted: see the Claimant's skeleton argument at §21). The guidance factors are simply designed to assist in addressing the key question posed by criterion 2(c) i.e. whether there is a clear risk that licensed items might be used in the commission of serious violations of IHL. They are not expressly or implied identified in the Secretary of State's policy as matters that must be taken into account - see *In re Findlay* [1985] AC 318 , 333-334 and *R(Khatun) v Newham LBC* [2005] QB 37 at §§34-35.

13. The fact that the Secretary of State did not expressly consider those factors does not mean that he failed to discharge his *Tameside* duty. It was for him to decide the specific matters that he considered bore centrally on the issues arising under criterion 2(c). The flexibility properly and lawfully inherent in that process is wide - particularly having regard to the points made in §3 above. 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: see SGR §§35-36.

(3) <u>The analysis of incidents of concern</u>

14. The Claimant contends that the process by which the Ministry of Defence analyses incidents of potential concern in Yemen requires clarification (Claimant's skeleton argument §10). The process has been clearly set out in the SGR. In summary:

    a. The Secretary of State's assessment pursuant to criterion 2(c) is informed by the three factors set out at in SGR at §17.

b. This includes a considered analysis by MOD of all incidents recorded on the database which is used to record incidents of concern (see SGR §§17a and 18-23).[1]
c. With reference to those three factors, the Secretary of State forms an overall view on the approach and attitude of KSA to IHL and makes its risk assessment pursuant to criterion 2(c) accordingly.
d. Neither the MOD nor the Foreign and Commonwealth Office reaches a conclusion as to whether or not an IHL violation has taken place in relation to each and every incident of potential concern that come to its attention (as recorded on its database).

15. It is to be emphasised that the Government is not acting as, or in the position of a Court charged with determining the question whether a sovereign state has or has not acted in breach of IHL. Nothing remotely approaching that sort of exercise or approach is required by the policy and context in question here. Criterion 2(c), considered in the present context, simply requires overall judgements (many of which will be prospective) to be made by the Secretary of State on the basis of the information and materials he considers it appropriate to focus upon.

16. The Country Guidance on Yemen report from the Home Office that is cited by the Claimant twice in its skeleton argument (§§6 and 39) simply records that there have been "reports" of indiscriminate violence by both sides. In keeping with the Home Office's approach in producing such country guidance reports, the report is neutrally reflecting *"external information sources"* to assist Home Office decision makers.[2] There is no inconsistency with the Secretary of State's risk assessment pursuant to criterion 2(c).

(4) Allegations in relation to cluster munitions

17. The Claimant has referred to a recent report by Amnesty International alleging that KSA has used UK-supplied cluster munitions in the conflict in Yemen (Claimant's skeleton argument §10). As soon as the allegation of the use of UK-supplied cluster weapons was made by Amnesty International (May 2016), the MOD started analysing the

[1] The other two factors are (ii) an understanding and knowledge of KSA processes; and (iii) ongoing post-incident dialogue, including with respect to investigations.
[2] See the Preface to the report at p.2 [B(UK)/2]

information available and sought clarification from the KSA, requesting an investigation.[3] The Secretary of State has responded to Amnesty International by letter dated 26 June 2016. The text of that letter is annexed to this skeleton argument.

18. This Amnesty report provides no basis for concluding that the decisions under challenge were irrational. It cannot provide a basis for criticising the factors or information considered and/or taken into account. It post-dates the decisions. Nor is there any basis for some new 'present' challenge - the matter is being properly considered consistently with the approach to keeping decisions under review outlined above.

(5) Expedition and cessation of hostilities

19. Andrews J concluded (it is submitted correctly) that this case would not in any event have been suitable for expedition:

> *"In any conflict, hostilities may continue even in the face of attempts to de-escalate; but given that such attempts are being made in Yemen the claim does not bear the same degree of urgency as one where hostilities are ongoing and escalating or where there is overwhelming evidence in support of the claim that the decision is irrational. It is not enough to warrant expedition to contend that this case might have a bearing on the Government's approach to licensing of arms in respect of other conflicts in future".*

20. On 23 March 2016, the UN announced a nationwide ceasefire which commenced on 10 April 2016 and continues to the present day. In parallel, the UN is facilitating peace talks, which commenced in Kuwait on 21 April 2016.

21. The Claimant asserts that *"the ceasefire in place is far from permanent (and rests on fraught peace negotiations which are on-going). It has only been intermittently respected"* (Claimant's skeleton argument §41.1). The Secretary of State does not accept that description as accurate. The FCO's assessment is that the ceasefire is broadly holding, and has resulted in a significant reduction in levels of violence. The Saudi-led

[3] The ownership and use of cluster munitions by states that are not signatories of the Convention (such as the KSA) is not necessarily unlawful, provided that they are used in a way that does not contravene international law, and particularly IHL. However, the United Kingdom as a signatory to the Convention on Cluster Munitions, does not use cluster munitions, nor supply them to others, and actively encourages KSA, along with other non-parties to the Convention, to accede to it.

Coalition has demonstrated restraint in response to Houthi provocations, including attacks across the KSA border.[4]

JAMES EADIE QC
JONATHAN GLASSON QC
AMY SANDER

29 JUNE 2016

[4] The Houthis have consistently failed to adhere to UN Security Council Resolutions and implement commitments made in the Peace and National Partnership Agreement of September 2014.

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ANNEX TO

SKELETON ARGUMENT OF THE SECRETARY OF STATE

FOR PERMISSION RENEWAL APPLICATION

Ministry of Defence

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4.2.6.12

26th June 2016

Dear Mr. Hancock,

I am responding to your letters to the Prime Minister dated 23 May and to me dated 3 June in which you sought an inquiry into the alleged use of UK-supplied BL-755 cluster munitions by the Saudi-led coalition in Yemen and helpfully provided more information about the research conducted by Amnesty International.

Let me first assure you that the UK, as a signatory to the Convention on Cluster Munitions, does not use cluster munitions, nor do we supply them to others. The UK last provided BL-755 cluster munitions to Saudi Arabia nearly 30 years ago; the final delivery was in 1989. We ratified the Convention on Cluster Munitions on 4 May 2010 through the Cluster Munitions (Prohibitions) Act and have not supplied, maintained or supported Saudi weapons since we signed the Convention in 2008. Indeed, the UK and its personnel are prohibited from using, developing, acquiring, possessing or transferring cluster munitions or assisting any person to do any of these things, anywhere. We actively encourage Saudi Arabia, along with other non-parties to the Convention, to accede to it.

Whatever we may think of these weapons, it is important to recognise that the ownership and use of cluster munitions by states which are not signatories of the Convention is not necessarily "unlawful", provided that they are used in a way that does not contravene International law, and particularly International Humanitarian Law (IHL). And it is our view that there is no legal obligation for the UK to ensure that Saudi Arabia and its coalition partners destroy all remaining stocks of UK supplied cluster munitions.

You call on the UK Government to launch a full independent inquiry into the alleged use of UK supplied cluster munitions. Whilst it is not for the UK Government to carry out an inquiry into the operations of another country, I can assure you that we are taking this allegation very seriously, are thoroughly analysing the case from all the information available to us and are seeking clarification on the alleged incident from the Saudi-led Coalition.

Tim Hancock
Director of Chief Executive's Office
Amnesty International
United Kingdom Section
The Human Rights Action Centre
17-25 New Inn Yard
London
EC2A 3EA

You also call for investigations to ascertain whether UK personnel were involved in the use of cluster munitions in any way. In line with the prohibitions placed on the UK highlighted above, I can confirm that no UK personnel have been involved in the preparation, loading or use of any cluster munitions in support of Royal Saudi Air Force (RSAF) operations. As soon as we signed the Convention in 2008, we informed the RSAF that the UK would be unable to continue with previously delivered support for these munitions. I would also like to clarify that the UK is not a member of the Saudi-led Coalition and British military personnel are not directly involved in the Saudi-led Coalition's operations.

You also ask what we know about types and locations of weapons used by the Saudi Arabia-led coalition, and if UK MOD staff were aware of the use of BL-755 cluster munitions. Although we do not have any embedded personnel taking part in the Saudi-led operations in Yemen, we have a very small number of staff working in Saudi headquarters in a liaison capacity only. The liaison officers are not involved in the targeting process, or in weapon selection. As set out above, we are analysing this matter thoroughly and seeking clarification from the Saudi-led Coalition.

You call on the UK Government to immediately suspend all weapons sales to Saudi Arabia and to support efforts to secure a full arms embargo. The UK Government takes its arms export responsibilities very seriously and operates one of the most robust arms export control regimes in the world. All export licence applications are assessed on a case-by-case basis against the Consolidated EU and National Arms Export Licensing Criteria, taking account of all relevant factors at the time of the application. A licence will not be issued for any country, including Saudi Arabia, if to do so would be inconsistent with any provision of the mandatory Criteria, including where we assess there is a clear risk that the items might be used in the commission of a serious violation of IHL. We are satisfied that all extant licences for Saudi Arabia are compliant with the Consolidated Criteria.

Yours sincerely,

Michael Fallon

THE RT HON MICHAEL FALLON MP