CO/1306/2016

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 30 June 2016

B e f o r e:

MR JUSTICE GILBART

Between:

THE QUEEN ON THE APPLICATION OF CAMPAIGN AGAINST ARMS TRADE
Claimant

v

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS
Defendant

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(Official Shorthand Writers to the Court)

Mr Martin Chamberlain QC and **Mr Conor McCarthy**(instructed by Leigh Day) appeared on behalf of the **Claimant**

Mr James Eadie QC and **Miss Amy Sander** (instructed by Government Legal Department) appeared on behalf of the **Defendant**

PROCEEDINGS

MR JUSTICE GILBART: Mr Chamberlain, may I tell you what I have read?

MR CHAMBERLAIN: That would be very helpful, my Lord.

MR JUSTICE GILBART: I have read the grounds and the claim, obviously, of resistance in reply. I have looked at the licensing criteria of the European Union. I have very briefly skimmed the guide. I have read the correspondence that passed between Leigh Day and the Minister. I have looked at the report of the United Nations panel of experts on Yemen. That is what I have looked at.

Now, there is one other matter I am going to ask both of you. I occasionally give money to Medecins Sans Frontieres -- should I recuse myself? I do not think I have to, but I am going to mention it just in case either of you think I should.

MR CHAMBERLAIN: I certainly do not.

MR JUSTICE GILBART: And the Red Cross, I give money to.

MR EADIE: I have no objection.

MR JUSTICE GILBART: Thank you.

MR CHAMBERLAIN: My Lord, I appear, as you know, with Mr Conor McCarthy for the claimant, Campaign Against the Arms Trade. My learned friend Mr Eadie QC appears with Miss Amy Sander for the Secretary of State for Business, Innovation and Skills. As you know, this is a renewed application for permission to apply for judicial review of the Secretary of State's decision not to suspend extant export licences for the sale or transfer of arms and military equipment to Saudi Arabia, and to continue to grant new licences.

MR JUSTICE GILBART: What is meant by the phrase "clear risk"? I am used to risk analysis, but I have never come across the phrase "clear risk" before. What does "clear" risk mean? What does that adjective add?

MR CHAMBERLAIN: My Lord, I am not sure one can go very far beyond the words used in both the domestic policy and the EU common position. I am not sure it would assist your Lordship to gloss the word "clear" risk. It is an ordinary English word, and it has to be applied in that way.

Now, there are various authorities that look at the question, how does one deal with ordinary English words. What the authorities suggest is that one does not attempt to gloss it. That sounds like a very unhelpful answer and indeed it probably is, but what we will show in due course, I hope, is that when one just applies that ordinary English phrase, "clear risk" that the weapons might be used in breach of international humanitarian laws --

MR EADIE: Serious.

MR CHAMBERLAIN: I am sorry, I missed out the word "serious", and that was unintentional but it does not, with respect, matter, when one looks at the facts of this case. What one finds is that the evidence in this case is overwhelming, and I use that word advisedly. I am going to just give you a little (Inaudible) the references in just a moment, but it is overwhelming. The open evidence in this case is not just that there is a risk or that there is a clear risk, but that there have in fact been repeated serious breaches --

MR JUSTICE GILBART: Let me put one thought -- mainly, for most of my question, of asking Mr Eadie some (Inaudible). As I understand it, it is agreed expressly that weapons have been supplied and used by the King of Saudi Arabia and supplied by this country?

MR CHAMBERLAIN: That is my understanding too.

MR JUSTICE GILBART: The issue then is what the evidence is that they have been used in serious breach of international humanitarian law?

MR CHAMBERLAIN: Yes.

MR JUSTICE GILBART: You say that, for example, one looks at the United Nations report

annex 52, for example, to find a documented example of the coalition, i.e. the King of Saudi Arabia and its allies, conducting air strikes on civilians. You say therefore there is clear evidence --

MR CHAMBERLAIN: Absolutely clear. We do not just rely, my Lord, on the UN panel of experts. So, just while we are on that --

MR JUSTICE GILBART: I know you do not just rely on them.

MR CHAMBERLAIN: Yes, but while we are on that, the UN panel of experts -- this is not just some ad hoc panel. This is a group that was appointed under a UN Security Council resolution --

MR JUSTICE GILBART: Excuse me, if you are going to drink, do you mind doing it out of a glass? It is really disconcerting, if you do not mind, to see people swigging from bottles in the back row of the court.

MR CHAMBERLAIN: I am sure we can find one inside the court is one is needed.

MR JUSTICE GILBART: I am sorry, it is a little niggle of mine.

You have a lot of evidence from different sources?

MR CHAMBERLAIN: Yes, and can I just summarise what the evidence is, so that you have references to it? If you want me to stop, please say so, but I will summarise it without taking you to it.

MR JUSTICE GILBART: If you do not mind I have read it quite a bit. Help me on this please, because this is the other matter which I really want to ask you about before I have some questions for Mr Eadie.

Let us suppose that the court ends up upholding your claim for judicial review. What is the relief which will follow?

MR CHAMBERLAIN: So, the relief that we have sought is relief quashing the decision that you

have seen set out in the letter of December 2015, and --

MR JUSTICE GILBART: Let us just look at that.

MR CHAMBERLAIN: Whether it goes further than that is going to depend on the basis on which the court quashes the decision. So, my Lord, if --

MR JUSTICE GILBART: Do you mind if I just look at (Inaudible) --

MR CHAMBERLAIN: It is in volume 3, tab D, D11.

MR JUSTICE GILBART: Yes?

MR CHAMBERLAIN: It is a set of answers to a set of questions, and that reflects and communicates a decision that the Secretary of State is not going to suspend extant licences and is going to continue on a case-by-case basis to grant further licences.

Now, your Lordship put to me the question, what happens if we win? I think the answer to that is, well, it depends how we win. If the claim for judicial review is allowed because the Secretary of State has failed to consider certain matters which he ought to have considered, if that is the basis on which the claim is allowed then the consequence of that would be just the same as it is in any judicial review claim where that is the ground of success, namely remittal to the Secretary of State to consider those matters which can be considered and ought to have been.

We do not know what the evidence will be at the substantive stage. Some of the evidence which has been referred to but not put in evidence at this stage is sensitive evidence, and so the court may have to look at some of that evidence. The court might find after looking at all of the evidence that no reasonable Secretary of State could have taken any decision other than to suspend the extant licences. That is one possible conclusion that the court could reach, and if it reached that conclusion it would no doubt order the Secretary of State to suspend the extant licences, or it would grant declaratory relief to the same effect.

So, the question that your Lordship puts to me, which is a very fair one because one needs to understand whether there is a point to these proceedings, is that it depends on how big a win we achieve.

MR JUSTICE GILBART: Well, let us just go one stage further, and I make no bones about the fact this is an aspect of Bradley that always worried me.

MR CHAMBERLAIN: Yes.

MR JUSTICE GILBART: I am always worried by judges supplanting democratically elected politicians. Let us suppose you win, and you win big -- irrationality. Is this actually at the end of the day a matter for Parliament to determine, whether or not this country should sell arms to Saudi Arabia? After all, it is possible to do so lawfully even if all of your case succeeds, on the basis that you might choose to make an exception to a policy?

MR CHAMBERLAIN: Well, that may be an argument that is open to the Secretary of State on relief, but then your Lordship would make a declaration, and if that argument succeeded -- I am not making any concession on that argument now, but if that argument conceded, then your Lordship or whoever was hearing the case substantively would make a declaration that there had been public law errors in the consideration of these matters, and it would then be for the Secretary of State or for Parliament to decide what to do in --

MR JUSTICE GILBART: But still you would argue that there are still international treaties which are binding on the government, I suppose you would argue?

MR CHAMBERLAIN: Well, there are, and not just international treaties, but also the common position which I am afraid, notwithstanding last week's events --

MR JUSTICE GILBART: We are still a Member of the European Union.

MR CHAMBERLAIN: We are indeed, and it remains a position adopted by the European Union institutions which we have implemented.

MR JUSTICE GILBART: Help me on this, please. Although I can understand that the facts are not the same, in Hasan Mr Justice Collins followed the principle that the real relief would be provided by scrutiny by parliamentary committee or by Parliament. What do you say to that? Because it is a point taken by Mr Eadie as well.

MR CHAMBERLAIN: It is, with respect, a bad point because what we have here is a policy that has been articulated. We have a statutory discretion that is being exercised by a minister, just in the normal way that any other statutory discretion would come to this court. We have an allegation by a claimant that the statutory discretion has been exercised unlawfully.

Now, if that allegation succeeds then the ordinary consequence is that this court grants whatever relief is appropriate. We have just been discussing now what relief might be appropriate.

MR JUSTICE GILBART: Thank you.

MR CHAMBERLAIN: So there are lots of --

MR JUSTICE GILBART: Thank you. I would like to hear from Mr Eadie.

Mr Eadie, I would like to hear from you, remembering always that at this stage I am determining arguability.

MR EADIE: My Lord, no need to (Inaudible) on that.

My Lord, my submission is that there is a fundamental difficulty of approach that flows through my learned friend's case at this stage, and it is a fundamental difficulty - or in fact two fundamental difficulties - in relation to which the learned judge refused permission on the papers, as Andrews J was very well aware.

The first fundamental difficulty is that the application that is made treats the case in effect as if the issue was, can it be established arguably that KSA, the Kingdom of Saudi Arabia, has acted in breach of international law -- I summarise, stripping out all the adjectives in the test but you know the word "clear" is in there, you know the word "serious" is in there.

My respectful submission is that that is fundamentally the wrong approach. It is unrealistic to start off with and impossible effectively, given that one is dealing with a series of judgments that have to be made about the military operations of a foreign sovereign government. As my Lord will be well aware, trying to get full information on a issue like that, even in an armed conflict in which the United Kingdom itself is involved, is difficult enough.

MR JUSTICE GILBART: But that would be a reason for not joining up in the common position? Once you have joined up, do we not have to apply it?

MR EADIE: My Lord, you have to apply it, the Secretary of State has to apply the common position, but this court is not second-guessing that.

MR JUSTICE GILBART: Well, let us just test it. You have repeatedly been asked by the claimant whether you dispute the credibility of the report. Now, if the United Nations report is correct, the coalition have engaged in the bombing of civilians. Now, if that is credible, or rather if you do not dispute its credibility, where does that leave you?

MR EADIE: My Lord, we disagree with that report. We disagree with the conclusions in that report and the judgment for this court is one of rationalty.

MR JUSTICE GILBART: Have you actually said that, that you disagree with that report's conclusions? I do not think you have, have you? It is all right, Mr Chamberlain.

MR EADIE: My Lord, we have taken the position firstly that we could not grant licences if there was a clear risk of a serious violation of international humanitarian law, and that we are able to continue to grant licences and not to suspend. It therefore follows that the view of the Secretary of State is that there is no clear risk of a serious violation of international humanitarian law.

MR JUSTICE GILBART: I have that point, but if the case I was being presented with was, we

have looked at all of these reports, we do not think they are credible, we do not accept them, we made our own investigations and we are satisfied that there is no clear risk - I understand that approach. But that is not your approach, because every time you are asked whether you dispute the report you take great care not to do so. Is that a logical position?

MR EADIE: My Lord, that is an entirely logical position. Can I take you to the summary of grounds in which this position is actually set out?

MR JUSTICE GILBART: Please do.

MR EADIE: You have them, I think, in the first examples.

MR JUSTICE GILBART: Yes, I do.

MR EADIE: You may have them separately.

MR JUSTICE GILBART: Sorry to bother you, Mr Eadie.

Yes?

MR EADIE: You will see the structure of the case that is being made is directly to answer the actual grounds of legal challenge that are made in this case. One goes, for example, to paragraph 42 of the summary grounds. The summary grounds have already indicated the approach that is being followed, and that includes asking the question whether or not there is a clear and serious risk, and applying the approach in the EU guide as indicated in, for example, paragraphs 10, 12, 14 and 15 of the summary grounds.

So then one comes to the question, how can that sit with the UN report and indeed the other reports upon which my learned friend relies? The answer is that unless the Secretary of State had formed the view that there was no risk of clear and serious violation, the Secretary of State would not be acting consistently with the policy in granting any licences or in failing to suspend. It is perfectly clear the Secretary of State has reached the opposite view that despite those reports, all of which have been taken into account as is expressly

asserted in paragraphs 42 and following of the summary grounds, despite all of that the Secretary of State has not felt that the right answer is to suspend and has not decided that he cannot grant further licences. So the position is that the Secretary of State has asked himself the right question, which is, is there a clear and serious risk, or is there a clear risk of serious violation of international humanitarian law; has applied the user guide guidance in order to answer that question, again, perfectly entitled properly to do that; has specifically considered the UN report and the other reports that are relied upon; and has nevertheless concluded that he is not prepared to say, I am going to suspend granting licences and has felt able to grant those licences.

MR JUSTICE GILBART: Mr Eadie, again you have not answered the question. You have said he has considered them and he has chosen not to suspend them. I repeat, is it the Secretary of State's case that those reports are not credible?

MR EADIE: My Lord, the question of state is not the question. The question is, can the Secretary of State, having properly taken into account those reports, can the Secretary of State rationally conclude as he has done? He does not need to challenge credibility of those reports.

MR JUSTICE GILBART: Well, if those reports show -- for example, one of them, I think it is example 52, it may be 56, is where they drop leaflets telling people to vacate the mosques and other areas because they were going to bomb a residential area of the city -- the coalition. Is that not a piece of evidence, which if true, if credible, has to be taken as a piece of evidence of clear risk?

Now it may be that there is other evidence which suggests that it was a one-off or that measures have been taken to avoid it happening again, or whatever. I completely understand that.

MR EADIE: Or that they were taking deliberate steps to avoid civilian casualties or to minimise

them in the course of a proper armed conflict.

MR JUSTICE GILBART: Or by a leaflet drop?

MR EADIE: By a leaflet drop inviting civilians to leave and taking every step to minimise or to avoid civilian casualties. It is not beyond the realms of possibility that mosques and/or residential areas are taken over by fighters in an armed conflict and are properly the subject of a strike.

MR JUSTICE GILBART: I have not said otherwise. I just --

MR EADIE: But my Lord is putting to me why they would -- if we accept the credibility of those reports, does it not necessarily follow that there is a clear risk?

MR JUSTICE GILBART: No, I am not, actually.

MR EADIE: Well, I have misunderstood. I am sorry.

MR JUSTICE GILBART: Let us be quite clear. It is a clear risk that there might be a serious breach.

MR EADIE: That I understand.

MR JUSTICE GILBART: Right. Evidence of what has been happening is evidence which must be taken into account (Inaudible).

MR EADIE: I agree.

MR JUSTICE GILBART: Now, I would entirely understand it if the Secretary of State had said, "We have considered these reports, we have decided that in fact measures have now been taken, etc, etc." But every time you have been asked, you have taken great care to avoid answering the question.

MR EADIE: I do not agree with that, I am afraid, with the greatest of respect. We have been asked a series of questions about whether or not we have taken into account these reports and what our reaction to them is, and we have set out in the summary grounds precisely

what the answer to that is. The question of whether or not there was a clear risk of a serious violation of international humanitarian law does not collapse into the question whether or not we consider those reports to be credible.

MR JUSTICE GILBART: Do you contend that this issue is one that is not arguable?

MR EADIE: Yes, otherwise we would not be here. Otherwise I would make that concession. We are here to contest the renewed application for your permission.

MR JUSTICE GILBART: I always admire the trenchancy of your advocacy, Mr Eadie.

MR EADIE: My Lord, (Inaudible) an impertinent argument.

MR JUSTICE GILBART: No, no, I do not mind people -- if I bowl fast, I do not mind if people bowl fast back.

MR EADIE: My Lord, the reason we are still here, quite apart from the fact that Andrews J adopted what we respectfully submit was an entirely principled approach to the question, the reason we are here is because we respectfully submit that her reasoning is entirely right. But her reasoning starts from the premise that you need to approach the issues, particularly the rationality challenge, which is what my Lord has put to me now, on the basis of the right legal approach and the right legal premise.

The question does not collapse into -- let us strip out the word "credibility", because it appears to be hijacking the debate, as it were. The question does not collapse into whether or not reports have been prepared which assert that the KSA has acted in violation of international humanitarian law. The reason that they do not do that is because what one has to ask in point of principle is whether or not the Secretary of State, despite the existence of those reports, which as I remind the court have been taken into account by the Secretary of State, whether or not the Secretary of State could rationally conclude that despite those reports there was no clear risk that there might be a serious violation of

international humanitarian law.

The reason I emphasise that is because as I said, my learned friend - no doubt I can now put it on the basis that it appears with some success, has sought to collapse that issue into precisely the issue that my Lord is putting to me. In fact what that rationality approach asks is whether or not the Secretary of State has stepped outside the bounds of reasonable decision-making in reaching the conclusion that he evidently has, despite the existence of those reports.

Now, one can quite see that if the position was that those reports existed without more, the Secretary of State was operating on the basis of precisely the same information as before the respective UN bodies who produced the UN report, one can quite see in those circumstances that the rationality challenge might be a rather more forceful one. If, however, the position is that those UN reports for entirely understandable reasons have to operate on the basis of the information - and only the information - that is available to them, but the Secretary of State has available to him a broader range of information including, as it were, direct access to the way in which the Saudis do go about operating strikes of the kind that my Lord has put to me in the armed conflict in Yemen, then the necessary inference from those reports simply does not flow.

MR JUSTICE GILBART: It is fair to say -- I take your point about hijacking, but it is fair to say that those reports are documented by a great deal of evidence, is it not? And photographs?

MR EADIE: Certainly.

MR JUSTICE GILBART: Could I ask you something about the criteria please?

MR EADIE: Yes.

MR JUSTICE GILBART: I am looking at the statement of the Secretary of State to the House. This is 25 March 2014, and it is criterion 2. Could I ask you something about that,

Mr Eadie? Could we look at 2B? "The Government will exercise special caution and vigilance in granting licences, on a case-by-case basis to take into account 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 and by the European Union." Is the UN report to which reference has been made something which falls within the description of competent bodies in the UN?

MR EADIE: My Lord, yes, that would fall within it.

MR JUSTICE GILBART: Right. So it has been established, a serious violation of human rights, by that document?

MR EADIE: Well, that is their opinion of the case.

MR JUSTICE GILBART: So under the criterion, the Secretary of State accepts that he had to exercise special caution and vigilance on a case-by case basis?

MR EADIE: My Lord, I think that is accepted in our pleading, but it nevertheless still is a decision for him.

MR JUSTICE GILBART: Of course, I understand that.

MR EADIE: It is a decision of a particular type. It is a decision which is redolent with judgments. It is a decision which is prospective. It involves predictions as to how the KSA is going to act at any given moment in time when the matter is being considered.

MR JUSTICE GILBART: So if we look at the criterion again, we would see there is an establishment of a serious violation of human rights? So, when we come to the third criterion, "not to grant a licence if there is a clear risk", which of course relates to the future, but the items must be used in the commission of a serious violation of international humanitarian law, he would have to be operating on the basis that he had evidence which fell within the second criterion that they had been used in a serious violation of

international humanitarian law?

MR EADIE: Well, my Lord is putting points to me as though the one leads to the other. In my respectful submission, what the first of the criteria you have just referred to does is to enhance the need to look carefully - "special vigilance" - at the second criterion you have just put to me, which is the one which is applied. No one is suggesting that the Secretary of State made an error of law in that respect, and no one is suggesting that by putting those two conditions together, you end up with anything other than an irrationality challenge. So the legal standard which has to be surmounted by a claimant challenging the Secretary of State's decision in that respect remains - and that is why I emphasise the nature of the decision - and is is not, as I say, it is not a -- one can entirely see the force of the point my Lord puts to me on the UN committee report. If the body of information on which the Secretary of State and the UN committee was operating was the same.

MR JUSTICE GILBART: But suppose it was not?

MR EADIE: Well, if you suppose it was not, then it does not flow from the fact that one respected body has come to the conclusion that there have been breaches of international humanitarian law. It does not flow that the Secretary of State has to operate on that basis.

MR JUSTICE GILBART: Do not let there be any confusion about what is in my mind. I am completely at home with the idea that the Secretary of State can form his own judgment. I have that point. And I am completely at home with the idea that he is not bound to accept what appears in the UN report. I am only pointing out the fact that the criteria accepted by the Secretary of State give special significance to the establishment in the UN report, and they dictate the method of consideration he must adopt.

MR EADIE: Yes, but even without that criterion I would not be making the submission to you that a body such as that body in the UN's report was not something which was highly

relevant to the rationality analysis. So if my Lord is putting that point to me the existence of the other criterion does not much advance the argument, in my submission, because he would take special care and would take that sort of report into account. But no one a querying, no one is challenging the idea that the Secretary of State has indeed considered with particular care that report. But the summary grounds have gone through in some considerable detail the nature of the decision-making process, and you will have seen the bodies that advise the Secretary of State. You will have seen the range of support that he has within and from the Government, including from the MoD and the Foreign Office. Once one understands that and one understands, again, what is set out in the summary grounds, that the Secretary of State has - and I can put it this way in very broad summary - special access to the KSA and the way in which it works, it ceases to be surprising and it ceases really to support a case of rationality to be pointing to a UN committee that did not have access to that range of information. Again, my Lord will be very well aware, taking the example you put to me about an air strike, the fact that members of the civilian population are killed in an armed conflict, the fact that there is an air strike on a residential area in an armed conflict, neither of those two facts establishes a violation, let alone, a serious -- I know that is not the point that my Lord is putting to me.

MR JUSTICE GILBART: It certainly is not.

MR EADIE: You start from the premise that says that there is a UN committee report that has reached that conclusion. My answer to that is, in order to determine properly and fully whether or not there has been a violation, let alone a serious one of international humanitarian law, you need to know the sort of things that you would find out if you did have special access to the country that was committing the strike.

MR JUSTICE GILBART: I think just to --

MR EADIE: You need to know what steps are being taken, what steps have been taken to try to avoid casualties, whether or not the principle of proportionality has been breached. All of that requires you to know how the military operator is working and has worked.

MR JUSTICE GILBART: I understand that. Just give me one moment. I just want to identify what is said. Excuse me, Mr Eadie.

MR EADIE: Not at all. If I can assist?

MR JUSTICE GILBART: I am just looking for the -- I have just momentarily lost the reference to the report and its appendices. My apologies to you. I think it is the (Inaudible).

MR CHAMBERLAIN: Is your Lordship looking for the UN?

MR JUSTICE GILBART: Yes, thank you. Sorry, I wanted to check. Yes, Mr Eadie?

MR EADIE: My Lord, so the short point is, while one entirely understands the force that says look at that body, it is a respected body, it is a body that you have to take into account, you would do anyway, but you have the criteria if necessary. Why does it not follow from that the clear risk is established? The answer that I give in very brief summary is, it -- as you will (Inaudible) at this stage, if it does not work in very brief summary it does not work at all at this stage, is because the body of information on which that conclusion was reached by the prospective body is not the same as the body of information which the Secretary of State has access to. That is not just a pure technical point, it is a point of real significance. That is why in the summary grounds such care was taken to set out the nature of the process, the nature of the access, the liaison with the KSA, what that liaison brought with it. It enables me to make the submission that it simply does not follow from the published report of the UN, or indeed any of the other reports, that the Secretary of State is outside, if I can put it this way, the very broad boundaries that exist in relation to rationality. This is not, I emphasise, a question of a court second-guessing whether there is a clear risk. The

legal question for my Lord is whether or not it is established that no Secretary of State acting rationally could have concluded that there was no clear risk of a serious violation, having regard to the existence of those reports. Now, that is not merely not a matter of inference from the existence of that report for the reason that I have given, but it is an inherently highly improbable outcome, in other words, that the Secretary of State has stepped outside the bounds of rationality in circumstances where it is accepted that the Secretary of State asked himself the right question, applied the right guidance framework to that and also specifically took into account the very reports upon which reliance is placed to establish rationality. My respectful submission is that that combination of features does lead to a place in which the inference of rationality - which is what my learned friend has - simply cannot be drawn. The high water mark of this case are the very reports which for understandable reasons my Lord has been putting to me. But if the answer to those reports is the inference does not flow, access to other information, he asked himself the right question, he took into account those reports as part of his consideration, but nevertheless reached the conclusion that he did, where is the case on rationality?

MR JUSTICE GILBART: I am grateful. Under the user guide, the European Union user guide, which is not (Inaudible) best friend when it comes to being brief. It has the tedious habit of inserting appendices into the middle of the text. But if I have understood this correctly, I think criterion 2 is C154, I think, Mr Eadie? Criterion 2 starts at 154.

MR EADIE: Heading "Best Practices"?

MR JUSTICE GILBART: Yes, and Interpretation of Criterion 2. Page 155 refers to material that can be obtained, and we see it includes international NGOs of the United Nations, ICRC, international NGOs, human rights NGOs, there are other sources, etc. Then at 156 are key concepts to consider. If we look at page 157, the third paragraph, current and past record is

relevant, unsurprisingly. Then at page 160, the definition of clear risk, the combination of clear risk and "might" sets a lower burden for evidence than the clear risk military technology equipment "will" be used for internal repression. Has that approach been adopted?

MR EADIE: Yes, those -- no one has suggested that the Secretary of State move from "might" to "will". "Clear" is nevertheless in there, with its plain English language meaning, and so is "serious".

MR JUSTICE GILBART: Then page 161, an analysis must be based on a case-by-case consideration of available evidence. We have the -- and I am not being rude when I say this, we have the assertion that has been done, but we do not have the analysis.

MR EADIE: My Lord, we do not, because in part, and this is my learned friend's point about sensitive information, and, of course, at this stage, for understandable reasons, we are not in the territory of making a section 6JSA application to you. I rely upon the fact of the existence of that.

MR JUSTICE GILBART: Well, could you take me to where it is set out that there was a case by case consideration of available evidence? Could I see where it is set out that that is the process that has been adopted?

MR EADIE: My Lord, I think all I can point you to is the summary ground and the case made in the summary grounds, which sets out the process followed.

MR JUSTICE GILBART: Let us have a look.

MR EADIE: It is really the section that deals with the approach that the Secretary of State takes, and it starts at paragraph 13, the title above paragraph 13 in the summary grounds. Questions asked, information obtained, and above 18, analysis of allegations of violation.

MR JUSTICE GILBART: Yes, it says there that it was carried out (Inaudible) on a case-by-case

basis.

MR EADIE: My Lord, I do not think anyone is suggesting that that is not the position, but the case-by-case basis requires one to look at the country to which arms are being exported as it were, and to look at the point the licence is being granted, and of course at that point, what you are doing is to make a prospective judgment. But no one, I think, is suggesting that that case-by-case basis has not been followed. The allegation on process, the Thameside allegation if I can put it like that -- my Lord will be aware that the claim was basically put in two broad parts, one is rationality, which we have been exploring and the second is the procedural challenge, effectively, it says, you did not do the right process. But no part of that challenge is to say you did not do it on a case-by-case basis, or that you moved "might" to "will", or that you did not apply that part properly. What is being said, rather, is that there are some elements of the framework, there are some specific questions that are referred to in the EU user guide that are not directly asked and answered in terms. And our answer to that, as you will have seen from the summary grounds is that just like rationality on the substantive decision, the case law including the dual risk burden to which you have referred, is absolutely clear that when you come to the question what material has to be looked at, what is process of consideration has to be followed by a decision-maker such as the Secretary of State, that is also a matter of rational judgment, and again, that's the flaw that runs through my learned friend's case, at that stage, which the learned judge Andrews J identified. He has effectively sought to collapse that, as though the question was a hard-edged one. He is effectively saying has the Secretary of State asked these questions which are referred to in the user guide. That, with the greatest of respect, is fundamentally wrong in principle as an approach, as the learned judge appears to have acknowledged. The right question, again, is could a rational Secretary of State have being

conducted the consideration on a case-by-case basis of this issue without asking questions which form the heart of my learned friend's challenge, and the answer to that --

MR JUSTICE GILBART: So, it is the old principle that it is up to the decision-maker to decide what is material?

MR EADIE: Exactly so. It is (Inaudible) Thameside, Findlay, all that and the case with which my Lord is very familiar. But we have set out in our skeleton, which I hope you will have received, the relevant paragraph or paragraphs from the Plantaganet Alliance.

MR JUSTICE GILBART: Funny, that case is devoted to me in almost every single (Inaudible).

MR EADIE: My Lord, I wish --

MR JUSTICE GILBART: I have just given judgment about a large number of trees in Sheffield in which that figures. It is an expectation.

MR EADIE: My Lord, if you have been privy to the (Inaudible) --

MR JUSTICE GILBART: Were you in the Plantagenet Alliance?

MR EADIE: Yes, but if you --

MR JUSTICE GILBART: (Inaudible).

MR EADIE: Sometimes it has (Inaudible). But if you remember the battles which led to us actually being in court in that case, it is not a bad example of an interesting case making good law, which is the flip side of a bad case making bad law. But my Lord, if you have that paragraph. It is quite an important paragraph, at 110 or whatever it is, that is quoted in the skeleton, because it encapsulates precisely the principle that my Lord has just given to me. It is for the rational judgment of the decision-maker to decide how to conduct that process based on Laws LJ in Khartoum is the --

MR JUSTICE GILBART: Yes, but is that -- does that apply (Inaudible) in decision-making, or (Inaudible) or is it that in this decision, we have to look at the criteria set in Parliament, at

the composition of the guide published in association with the Parliament position, but if that is the statutory (Inaudible), it is the legal background against which the decision is made.

MR EADIE: The policy to which the Secretary of State is has bound himself is to ask the question.

MR JUSTICE GILBART: Well, it is not that he has bound himself, it is that EU law has bound him.

MR EADIE: Well, it is not just directly applicable EU law, it is adopted as a matter of policy. But as a matter of policy, that does not, for our purposes -- I accept there is a public law obligation on him to ask the right question. The challenge is not to that.

MR JUSTICE GILBART: I mean, but essentially, Mr Eadie, I very much doubt that the Secretary of State wants to argue this case on the basis that having considered this other material he would have made a different decision, but he did not think it was relevant, but I very much doubt he wants to argue the case on that basis. Your case is, four square, is it not, taking all of this into account, he asked the right question?

MR EADIE: That is my case. And just to put the edge on it, it is not a question of ignoring relevant material, that might be different. This is whether or not an analytical framework that is recommended in the user guide was applied, and that is a different question, albeit legally in the same borough, if that makes sense. But that part of the user guide is not a "did he ask the right question?" issue, that is -- the challenge is that there was a bit of an analytical framework in the user guide that should have been used, and my respectful answer to that is perfectly competent rationally to decide, having asked the right question, that he did not need that additional matter. He set out in the grounds, bits of the user guide that he did rely on --

MR JUSTICE GILBART: It is small g, guidance, in other words?

MR EADIE: Well, it is small g guidance, but more importantly if you have to ask, having regard to a particular challenge that is made, did he ask the right headline question, serious risk, etc, yes. No challenge to that. Did he apply the key questions in the user guide, of which I think there are three, there are a further two in the summary grounds at paragraph 15, including the past and present record, the point that my Lord was putting to me, paragraph 15 in the grounds. So he asked those questions, which if I can put it this way are the core of the analytical framework, and what he has said is that, yes, but underneath that there are some other questions that should have been asked. And my respectful submission is, it is a matter for his judgment as to precisely how he goes about considering that question, i.e., the headline question, having also applied that core analytical framework that you see recorded in paragraph 15. And it cannot possibly be said that it was irrational, that he stepped outside the boundaries of irrationality in terms of process by not addressing directly and expressly the matters that my learned friend's case in this respect is based on. So, you have twin challenges. They do not necessarily have to be resolved in the same way, at the permission stage, but you have the rationality challenge to the substance of the decision - I have made my submission in relation to that - but you also have effectively a rationality challenge in relation to the procedural matter as well. In my respectful submission, in relation to both is what my learned friend has to --

MR JUSTICE GILBART: Is there a rationality challenge or is it a Thameside challenge?

MR EADIE: It is a Thameside challenge, which collapses into a rationality challenge.

MR JUSTICE GILBART: Well, I have always suspected though, that all Thameside challenges, and indeed most challenges of the basis of inadequacy of reasons, the clients collapse into a rationality challenge, because actually rationality is a sub-set of legality.

MR EADIE: Well, if my Lord is coming at it from that place of principle, we respectfully agree, see Richard III. That is the thrust of the point that is being made in that paragraph, albeit in the six or seven propositions that the three-person divisional court refused in that case. My Lord, that is the essence, and lurking behind all of this --

MR JUSTICE GILBART: What your case is, in a nutshell, is for the Secretary of State to decide if he has shown that he took all these matters into account and reached the decision that could only be challenged on rationality grounds and they have not got that far? That is your case?

MR EADIE: That they have not got that on the substance, and they have not got that far on the process. For that reason, for those reasons, carefully considering the processes that are set out in the summary grounds, Andrews J was correct --

MR JUSTICE GILBART: And you say it is not even arguable?

MR EADIE: I do. Otherwise -- I hate the repeat the impertinence of earlier, otherwise we would not be here. I am well aware --

MR JUSTICE GILBART: That is a pulling yourself up by your own boot straps argument. It is a very nice argument, but it is. You will have been instructed to be here, Mr Eadie, and it is a pleasure to have you here.

MR EADIE: It is my instructions that drag me here. And I am prepared to accept that.

MR JUSTICE GILBART: We would not have (Inaudible) you to be here if we did think you could achieve that, I understand that. The same applies to Mr Chamberlain.

MR CHAMBERLAIN: My Lord, there is a dispute --

MR JUSTICE GILBART: It is a draw.

MR EADIE: My Lord, I do not think either of us are going to addressing you at any great length to dispute the proposition that at the permission stage what is required is an arguable case,

but that was the test that was applied by Andrews J, and she reached the decision she did on the papers. Nothing of any materiality has changed since then, and for all the reasons that she gave, and for the reasons I have set out here, we respectfully submit that she reached entirely the right answer, and there is no particular concern in relation to that. We do not strongly dissent from the points my learned friend made about the parliamentary committees, but the parliamentary committees do look, I think my Lord put it to my learned friend on the basis that the parliamentary committees might in effect render issues non-justiciable. We do not go that far.

MR JUSTICE GILBART: I was not thinking of that. It was whether or not -- if that is a posh way of saying I was saying that it is a suitable alternative, well, that is what I was saying.

MR EADIE: Yes. Well, my Lord, we would agree with that, and one needs to be a little cautious, how far, because Hasan was about giving reasons. Hasan was at base a reason to challenge, and we were resisting giving reasons for particular decisions. I think Collins J's reasoning was that we do not need to worry about that and the imposition of the reasons duty here, because there is a parliamentary committee.

MR JUSTICE GILBART: Yes. Thank you.

MR EADIE: And that last point is against us, my Lord will I am sure appreciate.

My Lord, those are my submissions to you.

MR JUSTICE GILBART: Do you want to say anything, Mr Chamberlain?

MR CHAMBERLAIN: My Lord, as far as the rationality part of the case goes, the way that we put the case is really quite simple. If you strip away the material that the Secretary of State says is available to him, but not available to anyone else, let us just concentrate for the moment on the open material, the publicly-available material. No reasonable Secretary of State basing himself only on that material could come to any other conclusion but that the

criterion was satisfied.

Now, your Lordship then put to my learned friend, are you actually disputing any of these reports? And his answer came as news to me, because of paragraph 46 of the summary grounds. I will just ask your Lordship to look at paragraph 46 of the summary grounds. This was, until this morning, the Secretary of State's answer to our case, that the report showed beyond peradventure that there is at least a clear risk.

MR JUSTICE GILBART: Thank you. I am going to grant permission. I am going to give my reasons very shortly indeed. I am expressing no view on the final outcome. It seems to me that there is patently an arguable case, and there is an arguable case, it seems to me, because there is abundant evidence of actual breaches of international humanitarian law which had to be considered by the Secretary of State. The Secretary of State has not dealt with in the way in which he indicates whether or not he accepts that there were breaches as shown in those reports by the United Nations NGOs and others. It is unclear to me still whether the Secretary of State's case is he disputes them or not. This case is arguable, and I can say no more than that.

Now, for this, I think this is a case for a two-man or two-woman or mixed court. I think --

MR CHAMBERLAIN: (Inaudible).

MR JUSTICE GILBART: I think this should be a Lord Justice of appeal and one judge sitting as a two-person court. Does anyone dissent?

MR CHAMBERLAIN: I do not dissent from that, my Lord.

MR JUSTICE GILBART: , now, you haven't got before me at the moment any application for disclosure.

MR CHAMBERLAIN: No, we have not, and no doubt it would be said against us, if we were to make such an application that it was premature.

MR JUSTICE GILBART: Well, I was just thinking we had better wait and see what evidence is going to be adduced.

MR CHAMBERLAIN: We do, however, have an application for expedition.

MR JUSTICE GILBART: Well, do you mind if we just -- I will come to that in a minute. But the next question is going to inform that. Mr Eadie, could you indicate to me the evidence you are putting forward on behalf of the Secretary of State, its quantity and also how long it will take to prepare?

MR EADIE: Well, my Lord, no final decisions have been made in relation to that as yet, but what I would say is that you will have seen that the evidence has been ranged against the Secretary of State's decision in this case, and whatever else (Inaudible) the court might make, we respectfully submit that the usual time for prepare that evidence should be allowed, because it is going to be a not-insignificant task. My Lord will also need to bear in mind that as part of that exercise, consideration will need to be given by government both to the question of PII and also to the question of whether or not a section 6 justice and security act application ought to be made in order to place before whichever court hears this the material which has sensitive. Of course, my Lord will be well aware that there is a distinction drawn because of section 11 of the justice and security act between grounds for objecting to the production of material open on national security grounds within the matter, and other grounds which might traditionally base a PII application, such as impact on international relations. So one might need to be a little careful about that distinction. Both of those things will have to be done, so there will need to be thought disclosure there will need to be thought to the witness evidence that may need to be produced, or witness statements that may need to be produced, and as part of that, and running through all of it, the open and closed divide issue will be (Inaudible), I suspect.

MR JUSTICE GILBART: (Inaudible) time for all of that.

MR EADIE: No, no.

MR JUSTICE GILBART: If you do not mind.

MR EADIE: But I mean, I will put them in.

MR JUSTICE GILBART: No, absolutely. Do you wish to -- I think Mr Eadie has quite a strong point there. About his position. It is going to be very difficult to order expedition, is it not?

MR CHAMBERLAIN: Well, it is not, with respect, difficult to order expedition. I understand that he has to be given enough time to respond. I fully understand that. But the Secretary of State's opposition to our application for expedition to date has been on the basis that, well,, do not worry, conflict has more or less petered out. That's the basis on which my learned friend --

MR JUSTICE GILBART: That wouldn't trouble me at all.

MR CHAMBERLAIN: No well, you would be right not to, my Lord, because we have shown in our --

MR JUSTICE GILBART: I can't think of a conflict in the world in the last 25 years where (Inaudible) in advance of petering out (Inaudible).

MR CHAMBERLAIN: Well, not only is it right to be sceptical of those promises, but there have in fact been, we understand, 94 attacks --

MR JUSTICE GILBART: If you push the open door any harder, it will start rotating. I would like your submission please. Mr Eadie has a good point about some things that have to be done.

MR CHAMBERLAIN: Absolutely.

MR JUSTICE GILBART: Why would expedition achieve anything for you?

MR CHAMBERLAIN: Well, it would achieve something because if this conflict is on-going, if this case is not expedited, it is quite possible that this case wouldn't actually end up being heard until 2017, for example. And there is a very strong public interest in the issues that we have ventilated being heard more quickly than the than that. Of course, he must have time, we suggest a sensible time would be 14 days, or 21 days, in which to decide whether to make a section 6 application. I say that because once a section 6 application is made, there will then have to be the appointment of a essential advocate, and the application is going to be pursued seriously. There will then have to be a procedure to consider disclosure on of closed material into open. There will --

MR JUSTICE GILBART: In following the resolution of section 6 application?

MR CHAMBERLAIN: Yes, exactly. And all of that will have to take place before any substantive hearing.

MR JUSTICE GILBART: Well, there has to be filing evidence first, followed by the section 6 application, or a section 6 application.

MR CHAMBERLAIN: Well, it'll either by DII or section 6 or both, depending on whether the material falls into the international relations category or the national security category or both.

MR JUSTICE GILBART: So if -- with we have to allow a realistic time frame for the preparation of evidence.

MR CHAMBERLAIN: We do.

MR JUSTICE GILBART: And normally the civil service is not quite as generously funded as it used to be, shall we say. It will take some time.

MR CHAMBERLAIN: I understand that. The normal period of time for filing of evidence in a case of this kind would be 35 days from the grant of permission, and we would respectfully

submit that there is no reason to extend beyond 35 days the period for filing he find in this case. I would also says that if my learned friend is planning to serve either a PII certificate or an application for a section 6 declaration, that should be done either at the same time as or preferably before the filing of evidence, so that arrangements can be made for the appointment of a special advocate, and alter others steps that have to be gone through from this claimant to be heard. So really the expedition that I'm asking for is not necessarily expedition to require my learned friend to answer a case within 7 days, something of that like. It is expedition to ensure that when this case is set down for hearing, we are not pushing into the middle of next year or --

MR JUSTICE GILBART: So if I ordered that it is to be heard before Christmas this year?

MR CHAMBERLAIN: Yes well, my Lord, I would respectfully suggest that that would be a very --

MR JUSTICE GILBART: Brave, did you say?

MR CHAMBERLAIN: No, a very sensible order to make, because --

MR JUSTICE GILBART: That was the right adjective. Good, thank you, that's where we mean. Mr Eadie, it seems to me that that may be the (Inaudible) right approach.

MR EADIE: My Lord, first I have to address whether or not this is a case which pulls sufficiently hard on the court's heart strings to order expedition and (Inaudible). We respectfully submit that the learned judge who will consider permission will also consider, as you will have seen, expedition to reach the rightly view. I know my Lord threw out --

MR JUSTICE GILBART: There is expedition and expedition. I mean, yesterday as a (Inaudible) judge, I had to order expedition in the -- a hearing in the space of something like ten days where life was at stake of a small child.

MR EADIE: (Inaudible).

MR JUSTICE GILBART: Well that is what I have fixed on, Christmas. That is at the end of next term, and it is six months away. Now, if you are not going to ready, you can always make an application.

MR EADIE: My Lord, I understand that. My submission is, however, you have to ask yourself the question whether or not it is an appropriate case for expedition in the first place. Any order for expedition, even a Christmas order, requires other cases to give way, and the question is whether this is sufficiently strong case for the court to make that order in principle. And I do submit that one of the relevant factors to be taken into account is the state of the possibilities. Of course, you are right about the state of the relates of the world, but it is relevant that there are talks going on, there has been a cease fire, there has been a did he escalation. None of that is challenged. If so, for some reason there was to be, as it were, a reinvigoration of hostilities, then one can understand that the trap is down in terms of escalation, and our respectful submission is that if you leave the ordinary JR timetable and processes in place, there is no reason to suppose that the case would not be determined within a perfectly suitable time. No one is saying to you that you need to try this before Christmas, and before Christmas as my Lord rightly points out is six months away. And if the strength of the plea to the court can live with six months, then in my respectful submission, that tells you a great deal about the weight of the application for expedition in the first place. My submission, therefore, in principle is that you should leave the ordinary JR processes to operate, and that would probably lead to a trial, may be to a trial before Christmas, or likely to lead to a trial in the early part of 2017. And I am particularly cautious about that because although, of course, I understand a six months will have elapsed --

MR JUSTICE GILBART: Can we just move the (Inaudible) backwards a moment, please.

Firstly, it is the date for filing your evidence.

MR EADIE: Yes.

MR JUSTICE GILBART: What do you say before that?

MR EADIE: Well, my Lord at the moment, I am not instructed to ask for any extension. We will do the best we can to comply with the ordinary times.

MR JUSTICE GILBART: And filing any application under either or both PII or section 6?

MR EADIE: My Lord, although --

MR JUSTICE GILBART: Would that accompany the witness statements? I am not in favour of trying it before you serve them. I do not think there is any point to that. Could it accompany them.

MR EADIE: Well, it is possible, but what I would much prefer, if I may say so, and if you have 35 days from today, that takes you to 5 August, or the first week of August. We know that for a section 6 application to be considered and to be made, there will need to be serious Secretary of State-level involvement, and probably more than one, and that requires a very great deal of work, and it requires a great deal of work, and whether or not it is actually necessary to do that. PRI is exactly the same. It will involve a Secretary of State certificate, and what I would much rather do, particularly given that the 35 days falls within the first wee of August, but we know, nothing is realistically going happen thereafter for a period of weeks and months anyway, is to get evidence, if we possibly can do done by that date, but not have to put in either a PII application or a section 6 application.

MR JUSTICE GILBART: You could at least at that stage indicate whether you were going to.

MR EADIE: My Lord, we could, and I am perfectly content to do that. We will try and be as help them as we can, my Lord, to your order. But I am deeply conscious --

MR JUSTICE GILBART: I have that point.

MR EADIE: There is no point in going to the Secretary of State until you know exactly what the grounds (Inaudible).

MR JUSTICE GILBART: Mr Eadie, I have that. But this is a matter of importance and he do not think it is right to press sew hard on the accelerator that the Secretary of State does not have the ability to be able to deal properly with an important charge. I have that point. So I am just floating the idea, if you have 35 days from the witness statement, and you have to indicate when you serve them whether or not you would be making other applications, what I have in mind is whereas applications would be made by the middle of September? End of September?

MR EADIE: The send of September would be better because the powers that be I know are impossible to get hold of in August, and most of September as well. They sit at the same time as the courts do, and they --

MR JUSTICE GILBART: Do they have mobile phones?

MR EADIE: , of course, they do, and, of course,.

MR JUSTICE GILBART: As judges do.

MR EADIE: , of course, they have email, but it is very, very difficult to get decisions in that period. So I would have for the end of September. And then there will need to be a process after that has happened, and again, we will know, myself and my learned friend that's when his special section 6 application, we know that the real game starts there, because special advocates are appointed, there is a debate under section 8 around what (Inaudible) can't be given up, and that takes the time. Which is, yes, I was respectfully submitting, that even if almost irrespective of expedition, the realistic timeframe for the trial of this matter, I take it it is going to be an divisional court, it is likely to be in the early

part of 2017, rather than the late part of 2016.

MR JUSTICE GILBART: Indeed, right. Okay,, thank you. Do you want to say anything about that, Mr Chamberlain?

MR CHAMBERLAIN: I am not going to press the point too heavily, but we do say that there is no good reason why the consideration of whether to make a PII or section 6 application cannot take place at the same time as the preparation of the he find in the 35-day period, so our submission would be that both detailed grounds and evidence, and any section 6 or PII application should be made within 35 days, and we say that because we are conscious of the steps that have to be taken thereafter, appointment of special advocate, service on the special advocate of the closed material, disclosure hearing to determine what of the -- first of all, there will have to be a hearing to determine whether there is going to be a TSA declaration in the first place.

MR JUSTICE GILBART: The problem is, if you apply too much pressure, and it is true of this, it is true in almost every jurisdiction, what happens is, you then get adjournment because things haven't been done. I really want to avoid that.

MR CHAMBERLAIN: Yes. Well, your Lordship, I am sure, has a lot of experience of that kind of thing happening. Another difficulty that one would want to avoid is that one sets to timetable and one still gets application to adjournments. And so there is no reason of principle why my learned friend's evidence and detailed grounds and section 6 application can't be ready within 35 days before ministers go off for the recess. They have very little to do at the moment, my Lord. No one is in charge.

MR JUSTICE GILBART: No. I was just reflecting on the -- right. There will be 35 days to file your evidence by the Secretary of State. His witness evidence must be accompanied by a letter informing the court if there is to be any application either for a public interest

(Inaudible) under section 6 of the justice and security act. Such application must be made by 30 September 2016. The claimant may file a further evidence by 1 October, obviously with permission to file any further evidence in rebuttal as a result of the PII or section 6 procedure.

I'm going to order that the case is heard before 1 February 2017. Bill heard before a Lord Justice Or lady justice and a High Court judge. (Inaudible) before we mark it for expedition I'm going to make that order.

Now, is there anything else on the timescale or any other case management direction? I am not going to give directions now on the exchange of skeleton arguments. I do not think I should need to in this case

MR CHAMBERLAIN: My Lord, I am not sure that that would be necessary. There is, however, an application to the Secretary for protective costs.

MR JUSTICE GILBART: I am going to come to that. There is anything else in the case management?

MR EADIE: My Lord, I do not think so. The only think -- I do not think if my learned friend has any view on this, is that normally if you make an order of expedition, or by virtue of a date as it it was expedition, the court can be tempted to list without taking any regard at all of the (Inaudible).

MR JUSTICE GILBART: I shall make an order as well that within that timeframe, the case will be listed after consultation with counsel's clerks. Two days for argument? Two days? Is this a two-day case.

MR CHAMBERLAIN: My Lord, yes.

MR JUSTICE GILBART: Mr Eadie.

MR EADIE: I wonder if that is enough. I am wondering whether it would be better to list it for

three, and then if we go authority we go short.

MR CHAMBERLAIN: (Inaudible) closed part.

MR JUSTICE GILBART: I'm sorry?

MR CHAMBERLAIN: If we are going to be a closed part, I think that would be probably -- we do not know that yet obviously.

MR JUSTICE GILBART: Three days. Thank you.

Right, protective costs order

MR CHAMBERLAIN: Yes.

MR JUSTICE GILBART: Have you seen the application?

MR EADIE: I'm sure we have.

MR JUSTICE GILBART: Do any of the court staff mind if we continue to deal with this, we finish everything? Does anyone have any objections?

I hope you won't have any objections gentlemen

MR CHAMBERLAIN: None at all.

MR JUSTICE GILBART: I always ask the court staff. It is easy for advocates to take what happens for granted.

MR CHAMBERLAIN: But the application is in bundle A, not bundle 1, at A79. And what we have done in the application --

MR JUSTICE GILBART: If I may say so, I have found it, whether or not I agree with it, I have found it very clear. No, seriously.

MR CHAMBERLAIN: We just set out the --

MR JUSTICE GILBART: (Inaudible) page 75 to A85.

MR CHAMBERLAIN: How?

MR JUSTICE GILBART: But I have it, because I have read it.

MR CHAMBERLAIN: We can hand it if you need it.

MR JUSTICE GILBART: Just a minute. I know I have read it. I read it again this morning. Yes, I have it. Thank you. Those were the page numbers, but they have been been moved.

MR CHAMBERLAIN: So, what we have done in that application is, we have first of all set out the order that we are seeking, which is an order limiting the claimant's exposure to costs to the sum of 40,000 C:pounds inclusive of VAT. So this is not a case where the claimant is coming before the court and saying that we are not prepared to pay anything if we lose. In 4, we have made the point that your Lordship --

MR JUSTICE GILBART: There is a reciprocal costs cap, you have suggested?

MR CHAMBERLAIN: Well, yes, we have suggested that. Your Lordship will see that reciprocal costs cap isn't exactly the same as the one -- you wouldn't normally expect it to be for a claimant. Then we have set out the criteria that you see from the bundle --

MR JUSTICE GILBART: In an Aarhus claim, for example, it is 5 or 10 cap for the claim, and 35 for the defendant.

MR CHAMBERLAIN: Yes. So obviously we have, as you can see from the material that we have amassed, we have obviously expended quite a lot already. Then what we have done is, we have decided each one of the criteria that you see set out in corner house and bud life cases. First, the issues on of general public importance. We have set out why we say that there. Second, the public interest requires resolution of the issues in dispute. Again, we go from that. No private interest in the outcome of the litigation. Obviously the claimant is a public interest NGO.

MR JUSTICE GILBART: Well, I have read the application. Let me hear what Mr Eadie has to say.

MR EADIE: My Lord, all we have had to say on the principle of that is set out in paragraph 53

of the summary grounds, the sum (Inaudible) properly ought to be argued --

MR JUSTICE GILBART: (Inaudible) yes. The figure in 54, the reciprocal is 40,000.

MR EADIE: Social security same. My Lord is entirely right, there are circumstances in which the reciprocal, particularly under Aarhus, which is special as, you know, and can be subject to EU law obligations which are directly equivalent to Aarhus, and so there are particular circumstances which apply in relation to that (Inaudible) case, but although there is nothing objectionable in principle about there being a difference between the two, there is nevertheless a discretion in the court to order, usually, the exact equivalent --

MR JUSTICE GILBART: Well, as I understand it, you didn't, when 53 and 54 were drafted, it wasn't on the basis that you accepted that there should be a 40,000 cap on the claimant's costs. You were arguing against any protective costs order?

MR EADIE: We were, but we were saying in the alternative, if you are not with us on that, and you think PCO is the right way to go, the appropriate order in this case is that both sides should be restricted to the same amount.

MR JUSTICE GILBART: Isn't there a difference in equality on which arms? There is a difference in arms between the two of you?

MR EADIE: My Lord, it does not feel like it is all I am willing to say. I do not -- there is no particular --

MR JUSTICE GILBART: (Inaudible) as well a junior.

MR EADIE: On the one hand, you have an NGO, but it is protected in a way that it would be protected if it was 40,000 against it, as it were, and on the other hand you have the public purse,, now, if there are environmental cases, and there are specific rules that deal with that one thing and the legal disparity, out of the public interest matters that play into the exercise of the discretion on reciprocity, I respectfully submit, should lead to there can be

equivalence on a case such as this. There is no reason on the basis of inquality of arms to allow for a larger amount of money to be borne by the public purse. The appropriate order is that both sides should be restrained in what they can claim and that reciprocity of an equivalent amount is the right answer in principle.

MR JUSTICE GILBART: Just thinking this through. Just give me a moment, I just want to think about something.

Yes?

MR EADIE: In my respectful submission, the equivalence should be a proper start pointing, and if someone wants to say the public purse should bear more than I am going to have to bear, they ought to produce some pretty convincing reasoning for that, particularly if the figure that would be reciprocal is tolerably higher as the number that you are dealing with.

MR JUSTICE GILBART: Thank you.

MR CHAMBERLAIN: My Lord, just this one point rising out of the Plantagenet alliance case, which, of course, is your Lordship observed is authority for particularly everything, it is always authority for cost caps, would you believe. And one point that was made there, was that if in that case, it was said the justice secretary has allowed himself the luxury of the treasury (Inaudible) and two junior counsel and the consequence of that was that it would be fair to allow the claimant something approaching quality of arms, as your Lordship has pointed out, he has actually got two (Inaudible) and a junior. We do say that a figure of 75,000 for a claimant in a case such as this, whereas you can see, there has already been substantial work done producing quite voluminous materials --

MR JUSTICE GILBART: Could you just take me to the part in Plantagenet alliance? Which paragraph is it?

MR CHAMBERLAIN: It is paragraph 67.

MR JUSTICE GILBART: This is lady just Howard's judgment, is it not.

MR CHAMBERLAIN: Yes, -- no, it is not, it is Mr Justice haven cave.

MR JUSTICE GILBART: The judgment of the court was begin by lady justice Howard?

MR CHAMBERLAIN: I think it was a prior stage of the Plantagenet alliance. So if your Lordship has it at tab 10.

MR JUSTICE GILBART: Oh it is tab 10. Where Mr Justice had a don cave was the judge (Inaudible). He told me.

MR CHAMBERLAIN: Yes.

MR JUSTICE GILBART: Sorry. Which paragraph? 67?

MR CHAMBERLAIN: If you go to 67, you can see on the facing page at 59, the principles are set out there, but then if one looks at 67.4, there was an issue about whether it would be fair to allow the claimant to recover the costs of both retained junior counsel, since the justice secretary has allowed himself the luxury of the treasury devil.

MR JUSTICE GILBART: (Inaudible).

MR CHAMBERLAIN: Sorry, 67.4. Counsel. Short point, my Lord, we say it is fair to allow the claimant --

MR JUSTICE GILBART: But in that case, just help me.

MR CHAMBERLAIN: Yes?

MR JUSTICE GILBART: What happened with council in that case? What was the actual result.

MR CHAMBERLAIN: Well, they were talking there about -- if one looks at 67.5 --

MR JUSTICE GILBART: Because as I understand it, that part of the judgment, Mr Justice has had don cave is talking about (Inaudible) caps and the use of treasury rates and CFA is and so on?

MR CHAMBERLAIN: Yes, he may well be.

MR JUSTICE GILBART: I didn't understand that he was addressing --

MR CHAMBERLAIN: No, I think that's right, but he does take into account when one looks at what it is fair to expect a claimant to incur who is on the other side, and we say although your Lordship is absolutely right to say he was doing it in the context of working out what the initial cap should be, it is also a fair consideration to take into account the cap (Inaudible).

MR JUSTICE GILBART: Thank you. As far as the application for protected costs order is concerned, Mr Chamberlain on behalf of the claimant has in his skeleton taken the court through the relevant factors in determining whether to grant a protected costs order, having referred to the (Inaudible) authorities of (Inaudible) 2005EWCAsive 192, and that a bud mouth litigation, 2009CP rep 8. Those factors are that the issues in the present litigation are shown of public importance, that the public interest requires resolution of the issues in dispute, that the claimant has no private interest in the outcome of the present litigation, that the granting of a protective costs order would be just and fair, and that the claimant would be likely to discontinue the proceedings without a prospective costs order, and that there should be a reciprocal costs capping order. I am satisfied that each of the criteria apply for the reasons set out in the skeleton argument. This is patently a case for which the concept of the prospective costs order was designed, where there is a challenge to important decisions by government by a non-governmental organisation with a particular interest relating to a topic such as the supply of weapons,. I am therefore entirely satisfied that there should be a Prescott costs capping order. Having had regard to the financial information put before the court, I am also satisfied that it is appropriate that the claimant's costs should be capped in the amount of 40,000 C:pounds. The financial information demonstrates that a full costs order could not be met by the claimant, but they are able to

meet a costs order at that level, albeit with some stringency. The question which has exercised the court principally is whether or not there should be firstly a capping order, a reciprocal capping order, so far as the costs against the defendant are concerned, and if so, what figure. It is entirely fair that there should be a reciprocal cap so far as the claim dentist the defendant is concerned, and the question then becomes what order there should be. First of all, there can be no objection in principle to the caps being of a different order, although it ising true that the Aarhus protecting costs orders which are now made as a matter of course in planning and environment disputes emanate from European law, the fact is that they recognise the distinction between the claimant and the government and in that case, the caps against the claimant are 5,000 for individuals, or 10,000 C:pounds for companies or those representing groups, and so far as the government department or the local authority it is 35,000 C:pounds.

It would be wrong to have a difference between the costs cap so far as the claimants are concerned and so far as defendants are concerned to have is to great a percentage differentiation as applies in an Aarhus case.

Mr Eadie has submitted that there should be equality in terms of the two levels of costs cap. I do not accept that should be the right approach here. There is undoubtedly a difference in the adequacy of resources with which to fight litigation on the part of the claimant on the one hand and the government on the other, despite the fact that there is government expend tour and the requirement of sing icy, the fact is it is government, with all its very considerable resources, I therefore consider that it is appropriate that it is higher, the figure that has been put forward by the claimant, of 70,000 C:pounds, in my judgment, coincides with the guidance given in the Western Sahara case, 2015, EWHC1798, and the figure of 70,000 C:pounds a appropriate as the reciprocal cap. Those are the orders I make.

Anything else, Mr Chamberlain? (Inaudible)

Thank you both for, if I may say so, (Inaudible). Thank you very much.