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 THE ARMS TRADE

Claimant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant

-and-

(1) AMNESTY INTERNATIONAL
(2) HUMAN RIGHTS WATCH
(3) RIGHTS WATCH (UK)
(4) OXFAM

Interveners

SKELETON ARGUMENT FOR THE CLAIMANT

References in the form [**1/A1**] are to volume/page numbers in the agreed hearing bundle.

Time estimate: 3 days (including open and closed hearings, but not judgment)

Essential reading: Skeleton Arguments; Consolidated EU and National Arms Export Licensing Criteria [**1/6- 12**]; User's Guide to Council Common Position 2008/944/CFSP [**1/14 & 52-70**]; Written Ministerial Statement, dated 7 February 2012 [**4/D642**]; Report of UN Panel of Experts on Yemen, 26 January 2016, Sections I, V, VI and Annexes 52-56 and 60-62 [**4/D91-97 & 100-150**]; Written Ministerial Statement, 21 July 2016 [**2/B1055-1056**].

Introduction

1 By this claim [**1/A2**], the Claimant challenges:

(a) the on-going failure to suspend extant export licences for the sale or transfer of arms and military equipment to the Kingdom of Saudi Arabia (**KSA**) for possible use in the conflict in Yemen; and

(b) the decision, communicated on 9 December 2015, to continue to grant new licences for the sale or transfer of arms or military equipment to Saudi Arabia in respect of such equipment.

2 At a hearing on 30 June 2016, Gilbart J granted permission to apply for judicial review in respect of all grounds advanced by the Claimant [**1/A87**].

3 When the claim was issued, and at the time of the permission hearing, the Secretary of State for Business, Innovation and Skills was responsible for export control. In July 2016, that office was abolished and responsibility passed to the Secretary of State for International Trade, who should accordingly be substituted as defendant.

4 On 22 September 2016, Blake J granted permission to the first three interveners to make written and oral submissions, the latter limited to 30 minutes. The issues were restricted to "the issue of state responsibility in international law and update on the human rights situation of Yemen from January 2016" [**1/A/95**].

5 On 13 October 2016, and by consent, Cranston J made a declaration pursuant to s. 6 of the Justice and Security Act 2013 that a closed material application may be made to the court. The Secretary of State made such an application. A disclosure process under CPR Pt 82 has led to the disclosure into open of certain of the material that the Secretary of State applied to withhold. The following submissions must therefore be read together with the closed submissions made on behalf of the Claimant by the Special Advocates.

6 On 11 January 2017, Mitting J granted permission to the fourth intervener to make written submissions [**1/A132**].[1]

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[1] The Secretary of State has indicated by letter that he does not propose to address certain of the interveners' legal submissions insofar as they go to points not pleaded by the Claimant. In fact, however,

Overview and summary

7 The Export Control Act 2002 (the **2002 Act**) [**5/F1-3**], and orders made under it, impose controls on the export of various goods, including arms. Such goods can only be lawfully exported under a licence issued by the Secretary of State. He can give guidance under s. 9 of the 2002 Act about any matter relating to the exercise of his licensing powers; and he must set out the general principles to be followed. The Secretary of State has formulated and laid before Parliament guidance in the form of the Consolidated EU and National Arms Export Licensing Criteria (the **Consolidated Criteria**) [**1/8-12**]. These incorporate and adopt as UK Government policy criteria set out in the Common Position. They also give effect to the UK's obligations under the United Nations Arms Trade Treaty, signed in 2013 (**ATT**) [**5/F130-144**].

8 Criterion Two of the Consolidated Criteria provides that "the Government will… (b) exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union; (c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law" (**IHL**) (emphasis added). This implements Article 7 of the ATT.

9 Separately, as the Secretary of State explained to Parliament on 7 February 2012, it is the Government's policy that the suspension of extant licences will be "triggered for example when conflict of crisis conditions make conducting a proper risk assessment difficult" (the **Suspension Mechanism**) [**4/D642**].

10 This claim arises in the context of an ongoing conflict in Yemen between pro- and anti-government forces. An international coalition, led by the Kingdom of Saudi Arabia (**KSA**), has intervened in this conflict in support of the government of

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many of the points raised by the interveners are (depending on the view the court reaches on them) relevant to the grounds of challenge that have been pleaded and should be considered in that context. In any event, if the claim succeeds, it may be necessary for the decisions under challenge to be re-taken. Resolution of the issues raised by the interveners (or some of them) would assist the Secretary of State in ensuring that any reconsideration is lawful.

Yemen. At various points, there have been initiatives to "de-escalate" this conflict. None has lasted long. The conflict is ongoing. It has, on any view, resulted in a great deal of civilian bloodshed. The Home Office's Country Information and Guidance document *Yemen: Security and humanitarian situation* (April 2016) provides the following summary:

> "There are reports of the use of indiscriminate violence by both sides including the use of cluster bombs and attacks on civilian homes, hospitals, schools, markets and factories and reports of civilians fleeing air strikes being chased and shot at by helicopters. In the north, west and centre of the country levels of indiscriminate violence are currently likely to be at such a level that substantial grounds exist for believing that a person, simply by being present there, faces a real risk of harm which threatens their life or person." [**4/D760/§2.4.5**]

11 The conduct of the conflict has been the subject of numerous investigations and findings, not only by non-governmental organisations (**NGOs**) such as Amnesty International and Human Rights Watch, but also by an expert panel appointed by the United Nations Security Council (the **UN Expert Panel**), other UN bodies and officials and the European Parliament (the **EP**). The findings of these bodies establish an overwhelming case that the KSA-led coalition has committed repeated and serious breaches of IHL. Some of these breaches (such as the designation as a military target of an entire city with a large civilian population) appear have been deliberate and flagrant and are evidenced by public statements of KSA military officers; others may not have been deliberate, but nonetheless constitute serious failures to respect the principle of proportionality or to take proper precautions to avoid civilian casualties, particularly in "dynamic" attacks (attacks that are not pre-planned). The incidents in respect of which findings of breach of IHL have been made include attacks on hospitals, schools and residential areas.

12 The Secretary of State has granted, and continues to grant, licences for the export of a wide range of military equipment to KSA. Upon reconsideration in February 2016, he confirmed that decision, albeit the issue was "finely balanced" [**1/B262/§10 & 1/B266/§4**]. The Claimant's understanding of the equipment covered by these licences was set out in its Statement of Facts and Grounds (**SFG**) §10 [**1/B5**]. It has not been disputed by the Secretary of State. It includes precision-guided weapons and munitions, components, equipment and technology for KSA's fleet of Eurofighter Typhoon fast jets, including military aero-engines, military

communications equipment, components for military helicopters, components for gun turrets, components for military support aircraft, military support vehicles and associated technology.

13 On 14 September 2016, the House of Commons Business, Innovation and Skills and International Trade Committees[2] published a joint report, *The use of UK-manufactured arms in Yemen* [**2/B1000-1054**]. It concluded that "the UK Government has not responded to allegations of IHL by the Saudi-led coalition in any meaningful way" and expressed concern that "our support for the coalition, principally through arms sales, is having the effect of conferring legitimacy on its actions" [**2/B1045/§2**]. It recommended that the Government support the establishment of an independent UN-led investigation into alleged violations of IHL by all parties [**2/B1046/§6**] and concluded as follows:

> "In the case of Yemen, it is clear to us that the arms export licensing regime has not worked. We recommend that the UK suspend licences for arms exports to Saudi Arabia, capable of being used in Yemen, pending the results of an independent, United Nations-led inquiry into reports of violations of IHL, and issue no further licences. In addition, the UK Government should investigate whether any licences so far issued have led to the transfer of weapons which have been used in breach of IHL. This suspension must remain in place until such time as the UN-led inquiry can provide evidence that the risk that such exports might be used in the commission of serious violations of IHL has subsided." [**2/B1049/§20**].

14 On the same day, the House of Commons Foreign Affairs Committee[3] published a separate report, *The use of UK manufactured arms in Yemen* [**2/1067-1147**]. It noted as follows:

> "In the face of widespread allegations of violations of international humanitarian law in Yemen, it is difficult for the public to understand how a reliable licence assessment process would not have concluded that there is a clear risk of misuse of at least some arms exports to Saudi Arabia. At present, the Government's export licensing policy towards Saudi Arabia could be interpreted as not

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[2] Both committees have Conservative majorities.

[3] This committee also has a Conservative majority.

> living up to the UK's robust and transparent regulations, nor upholding the UK's international obligations." [**2/B1109/§14**].

The Committee did not recommend a suspension of export licences, but did say, having referred to the fact that this claim was currently before the High Court:

> "The courts are the appropriate body to test whether or not HMG is compliant with the law." [**2/B1105/§111**]

15 The views of the various committees that have considered these issues are relevant and admissible both by way of background and to demonstrate Parliament's positive endorsement of this Court's proper function in determining the questions of law to which this claim gives rise.[4]

16 The Claimant's case – in summary – is as follows:

(a) KSA is a "country where serious violations of human rights have been established" by competent bodies of the UN and EU. It is therefore, a country in respect of which "special caution and vigilance" is required by Criterion Two (b). This is not disputed.

(b) In that context, and given the range and volume of open material establishing repeated and serious violations of IHL by KSA, no rational decision-maker could conclude, on that material alone, that there is no "clear risk" that UK supplied military equipment "might" be used to commit serious violations of IHL. As noted above, the Secretary of State does not appear to contend otherwise.

(c) The Secretary of State is not required to rely only on open material. He can properly conduct his own analysis, including by reference to sensitive

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[4] The Claimant accepts that questions of Parliamentary privilege could arise if positive reliance were to be placed on the conclusions of these committee reports in support of a submission that the "clear risk" test was met on the open material: see eg *Office of Government Commerce v Information Commissioner* [2010] QB 98. But there is no need to rely on them for that purpose, since the UN and NGO expert reports are sufficient to establish that – and it does not appear to be disputed. But it does not involve any impermissible questioning of proceedings in Parliament for the Court to inform itself of the fact of the Committees' recommendation as part of the background against which the Secretary of State's continuing stance falls to be judged, particularly in the context of the Secretary of State's submission that "[a]ccountability is ensured… by the existence and operation of the Parliamentary processes, including specifically the [Committees on Arms Exports Control]": see Summary Grounds §49 [**1/B84**]; see also fn6 [**1/B70**].

information. But, where, as here, there is a vast quantity of open material all pointing in one direction, ordinary public law principles require the Secretary of State to demonstrate (i) that he has made sufficient inquiries; and (ii) that he has adopted a sufficient process of analysis to negative the conclusion to which the open material unequivocally points.

(d) On both questions, the Court is entitled and obliged to apply a rigorous standard of review. It is not required to give the special weight to the Secretary of State's view that would be appropriate in (for example) a case where the outcome depends on a judgment about what is required in the interests of national security or the UK's international relations. The Secretary of State was here engaged in the exercise of analysing evidence and applying a legal test to that evidence. This Court, particularly in circumstances where it can consider closed as well as open material, is well placed to judge whether that analysis was flawed.

(e) The open evidence now available as to the inquiries and analysis undertaken by the Secretary of State in this case shows as follows. Contrary to what was initially said both to Parliament and in these proceedings, although the MOD "tracks" incidents where it is alleged IHL has been breached, it does not reach a conclusion about whether or not IHL has been breached in these incidents. Rather its analysis is confined (relevantly) to asking whether it is possible to identify a "legitimate military target". Even then, in a large number of cases (the majority in some reporting periods), it is unable to identify such a target.

(f) The Secretary of State has chosen not to ask a series of questions identified as relevant in the EU Council's User's Guide to the Common Position (the **User's Guide**), which serves a guidance under Article 13 of the Common Position. Those questions were especially pertinent in the light of statements made by KSA military officers indicating a flagrant disregard for IHL. Given that no adequate explanation has been provided for not addressing these questions, the failure amounts to a breach of the Secretary of State's duty to inform himself properly before reaching a decision (**Ground 1**).

(g) On the basis of the open description of the analysis undertaken, and whatever standard of review applies, the Secretary of State did not have material that could justify departing from the conclusions drawn in the open material. He

could not properly conclude that there was no "clear risk" that UK military equipment "might" be used in violation of IHL (**Ground 3**).

(h) Alternatively, and at the very least, he did not and does not have (and has not obtained from KSA) information that is key to a proper application of the Consolidated Criteria. The evidence served by the Secretary of State and material made open as part of the closed disclosure process reveals significant gaps in the Secretary of State's assessment of incidents where violations of IHL have been alleged and found established by other expert bodies. In these circumstances, the only conclusion consistent with his Suspension Mechanism, was to impose a moratorium on the granting of new licences and a suspension of existing ones until such time as further information could be obtained (**Ground 2**).

17 Although this claim touches subject matter not familiar to the Administrative Court, it is – in form and structure – a challenge, brought on ordinary public law grounds, to the exercise of a statutory discretion. The function of the Court is to examine whether the discretion has been exercised lawfully. As the Foreign Affairs Committee recognised, that function is a constitutionally proper one.

Legal framework

18 The legal framework governing the export of military equipment to KSA is set out in full at SFG §§32-42 [**1/B14-20**]. The main points can be summarised as follows.

19 The 2002 Act provides the legal framework for the regulation and control of the export of certain goods, including military equipment and technology from the United Kingdom. Controls may be imposed by the Secretary of State "for the purpose of giving effect to any EU provision or other international obligation of the United Kingdom": s. 5(2). Section 9 empowers the Secretary of State to give guidance about any matter relating to the exercise of his licensing powers; and requires him to set out the general principles to be followed. By s. 9(5) of the 2002 Act, decision makers must have regard to this guidance "when exercising a licensing power or other function" under the 2002 Act.

20 The Export Control Order 2008 (the **2008 Order**) [**5/F4**] provides for controls in respect of the export of military goods or technology from the United Kingdom.

Article 32 of the 2008 Order empowers the Secretary of State to "amend, suspend or revoke a licence [previously] granted by the Secretary of State".

21 According to the Government's policy on export control licensing, as set out in Parliament on 7 February 2012 by the Secretary of State for Business, Innovation and Skills, the Suspension Mechanism will be "triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult" [**4/D642**]. This policy must be read in conjunction with the Consolidated Criteria, which require a risk assessment to be conducted on the basis of "reliable evidence" [**1/12**].

22 The Common Position applies to EU Member States exporting arms and military equipment to non-EU States. The Common Position is legally binding as between Member States. Article 1 imposes an obligation to assess applications for arms export licenses case by case, in conformity with the criteria set out. Under Article 13 of the EU Common Position, the User's Guide to the European Code of Conduct on Exports of Military Equipment (the **User's Guide**) "shall serve" as guidance for the implementation of the Common Position.

23 The United Kingdom implements the requirements of the Common Position through the Consolidated Criteria. The Consolidated Criteria serve as guidance under s. 9 of the Export Control Act 2002.

24 Criterion One provides:

> "The Government will not grant a licence if to do so would be inconsistent with, *inter alia*:
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> …
>
> (b) the UK's obligations under the United Nations arms trade treaty;
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> ...
>
> (f) European Union common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment."

25 Criterion Two provides:

> "Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will:
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> ...
>
> (b) exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union;
>
> (c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law."

26 The Consolidated Criteria also provide:

> "In the application of the above criteria, account will be taken of reliable evidence, including for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations".

27 The User's Guide is drawn up by the Working Party on Conventional Arms Exports. Of the requirement in Criterion Two (c) for a clear risk that military technology or equipment might be used in the commission of <u>serious</u> violations of international humanitarian law, the User's Guide says this at §2.6:

> "Regarding the qualification of a human rights violation as 'serious', each situation has to be assessed on its own merits and on a case-by-case basis, taking into account all relevant aspects. Relevant factor in the assessment is the character/nature and consequences of the actual violation in question. Systematic and/or widespread violations of human rights underline the seriousness of the human rights situation. However, violations do not have to be systematic or widespread in order to be considered as 'serious' for the Criterion Two analysis. According to Criterion Two, a major factor in the analysis is whether the competent bodies of the UN, the EU or the Council of Europe (as listed in Annex III) have established that serious violations of human rights have taken place in the recipient country. In this respect it is not a prerequisite that these competent bodies explicitly use the term 'serious' themselves; it is sufficient that they establish that violations have occurred."

Of the words “clear risk” and “might”, the User’s Guide says this at §2.7:

> “The combination of ‘clear risk’ and ‘might’ in the text should be noted. This requires a lower burden of evidence that a clear risk that the military technology or equipment will be used for internal repression.”[5]

At §2.13, the User’s Guide continues:

> “A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international law humanitarian law should include an inquiry into the recipient’s past and present record of respect for international humanitarian law, the recipient’s intentions as expressed through formal commitments <u>and</u> the recipient’s capacity to ensure that the equipment or technology is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.
>
> Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country’s attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern.
>
> …
>
> Relevant questions to be considered include:
>
> - Is there national legislation in place prohibiting and punishing violations of international humanitarian law?
> - Has the recipient country put in place requirements for its military commanders to prevent, suppress and take action against those under its control who have committed violations of international humanitarian law?
> - Has the recipient country ratified the Rome Statute of the International Criminal Court?

[5] This was in the context of internal repression (Criterion Two (a)), but the same words (“clear risk” and “might”) are also used in Criterion Two (c), to which this part of the guidance is also plainly applicable.

- Does the recipient state cooperate with other states, ad hoc tribunals or the International Criminal Court in connection with criminal proceedings relation to violations?

…

- Does the recipient country educate and train its military officers as well as the rank and file in the application of the rule of international humanitarian law? (eg during military exercises)?

- Has international humanitarian law been incorporated in military doctrine and military manuals, rules of engagement, instructions and orders?

…

- Have mechanisms been put in place to ensure accountability for violations of international humanitarian law committed by the armed forces and other arms bearers, including disciplinary and penal sanctions?

- Is there an independent judiciary capable of prosecuting serious violations of international humanitarian law?..."

28 The relevant requirements of IHL (derived in particular from the four Geneva Conventions of 1949, Additional Protocols I and II and customary international law) are set out in full at SFG §39 [**1/B17-19**]. They include:

(a) the obligation to take all feasible precautions in attack (SFG §39.1);

(b) the protection for medical clinics and transport (see Articles 11-13 APII);

(c) the protection of objects indispensable to the civilian population (SFG §39.3);

(d) the prohibition on indiscriminate attacks (SFG §39.4);

(e) the prohibition on disproportionate attacks (SFG §39.5);

(f) the prohibition on attacks directed against civilian objects and/or civilian targets (SFG §39.6);

(g) the obligation to investigate and prosecute (SFG §39.7);

(h) the obligation to make reparation (SFG §39.8).

The open evidence of breaches of IHL by Saudi Arabia

29 The open evidence that Saudi Arabia has committed repeated and serious breaches of IHL, insofar as it was available when the claim was issued, is summarised in SFG §§11-25 [**1/B5-11]** and in Annexes I-V [**1/B33-67**]. It is not repeated here. The following extracts give a flavour of the large volume of open material available at that time:

(a) The UN Expert Panel was established under Security Council Resolution 2140 (2014) [**5/F148/§§21-23**], as amended by Resolution 2216 (2015) [**5/F156/§§21-23**]. It conducted interviews with eye witnesses, including refugees, humanitarian organisations, journalists and local activists. It also considered satellite imagery [**4/D100/§122**]. Its findings are summarised at SFG §14 [**1/B7**]. It concluded that the KSA-led coalition's

> "targeting of civilians through air strikes, either by bombing residential neighbourhoods or by treating the entire city of Sa'dah or region or Maran as military targets, is a grave violation of the principles of distinction, proportionality and precaution. In certain cases, the Panel found such violations to have been conducted in a widespread and systematic manner." [**4/D102/§128**, emphasis added]

The use of the terms "widespread" and "systematic" are significant because violations described in these terms may amount to crimes against humanity.[6]

(b) This is consistent with the Amnesty International's conclusions in its report *Yemen: 'Nowhere safe for civilians': Airstrikes and ground attacks in Yemen* (August 2015):

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[6] See eg Article 7(1) of the Rome Statute of the International Criminal Court, which defines "crime against humanity" as any of a list of acts (including murder) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". "Attack directed against any civilian population" is defined in Article 7(2) as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack".

> "The Saudi Arabian-led coalition forces have killed and wounded civilians, in unlawful airstrikes which failed to distinguish between military targets and civilian objects in Houthi-controlled areas." [**4/D285**]

See also Human Rights Watch *'What military target was in my brother's house?' Unlawful Coalition Airstrikes in Yemen* (November 2015):

> "In the cases discussed in this report, which caused at least 309 civilian deaths and wounded at least 414 civilians, Human Rights Watch found either no evident military target, or that the attack failed to distinguish civilians from military objectives." [**4/D455**]

(c) The European Parliament has reached the same conclusion. See in particular its resolutions of 9 July 2015:

> "on several occasions air strikes by the Saudi-led military coalition in Yemen have killed civilians, in violation of international humanitarian law, which requires all possible steps to be taken to prevent or minimise civilians casualties" [**4/D220/§G**]

and 25 February 2016, declaring that:

> "transfers [of weapons and related items to KSA] are in violation of Common Position 2008/944/CFSP on arms export control, which explicitly rules out the authorising of arms licences by Member States if there is a clear risk that the military technology or equipment to be exported might be used to commit serious violations of international humanitarian law and to undermine regional peace, security and stability" [**4/D227/§N**].

30 Since the proceedings were issued, the UN Secretary General's Report on Children and Armed Conflict (20 April 2016) noted that more than half of the attacks perpetrated on schools in 2015 were attributed to the KSA-led coalition [**4/D185/§171**] and concluded that

> "owing to the very large number of violations attributed to the two parties, the Houthis/Ansar Allah and the Saudi Arabia led Coalition are listed for killing and maiming [children] and attacks on schools and hospitals" [**4/D193/§228**].

31 Incidents in which large numbers of civilians have been killed have been reported frequently since the claim was issued. Examples are given in Feltham 2 [**2/B534/§§16-29**], including attacks on a school, a Médécins Sans Frontières

hospital, a water well, civilian areas in the port of Hodeidah and an attack killing some 140 people at a funeral for the father of a Houthi political figure. A more detailed summary of post-March 2016 attacks, and of the reports following investigations of them, is provided in the written submissions of the first, second and third interveners [**3/C21-24/§34**]. See also the statement of Joesphine Hutton on behalf of the fourth intervener, which describes generally (and vividly, on the basis of reports from Oxfam staff among others) the critical humanitarian situation in Yemen and notes in particular at that "[t]he number of casualties rose dramatically after the collapse of the cessation of hostilities in August 2016" and that "[KSA-led coalition] airstrikes on civilian targets have continued into 2017" [**3/C330/§4**].

The significance of public statements by KSA military officers and other officials

32 In his evidence the Secretary of State relies on a selection of statements made by various KSA Government officials said to indicate "positive steps in relation to IHL compliance": see Crompton §85a [**2/B332**]. Some of these were apparently taken into account when concluding in February 2016 that arms exports could continue. There does not, however, seem to have been any engagement with the earlier statements (made in some cases by the same individuals), which indicate – to put the matter neutrally – serious cause for concern in relation to IHL compliance.

33 On 8 May 2015, Brigadier General Assiri (then and now, the official spokesman for the KSA-led coalition) issued what has become known as the "the May Declaration". Its purpose was to declare the entirety of the Houthi-majority city of Sa'dah and the area of Maran to be military targets. The declaration was intended for public consumption. General Assiri's remarks at that news conference on 9 May 2015 are quoted in full by Human Rights Watch in its report *Targeting Saada* [**4/D404**]. The declaration was as follows:

> "Starting today and as you all remember we have declared through media platforms and through the leaflets that were dropped on [Marran and Saada], and prior warnings to Yemeni civilians in those two cities, to get away from those cities where operations will take place. This warning will end at 7 p.m. today and coalitions forces will immediately respond to the actions of these militias that

> targeted the security and safety of the Saudi citizens from now and until the objectives of this operation are reached.
>
> We have also declared Saada and Marran as military targets loyal to the Houthi militias and as a result the operations will cover the whole area of those two cities and thus we repeat our call to the civilians to stay away from these groups, and leave the areas under Houthi control or where the Houthis are taking shelter."

34 What then followed has been widely documented. The UN Expert Panel, for example, compared satellite images of Sa'dah before and after the May Declaration. It noted that, whilst in some areas there had been "ground fighting" (so that damage could have been caused by Houthi shelling), in Sa'dah there had not. It concluded that, in Sa'dah, "the widespread destruction is the probable result of coalition airstrikes and shelling" [**4/D104/§139**]. At §140, the UN Expert Panel said this:

> "On 8 May, the entire city of Sa'dah and region of Maran were declared 'military targets' by the coalition. Sa'dah remains one of the most systematically targeted and devastated cities in Yemen, attributable to coalition airstrikes and the targeting of the entire city in direct violation of international humanitarian law… Sa'dah also faced systematic indiscriminate attacks, including on hospitals, schools and mosques."

35 On 1 February 2016, Brigadier General Assiri spoke in the context of militia activities along the Saudi/Yemeni border and announced: "[n]ow our rules of engagement are: you are close to the border, you are killed" [**4/D579**]. On any view, this statement discloses a targeting practice that is flagrantly incompatible with IHL and, in particular, the rule of distinction and the prohibition on indiscriminate targeting.

36 The Secretary of State responds to the Claimant's reliance on these statements in his Summary Grounds §§37-40 [**1/B79-80**]. He makes three points. First, he says that General Assiri's statements

> "do not establish a clear risk that UK licensed items might be used in the commission of serious violations of IHL. An overall assessment must be undertaken, with regard to the factors outlined above, including the detailed understanding of the processes in place, how the rules of engagement are operated in practice and the facts on the ground." (§38)

Second, he says that there are many concrete examples of KSA respecting the principle of distinction. Third, he says that General Assiri's statements have to be placed in their proper context.

37 As to this:

(a) There is no dispute that these public statements have to be considered alongside other information. But, in the case of Sa'dah, that other information appears to show that General Assiri's statement were not just words; and that KSA went on to do precisely what he said it would do – ie treat an entire city as a military target.

(b) The suggestion that it is permissible to treat an entire city (or, in the case of Maran, a larger area) as a military target, provided that a warning is given to civilians, has no foundation whatsoever in IHL. As must be obvious, some civilians (for example, those who are elderly or infirm and those who lack transport) will not be able to leave at short notice. The giving of a warning does not absolve KSA from its obligation to observe the principle of distinction.

(c) It is, of course, true that General Assiri's statement of 1 February 2016 ("you are close to the border, you are killed") was made in the context of Houthi/Saleh forces targeting KSA forces close to the border. The Secretary of State's response to that statement (Summary Grounds §40c [**1/B80**]) is that "Brigadier Assiri is talking about the general principle of bearing arms against the Saudi border which will see a strong response". That is a précis of which a government spin doctor might be justifiably proud. It does not suggest the "special caution and vigilance" required by Criterion Two (c). The Secretary of State's evidence as a whole suggests, on the contrary, that statements made to audiences that would expect IHL-compliant language (eg the Royal United Services Institute) were relied upon; whereas statements made in theatre, demonstrating a cavalier disregard for IHL, were accorded little or no weight.

KSA internal investigations

38 The Secretary of State relies on the investigations said to have been conducted by KSA and, more recently, the Joint Incidents Assessment Team (**JIAT**) as providing reassurance that the "clear risk" test in Criterion Two (c) has not been met. He makes three points:

(a) The fact that an investigation is taking place is "important" even if the results are unknown: SGR §44(a) [**1/B82-83**].

(b) KSA has mounted investigations into certain incidents of concern and the Secretary of State is now aware of the results of some of them.

(c) The JIAT began work in the summer of 2016 and made certain conclusions public (although not its underlying reports): Crompton 1 [**2/B323- B324**] & Crompton 2 [**3/B1245 -1246**].

39 But, on analysis, there is little comfort to be gleaned from the existence of these investigatory procedures.

40 First, KSA's investigations have been slow. On 12 January 2017, Tobias Ellwood MP (Parliamentary Under Secretary of State for Foreign and Comonwealth Affairs) told Parliament:

> "I agree absolutely that the production of these reports has been far too slow. The reason for that is that we are dealing with a country that has never written a report like this in its life and it is having to learn the hard way how to show the transparency that the international community expects".[7]

41 Secondly, JIAT has reported on only 14 incidents in the conflict to date: see Crompton 1 [**2/B323-324/§53**], the coalition statement of 1 February 2016 [**2/B439-**

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[7] HC Deb. 12 January 2017, col. 496. See also in this regard the announcement by Michael Fallon MP (the Defence Secretary) on 19 December 2016 that KSA had admitted using UK-supplied cluster munitions: HC Deb., 19 December 2016, col. 1215 [**3/B1609-1625**]. As Mr Fallon made clear the matter had been raised in the House of commons on 24 May 2016 (having been identified in an Amnesty International report earlier). The confirmation that these munitions had indeed been used took some 7 months from the date when the matter was first raised. These very recent Parliamentary statement have not been formally evidenced, but can be if required.

440] and Crompton 2 [**3/B1246/§23**]. This represents only 5.5% of the total number of incidents being tracked (252).

42 Thirdly, both KSA's investigations and, more recently, those of JIAT have been criticised by independent observers. See eg the Report of the UN High Commissioner for Human Rights on Yemen (3 August 2016) A/HRC/33/38 [**2/B940-975**]; and Human Rights Watch's letter of 13 January 2017 to JIAT [**3/B1641-1649**]. In that letter Human Rights Watch noted its concern about the transparency of the JIAT's methodology, including "its verification of information, the choice of incidents investigated, investigations of acts by non-coalition parties to the conflict, and the status of its recommendations vis-à-vis coalition members". It noted:

> "In 10 of the 14 strikes investigated, JIAT absolved the colatition of responsibility for alleged violations, often reaching different factual and legal conclusions than UN or human rights organizations that had documented the same strikes."

A detailed criticism of several of JIAT's findings follows. The exiguous published summaries of conclusions amount, as Human Rights Watch say, to "about a paragraph on each strike". Those paragraphs [**3/B1279-1280**] do little to inspire confidence in the robustness of the investigations.

The significance of the UN, NGO and EU findings

43 As noted above, the Consolidated Criteria make clear that, in applying them, account will be taken of "reliable evidence, including for example… relevant reports by international bodies… and information from open sources and non-governmental organisations".

44 Of course, there are <u>some</u> circumstances in which the Secretary of State <u>might</u> conclude that a particular finding in relation to a particular incident by an apparently authoritative body (such as a UN body or official or an NGO) is wrong. But, for such a conclusion to be rational, it would have to be based on: (i) a proper analysis of the finding; and (ii) cogent reasons for discounting it. Those reasons could in principle draw on sensitive evidence not available to the body or official that made the finding in the first place. But the evidence in question would have to be capable of demonstrating that the finding should be rejected.

45 In this case, the open material contains a considerable body of findings by authoritative bodies and officials establishing repeated and serious breaches of IHL by the KSA-led coalition. On the face of it, that material goes far beyond establishing a "clear risk" that UK-exported military equipment "might" be used in breach of IHL. The Secretary of State does not appear to dispute this. A rational decision that there is no "clear risk" would have to be based on other compelling evidence and analysis capable of negativing the clear (and only) conclusion that can be drawn from the open evidence.

The Secretary of State's changing case as to the process of analysis undertaken

46 In assessing whether the Secretary of State has other evidence and analysis of this sort, it is important to understand the process he has adopted to enable him to decide whether a "clear risk" in terms of Criterion 2(c) has been made out. The Secretary of State's case as to what that process is has changed fundamentally as this litigation has progressed and remains in certain respects opaque.

<u>The Secretary of State's initial position in these proceedings and in Parliament</u>

47 In its response of 16 February 2016 to the Claimant's letter before claim, the Government Legal Department (**GLD**) said this at §8 [**5/E47**]:

> "…the MOD monitors all incidents of alleged IHL violations by the Coalition that come to its attention... The available information is assessed to identify whether... the responsible party's actions are assessed as compliant with IHL or not."

In the same letter, at §20 [**5/E50**], GLD said that:

> "all allegations that come to the attention of the MOD are tracked and assessed to identify ... whether the responsible party's actions are assessed as compliant with IHL or not".

48 This was consistent with what was being said to Parliament. For example, on 28 January 2016, Hilary Benn MP tabled written question 24770, asking the Foreign Secretary

> "what assessment he has made of whether the 119 Saudi-led coalition sorties documented in the Final Report of the UN Panel of

> Experts in Yemen represent potential violations of international humanitarian law".

The Foreign Secretary's answer, given on 12 February 2016, was as follows:

> "We take all allegations of International Humanitarian Law (IHL) violations very seriously. The MOD monitors incidents of alleged IHL violations using available information which in turn informs our overall assessment of IHL compliance in Yemen. This includes looking at the allegations raised in the UN Panel of Experts' report. Looking at the information available to us, we have assessed that there has not been a breach of IHL by the coalition, but continue to monitor the situation closely, seeking further information where appropriate." (Emphasis added.)

49 On 15 February 2016, in answer to written question 24769, the Foreign Secretary said this:

> "…British liaison officers have provided information as part of the Ministry of Defence (MoD) monitoring of incidents of alleged International Humanitarian Law (IHL) violations. Looking at the information available to us, we have assessed that there has not been a breach of IHL by the coalition, but continue to monitor the situation closely, seeking further information where appropriate." (Emphasis added.)

And on the same day, in answer to written question 24771, he added this:

> "We are looking at the conclusions of the UN Panel of Experts' report carefully. We recognise the importance of the work of the UN Panel of Experts. Looking at the information available to us, we have assessed that there has not been a breach of IHL by the coalition." (Emphasis added.)

50 In a Westminster Hall debate on 8 June 2016, the Minister of State for Foreign and Commonwealth Affairs (David Lidington MP) said:

> "The MOD assessment is that the Saudi-led coalition is not targeting civilians." (HC Deb, col. WH138, emphasis added)

The Secretary of State's position in his Summary Grounds and at the permission hearing

51 In his Summary Grounds for Resisting the Claim, on 30 March 2016, the Secretary of State said this, under the heading "Analysis of allegations of violations of IHL":

> "18. MOD monitors and analyses allegations of IHL violations arising from airstrikes in Yemen conducted by the coalition…
>
> 19. All allegations that come to the attention of the MOD are recorded by Ops Dir. Allegations are identified from a range of sources cited by the Claimant… Once an allegation of an IHL violation is identified and listed by Ops Dir, PJHQ [Permanent Joint Headquarters] will analyse it.
>
> …
>
> 23. On the basis of all the relevant information available to it, MOD then assesses so far as possible (sharing its analysis both within MOD and with the FCO as appropriate):
>
> (a) whether the alleged event occurred as reported…
>
> (b) who was responsible for the event and whether the strike was the result of a coalition airstrike…
>
> (c) whether a legitimate object is identified and <u>whether any concerns are raised by the strike</u>." [**1/B74,** emphasis added]

In context, the reference to "concerns" is plainly a reference to concerns about breaches or possible breaches of IHL.

52 That was understood by the Claimant as a positive assertion (in line with what had been said in pre-action correspondence) that, whenever an allegation is made that a strike breached IHL, the MOD undertakes an assessment of (*inter alia*) whether the strike raised IHL concerns. At the permission hearing on 30 June 2016, Gilbart J referred to the need for an assessment of alleged violations of IHL "based on a case by case consideration of available evidence" [**1/A62**]. He continued:

> "Well, could you take me to where it says 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?"

Leading counsel for the Secretary of State (Mr Eadie QC) summarised the process by reference to the Summary Grounds as follows:

> "Questions asked, information obtained, and… analysis of allegations of violation".

Gilbart J observed:

> "Yes, it says there that it was carried out on (Inaudible) on a case by case basis." [**1/A63**]

Mr Eadie QC responded:

> "My Lord, I do not think anyone is suggesting that that is not the position…"

<u>The Secretary of State's confirmation that the statements made to Parliament were untrue</u>

53 If the MOD and/or FCO had, in fact, conducted an assessment of each instance where it was alleged that a violation of IHL had taken place (or even each incident where there was a credible allegation to that effect), and reached its own view about "whether the responsible party's actions are assessed as compliant with IHL or not" (or even "whether any concerns are raised by the strike"), that could – in principle – have provided a basis on which the Secretary of State could reject the overwhelming consensus of respected expert opinion that there <u>had</u> been repeated, serious violations; and it could – in principle, depending on the robustness of the analysis – have provided a basis on which he could conclude that there was no "clear risk" of such a violation in the future.

54 But it appears that the clear statements made in Parliament on 12 and 15 February and 8 June 2016 were untrue. This has now been acknowledged in a written statement by Tobias Elwood MP (the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs) on 21 July 2016 [**2/B1055-1056**]. According to that statement, when the Foreign Secretary said "we have assessed that there has <u>not</u> been a breach of IHL by the coalition" (on 12 and 15 February 2016), this was wrong. He should have said "we have <u>not</u> assessed that there <u>has</u> been a breach of IHL by the coalition". And when the Minster of State said "The MOD assessment is that the Saudi-led coalition is <u>not</u> targeting civilians", this too was wrong. He should have said "The MOD has <u>not</u> assessed that the Saudi-led coalition <u>is</u> targeting civilians". (Emphasis added in each case.)

55 The difference between the uncorrected and corrected versions is critical. In the uncorrected versions, the Secretary of State says that he has made a positive assessment that could – in principle – provide a proper basis for rejecting the apparently reliable findings of expert bodies. In the corrected version, the Secretary of State says only that he has not made a positive assessment that there have been

breaches. That provides no positive basis to gainsay the findings of the expert bodies.

The Secretary of State's current position in these proceedings

56 It appears to follow from the correction statement made in Parliament that, when the Secretary of State said through GLD on 16 February 2016 that "all allegations that come to the attention of the MOD are tracked and assessed to identify... whether the responsible party's actions are assessed as compliant with IHL or not" [**5/E50**], this – like the statements made in Parliament to the same effect – was not true.

57 Confusingly, however, the Secretary of State does not accept this. On 19 August 2016 [**5/E107-108**], the Claimant's solicitors asked GLD to confirm

> "1. Whether it is now your case that
>
> a. '[a]ll allegations that come to the attention of the MOD are tracked and assessed to identify whether the alleged event occurred as reported, who was responsible for the event, and whether the responsible party's actions are assessed as compliant with IHL or not' (as you said in your letter of 16 February 2016)."

Nearly 2 months later, on 14 October 2016, GLD wrote a response [**5/E116-118**], which included the following two statements [**5/E118**]:

> "Neither the MOD nor the FCO reaches a conclusion as to whether or not an IHL violation has taken place in relation to all specific incidents."

and:

> "The Secretary of State does not accept that the statement at paragraph 1(a) [of Leigh Day's letter of 19 August 2016] is not true."

58 On 7 November 2016 [**5/E119**], Leigh Day wrote to GLD asking it to clarify how these two statements could both be maintained at the same time. Despite a chasing letter on 19 January 2017 [**5/E129**], no reply has been received.

59 The Secretary of State's current position, as set out in his pleadings and evidence and in documents disclosed following the closed disclosure process, appears to be as follows:

(a) On 5 August 2016, two weeks after making the correction in Parliament, the Secretary of State served three witness statements under cover of a letter indicating that his Summary Grounds were to stand as Detailed Grounds. The Summary Grounds have not been amended since, so they can be taken to represent the Secretary of State's up-to-date pleaded case.

(b) The process followed by the MOD is described in the statement of Peter Watkins [**2/B479-508**]. Essentially:

(i) Allegations of breaches of IHL come to MOD from a variety of sources, including media, NGO reporting and UN bodies [**2/B490/§41-2/B491/§42**].

(ii) All such allegations are recorded in a central database known as "the Tracker" [**2/B491/§43**].

(iii) The issues addressed by the MOD in its "analysis" are: whether (1) it is possible to identify a specific incident; (2) the incident was likely to have been caused by a Coalition strike; (3) it is possible to identify the Coalition nation involved; (4) a legitimate military object is identified; and (5) the strike was carried out using an item that was licensed under a UK export licence [**2/B492/§46**].

(iv) The second of these issues (whether the incident was likely to have been caused by a coalition airstrike) is one to which sensitive material, in particular "Mission Reports", may be relevant. But even here, PJHQ has "no insight into incidents caused by artillery attacks or attack helicopters as we have almost no visibility of Coalition ground force operations" [**2/B494/§54**].

(v) When considering the fourth issue (whether a legitimate military object is identified), the MOD "do not have access to any of the operational intelligence which the Coalition use" and "without being directly inside the RSAF [Royal Saudi Arabian Air Force] targeting process and

understanding the rationale and the specific situation on the ground at the time of a strike… are not in a position to interpret whether a target was legitimate or not from a Mission Report" [**2/B495/§57**].

(vi) The evidence makes clear that it is even more difficult to assess "dynamic" than pre-planned targeting and that the assessment in January 2016 was that "procedures for dynamic targeting were less robust" than procedures for pre-planned targeting: see Crompton §§60 & 66B [**2/B325**].

(vii) Note that the issues that Mr Watkins says are considered by the MOD do not include "the alleged consequences of a strike, including the reported civilian casualties": Watkins 2 §26 [**3/B1322**]. That means that, even in those cases where there is an identifiable military target, the MOD (and the UK Government generally) is in no position to gainsay what appears from other reports about casualty numbers. Some very general statements about the casualty numbers in reports can be found in the evidence, eg "high levels of civilian casualties can raise concerns, particularly around the proportionality criteria": Crompton §58 [**2/B325**]). But the analysis conducted by the MOD does not appear to involve its own assessment of the compatibility of the strike with the principle of proportionality under IHL.

(viii) Nor, apparently, does the MOD consider whether the strike was against a target (such as a hospital) that attracts special protection under IHL. So, it appears, the MOD (and the UK Government generally) does not analyse whether a strike involves a breach of (for example) Article 11 APII. This is a matter of some importance given that aerial attacks on hospitals and clinics by the KSA-led coalition have been a feature of the conflict: see generally the material from Médécins Sans Frontières [**4/D254-274** and **2/B839-855**].

(ix) It is therefore clear that the information gathered by MOD is insufficient to enable the MOD (or the UK Government generally) to say "whether the responsible party's actions are assessed as compliant with IHL or not" (as stated in GLD's letter of 16 February 2016

[**5/E47**]), or even "whether any [IHL] concerns are raised by the strike (Summary Grounds §23(c) [**1/B74**]).

(c) Documentary evidence disclosed in these proceedings (including as a result of the closed disclosure process) shows that there are significant gaps in the MOD analysis:

(i) Up to 10 January 2016, the MOD was tracking 114[8] alleged incidents of potential concern of which over a third are assessed as probable Coalition air strikes. Of these, MOD was unable to identify a legitimate military target in the majority. MOD formed the view that targeting processes for pre-planned strikes comply with NATO standards, but "processes governing dynamic targeting are less robust than those governing their pre-planned targeting and we have little insight into these." It was assessed that an increased proportion of airstrikes involved dynamic targeting [**2/B462**]. This proportion increased again over the two months to April 2016 [**2/B343**].

(ii) The 114 incidents that were tracked represented "only a very, very small percentage of the overall coalition airstrikes carried out" [**2/B261**].

(iii) The Head of Policy at the Export Control Organisation, advising the Secretary of State on 4 February 2016 [**2/B262**], noted:

> "While FCO appear confident about their policy to make proper assessments against the Consolidated Criteria we do have significant concerns regarding the acknowledged gaps in knowledge about Saudi targeting processes and about the military objectives of some of the strikes; in particular the fact that while MOD consider only a third of the incidents they have been tracking to have been the result of Coalition airstrikes, the MOD are only able to identify a 'valid military target' for the majority of them.[9] Additionally they cannot be

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[8] The BBC's latest report of 25 January 2017 (which can be formally evidenced if necessary) notes that the total number of incidents currently being tracked is 252: see www.bbc.co.uk/news/world-38745454.

[9] This, presumably, was a reference to those reporting periods where MOD had been able to identify a legitimate military target in the majority of cases. In many reporting periods MOD was unable to identify a valid military target in the majority of cases.

> certain that the vast majority of total airstrikes that are not being tracked have all been IHL-compliant. We are also concerned that FCO/MOD appear only to have limited insight into Saudi processes in respect of pre-planned strikes and have very little insight into so-called 'dynamic' strikes – where the pilot in the cockpit decides when to despatch munitions – which account for a significant proportion of all strikes."

(iv) The Secretary of State, explaining on 11 February 2016 his decision not to suspend licensing or extant licences to Cabinet colleagues, noted the "uncertainty and gaps in information available" [**3/B1375**].

(v) For many later reporting periods (eg May, June and July 2016), the MOD remained unable to identify <u>any</u> military target in <u>the majority</u> of cases identified as coalition air strikes [**2/B342**].

Ground 1: Failure to ask correct questions and make sufficient enquiries

<u>The test to be applied</u>

60 In *Secretary of State for Education & Science v Tameside MBC* [1977] AC 1014, Lord Diplock said this at 1064-5:

> "It is not for any court of law to substitute its own opinion for [the Secretary of State's]; but it is for a court of law to determine whether it has been established that in reaching his decision… he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 , per Lord Greene MR, at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

61 In general, unless statute makes a particular inquiry mandatory, it is for the public body to decide, subject to rationality-based review, "the manner or intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such": *R (Khatun) v Newham London Borough Council* [2005] QB 37, per Laws LJ

at [35]. But that is subject to the general requirement that a decision-maker must follow his published policy unless there are good reasons for not doing so: R *(Lumba) v Secretary of State for the Home Department)* [2012] 1 A.C. 245, per Lord Dyson at [26].

62 Furthermore, in *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), Popplewell J had to consider an allegation that the Tameside duty had been breached in taking a decision about the appropriate levels for asylum support. He said this at [121]:

> "The scope of investigation required for any given decision is context specific. The decision in this case was as to what was sufficient to keep about 20,000 people above subsistence level destitution, a significant proportion of whom are vulnerable and have suffered traumatic experiences. This of itself mandates a careful inquiry." (Emphasis added.)

63 The decision here was whether to continue to export military equipment to a regime that had been found by reputable expert bodies to have committed repeated and serious violations of IHL. The importance of the decision here called for no less careful an inquiry than in the *Refugee Action* case.

The relevance of the questions posed in the User's Guide

64 As to the relevance of the factors identified as such in the User's Guide:

(a) the Consolidated Criteria provide, in Criterion One (f), that the Government "will not grant a licence" if to do so would be inconsistent with the Common Position;

(b) the Common Position provides, in Article 13, that the User's Guide "shall serve as guidance" for its implementation;

(c) the Secretary of State expressly accepts the relevance of the User's Guide to his analysis: see his reference to the "three key factors referred to at §2.13" of the User's Guide (Summary Grounds §§15 and 35 [**1/B/B72 & 79**]);

(d) having properly accepted the relevance of parts of the User's Guide as authoritative guidance on the implementation of the Common Position, it cannot be rational to disregard other parts without giving reasons for doing

so. That follows from the fact that the choice of the manner and intensity of inquiry is subject to rationality review and also from the duty to follow policy absent good reason for departing from it.

65 Here, the factors identified at SFG §45 [**1/B22-24**] were identified in the User's Guide as "relevant questions to be considered" [**1/67**]. The Secretary of State has given no reason at all for concluding that they were not relevant or did not need to be asked. The fact that these matters were not considered represents both a failure to take account of relevant matters and a failure to take reasonable steps to acquaint himself with the relevant information required for a finding that there was no "clear risk" for the purposes of Criterion Two (c).

66 It is sufficient for present purposes to concentrate on three of the matters identified at SFG §45.

(a) Does KSA have national legislation in place prohibiting and punishing violations of IHL? Has it adopted national legislation or regulations required by the IHL instruments to which it is a party? (SFG §45.1 [1/B22]) It should not be surprising that the existence or otherwise of national legislation prohibiting breaches of IHL appears as the first "relevant question" identified in the User's Guide. Each of the four Geneva Conventions contains a materially identical obligation on States to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article": see eg Article 146 of GC IV. It is difficult to think of a more basic or necessary starting point when examining "the recipient's past and present record of respect for [IHL]" (the first of the general topics mentioned in §2.13, which the Secretary of State says was considered). The (surprising) response to Leigh Day's letter before claim on this point was that the Secretary of State is "not in a position to advise on the domestic legislation of the KSA" [**5/E55**]. In other words, by the time of the decision under challenge, he had – on the open evidence at least – taken no steps at all to acquaint himself with the state of KSA law on this topic, whether by making its own enquiries (perhaps through the UK post in KSA) or by asking the KSA Government. So, as far as the Secretary of State was aware, it may be perfectly lawful under the municipal law of KSA to commit what in international law would be regarded as war crimes. Yet, neither that

possibility, nor the Secretary of State's complete absence of knowledge as to the content of KSA law, figured in the submission to the Secretary of State on the basis of which he decided to maintain his decision [**1/B259-264**] or the FCO advice [**2/B455-474**] (at least as far as can be gleaned from the open sections of these documents). Nor has the omission been rectified since this claim was issued or following the grant of permission. Although the Secretary of State's Summary Grounds assert (without any supporting reference) that "as a matter of fact, KSA does have such procedures [*sc* for the prohibition and punishment of violations of IHL] in place" [**1/B79/§36**], nothing in any of the Secretary of State's witness statements addresses the municipal law of KSA. Nor do the KSA Government statements relied upon by the Secretary of State. [10]

(b) Has KSA put in place mechanisms to ensure accountability for violations of IHL committed by the armed forces and other arms bearers, including disciplinary and penal sanctions? (SFG §45.2 [**1/B23**]). As with the state of the KSA law, the Secretary of State's position on this question is one of ignorance. Not only does he not know whether KSA has ever prosecuted or punished a member of its armed forces for a breach of IHL (something which must follow from his state of ignorance as to KSA law), he also does not know whether KSA has ever instigated any form of disciplinary investigation into any of its armed forces in respect of an allegation of breach of IHL [**5/E55**]. This gap in the Secretary of State's knowledge is significant in circumstances where reliance is placed on the training provided to members of the KSA armed forces. Training alone cannot be expected to address the risk of IHL violations if there is no effective sanction for such violations. At the very least this important gap in knowledge about KSA internal

[10] The closest the documents come to addressing this point is General Assiri's statement of 31 May 2016 (some six months after the challenged decision and three months after the February 2016 reconsideration) indicating that "the legal necessary procedures" after an investigation would include "Take action in questioning any convicted person" [**2/B422**]. In context, the word "convicted" here must mean "implicated" (since it would not make sense to talk about questioning someone who had already been criminally convicted). That being so, the statement says nothing at all about whether KSA law allows for the prosecution of violations of IHL.

mechanisms was a matter which should have been drawn explicitly to the attention of the decision-maker.[11]

(c) Does KSA have an independent and functioning judiciary capable of prosecuting serious violations of IHL? (SFG §45.6 [**1/B24**]) This question too would be highly relevant if there were any law prohibiting violations of IHL by members of the armed forces. The US State Department, for example, says this is its 2014 Report on Saudi Arabia:

> "The law provides that judges are independent and are subject to no authority other than the provisions of sharia and laws in force. Nevertheless, the judiciary was not independent, as it was required to co-ordinate its decisions with executive authority, with the king as final arbiter."

Once again, even if relevant laws were in place, the effect of those laws would be minimal if (as members of the armed forces will readily understand) there is no independent judiciary to enforce them. Again, this relevant factor was left out of account. The Secretary of State's attention was not drawn to it.

67 The omission to address these and the other questions set out at SFG §45 vitiates the decision. Given that the decision was "finely balanced" [**1/B262/§10 & 1/B266/§4**], it cannot be said that the same decision would have been taken if the Secretary of State had been told that, as far as officials knew, KSA may have no law, no disciplinary rules and no effective enforcement mechanism for prohibiting breaches of IHL.

Grounds 2 and 3: The conclusion that there was no "clear risk" under Criterion 2(c) and the failure to trigger the Suspension Mechanism

68 In *Kennedy v Charity Commission* [2015] AC 455, Lord Mance held as follows:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle: see Associated Provincial Picture

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[11] It was, in Sedley LJ's language in *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, at [63], one of the "things which are so relevant that they must be taken into account".

> Houses Ltd v Wednesbury Corpn [1948] 1 KB 223. The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich *in R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531, where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion,
>
> > 'the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'".

Here, the decision was not only one of exceptional gravity, it was also one that required – under Criterion Two (b) itself – "special caution and vigilance".

69 That is not, of course, the only matter relevant to the intensity of review. Another is whether the decision in question depends on political judgment: see eg the quotation at [53] of Lord Mance's judgment in *Kennedy*. Decisions about whether some step is necessary in the interests of national security or the international relations of the UK may fall into this category: see eg *Rehman v Secretary of State for the Home Department* [2003] 1 AC 153. See also the distinction drawn by the Court of Appeal (Lord Phillips CJ, Sir Anthony Clarke MR and Sir Igor Judge P) in *Secretary of State for the Home Department v MB* [2007] QB 415. There, the context was control orders. The court drew a distinction between the question whether there were reasonable grounds for suspecting the controlee of involvement in terrorism (which was an "objective question of fact": [60]) and the question whether the particular controls imposed were necessary in the interests of national security (an issue on which it was necessary to give greater weight to the views of the Secretary of State: [63]).

70 In the present case, there are three reasons why the Court should apply a rigorous and intensive standard of review:

(a) The Secretary of State has at no point suggested that the decision involved exercising a political judgment about whether a suspension of arms export licensing would impact negatively on the national security or foreign relations

of the UK.[12] On the contrary, the question for the Secretary of State involved the application of a legal test (the "clear risk" test in Criterion Two (c)) to the open and closed evidence. That is a task (like the task in *MB* of considering, on the basis of open and closed evidence, whether there are reasonable grounds for suspecting that an individual is involved in terrorism) that lies properly within the province of the court.

(b) The closed material procedure enables the Court to consider the full range of before the Secretary of State. This is not a case where the Court needs to be concerned that it is unsighted on any part of the information on which the decision was taken.

(c) This was not a decision that even the Secretary of State considered clear. On the contrary, the senior official advising the Secretary of State advised twice that it was "finely balanced" [**1/B262/§10 & 1/B266/§4**].

71 In any event, whatever standard is review is applied, the Court is plainly entitled to consider whether, given the open expert material before the Secretary of State, the conclusions he reached based on a limited analysis of sensitive material could, <u>as a matter of logic</u>, sustain the view that the "clear risk" test was met. As Sedley J observed in *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1, at [27], a claimant alleging irrationality

> "does not have to demonstrate, as respondents sometimes suggest is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term 'irrationality' generally means in this branch of the law is a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic."

72 The decision-making process in this case falls into that category.

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[12] Such considerations would be impermissible under Criterion Five (a) [**1/10**], which permits taking into account "the potential effect of the transfer on the UK's defence and security interests", but subject to the caveat that "this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability". Equally, under the heading "Other factors", the Consolidated Criteria make clear that economic, social, commercial and industrial interests "will not affect the application of the criteria in the common position".

73 First, the Secretary of State says that Criterion Two (c) "imposes no burden on the Secretary of State to find or explain why views expressed by… third parties are wrong", as long as they are taken into account: Summary Grounds §46 [**1/B83**]. It may be right that Criterion Two (c) itself imposes no such burden. But the demands of rational decision-making do. If positive findings have been made that KSA has repeatedly committed serious violations of IHL, logic requires the Secretary of State to reject these findings before concluding that there is no "clear risk" that such a violation "might" take place in the future.[13] As a matter of logic, there are three routes by he could do so. The Secretary of State might:

(a) conclude that the bodies responsible for the findings are inherently unreliable. But he has not said that of the UN Expert Panel, or the NGOs, or the EP. Nor, it might be added, could he plausibly do so;

(b) subject the expert reports to close analysis and demonstrate that the process of reasoning that led to the conclusions contained in them is not reliable. On the contrary, the Secretary of State submits (see the citation from the Summary Grounds set out above) that he is not required even to consider whether the conclusions drawn in these reports are wrong; or

(c) consider evidence not before the expert bodies that made these findings, which leads him to conclude – contrary to the findings – that KSA has not violated IHL. But, contrary to what was initially said to Parliament and in these proceedings, he has in fact drawn no such conclusion. Given the description in evidence of the MOD's analytic process, it is clear that no such conclusion could, even in principle, be drawn (because, even in those cases where a military target is identified, the MOD does not gather the information, eg as to civilian casualties and identity of target, that would be

[13] Strictly, it is possible to envisage a scenario in which the Secretary of State accepts that KSA has committed repeated and serious violations of IHL, but that there is still no "clear risk" that UK military equipment might be used in such violations in future. But that scenario is wholly unrealistic given the range of military equipment covered by existing licences. Nor is it suggested (at least in open) that this is the basis for the Secretary of State's decision.

needed to assess whether a particular strike was or was not compliant with IHL).[14]

74 Secondly, no clear explanation has been given (in open, at least) as to what inference – if any – has been drawn from the fact that the MOD has been unable to identify a legitimate military target for air strikes in many cases (the majority in several reporting periods). On any common-sense approach, that fact alone would establish, or strongly suggest, a "clear risk" that at least some of these strikes involve serious violations of IHL. When this fact is taken together with the expert reports, it is impossible to reach the contrary conclusion.

75 Thirdly, the UK Government's approach appears to have been more akin to the process of analysis appropriate for an international criminal tribunal. It seems to have involved the following process of reasoning: (i) use the reasoned findings of NGOs, the UN Expert Panel and the EP solely as a basis for adding incidents to its Tracker (rather than as strong *prima facie* evidence that violations have occurred); (ii) ask whether FCO/MOD, having investigated the allegations, was able to establish one or more breaches of IHL; (iii) decide (often because of the absence of information as to the target or the targeting processes used) that no such breach of IHL could be established; (iv) add that fact together with other selected information about KSA's attitude to IHL compliance (much of it in the form of self-serving statements made by KSA officials); and (v) conclude that – on balance – the "clear risk" threshold is, therefore, not met. But this approach, while paying lip-service to the "clear risk" test:

(a) in substance turns it into an insuperable hurdle (contrary to the indication at §2.7 of the User's Guide that the words were intended to require a "lower burden of evidence"); and

(b) systematically devalues the evidential force of the UN Expert Panel and NGO findings (which the Consolidated Criteria themselves make plain can

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[14] See by analogy *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 11, per Sir John Chadwick at [51]: "it is not enough for a minister who decides to reject the ombudsman's finding of maladministration simply to assert that he had a choice: he must have a reason for rejecting a finding which the ombudsman has made after an investigation under the powers conferred by the Act". Here, the findings being rejected were, like the Ombudsman's findings in *Bradley*, made after extensive investigations.

constitute "reliable evidence" in their own right [**1/12**] and whose reliability the Secretary of State has not questioned in the present case).

The Suspension Mechanism

76 As noted above, it is the Secretary of State's policy that the Suspension Mechanism will be "triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult."

77 In this case, the decision not to trigger the Suspension Mechanism was irrational, given the matters set out above and Secretary of State's own evidence positively drawing attention to the various respects in which it is difficult to conduct a proper risk assessment. These are set out in full at §59 above. They include, in particular, the facts that:

(a) MOD tracks "only a very, very small percentage of the overall coalition airstrikes carried out" [**2/B261**];

(b) PJHQ has "no insight into incidents caused by artillery attacks or attack helicopters as we have almost no visibility of Coalition ground force operations" [**2/B494/§54**];

(c) MOD "do not have access to any of the operational intelligence which the Coalition use" and "without being directly inside the RSAF [Royal Saudi Arabian Air Force] targeting process and understanding the rationale and the specific situation on the ground at the time of a strike… are not in a position to interpret whether a target was legitimate or not from a Mission Report" [**2/B495/§57**];

(d) the UK Government has "very little insight into so-called 'dynamic' strikes – where the pilot in the cockpit decides when to despatch munitions – which account for a significant proportion of all strikes" [**2/B262**];

(e) the Secretary of State, explaining on 11 February 2016 his decision not to suspend licensing or extant licences to Cabinet colleagues, noted the "uncertainty and gaps in information available" [**3/B1375**].

Conclusion

78 For these reasons, the Court is respectfully invited to grant the relief sought in SFG §8 [**1/B4-5**].

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CONOR McCARTHY

30 January 2017