

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

BETWEEN:

THE QUEEN
on the application of

CAMPAIGN AGAINST ARMS TRADE

Claimant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant

SPECIAL ADVOCATES' DETAILED GROUNDS

17 January 2017, for hearing 7-9 February 1717

*The first part of these Grounds is intended to be made open and disclosed to the Claimant.
The Defendant has approved the disclosure.*

PART 1: SPECIAL ADVOCATES' OPEN SUBMISSIONS

The dispute in open

1. The Claimant (C) challenges D's failure to suspend extant export licences for the sale of arms to Saudi Arabia and (b) D's decision to continue to grant new export licences for such exports, communicated to C on 9 December 2015. (see e.g. **SFG Summary at §2 and §7**). In particular, D's conclusion that Criterion 2(c) of the Consolidated Criteria does not prevent the grant of a licence is challenged.

"the Government will ... (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." [e.g. at **EB1/5**]

2. C relies upon a substantial mass of reporting, and conclusions reached by independent bodies, that the Saudi-led Coalition has repeatedly violated International Humanitarian Law (IHL) (see **SFG §11-31 and Annexes**).
3. D claims that in continuing to license arms for sale to Saudi Arabia (KSA), he has reasonably and rationally considered the "three key factors" identified in the User Guide in relation to conducting" 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 humanitarian law" and accordingly reached a lawful decision. [**C115-269 of Hearing Bundle for 30 June 2016 at C168/p54 of the Guide para 2.13**]. The key factors are:
 - a) KSA's past and present record of respect for IHL;
 - b) KSA's intentions as expressed through formal commitments; and
 - c) KSA's capacity to ensure that the licensed items are used in a manner consistent with IHL [**SGD §15, A114**]
4. The starting point is the mass of evidence of breaches of IHL by the Saudi-led Coalition assembled by the Claimant. This suggests that there is prima facie a manifestly "clear risk" that UK-supplied weapons will be used in serious breach of IHL. In evaluating the CLOSED evidence relied upon by the Government in support of a conclusion that the relevant "clear risk" did not exist in December 2015, and still does not exist now, the following general points are made:
 - the apparent risk that emerges from the mass of independent reporting and assessment from apparently reliable sources (including the UN, EP, and reputable NGOs) would require **compelling evidence** to be displaced in any sustainable assessment that no clear risk exists.
 - specifically, the assessment is required to consider "**reliable evidence**" (as per the Consolidated Criteria) and C's SFG.

- “**special caution**” in the assessment is required given the findings of the UN and EU competent bodies (Criterion 2(b)).
5. D's SGD identifies "three strands of information and analysis" by which his assessment is "particularly informed." In relation to each strand, there is said to be "sources and analyses" of a sensitive nature, to which C does not have access, which are taken into account. [SGD§17]. The identified strands are:
- a. a "considered analysis of all incidents of alleged IHL violations by the Coalition in Yemen that come to its attention": (**The Tracker**)
 - b. an "understanding and knowledge of KSA military processes and procedures, notably by reference to information provided from UK Liaison Officers located in KSA Air Operations Centre (Riyadh)" which is "also informed by logistical and technical support and training provided to KSA, and engagement with the Saudi targeting process on the strategic, operational and tactical levels": (**(i) Liaison Officers; (ii) Training; (iii) Engagement with targeting processes.**)
 - c. "on-going engagement with KSA and post-incident dialogue, including with respect to investigations". (**Dialogue with KSA and investigations**).
6. On the basis of the particular insight that access to these sensitive sources of material provides, D asserts that he could lawfully and rationally conclude that that Criterion 2(c) has at all relevant times (as at December 2015 and since) been met: i.e. that there is no clear risk that the arms being licensed for sale to KSA might be used in serious violation of IHL.

Open Summary of Closed Grounds

7. The SAs submit that the CLOSED material produced by the Defendant confirms and supports the Claimant's grounds of challenge:
- 1) **Failing to make sufficient enquiries or obtain sufficient information**
 In particular, by adopting a process which irrationally fails to address the likelihood of past breaches of IHL having occurred in relation to specific incidents of alleged breach.

2) **Failing to apply the 'suspension mechanism' , where a proper risk assessment cannot be carried out on the basis of reliable evidence**

The closed material confirms the lack of reliable material available to assess the 2(c) risk, or reach a view that such a risk does not exist. Accordingly suspension of licensing is mandated.

3) **Irrationality**

Far from displacing the risk which appears from the open material, the closed evidence tends to confirm that any assessment that there was and remains 'no clear risk' for the purposes of 2(c) is irrational and/ or *Wednesbury* unreasonable.

The contradiction in D's position in open

8. C has highlighted in correspondence (7.11.16 letter and preceding correspondence) an apparent contradiction in D's position.
- On 16.2.16 GLD stated that "All allegations [of IHL] that come to the attention of the MOD are tracked and assessed to identify ... whether the responsible party's actions are compatible with IHL or not" [D50 at §20p]¹
 - On 14.10.16 GLD stated: "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"
9. The confusion in D's position is also illustrated by the series of corrections to answers given to Parliamentary Questions and in Debates that was made by the Minister (PUSS for FCA, Mr Tobias Ellwood) on 21.7.16 [AF30, 447-448, and at NC8]. Thus:
- "we have assessed that there has not been a breach of IHL by the coalition" is corrected to "we have not assessed that there has been a breach of IHL by the coalition"
 - "there is no evidence that IHL has been breached" is corrected to "we have been unable to assess that there has been a breach of IHL"

¹ The paragraph continues: "We should stress that MOD considers all reports of allegations or violations, or potential violations of IHL, including those made by NGOs, which come to the MOD's attention, and make an assessment of the facts so far as possible, including where possible identifying alternative causes."

- The MOD assessment is that the Saudi-led coalition is not targeting civilians" is corrected to "The MOD has not assessed that the Saudi-led coalition is targeting civilians".
- "we are doing our own assessments to understand whether the equipment we sell as any participation in that [i.e. allegations of violations of IHL] ... " is corrected to "we make it clear that we are doing our own analysis. We encourage the Saudis to conduct their own investigations ... ".

10. In D's open evidence, the MOD assessments - 'the Tracker' - are referred to and explained in Mr Watkins' statements (first statement at §39ff, and second statement at §20ff), with further detail provided in the closed versions.

11. On review of the open and closed material, the SAs submit that it is quite clear that the first statement made on behalf of D and quoted at paragraph 8 above is wrong, or at least misleading.

- (1) In particular, the 'Tracker' does not generally provide any assessment of whether the actions of the responsible party are compatible with IHL or not. In its initial format the Tracker included a question for each incident: "IHL breach?", but in no case was an assessment of this question addressed in the box provided. That question was removed from subsequent versions of the Tracker (the SAs have asked D - in their Submissions on Further Disclosure/Supplementary Evidence dated 11 January 2017 - to clarify when this was done and why).
- (2) No other material disclosed in open or closed suggests that the process adopted by D (through the FCO, or MOD, or otherwise) includes any routine attempt to reach an assessment, in any individual case, "to identify whether the responsible party's actions are compatible with IHL or not".
- (3) The Ministerial Statement making corrections in relation to Parliamentary Questions and Debates stated:

"It is important to make clear that neither the MOD nor the FCO reaches a conclusion as to whether or not an IHL violation has taken place in relation to each and every incident that comes to its attention. This would simply not be possible in conflicts to which the UK is not a party, as is the case in Yemen." [NCS, AF30/44S].

On the material disclosed in open and closed, it appears that statement is, strictly speaking, generally correct.² However, it is potentially misleading by giving the impression that a conclusion is reached in relation to some alleged incidents of IHL violation. The true position (as it appears to the SAs) is that it appears that D has deliberately decided not to make any assessment of the likelihood or otherwise of a breach of IHL in relation to any specific incident contrary to the most obvious interpretation of the assertion by GLD on 16.2.16.

- 4) Mr Crompton (FCO) has emphasised in his first open statement (§111) that the Ministerial Statement making the corrections" *does not represent or contain any change in policy*". Thus, it seems clear that the Government does not seek to assess the likelihood of a breach of IHL having been committed by the Coalition in any specific case.

12. This issue has a particular significance by reference to C's first ground of challenge (a failure to make sufficient enquiries). Subject to the views of C's open representatives, the SAs submit that not making an assessment of the likelihood of breach of IHL having been committed in relation to any allegation raised is plainly a failure to make a sufficient enquiry and/ or is irrational and/ or a failure to take relevant information into account. D recognises and accepts that the first of the three 'key factors' in the User Guide, in its consideration of Criterion 2 is "(a) KSA's past and present record of respect for IHL". Yet, in addressing that Criterion, the decision making process makes no assessment, based on the range of material available to it (both open and closed), of the likelihood of breaches of IHL having taken place in relation to specific incidents.

13. Criterion 2(c) requires an assessment of risk. The process of risk assessment necessarily includes an assessment of past conduct, on the information available. And yet in applying the policy, and notwithstanding an analysis of each incident of alleged breach of IHL (as represented by the 'Tracker'), there is no determination of the likelihood of a breach by the KSA having taken place in each case. As indicated above, the relevant question ("IHL Breach?") was at one time posed in each case, but not answered. Whilst a rational process may not necessarily involve formal or conclusive "determination" in each case of alleged

² See also 14.10.16 letter from GLD, response to C's question 1(a).

past violation (recognising that the ultimate question is one of risk assessment rather than fact finding), nevertheless, a rational process - pursuant to both logic and the applicable policy - at the least requires assessment of likelihood of previous breaches having been committed.

The sensitive material

14. In support of their closed grounds, the SAs analyse the sensitive material relied upon by the D in support of the conclusion that the 2(c) criterion is not met, and submit that this material could not rationally support a conclusion that no such / clear risk" exists.

Dated 19th January 2017

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UPDATE: at paragraph 11(1) of the Open part of the Special Advocates' Grounds, there is reference to the Special Advocates' request for clarification as to the when and why the "IHL breach?" question was removed from the Tracker.

On 24 January 2017 the Defendant provided further information, of which the following may be stated in OPEN:

"When the Tracker was initially created it was thought that the MOD would be able to come to conclusions in relation to individual allegations of breaches of IHL. Although it was quickly realised that this was not the case this was not immediately rectified administratively. The decision to change the column heading was reached on approximately July 2016. There are no documents recording this decision."

Notwithstanding the indication that there were no documents relating to the decision to change the column heading, on 27 January 2017 the Defendant told the Special Advocates that two documents relevant to that decision would be disclosed to the Special Advocates.