

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

BETWEEN:

**THE QUEEN
on the application of
CAMPAIGN AGAINST 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

**SECRETARY OF STATE'S NOTE ON THE CLAIMANT'S DRAFT ORDER
AND RESPONSE TO APPLICATION FOR PERMISSION TO APPEAL**

Introduction

1. The Secretary of State submits that permission to appeal should be refused and that, consequently, §4 of the Claimant's draft Order (stay of enforcement of the costs order pending an appeal) is unnecessary.
2. For the avoidance of doubt the Secretary of State agrees that:
 - a. If permission to appeal is refused, enforcement of the costs order may be stayed pending the determination of any application to the Court of Appeal for permission to appeal;
 - b. If permission to appeal is granted, enforcement of the costs order may be stayed pending determination of the appeal.

Response to the application for permission to appeal

3. For convenience, the Secretary of State adopts the headings used in the Claimant's "Submissions on draft Order" in which the Claimant applies for permission to appeal the Divisional Court's judgment.

Limb (a): Real prospect of success

4. The Court has addressed all of the OPEN and CLOSED evidence and arguments presented by the parties and the interveners in comprehensive and detailed OPEN and CLOSED judgments. The Secretary of State submits that the Court's conclusions are correct, for the reasons it gave. None of the three grounds relied upon by the Claimant has any real prospect of success as required by CPR r. 52.6(1).
5. At its heart, this was primarily a rationality challenge to decisions made by officials with "particular expertise to make those judgements, and judgements which are prospective and predictive" (§ 201(1)). As the Court observed: "[t]he government system involves drawing upon, and drawing together, a large number of significant strands and sources of information, including evidence and intelligence not available to the public, NGOs [or] press, including through close contacts with the Saudi military." (§ 201 (2)). As the Court explains, at §60, it was taken to key aspects of the evidence during the OPEN and CLOSED hearings and subsequently undertook a careful review of all the OPEN and CLOSED materials. At §212, the Court records that "*Mr Chamberlain accepted and averred that 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.*" It is not now open to the Claimant to seek a second review of this material in the Court of Appeal.

Ground 1: Error of approach to the open source material and findings

6. This ground is based upon the flawed propositions that:
 - a. The "starting point" for the Secretary of State was Saudi Arabia's "past and present record of respect for IHL";
 - b. The NGO and other reports relied upon by the Claimant provided strong *prima facie* evidence of a pattern of violations of IHL;
 - c. The Secretary of State was required either to accept that there was a pattern of violations (but conclude that the "clear risk" test was nevertheless not met) or that there was no such pattern; and
 - d. The Secretary of State was "*obliged to form a judgment about a sufficient number of the incidents in which breaches of IHL have been found to displace the prima facie evidence of a pattern of such violations.*"
7. However, as the Court rightly identified at §179(3), past and present conduct is one of three key matters identified by the User's Guide. It is not a "starting point" which creates a presumption which must then be rebutted, but merely one factor which must be considered and weighed with the other relevant factors.

8. The Court expressly acknowledged, at §86, that the material relied upon by the Claimant *“represented a substantial body of evidence suggesting that the Coalition has committed serious breaches of [IHL] but emphasised that “this open source material is only part of the picture.”* The Court went on to analyse, in the following 85 paragraphs of the OPEN judgment (and in greater detail in the CLOSED judgment) the other sources of information available to the Secretary of State. On the basis of this careful and detailed review, the Court (rightly) concluded, at §192 that there was *“no sustainable criticism of the scope of the inquiries made on [the Secretary of State’s] behalf or the quality of the information available to him”* and that *“The evidence shows beyond question that that the apparatus of the State, ministers and officials, was directed towards making the correct evaluations for the purposes of the Consolidated Criteria.”*
9. Further, as the Court expressly acknowledged, the Secretary of State *was* well aware of the relevance of patterns of conduct and that this is properly fed into the overall analysis. In particular, the Court noted that:
 - a. The MOD was monitoring a significantly greater number of allegations than the net 44 identified and listed by the Claimant §115;
 - b. The MOD’s analysis in the Tracker provided, *inter alia*, information as to pattern and frequency of Coalition attacks §183;
 - c. The assessment *“has all the hallmarks of a rigorous, robust, multi-layered process...”* §120.
10. In relation to the Claimant’s argument summarised in paragraph 6(d) above, this betrays again the consistent error in the Claimant’s approach, as identified by the Court at §182: *“The Claimant’s case depends largely upon inferring violations of International Humanitarian Law on the basis of the reports of civilian casualties and damage. However, International Humanitarian Law is much more sophisticated than this, and the analysis required necessarily complex”.*

Ground 2: Error in relation to the duty to consider Saudi Arabia’s past record of compliance with IHL

11. This ground of appeal mischaracterises the Court’s approach to the relevance of the User’s Guide, at §§178-179. The Court correctly proceeded on the basis that the User’s Guide is non-binding guidance. It identified three key matters which the Secretary of State’s inquiry should include and noted that the list of suggested *“relevant questions”* at pages 50 and 55 of the User’s Guide were indicative of the sorts of matters which might be considered in addressing the three key questions.
12. It cannot sensibly be suggested that the list of questions in the User’s Guide constitutes a mandatory checklist, each of which must be addressed before reaching a conclusion on the *“clear risk”* test.

Ground 3: Meaning of “serious violation of IHL”

13. The Claimant does not identify any purported error in the Court’s approach to the meaning of “serious violation of IHL” nor is it explained why it was unsustainable for the Secretary of State to conclude that the “clear risk” test was not met.

Limb (b): Other compelling reason why an appeal should be heard

14. The Secretary of State acknowledges the seriousness of the issues raised by this case, but does not accept that that constitutes a “compelling reason” why an appeal should be heard.
15. In circumstances where the Claimant is unable to identify any error of law in the Judgment and merely seeks an opportunity to re-argue the submissions which have been extensively aired and considered in detail by the Divisional Court, this Court is invited to refuse permission to appeal. That is particularly so where the Court has, through the mechanism of a CMP, been able to consider both OPEN and CLOSED evidence.

**James Eadie QC
Jonathan Glasson QC
Kate Grange QC
Jessica Wells**

6th July 2017