Claim No CO 1306/2016
T3/2017/2079

IN THE COURT OF APPEAL (CIVIL DIVISION)

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPEAL

FROM THE HIGH COURT OF JUSTICE (DIVISIONAL COURT)(BURNETT LJ AND HADDON-CAVE J)

BETWEEN:

THE QUEEN
on the application of
CAMPAIGN AGAINST ARMS TRADE

Claimant /Applicant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant /Respondent

-and-

AMNESTY INTERNATIONAL
HUMAN RIGHTS WATCH
RIGHTS WATCH (UK)
OXFAM

Interveners

THE SECRETARY OF STATE'S UPDATED STATEMENT OPPOSING PERMISSION TO APPEAL

Introduction

1. This is the Secretary of State's updated OPEN Statement opposing the Claimant's application for permission to appeal the judgment of Burnett LJ (as he then was) and Haddon-Cave J in *R (oao Campaign against Arms Trade) v Secretary of State for International Trade and Interveners* [2017] EWHC 1754 (Admin); [2017] H.R.L.R. 8 ("the Judgment"). This updated Statement is filed pursuant to the Order of Irwin LJ dated 24 January 2018.

2. The Secretary of State submits that, for the reasons set out below, permission to appeal should be refused on all of the OPEN Grounds. There are no "real

prospects" that any of the Grounds of Appeal will be allowed, and there is no other compelling reason why permission should be granted. For reasons set out in his CLOSED Statement, the Secretary of State submits that the CLOSED Grounds of Appeal equally fail to meet the threshold for permission to appeal to be granted.

3. The Claimant has put forward four Grounds of Appeal from the Judgment. Grounds 1 and 2 are no more than an impermissible attempt to obtain a second factual review of the evidence, in circumstances in which the Divisional Court conducted the most careful and extensive analysis of the facts. Grounds 3 and 4 are both based on a selective reading of passages of the Judgment; and, even if (which is denied) they had a basis in principle, neither would be capable of undermining the Court's subsequent analysis. There is no other compelling reason to grant leave. As the Divisional Court rightly observed when refusing permission to appeal: "*That this judicial review was concerned with a very serious issue does not justify an appeal which, in essence, would require the Court of Appeal to conduct a fresh review of the thousands of pages of material placed before us in open and closed*."[1]

The Legal Framework for UK Arms Exports

4. The legal framework governing the export of military equipment from the UK is set out in detail at §§4-24 of the Judgment. For the purposes of this Statement, the Secretary of State draws attention to key aspects of the framework.

5. As the Divisional Court noted, the claim was primarily concerned with Criterion 2 of the Consolidated EU and National Arms Export Licensing Criteria (**"the Consolidated Criteria"**). This provides:

"The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.

[1] Order dated 21 July 2017 at §8 p.110-112 of the Appeal Core Bundle.

Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the government will:

a) not grant a licence is there is a clear risk that the items might be used for internal repression;

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 competent bodies of the UN, the Council of Europe or by the EU;

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."

6. As the Judgment further highlighted, at §10, the Consolidated Criteria also provide that:

"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."

7. In relation to the *"User's Guide",* on which the Claimant places great reliance, the Divisional Court, at §11, highlighted the general introduction to the "*Criteria guidance*" which explains the purpose of this guidance:

"…They are intended to share best practice in the interpretation of criteria rather than to constitute a set of instructions; individual judgment is still an essential part of the process, and Member States are fully entitled to apply their own interpretations."

8. The Judgment also noted, at §15, the definition of *"serious violations of IHL"* in §2.11 of the *User's Guide*:

"Serious violations of international humanitarian law include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (arts 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non-international armed conflict, which it defines as war crimes (Article 8, sub-sections b, c and e…)"

Ground 1: "Error of approach in the open source material and findings of past breaches of international humanitarian law ("IHL") by KSA"

9. The Claimant contends that the Divisional Court erred in its approach to the open source material and to the findings by the UN Panel of Experts, NGOs, the European Parliament and others of past violations of IHL.

10. This Ground is based on a fundamental misconception, which pervaded the Claimant's case before the Divisional Court and similarly underpins these Grounds of Appeal, namely that the open source evidence created a presumption of "*clear risk*". As the Divisional Court noted:

> "*In essence, the claimant's primary case was that the open source evidence raised a presumption of a "clear risk" under Criterion 2c which could not rationally be rebutted. Mr McCullough QC submitted that logic pointed to the "clear risk" test being met.*"[2]

11. The Claimant asserts that (i) the OPEN evidence demonstrates a pattern of serious violations of IHL and (ii) rationality required the Secretary of State to consider that evidence and to reach a view as to whether a pattern of violations had been shown.[3] On the Claimant's case, the OPEN evidence *"constituted an overwhelming body of evidence establishing that there <u>was</u> a pattern of violations of IHL, some of them serious"* [4] and that it was only open to the Secretary of State to reject the conclusions in the open source reports *"if there were reason to regard them as unreliable, or if there were other evidence – not available to the authors – to contradict them."*[5]

12. There is, however, no proper basis for the Claimant's argument. As the Divisional Court rightly held, at §207: *"the third party reports do not raise any legal presumption that Criterion 2C is triggered, although, as the Secretary of State accepts, their content must be properly considered in the overall evaluation."* The Divisional Court set out in detail at §208 the approach that had been taken to the various third party reports – see in particular §208(4)–(6).

[2] See, e.g. §§54, 86, and 205 of the Judgment.
[3] Appellant's Skeleton Argument (**"ASA"**) §31.
[4] ASA, §35.
[5] ASA, §36.

13. The Divisional Court's conclusion is manifestly consistent with the guidance given in the Consolidated Criteria i.e. that "*account will be taken of reliable evidence"* (see §6 above). It is notable that the Claimant fails to make any reference to this provision in its ASA, preferring to rely on assertions of "*logic*" and "*rationality*".[6] However, in the light of this guidance, the Claimant's assertion that *"As a matter of rationality, it was not enough that this apparently compelling evidence was "taken into account""*[7] is untenable.

14. So too is the suggestion that this alleged "*defect*" could not be cured by the other material relied upon by the Secretary of State and the Divisional Court.[8] As the Divisional Court emphasised, at §86, the open source material was only part of the picture.

15. The Divisional Court therefore undertook a thorough review of the full range of OPEN as well as CLOSED evidence which was available to, and was considered by, the Secretary of State. In particular, the Divisional Court highlighted the following:

    (a) The material put forward by the Claimant constituted a substantial body of evidence which, on its face, suggested that the Coalition had committed serious breaches of IHL in the Yemen conflict.[9] It noted, however, that the evidence relied upon by the Claimant was only part of the picture. For example, allegations for the most part did not distinguish between the different members of the Coalition.[10]

    (b) On analysis, the 72 *"potential serious breaches"* identified by the Claimant from the open source reporting in fact represented 44 specific allegations. 41 of these allegations had already been identified by the MoD before this claim was brought.[11] As at August 2016, the MoD was tracking 208 potential

[6] ASA, §37.
[7] ASA, §17(1).
[8] ASA, §§40-41.
[9] Judgment, §86.
[10] Judgment, §61.
[11] Judgment, §§113-114.

incidents of concern.[12] In quantitative terms, the MoD was monitoring on its Tracker a significantly greater number of allegations than the net 44 identified by the Claimant.[13]

(c) In qualitative terms, the MoD and Permanent Joint Headquarters Current Operations (one of the teams which contributes to the MoD's analysis of IHL allegations) clearly have available to them a much wider range of information upon which to base their assessment of incidents than that available to the NGOs and others.[14] Much of this information was sensitive and could not be referred to in detail in open court.[15]

(d) The volume of material generated by the MoD and Foreign Office was considerable and demonstrated the genuine concern and scrutiny that the MoD and Foreign Office were determined to give to the report of alleged IHL violations. This exercise *"**has all the hallmarks of a rigorous and robust, multi-layered process of analysis carried out by numerous expert government and military personnel, upon which the Secretary of State could properly rely**".*[16]

(e) It was clear from the evidence that the UK has considerable insight into the military systems, processes and procedures of Saudi Arabia adopted in Yemen.[17]

(f) It was clear from the evidence that there had been extensive political and military engagement with Saudi Arabia with respect to the conduct of military operations in Yemen and IHL compliance.[18]

(g) It was clear from the evidence that Saudi Arabia had been mindful of concerns expressed in relation to civilian casualties and that Saudi Arabia

[12] Judgment, §110.
[13] Judgment, §115.
[14] Judgment, §116.
[15] Judgment, §117.
[16] Judgment, §120.
[17] Judgment, §121.
[18] Judgment, §126.

had sought positively to address those concerns.[19] In relation to the Claimant's criticisms of the investigations carried out by Saudi Arabia, the Divisional Court considered that the growing efforts to establish and operate procedures to investigate incidents of concern was of significance and a matter which the Secretary of State was entitled to take into account.[20]

(h) The Secretary of State was also entitled to take into account various public statements by Saudi officials *"as part of a wider, complex patchwork of evidence"*. There was no reason to consider it impermissible for the Secretary of State to conclude that such statements were more than aspirational.[21]

(i) The *International Humanitarian Law Updates*, provided regularly to the Foreign Secretary by officials in the FCO, with input from a wide variety of sources, are detailed documents which include: (i) a summary of alleged incidents of IHL violations including any specific incidents of concern; (ii) an overview of what has changed since the last update; (iii) a summary of UK efforts to support Saudi Arabia's IHL compliance; (iv) a report on the US position; and (v) an overall analysis of Saudi Arabia's attitude towards the principles of IHL.[22]

(j) The precise steps taken by the Secretary of State and his advisers following reports of the Great Hall strike and other incidents of serious concern were the subject of detailed evidence in the CLOSED materials.[23]

16. It is not even suggested, and nor could it be given the evident care and thoroughness with which the Divisional Court considered the evidence, that any of these findings of fact were not properly open to them.

17. In the light of this detailed review of the evidence, materials and advice available to the Secretary of State, the Divisional Court correctly concluded, at §192, that:

[19] Judgment, §128.
[20] Judgment, §133.
[21] Judgment, §136.
[22] Judgment, §151.
[23] Judgment, §175.

*"**The reality of the position is that the Secretary of State has available to him and his advisers a significant amount of information relating to the conflict in Yemen and the conduct of Saudi Arabia as part of the Coalition. There is no sustainable public law criticism of the scope of the inquiries made on his behalf or the quality of the information available to him. The evidence shows beyond question that the apparatus of the state, ministers and officials, was directed towards making the correct evaluations for the purpose of the Consolidated Criteria**."*

Again, it is not and cannot be suggested that these conclusions of fact were not properly open to the Divisional Court.

18. In summary therefore, although characterised by the Claimant as an "*error of approach*", this ground is nothing more than an attempt to reopen the Court's findings of fact.

Ground 2: "Error in relation to the Secretary of State's failure to ask the questions identified in the User's Guide."

19. The Divisional Court rightly held, at §179, *inter alia* that:

(a) The User's Guide is non-binding guidance, as is clear from the explanation in its "*Introductory Note*": "*The User's Guide is intended to help Member States apply the Common Position. It does not replace the Common Position in any way, but summarises agreed guidance for the interpretation of its criteria and implementation of its articles. It is intended for use primarily by export licensing officials*."

(b) The relevant question for the Secretary of State under Criterion 2C is whether there is a clear risk that items to be licensed might be used in the commission of a serious violation of IHL.

(c) The User's Guide suggests that the Secretary of State's assessment should include three key matters in particular: (i) the recipient country's past and present record of respect for IHL; (ii) the recipient country's intentions as

expressed through formal commitments; and (iii) the recipient country's capacity to ensure that the equipment or technology transferred is used in a manner consistent with IHL and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

(d) The list of suggested "*relevant questions*" of the User's Guide (see pages 50, 55 and 56) are merely indicative of the sort of questions which the decision-maker might consider in order to assist him or her in addressing the three key matters highlighted in §2.13. The policy articulated by the Secretary of State did not commit the Government to consider that suggested non-exhaustive list serially. Neither does the Guide itself indicate such an approach.

20. As set out above, the Divisional Court analysed the evidence regarding the procedures, inquiries and analysis undertaken by the Secretary of State in the course of some 88 paragraphs of the OPEN Judgment (and in greater detail in the CLOSED Judgment).

21. The Claimant argues that there was an *"error of approach"* based on an alleged failure by the Secretary of State and the Divisional Court to ask themselves some of the specific questions highlighted in the User's Guide. In particular, the Claimant asserts[24] that:

(a) Article 13 of the Common Position, which provides that the User's Guide *"shall serve as guidance for the implementation of this Common Position"* has the effect of creating the equivalent of statutory guidance, which must be followed in the absence of cogent reasons for departing from it. This ignores the clear direction in the general introduction to the "*criteria guidance*" which is highlighted at §11 of the Judgment. This expressly states that the purpose of the User's Guide is to *"share best practice in the interpretation of the criteria rather than to constitute a set of instructions."*

[24] ASA §47.

(b) The fact that §2.13 of the *User's Guide* opens with the words *"relevant questions include"* somehow creates a duty on the Secretary of State to consider every question unless there is some cogent reason for not asking them. However, the natural meaning of these introductory words is entirely consistent with the Divisional Court's interpretation, namely that these are matters which the decision-maker may or may not consider, along with other matters not specifically identified in this list. The focus however must be on the three key matters identified in the User's Guide referred to above.

(c) The *Tameside* duty is context specific and, in this context, Criterion 2B requires *"special caution and vigilance"* where *"serious violations of human rights have been established…"* Leaving aside this attempt to import an additional threshold into Criterion 2C, the Secretary of State simply notes that (i) applying *"special caution and vigilance"* does not equate to a requirement to consider each and every item in the list in §2.13 of the User's Guide; and (ii) in any event, it is clear from the Divisional Court's review of the Secretary of State's approach, that special caution and vigilance has been applied at all times.

(d) The *Tameside* duty is concerned with what inquiries a public authority must make in order to reach its decision in circumstances where it does not have all the relevant facts. The correct threshold, as set out in §139 of *Tameside* (expressly cited at §38 of the Judgment) is:

> *"Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same."*

22. In summary, therefore, although characterised by the Claimant as an *"error of approach"*, this ground is nothing more than an attempt to reopen the Court's finding of fact.

Ground 3: "Incorrect approach to standard of review"

23. The Claimant asserts that the Divisional Court applied the wrong approach by not applying a more stringent review of the evaluation carried out by the Secretary of State. That is untenable when the passage on which particular reliance is placed is read (as it must be) in its context and not in isolation.

24. The Divisional Court explained the approach to be taken to the Claimant's rationality challenge in detail in §§25-35 of the Judgment. That passage of the Judgment must be read as a whole. The approach adopted by the Divisional Court was plainly correct. Specifically, the Court:

    (a) Noted that the nature of judicial review (including questions of rationality) is context-specific (*per* Lord Mance in *Kennedy v Charity Commission* [2015] AC 455 at §51);

    (b) Agreed with the Claimant that the decision at issue was of exceptional gravity and required a "***rigorous and intensive***" standard of review;

    (c) Agreed with the Claimant that Criterion 2C sets a legal test and does not admit of additional "*political*" considerations; and

    (d) Held that it did not follow from the rigorous and intensive standard of review that the Court should stray into areas which are *"properly the domain of the executive"*; and emphasised that the process of evaluation is informed by diplomatic and security expertise which the Court does not possess.

25. The Claimant, in elaborating this Ground, focuses solely on the parallel drawn by the Divisional Court with *Rehman* and the nature of the evaluation carried out by the Secretary of State when making national security assessments. The point being made by the Divisional Court was merely that the assessment under Criterion 2C, like a national security assessment, involves matters of judgment and policy and, in making that assessment, the Secretary of State is assisted by those with specialised knowledge and experience, including diplomats and military personnel. As the Court emphasised, at §209, *"…in an area where the court is not possessed of the institutional expertise to make the judgments in*

question, it should be especially cautious before interfering with a finely balanced decision reached after careful and anxious consideration by those who do have the relevant expertise to make the necessary judgments." That was the correct approach in principle.

26. The Claimant then contends that the test to be applied under Criterion 2C does not involve any "*policy considerations*" but simply involves *"an assessment of future risk, founded on an evidence-based analysis of the state's record of compliance with IHL in the past."* This approach to Criterion 2C is clearly inconsistent with the User's Guide. As the Divisional Court correctly summarised, at §179 of the Judgment, the User's Guide indicates that the Secretary of State should consider three matters in assessing the "*clear risk*"; it is not purely based on the recipient's past and present record of IHL compliance.

27. More fundamentally, the Claimant's argument ignores the evaluative nature of the decision-maker's task. That evaluation draws on many strands of information, some of which are highly sensitive, and is shot through with judgments. The consideration of a country's "past and present" record necessarily involves the exercise of judgement by the Secretary of State. For instance, as the Divisional Court explained, at §181, *"there would be inherent difficulties for a non-party to a conflict to reach a reliable view on breaches of international humanitarian law by another state"*. Rather, *"An international humanitarian law analysis is necessarily a sophisticated exercise involving a myriad of issues"* and the prospective analysis required by Criterion 2C requires *"an overall judgment of all the information and materials which the decision-maker State considers appropriate and has available to it."*

28. It is submitted that the Divisional Court's approach was not tainted by basic error of principle, as the Claimant suggests; and was, on the contrary, entirely in accordance with established authority. Furthermore, it cannot seriously be suggested, in light of the Court's thorough scrutiny of all of the evidence, that the Court was inappropriately "*deferential*"[25] to the Secretary of State. It in fact subjected the evidence to a "*rigorous and intensive*" review as it stated it would.

[25] §17(3) of the ASA.

Significantly, the Claimant's conclusion on this ground, at §50 of the ASA, merely recycles its complaints from Grounds 1 and 2.

Ground 4: "Failure to rule on the meaning of 'serious violations of IHL'"

29. Finally, the Claimant contends that the Divisional Court did not rule on the meaning of "*serious violation of IHL*" and *"left unresolved a dispute between the parties over the correct interpretation"* of this phrase. The Claimant identifies this dispute as being between (i) the Secretary of State's position that "*serious violation*" is synonymous with "*war crimes*" and "*grave breaches*" as defined in particular in the Geneva Conventions; and (ii) the Claimant's position that "*serious violation*" includes but is not limited to war crimes.

30. The Divisional Court summarised the relevant principles of IHL at §§15-24 of the Judgment. In particular, the Divisional Court expressly held, at §16, that the term *""serious violation" **includes** "grave breaches" and "war crimes""* (the word "*includes"* was emphasised in the original by the Court).

31. The Judgment further:

    (a) Set out the provisions of Article 8(2)(a) and (b) of the Rome Statute, which defines "*war crimes*" and "*other serious violations of the laws and customs applicable in international armed conflict*".

    (b) Expressly highlighted a distinction between "*grave*" and "*serious*" breaches, indicating that the latter would incorporate reckless as well as intentional conduct.

    (c) Highlighted that §2.6 of the *User's Guide* does not require that violations of IHL must be systematic or widespread in order to be considered as "*serious*" for the purposes of Criterion 2C.

(d) Summarised the main principles of IHL relating to the use of weapons in armed conflict, including the rule against indiscriminate attacks, the rule of distinction and the principle of proportionality.

(e) In relation to the principle of proportionality, emphasised that this prohibits an attack launched on a military objective in the knowledge that the incidental civilian injuries would be excessive in relation to the concrete and direct overall military advantage anticipated.

32. The Divisional Court therefore agreed with the Claimant's position, as set out in §55 of its ASA. In the light of this careful explanation of the principles of IHL, the suggestion that the Divisional Court somehow adopted a narrow interpretation of "*serious violations*" or viewed the concepts of "*grave breach*" and "*serious violation*" as interchangeable is obviously wrong.

33. The Claimant states, at ASA §60, that it was not its position that the only difference between "*grave breach*" and "*serious violation*" was that the latter includes reckless conduct. However, the Claimant does not identify any material distinction between the two concepts which the Divisional Court (or the Secretary of State) could be said to have overlooked.

34. In fact, it is clear from the review of the IHL Updates at §§152-175 of the Judgment that the Divisional Court was applying a broad approach to "*serious violation of IHL*" in assessing the Secretary of State's analysis. In particular:

(a) In relation to the October 2015 Update, it was noted that the high level of civilian casualties could raise concerns about the proportionality and that it was recognised that this was a key element in assessing IHL compliance. The Divisional Court also noted that it was clear from the update that those making the assessment were well aware that a consistent pattern of non-deliberate incidents could amount to a breach. (The Claimant's reliance on

the reference to "*deliberate incidents*" in this Update is clearly taken out of context[26]);

(b) The November 2016 Update again expressed concern about the picture of civilian casualties and the damage to civilian infrastructure and, in particular, raised concern about the attack on a Médecins Sans Frontières hospital in Haidan;

(c) The January 2016 Update referred to NGO Reports, including those alleging the use of cluster munitions over Sana'a on 6 January. The Court noted that the allegation regarding the use of cluster munitions had caused great concern and that immediate steps were taken to establish what had happened. In relation to the new allegations raised by the UN Panel of Experts, the analysis indicated that just 18 of the 119 allegations were incidents of potential concern – although the IHL Update noted that this relatively small number did not diminish the seriousness of the individual incidents.

35. The Divisional Court further noted, at §§173-174, that the Foreign Secretary had received *ad hoc* updates informing him of particular incidents of concern, such as the alleged use of cluster munitions and the Great Hall strike.

36. In short, it is clear that neither the Secretary of State nor the Divisional Court approached the analysis of incidents of concern on the basis of any technical arguments as to the scope of "*serious violation of IHL*". On the contrary, the evolving picture was assessed against the broad principles of IHL as identified by the Divisional Court. There is no basis for the Claimant's assertion, in ASA § 60, that, if the Divisional Court had resolved the "*dispute*" as to the meaning of "*serious violation*" in favour of the Claimant it would necessarily have concluded that the Secretary of State's decision was taken on a flawed legal basis.

No compelling reason

[26] ASA, §56(1).

37. The Secretary of State submits that there is no "*compelling reason*" why an appeal should be heard.

38. The context generally is a serious one of course. However, that is not a basis for concluding that there is a compelling reason for an appeal.

39. No serious and important issue of principle has in fact been identified by the Claimant that calls for ruling by the higher Courts. As the Divisional Court's Judgment indicates, this case turned on the facts. It was also a judgment (and a case) that considered the position at a particular point in time – ie on the basis of the facts up to the date of the hearing by the Court.

40. As already noted, the Appellant seeks to drag asserted points of principle out of a case which was in truth about the facts. In any event, the Courts are very and correctly reluctant to produce hypothetical or advisory opinions. The current state of affairs in relation to Yemen is not relevant to the issues arising in this application.

41. As noted at §60 of the Judgment, the Divisional Court was presented with "*voluminous*" evidence by both parties, some of which was highlighted during the course of the three-day hearing, <u>all</u> of which (both OPEN and CLOSED) was subsequently reviewed by the Court. At §212, the Court records that *"Mr Chamberlain QC 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."* The level of detail and the depth of scrutiny with which the Court has engaged with this claim are plain from the face of the OPEN and CLOSED Judgments.

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