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)

THE RT HON. LORD JUSTICE BURNETT AND THE HON. MR JUSTICE HADDON-CAVE

BETWEEN:

THE QUEEN
on the application of
CAMPAIGN AGAINST ARMS TRADE

Claimant/Applicant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant/Respondent

-and-

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

Interveners

CLAIMANT'S REPLY TO RESPONDENTS' UPDATED STATEMENT

Introduction

1. On 24 January 2018, Irwin LJ adjourned the application for permission to appeal to an oral hearing. This document replies to the Secretary of State's Updated Statement ("**the Updated Statement**"), which advances additional bases for opposing the grant of permission. Although no provision was made for this Reply, the Court is respectfully invited to permit reliance on it, so that the parties' positions are clear in advance of the oral permission hearing on 12 April 2018.

Ground 1: Error of approach in relation to the open source findings of past violations of International Humanitarian Law ("IHL") by the Kingdom of Saudi Arabia ("KSA")

2. The Secretary of State's response to Ground 1 misstates the way in which the Claimant put (and puts) its case. The Claimant's case was not (and is not) that there was "a

presumption", legal or factual, that the Defendant had to rebut. It was[1] (and is) that, in the light of the extensive open evidence from apparently authoritative sources indicating a pattern of violations of IHL by KSA (some of them serious), rationality (i.e. logic) requires the Secretary of State either:

a. to accept that there is a pattern of such violations; or
b. to have, and give, reasons for concluding that, notwithstanding the open evidence, no such pattern of violations can be established.

3. Conclusion (a) would not necessarily entail that exports must be suspended. It is logically conceivable that a state which has committed a pattern of violations of IHL (some of them serious) might take steps sufficient to justify the conclusion that there is no "clear risk" that such violations "might" be repeated. It is (just) possible that this might be so even in a case such as the present where, as the Secretary of State concedes, "special caution and vigilance" is required. But the existence or otherwise of a pattern of violations (some of them serious) is, on any view, centrally relevant to the question whether Criterion Two (c) is satisfied. If the conclusion on the "pattern" question were flawed, the decision could not stand and would have to be retaken.

4. The open materials make clear that the Secretary of State did not approach the challenged decision on the basis of a pattern of past violations (some of them serious). They also show, however, that he had no sufficient reason for concluding that no such pattern was established. In particular:

   a. The Secretary of State gave no reason for supposing that the conclusions of the various UN bodies, the European Parliament and the NGOs were unreliable on account of their constitution or motives or methodology.

   b. That did not mean that he had to accept the conclusions of these bodies. But if he was going to reject them, he had to have a reason for doing so. It was not necessary to form a concluded view about each and every breach of IHL found in the open materials. But there had to be some assessment of a sufficient number of them rationally to conclude that the pattern was not established.

[1] See Claimant's Skeleton Argument below §§71 et seq.; Claimant's Written Reply dated 9 February 2017 §1(a)-(e).

c. In fact, the information available to him from the MOD provided no basis for assessing whether violations (or serious violations) had occurred in any particular case – let alone a sufficient number of such cases to displace the conclusion of a pattern. In the majority of cases, the MOD "tracker" could not identify any legitimate target. This did not mean that there was in fact no legitimate target, but it did mean that there was nothing to displace the open source findings that violations (some of them serious) had occurred. Nor did the information available to the Government from KSA (such as it was) provide the missing information necessary to displace the evidence of a pattern of violations (some of them serious).

5. This is not a case where the Claimant invites the Court to interfere with the Secretary of State's factual assessment about whether there was a violation (or serious violation) in any particular case. The Claimant's complaint is that the Secretary of State's own evidence shows that he never engaged with that question, because the information available to him did not enable him to do so. To that extent, his decision-making process was flawed.

6. The Secretary of State criticises the Claimant for overlooking the statement in the Consolidated Criteria that: "[i]n the application of the… criteria, <u>account will be taken</u> 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" (emphasis added). But the demands of public law rationality are not satisfied merely by asserting that evidence has been "taken into account". A decision maker has to show what he made of it – in particular, whether he accepted it and if not, why not. This the Secretary of State has not done.

Ground 2: Failure to ask the questions identified in the User's Guide

7. The Secretary of State submits that the Divisional Court was correct to find that he did not act unlawfully in failing to consider, or inquire into, a series of matters identified as relevant by the User Guide: Judgment [178]-[179]. These matters included:

(i) whether the state in question has legislation in place prohibiting violations of IHL;

(ii) whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; and

(iii) whether KSA has ever prosecuted or disciplined an official for violation of IHL;

(iv) whether there is an independent and functioning judiciary capable of punishing members of the armed forces who violate IHL.

8. The Secretary of State had no information on any of these questions; and has given no reason for not making inquiries about them with its interlocutors in KSA: see Claimant's Amended Skeleton Argument §§42-47. In §21 of the Updated Statement, the Secretary of State contends that a decision-maker "may or may not consider" matters identified as relevant in the User Guide and that the "focus" must be on the three key matters identified in §2.13 of the User Guide. That provides that a decision maker should "inquire into" the recipient country's "past and present record of respect for IHL; …intentions as expressed through formal commitments; and …capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law".

9. But it is impossible to see how the Secretary of State could rationally discharge his duty to "inquire into" these matters without knowing, or inquiring about, any of the matters set out at §7 above. Suppose that a state has no (or no adequate) legislative framework requiring officials to respect IHL; has no (or no adequate) mechanisms to punish breaches by individuals of IHL; has never in fact prosecuted or disciplined such breaches in practice; and lacks an independent judiciary capable of punishing violators. It may be (just) possible to imagine such a state satisfying Criterion Two (c) if these matters were outweighed by other very compelling evidence. But it is not rational to conclude, *a priori*, that these matters are categorically irrelevant to the inquiry so that no effort will be made to inquire into them at all.

Ground 3: Error in identifying the proper standard of review

10. In its judgment, the Divisional Court set out six points "made by Mr Eadie QC as conditioning the nature of the review to be carried out by the court", which it accepted: Judgment [29]-[35]. The sixth of these points was that "the evaluation [carried out by the Secretary of State] has parallels with making national security assessments" and that the evaluation concerns "matters of judgment and policy [that] are recognized as primarily matters for the executive". The Court explained this approach by reference to *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, at [50]. In this passage Lord Hoffmann held that "decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision" and are instead "entrusted to the executive".[2]

11. The analogy was a false one. The decision under Criterion Two (c) did not depend on a judgment about whether continued exports were in the interests of national security (or otherwise in the interests of the UK). It depended on an assessment, in the light of the evidence, of the risk of a particular situation (that UK-supplied arms might be used to commit a serious violation of IHL) eventuating. That is more akin to the kind of factual assessment undertaken by courts and tribunals in asylum or extradition cases. In any event, the assessment requires (i) a factual conclusion about whether the evidence establishes a historic pattern of violations of IHL (some of them serious); and (ii) a predictive judgment about whether, in the light of (i), the "clear risk" test is met. The courts have long held that they are well equipped to review factual conclusions in the first category, even if judgments in the second category are entitled to a greater margin of discretion: see by analogy *Secretary of State for the Home Department v MB* [2007] QB 415, [58]-[60].

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

12. The Claimant's position before the Divisional Court was that the term "serious violation" has the specific meaning adopted in international criminal jurisprudence, namely a "breach of a rule protecting important values" involving "grave consequences for the

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[2] At §25 of the Updated Statement, the Secretary of State submits that 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". This reading is untenable, not least because the Court had already made the latter point at point 3: Judgment [31].

victim": *Prosecutor v. Tadic*, Appeals Chamber, IT-94-1 Decision on Interlocutory Appeal on Jurisdiction [91]-[94] and *Prosecutor v. Galic*, Trial Chamber, Judgment, IT-98-29-T [106]-[108]. The Secretary of State, by contrast, argued that "serious violation" is "synonymous" with the concepts of a "war crime" and "grave breach" of IHL. The only proper inference is that this understanding informed his decision-making process.

13. There is nothing in the Divisional Court's judgment to suggest that it engaged with the dispute between the parties on this issue – let alone that it determined that dispute in the Claimant's favour. The issue mattered for three reasons:

    a. Crimes under international law, including war crimes, are <u>necessarily</u> committed by individuals. Serious violations of IHL are attributable to the state as a whole (its institutions, apparatus and officials collectively). The analysis required to assess the risk of the apparatus of a State as a whole seriously breaching IHL is different from that required merely to determine the specific risk of individuals committing war crimes.

    b. It is often much more difficult to establish the mental elements necessary for a war crime (in general, intent or recklessness) than to establish a serious violation of IHL. For some important rules of IHL, including the prohibition on indiscriminate killing and the duty to take all feasible cautions in attack, there is no requirement for proof of either intent or recklessness.[3]

    c. Assessing the risk of a "serious violation of IHL" (properly understood) requires focus on the likely consequences of a breach for victims and the character of the rules which may be breached. The Secretary of State's analysis therefore lacked the correct focus when assessing risk.

14. By limiting his assessment to the risk that individual KSA officials may commit war crimes (including having the necessary intent so to so), the Secretary of State erroneously set a higher threshold than would should properly have applied when assessing the risk of a serious violation of IHL by KSA.

[3] See Article 57 of Additional Protocol I.

15. If the Claimant is correct as to the proper interpretation of the term "serious violation of IHL", and the Secretary of State was wrong, that would affect the legality of the Secretary of State's decision, because it would show that the wrong test was applied. Given that the decision was finely balanced, the error could have affected the outcome.

MARTIN CHAMBERLAIN QC

CONOR McCARTHY

28 March 2018