**T3/2017/2079**

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM THE DIVISIONAL COURT (BURNETT LJ AND HADDON-CAVE J - [2017] EWHC 1754 (Admin))**

**BETWEEN:**

**THE QUEEN**
**on the application of**
**CAMPAIGN AGAINST ARMS TRADE**

***Appellant***

-and-

**THE SECRETARY OF STATE FOR INTERNATIONAL TRADE**

***Respondent***

-and-

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

***Interveners***

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# OPEN SKELETON ARGUMENT OF THE SECRETARY OF STATE

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*Essential pre-reading: the Secretary of State agrees the Appellant's suggested pre-reading.*

*References to the OPEN Judgment below are "J1-3"*

## The Legal Framework for UK Arms Exports (see J4-24)

1. The claim is focused on Criterion 2C of the Consolidated EU and National Arms Export Licensing Criteria (**"the Consolidated Criteria"**).[1] The Consolidated Criteria are based on the EU Code of Conduct which was adopted by EU Member States in December 2008 (**"the EU Common Position"**).[2] They fulfil the duty on the Secretary of State, under s.9(3) of the Export Control Act 2002,[3] to give guidance on the general principles to be followed when exercising licensing powers. They were set out in a written statement to Parliament on 25 March 2014. Criterion 2 provides:

[1] [**Authorities/5**].
[2] [**Authorities/4**].
[3] [**Authorities/1**].

*"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.*

*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."*

2. As noted at J10, the Consolidated Criteria conclude with the guidance 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."*

3. Article 13 of the EU Common Position states that *"the User's Guide to the European Code of Conduct on Exports of Military Equipment ... shall serve as guidance for the implementation of this Common Position."* The current version of the User's Guide is dated 20 July 2015[4]. As noted at J11, the purpose of the User's Guide was set out in the general introduction to the "*Criteria guidance*":

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

4. Section 2 of the User's Guide is entitled "*Best practices for the interpretation of Criterion Two*".[5] §2.10 identifies *"The relevant principles established by instruments of international humanitarian law"* as follows:

*"International humanitarian law ... comprises rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in hostilities (e.g. civilians and wounded, sick and captured combatants), and to regulate the conduct of hostilities (i.e. the means and methods of warfare). It applies to situations of armed*

[4] [**Authorities/4**].
[5] [**Authorities/6**].

*conflict and does not regulate when a State may lawfully use force. International humanitarian law imposes obligations on all parties to an armed conflict, including organised armed groups.*

*The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rules of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection…"*

5. The principles of distinction and proportionality were further analysed at J23-24, citing Additional Protocol I, Article 8(2)(b)(iv) of the Rome Statute and the Turkel Commission. The Court also noted, at J15, 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 (Articles 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…)"*

6. §2.13 of the User's Guide gave guidance on aspects of *"clear risk"*, stating:

*"A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of a serious violation of international 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 and the recipient's capacity to ensure that the equipment or technology transferred 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."*

7. There follows in §2.13 of the User's Guide a non-exhaustive and wide-ranging list of "*relevant questions*" to assist in identifying the recipient state's attitude to IHL. For instance:

- Has the recipient country put in place requirements for its military commanders to prevent, suppress and take action against those under their control who have committed violations of international humanitarian law?
- Does the recipient state cooperate with other states, ad hoc tribunals or the International Criminal Court in connection with criminal proceedings relating to violations?
- Have legal measures been adopted prohibiting and punishing the recruitment or use in hostilities of children?
- Does the recipient country educate and train its military officers as well as the rank and file in the application of the rules of international humanitarian law?
- Has international humanitarian law been incorporated in military doctrine and military manuals, rules of engagement, instructions and orders?
- Are there legal advisers trained in international humanitarian law who advise the armed forces?
- 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?
- Does the stated end-user have adequate procedures in place for stockpile management and security, including for surplus arms and ammunition?

8. As the Court correctly noted at J179(v), the matters covered in this list 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."* (Emphasis added).

9. The guidance on Criterion 2 concludes by emphasising, at §2.15 of the User's Guide, that *"Based on information and assessment of elements suggested at §§2.3–2.14 above*

*Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion Two."*

10. The Court concluded that *"the particular context of this case necessitates that considerable respect should be accorded to the decision-maker by the Court"* (J35)[6] having regard in particular to the following (see J29):

    a. The assessment under Criterion 2C is 'predictive' and involves the evaluation of risk as to future conduct in a dynamic and changing situation. It is therefore appropriate for review to be on rationality grounds;
    b. The assessment involves the evaluation of risk of extremely complex facts and information drawn from a wide variety of sources (including sensitive sources not publicly available);
    c. The assessment involves the decision-maker drawing on advice from those with considerable specialised knowledge, experience and expertise in the field, including diplomats and military personnel. That expertise means that the Executive's assessments in this area are entitled to great weight;
    d. The assessment is made on the basis of advice from government departments and ministers and officials at the highest level, including the Foreign Secretary;
    e. The role of the Court can properly take into account that there is an expectation, consistent with democratic values, that a person charged with making assessments of this kind should be politically responsible for them;
    f. The evaluation has parallels with making national security assessments. They are matters of judgement and policy and are recognised as primarily matters for the Executive.

11. In relation to the *Tameside* duty, the Court applied the principles summarised by the Divisional Court in *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB) at §100 and its formulation of the basic test at §139:[7]

[6]The Appellant sought permission to challenge the Divisional Court's findings in relation to the standard of review but permission was refused by the Court of Appeal: *"In our judgment it is not arguable that the Divisional Court misdirected itself as to the nature or character of the Review it had to conduct"*(Permission Ruling at §12 [**CB/19/395**).
[7] [**Authorities/12**].

*"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?"*

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

12. The Appellant contends that the Secretary of State and the Divisional Court both erred in their 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. The Appellant's case is that:

    a. The OPEN evidence demonstrates a pattern of violations of IHL, some of them serious;
    b. As a matter of "*logic*" and rationality it was necessary for the Secretary of State either (i) to *"consider a sufficient number"* of these incidents to *"displace the conclusion"* that there was a pattern of past violations; or (ii) to accept that there was a pattern of past violations and then *"consider whether, notwithstanding that pattern, there were reasons to suppose that KSA's conduct would improve in the future"*;[8] and
    c. The Secretary of State has "*not formed a view as to whether the findings of the UN Expert Panel, NGOs or the [European Parliament*]" are "*right or wrong*"[9]

13. The Court concluded at J207 that *"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."* This conclusion is both correct and consistent with the guidance given in the Consolidated Criteria that *"account will be taken of"* a range of *"reliable evidence"*. However, it is important to bear in mind that there is a significant qualitative difference between the risk analysis carried out by the Government and the reports of the NGOs. The UN, NGOs and media have much more limited access to information than does the Government. As the Court noted, *"such organisations often have not visited and conducted investigations in Yemen,*

[8] Appellant's Skeleton Argument, at § 41.
[9] Appellant's Skeleton Argument, at § 30 (3).

*and are necessarily reliant on second-hand information"* (J201(ii)). Recognition of the qualitative differences between the information available to third parties and to the Government is clearly not "*wrong in law*" as suggested by the First Interveners. [10]

14. The Appellant places particular reliance on two reports from the UN Panel of Experts, published in January 2016 and January 2017 respectively. The 2016 Report was produced in OPEN evidence before the Court. However the 2017 Report had, at the time of the Divisional Court hearing, only very recently been provided to the Government on a confidential basis and was accordingly only disclosed in CLOSED. The 2017 Report is not therefore addressed in the OPEN Judgment. Nonetheless the points just made apply to both reports. For example:

    a. It was expressly acknowledged, in the 2016 Report, that *"Physical inspections, observations and on-site interviews in Yemen were not possible throughout the Panel's mandate."*[11] The 2017 Report similarly records that the Panel did not have physical access to Yemen.[12] The 2016 Report explains, at §122, that the Panel's methodology included: *"conducting interviews with refugees, humanitarian organisations, journalists and local activists and undertaking a trend analysis relating to the conduct of hostilities."* The Panel had access to commercial satellite imagery *"to assist in substantiating widespread or systematic attacks."*[13]
    b. By contrast, and as explained in detail in the CLOSED Judgment, the *"MoD is able to base its analysis on a wide range of information including sensitive MoD sourced imagery which secures a more comprehensive and immediate picture than that provided by third party commercial imagery"* (J208(5)). Further detail regarding the careful process of analysis adopted by the MoD in relation to <u>every</u> allegation which was brought to its attention, is contained in the CLOSED Judgment and in the Secretary of State's CLOSED Skeleton Argument for this Appeal.

[10] Skeleton Argument of Amnesty International, Human Rights Watch and Rights Watch UK ("the First Interveners"), § 7 [**CB/20**].
[11] UN Panel of Experts, 2016 Report, §7 at [**SB/3/31/C206].**
[12] UN Panel of Experts, 2017 Report, §119 at [**SB/3/45/C338].**
[13] [**SB/3/31/C209].**

15. Further, as the Court recorded:

a. The mandate for the UN Panel of Experts was a broad one: to monitor the implementation of sanctions measures. The UN's comments on international humanitarian law issues are but a small part of the 2016 and 2017 Reports;
b. The 2016 Panel of Experts Report refers to 119 allegations of IHL violations by the Coalition, but does not contain a detailed or comprehensive analysis of them: see J208(5)(b);
c. Many of the allegations are made in very general terms (e.g. *"…all parties to the conflict in Yemen have violated the principles of distinction, proportionality and precaution…"*[14]) or with insufficient detail to enable further analysis: see J208(5)(c);
d. The sources used to compile the report were necessarily limited and were not qualitatively as sophisticated as the sources available to MoD: see J208(5)(e);
e. The open source reports do not (and could not) generally distinguish between the different members of the Coalition: see J61.

16. It is also to be noted that the Panel's assessment appears to be based principally on the location of alleged damage and the number of reported civilian casualties. The UN assumed from these allegations that the Coalition had "targeted" civilians and civilian objects.[15] That assumption is flawed as civilian casualties and damage to civilian infrastructure might still occur in IHL compliant warfare. As the Court correctly noted, the fact that civilian casualties have occurred is by no means determinative: *"The question of whether a breach of International Humanitarian Law has in fact taken place following civilian casualties is often necessarily a complex and fact sensitive question regarding careful investigation"* (J208(1), and see also J182).

17. In the light of these limitations, it is submitted that the Panel's assessment that there have been breaches of international humanitarian law is to be treated with caution; and (as the Court correctly concluded) leads to no 'burden of response' on the part of the Secretary of State, still less any form of presumption that the Criterion 2C threshold had been met. There is no basis for the Appellant's contention that, as a matter of rationality or logic,

[14] UN Panel of Experts, 2016 Report, §124 [**SB/3/31/C210**].
[15] UN Panel of Experts, 2016 Report, §137. UN Panel of Experts, 2017 Report, § 131 [**SB/3/45/C344**]. See also footnote 210 in Appendix A to Annex 49 **[SB/3/45/C371**]

the Secretary of State was required to accept the open source "findings" of a pattern of violations or to explain why those "findings" were rejected. It would be odd indeed if the least informed part of the evidential picture were taken to create such a burden.

18. In any event, the Secretary of State was not confined to a binary choice between either accepting or rejecting the open source material. He did not (and was not required to) dismiss these allegations as unreliable or accept them. Rather, he took them into account as part of the overall Criterion 2 analysis. Indeed, as at the time of the hearing, the Secretary of State was reviewing and analysing the 2017 Report which he had recently received in confidence. It is clear from the face of the 2017 Report that the UN Panel of Experts again had limited information. For example, in relation to the Hajjah market place allegation, the UN Panel of Experts acknowledged that it *"did not have access to the information that was at the disposal of JIAT[16], despite requests for information that was at the disposal of JIAT…"*. It therefore based its IHL assessment on its own investigations, although it is clear that in fact the Panel of Experts simply made a number of assumptions for instance, as to whether the coalition respected principles of proportionality and whether appropriate precautionary measures were taken.[17]

19. The Secretary of State is entitled to form his own view on the reliability of the open source reporting and to factor it into his overall assessment, along with all the other information and analysis available to him. This was a lawful approach, consistent with Criterion 2.

20. The Secretary of State's approach to the open source reporting, and particular the UN Panel of Experts Report, is endorsed at J208(6):

> *"It is clear the Secretary of State and his advisers treated the allegations drawn to their attention in the third party reports seriously and as a matter of concern. When MENAD received an advance copy of the UN Panel of Experts Report, they immediately forwarded it to the MoD. The MoD then carried out a preliminary assessment of the 119 allegations. Some 39 allegations were eventually added on to the MoD tracker as a result of the Report. The UN Panel of Experts Report was carefully considered in the January 2016 update. It was concluded that the additional allegations were concerning but they did not warrant a change in the overall analysis of the risk of future non-compliance with international humanitarian law by the Saudi*

[16] The Joint Incident Assessment Team
[17] See [**SB/3/45/C374-376**].

*authorities. It was decided that further work was required by MoD to identify whether the alleged attacks had been carried out by. The Royal Saudi Air Force, rather than one of its coalition partners. MENAD also requested further information from the UN Panel of Experts with regards to seven of these incidents but no further detail has been forthcoming to date."*

21. The Court likewise accepted that the open source reporting constituted *"a substantial body of evidence suggesting that the Coalition has committed serious breaches of International Humanitarian Law in the course of its engagement in the Yemen conflict"* (J86). Critically however, as it rightly held, this was *"only part of the picture"*.

22. None of this diminishes the importance under Criterion 2 of considering allegations of breaches of IHL and seeking to analyse, to the extent possible, patterns of concern. It is clear from the Court's summary of the IHL Updates (J153-175) that the Secretary of State was: (i) well aware that patterns of past incidents were relevant; (ii) identified from the allegations trends of concern (in particular arising from civilian casualties and damage to key civilian infrastructure); and (iii) fed this into the overall analysis. For example:

    a. The October 2015 IHL Update expressed concern at the *"worrying levels of civilian casualties in some reports"* and noted that *'high levels of civilian casualties can raise concerns particularly around the proportionality criteria."* The report notes the difficulties in identifying intent, but makes clear that *"a consistent pattern of non-deliberate incidents (with the same cause and without remedial actions being taken to address that cause) could amount to a breach."* [18]
    b. The November 2015 IHL Update similarly expressed concern about the level of civilian casualties and damage to civilian infrastructure, highlighting, in particular, concerns about the attack on an MSF hospital in Haidan.[19] The January 2016 IHL Update recorded particular concern regarding two further allegations of strikes against MSF facilities and regarding an allegation relating to the use of cluster munitions over Sana'a. This increased level of concern is reflected in the overall conclusion, which recorded that *"the judgement as to whether the [clear risk] threshold has been met is finely balanced."*[20]

[18] October 2015 IHL Update, see Crompton 1 at §§57-59 [**SB/1/5/B156-157**].
[19] November 2015 IHL Update, see Crompton 1 at §§60-62 [**SB/1/5/B157-158**].
[20] January 2016 IHL Update [**SB/1/NC6/B240-B242**].

c. The March 2016 IHL Update reflects that, although the MSF incident was of very real concern, the Saudis had admitted responsibility for the strike and put in place procedures to prevent a recurrence. Consequently, the overall assessment remained that there was not a clear risk that the KSA would commit serious IHL violations in the future.[21]

23. The IHL Updates illustrate how these concerns were, however, balanced by other factors (much of the detail of which is necessarily in the CLOSED evidence):

a. The January 2016 IHL update noted that "*We continue to engage with Saudi Arabia to better understand the dynamic targeting processes and to help improve any processes (as may be necessary). …"*[22]

b. The March 2016 IHL update recorded that the UK MOD had offered training. It was also noted that the KSA had announced their intention to form an independent high level team to assess and verify incidents of concern. This had been confirmed in a letter from the KSA government to the Security Council. High-level engagement with the KSA had continued.[23]

c. In May 2016, there was a significant reduction in air strikes, following a Cessation of Hostilities which held (albeit not without challenges) through the summer of 2016. Further positive developments in this period included the commencement of investigations by the Joint Incidents Assessment Team, which had received advice and training from the UK and further engagement between the KSA and MSF in response to the earlier attacks on their facilities.[24]

d. The October 2016 IHL Update recorded that, before the Great Hall strike, the assessment had been that the *"clear risk"* threshold had not been met, despite the resumption of hostilities and the high level of air operations. It was assessed that the Saudi authorities and military were increasingly engaged with the importance of IHL compliance and were making efforts to decrease the risk of violations. The KSA had initiated urgent investigations and it was noted that the complexity of the circumstances was unprecedented.[25]

[21] March 2016 IHL Update, see Crompton 1 at §§ 68-70 [**SB/1/5/B160**].
[22] January 2016 IHL Update [**SB/1/NC6/B240**] quoted in J159
[23] March 2016 IHL Update, see Crompton 1 at §§ 68-70 [**SB/1/5/B160**].
[24] May and June 2016 IHL Updates, see Crompton 1 at §§ 71-78 [**SB/1/5/B160-B161**].
[25] October 2016 IHL Update, see Crompton 2 [**SB/3/13/B469**].

e. The December 2016 and January 2017 IHL Updates recorded that steady progress continued to be made.[26] As the court noted at J175, *"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 are the subject of detailed evidence in the closed materials. We consider these in our closed judgment."*

24. The Court undertook the most painstaking and thorough review of the OPEN and CLOSED evidence; and considered all the material available to, and considered by, the Secretary of State. The Court's core conclusions were as follows:

a. On analysis, the 72 *"potential serious breaches"* identified by the Appellant 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: J113-114. As at August 2016, the MoD was tracking 208 potential incidents of concern: J110. In quantitative terms, the MoD was monitoring on its Tracker a significantly greater number of allegations than the net 44 identified by the Appellant: J115.
b. 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: J116. Much of this information was sensitive and could not be referred to in detail in open court: J117.
c. The volume of material generated as part of a systematic IHL assessment process 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"* (J120).
d. 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: J121.

[26] Crompton 2, para. 24. [**SB/2/13/B469**]; NC23 p. 7 [**SB/2/NC23/B614**].

e. It was clear from the evidence that there had been extensive political and military engagement with KSA with respect to the conduct of military operations in Yemen and IHL compliance: J126.

f. It was clear from the evidence that KSA had been mindful of concerns expressed in relation to civilian casualties and had sought positively to address those concerns: J128.

g. In relation to the Appellant's criticisms of the investigations carried out by KSA, the 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: J133.

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: J136.

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: J151.

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: J175.

25. The Appellant does not (and could not) challenge these findings, but asserts that the wider material relied upon by the Secretary of State could not cure the "*defective approach*" adopted in relation to the *"pattern of violations of IHL established by the OPEN evidence"*.[27] In seeking to articulate the "*defect*" which the Secretary of State is said to have committed, however, the Appellant is now in difficulty. In the light of the Court's clear determination, at J181, the Appellant (correctly, albeit reluctantly) now accepts that the Secretary of State was <u>not</u> required to form a judgment about every past

[27] Appellant's Skeleton Argument, § 47.

incident in which a breach of IHL is alleged to have taken place.[28] Instead, the Appellant is driven to formulate a vague and impractical legal obligation, requiring the Secretary of State to *"consider"* a *"sufficient number of these incidents"* to "*displace the conclusion that there was a pattern of past violations*".[29] What this threshold means, or how it is supposed to apply in practice is not explained by the Appellant. It is no more practicable than the submission that a conclusion be reached about each and every allegation. As the Court explained:

> *"…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 sovereign state. A non-party would not be likely to have access to all the necessary operational information (in particular, knowledge of information available at the time to the targeting decision-maker forming the basis of the targeting decision). An International Humanitarian Law analysis is necessarily a sophisticated exercise involving a myriad of issues , for instance: (a) whether there was a military necessity to strike the target; (b) whether there was a distinction drawn between military objectives and civilians and civilian objects; (c) whether the intended target was perceived to be a 'military' objective; (d) whether any expected incidental civilian loss of life, injury or damage was 'proportionate' to the expected military gain; and (e) whether all feasible precautions were taken to avoid and minimise civilian loss of life, injury or damage."* (J181(ii))

26. If it is, in practice, not possible to reach a conclusion on whether a single incident constituted a violation of IHL, it makes no more sense to require the same conclusion to be drawn about a "sufficient number" of allegations. The lack of utility in attempting such an exercise is all the more apparent in light of the forward-looking assessment which is required. It is submitted that this is precisely why the Consolidated Criteria and the User's Guide do not seek to impose any form of straitjacket on the decision-maker, but are rather couched in terms which are deliberately more open-textured.

27. There is no basis, in the Consolidated Criteria, the User's Guide or the rationality threshold, for importing a requirement that the Secretary of State should reach some form of conclusion as to whether past incidents, which undoubtedly gave rise to real and anxious concerns on the part of the Government, constituted actual violations of IHL. There has been no *"error of approach"* on the part of either the Secretary of State or the Court and this Ground of Appeal should be dismissed.

[28] Appellant's Skeleton Argument, § 41.
[29] Appellant's Skeleton Argument, § 41.

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

28. The Court rightly held, at J179, *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.

29. As already noted, the 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).

30. **First**, the Appellant contends that, because Article 13 of the Common Position provides that the User's Guide *"shall serve as guidance for the implementation of this Common Position"*, it follows that the User's Guide has the status of statutory guidance which must be followed in the absence of cogent reasons for departing from it. The User's Guide is not statutory guidance. This contention also ignores the clear direction in the general introduction to the "*criteria guidance*" which is highlighted at J11. This 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."* There is thus no basis for equating the User's Guide with statutory guidance. Even if there was such a basis there is nothing in *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148[30] to support a general principle of public law to the effect that statutory guidance should be followed unless there are cogent reasons for departing from it.[31]

31. **Secondly**, the Appellant extrapolates from the fact that § 2.13 of the User's Guide opens with the words *"relevant questions include"* 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[32] of these introductory words is consistent with, and supports, the 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. That that is the correct interpretation is also support by considering the 21 matters which are listed in § 2.13. The wide ranging nature of these questions indicates that they are not intended to be applied serially in every case; but rather are intended to provide guidance on the types of questions that might, in particular contexts, be useful in illuminating the attitude of the recipient state to IHL compliance.

32. **Thirdly**, the Appellant seeks to import a *"special caution and vigilance"* threshold from the different context of Criterion 2B, which relates to serious violations of human rights. That is not appropriate – the setting of that threshold was evidently confined to Criterion 2B (and the fact that it was not included in Criterion 2C is telling). In any event, (i) applying *"special caution and vigilance"* does not equate to a requirement to consider

[30] [**Authorities/10**].
[31] Lord Bingham's observations, at §21, which are cited by the Appellant indicate, on the contrary, that the weight to be attributed to the Code of Practice was context specific.
[32] It is noted that the issue requires interpretation of an EU legal instrument, rather than the application of the domestic *Tameside* threshold.

each and every item in the list in §2.13 of the User's Guide; and (ii) it is clear from the Court's review of the Secretary of State's approach, that special caution and vigilance has been applied at all times.

33. **Finally**, the Appellant contends that its interpretation of §2.13 can be tested by considering the position if certain facts were known to the decision-maker – e.g. if it were known that there was no legislation in place prohibiting violations of IHL. The Appellant asserts that such a fact could not rationally be left out of account and therefore it must follow that a decision-maker who chooses not to ask these questions also acts irrationally. However, 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 scope of the duty cannot therefore sensibly be tested by starting from the hypothetical assumption that the decision-maker did know the facts and then asking if he or she could rationally ignore them. The correct threshold, as set out in §139 of *Tameside* (expressly cited at J38) 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."*

34. Given the other inquiries made and information obtained – in particular in relation to the KSA's attitude and response to potential violations of IHL – it was plainly rational for the Secretary of State to conclude that the KSA's attitude to principles of IHL did not give rise to a clear risk of serious violations. In particular, as the Court concluded:

> *"It is clear from the evidence that, far from being immune to international criticism and concern as to civilian casualties alleged to have been caused by the Coalition in the Yemen conflict, Saudi Arabia has been mindful of concerns expressed, in particular by the UK. It is also clear from the evidence that Saudi Arabia has sought positively to address these concerns, in particular by conducting investigations into incidents and setting up a permanent investigatory body."* (J128)

35. The Court noted the Appellant's criticisms of the JIAT processes, but concluded that *"the Saudi's growing efforts to establish and operate procedures to investigate incidents of concern is of significance and a matter to which the Secretary of State was entitled to take into account as part of his overall assessment of the Saudi attitude and*

*commitment to maintaining International Humanitarian Law standards"* (J133). As this passage emphasises, it is the broader question which the Secretary of State was required to ask. It was for him to determine the specific matters which he considered necessary to answer that question. The Divisional Court's careful and detailed review – in its OPEN and CLOSED Judgments – of the Secretary of State's methodology, the range of sources of information and the level of communication with the KSA justifies its conclusion (J192) that:

> *"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 purposes of the Consolidated Criteria."*

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

36. The Appellant appears to suggest that the Secretary of State *may* have adopted a narrower view of the concept of "*serious violation*" and that this *may* have infected his approach to the "*clear risk*" threshold. The implication appears to be that the Secretary of State may have approached his assessment of the incidents of concern on the basis that (i) they did not fall within some technical legal definition of serious violation of IHL and/or (ii) even if they might constitute "*violations*" they were not "*serious violations*" and hence could be dismissed from the overall "*clear risk*" assessment.

37. The Appellant overstates the difference, if any, between the parties on the concept of serious violation. The Secretary of State did not, and does not disagree with the relevant parts of the User's Guide – e.g.

    a. §2.10 which states:

    > *"The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rules of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection."*

    b. §2.11 which gives the following, inclusive definition:

*"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 (articles 50, 51, 130 and 147 respectively). Articles 11 and 85 of AP1 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, subsections b, c and e)…"*

38. In any event, however, the Court resolved any point in the Appellant's favour: see J15-24.

a. J15 refers to the definition of "*serious violations*" of IHL in §2.11 of the User's Guide. At J16, the Court then concludes:

*"Thus, the term "serious violation" is a general term in International Humanitarian Law which <u>includes</u> "grave breaches" and "war crimes" as defined, in particular, in the four Geneva Conventions, Additional Protocol I and in Article 8 of the Rome Statute…"* (emphasis in original)

b. The Judgment then goes on to recite relevant paragraphs of Article 8 of the Rome Statute and §§2.6 and 2.7 of the User's Guide. At J21, the Court notes: *"The User's Guide also summarises the main principles of International Humanitarian Law relating to the use of weapons in an armed conflict."* It recites §2.10 of the User's Guide and summarises, at J22, the relevant principles of IHL as codified in the Geneva Conventions, the Additional Protocols and in Customary International Law:

*"They include the following (1) obligation to take all feasible precautions in attack; (2) effective advance warning of attacks which may affect the civilian population; (3) protection of objects indispensable to civilian population; (4) prohibition on indiscriminate attacks; (5) prohibition on disproportionate attacks; (6) prohibition on attacks directed against civilian objects and/or civilian targets; (7) obligation to investigate or prosecute; (8) obligation to make reparation."*

c. At J23-24, the Court elaborates upon the principles of distinction and proportionality.

39. The Court therefore agreed with the Appellant's position, as set out in §55 of its Updated Skeleton Argument. There was no "failure to rule" on this point.

40. The Secretary of State and his advisers:

    a. took into account *every* allegation which came to their attention;
    b. through the Tracker, conducted a wide-ranging analysis of each allegation, including: (i) providing information as to the pattern, frequency, nature and intensity of Coalition attacks; (ii) identifying whether a military object was within the vicinity of the alleged incident; (iii) enabling focus on investigating incidents of concern; (iv) enabling particular areas of concern to be raised and discussed with KSA; and (v) ensuring that particular incidents of concern were made the subject of investigation by the KSA: J183; and
    c. identified, and fed into the IHL Updates, broad issues of concern, in particular relating to numbers of civilian casualties and weaknesses in targeting processes.

41. The Appellant, at § 63 (1) of its Updated Skeleton Argument contends that the October 2015 IHL Update indicates the materiality of the alleged error of approach. That Update concluded that *"On the information currently available, given that we do not have evidence establishing deliberate incidents that could amount to an IHL breach by Saudi Arabia, in particular in relation to items previously supplied by the UK, we do not currently assess that extant export licences need to be revisited in relation to Criterion 2C."* However, the summary of this Update at §§57-59 of Neil Crompton's First Witness Statement,[33] makes clear that the Secretary of State was not applying a narrow test. This is evident from the summary of this Update quoted at §63 of the Appellant's Skeleton Argument that the Secretary of State's advisers had also expressed concerns at the *"worrying levels of civilian casualties in some reports"* and noted that *"high levels of civilian casualties can raise concerns particularly around the proportionality criteria."* It also stated that *"a consistent pattern of non-deliberate incidents (with the same cause and without remedial actions being taken to address that cause) could amount to a breach."*[34] Clearly, therefore, the Secretary of State and

[33] [**SB/1/5/B157**].
[34] The Appellant notes that this Update refers to avoiding the risk of "*wilful blindness*" and point out that this is a concept drawn from international criminal law. This is clearly taking that phrase out of context: the IHL

his advisers were not applying a narrow and technical approach to "serious violation" as the Claimant suggests. These points from the October 2015 IHL Update were recorded at J153.

42. In short, there is nothing in the evidence which indicates that the Secretary of State adopted a narrow or technical approach to the scope of "*serious violations of IHL*" and likewise nothing in the Judgment to support the contention that the Court made any error in this regard.

43. For completeness, it is noted that the Appellant has, in correspondence since the Permission hearing, sought confirmation that the Secretary of State *"accepts that the term "serious violation" is to be interpreted and applied in the manner identified by the Appellant in its Amended Skeleton Argument at §§55 and 57-58 and its Reply to the Respondent's Updated Statement at §§12-13(a)-(c)."* In response, the Secretary of State has confirmed that he does not challenge the Court's finding at J16 and accepts that the meaning of "*serious violation*" is not necessarily limited to war crimes and grave breaches. The Secretary of State has further noted that the Court of Appeal gave permission to the Appellant to appeal on Ground 4 on the limited basis that *"... it is arguable that there was an elision of meaning between "grave breaches" of IHL, "war crimes" and "serious violations" of IHL, which may have been material because of some of the advice bearing on the decision"* (§13). Consequently, the only point at issue in the appeal on this Ground is whether <u>in fact</u> the Secretary of State's decision making did wrongly elide these concepts. For the reasons set out above, it did not. In the Secretary of State's submission, it is neither necessary nor appropriate in this Appeal for the parties and/or the Court to engage in a detailed consideration of the precise scope of "*serious violation*".

**SIR JAMES EADIE QC**
**JONATHAN GLASSON QC**
**JESSICA WELLS**

**2 APRIL 201**

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Update was referring to the risk of the Secretary of State appearing to turn to a blind eye to allegations of breach.