



Government Legal Department

FAO Rosa Curling & Erin Alcock
Leigh Day
Leigh Day Solicitors
Priory House
25 St John's Lane
LONDON
EC1M 4LB

Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

T020 7210 3000

DX 123243, Westminster 12 www.gov.uk/gld

Copied to interveners & SASO

By email only

Your ref: REC/ADE/00065492/8
Our ref: Z1601555/SAW/DS4

28 July 2020

Dear Ms Alcock

Re: Campaign Against Arms Trade v Secretary of State for International Trade

1. We refer to your letters of 14 and 22 July 2020, in which you seek clarification of whether there remains a live issue between the Claimant and the Secretary of State on the third issue before the Supreme Court (what was Ground 4 before the Court of Appeal). You suggest that this clarification is necessary in order for your client to decide whether or not it wishes to continue with its appeal to the Supreme Court on this ground.
2. The Secretary of State does not consider that there remains (if there ever was) any live or freestanding issue between the parties which could properly be the subject of an appeal to the Supreme Court.
3. As you will recall, this point first arose during the hearing before the Divisional Court. In summary, the Claimant interpreted the Secretary of State's written and oral submissions as indicating that the Secretary of State had misdirected himself in treating "serious violation of IHL" as being synonymous with "grave breaches" and/or "war crimes". The Claimant relied upon a number of authorities from international criminal tribunals to contend that a "serious violation" of IHL has a broader meaning.
4. The Divisional Court held, at §15 of its OPEN judgment, that "... the term "serious violation" is a general term in International Humanitarian Law which includes "grave breaches" and "war crimes"..." (emphasis in original). The Divisional Court went on to outline Article 8 of the ICC Statute (noting at §18 that this provision requires a mental element for a "grave" breach) and the relevant principles of IHL as codified in the four Geneva Conventions (focussing in particular on the principle of proportionality and the principle of distinction).
5. Ground 4 of the Claimant's appeal to the Court of Appeal contended that the Divisional Court had:

"... erred in failing to determine whether the term "serious violations" as used in the Consolidated Criteria, the Common Position and the ATT was synonymous with "grave breaches" of the Geneva Conventions and war crimes under international law (as asserted by the Secretary of State) or (as the Claimant submitted) referred to a wider category of non-trivial violations of international humanitarian law, as explained by the International Criminal Tribunal for the Former Yugoslavia in its Tadic judgment. Had it determined that question in the Claimant's favour, as it should have done, it would or should have concluded that:

(a) The Secretary of State had approached the question whether there had been a pattern of past violations of IHL by KSA on an incorrect legal basis; and

Emma Robinson - Head of Division

Elizabeth Mackie / Lorna Robertson - Deputy Directors, Team Leaders Defence, Security & General Public Law



(b) This was a further reason why the Secretary of State's conclusion that the "clear risk" test was not met was unsustainable."

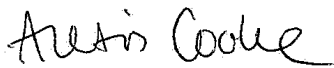
6. The Secretary of State's position in the Court of Appeal was that the Claimant had overstated the differences, if any, between the parties on the concept of serious violation. In particular, the Secretary of State did not, and does not, disagree with the elaboration of the concept in §2.10 and §2.11 of the User's Guide. In any event, the Secretary of State's position was that, if there was any distinction between the parties, the Divisional Court had resolved this in the Claimant's favour. The Secretary of State made clear that the Divisional Court's summary of the relevant principles of IHL at §§15 to 24 of its OPEN judgment was not challenged.
7. The Court of Appeal agreed with the Secretary of State's submission that the Divisional Court had not approached the concept of serious violations of IHL on the basis that it was restricted in some way to cases where individual criminal responsibility could be established, holding, at §161, that *"the Court clearly had in mind the wider obligations which IHL imposes on a state when conducting its operations in the course of an armed conflict, not only questions of individual criminal responsibility, which is the subject of that body of IHL which concerns grave breaches."*
8. The Court of Appeal further held, at §163, that the Divisional Court *"clearly took the view...that the IHL Updates before it did not confine themselves to incidents where there was evidence of intent or deliberate conduct. This is why, as those passages made clear, the Updates included incidents of non-deliberate conduct and considered whether there may have been a consistent pattern of such incidents."* Thus, any possible difference of principle was irrelevant given the approach taken.
9. In accordance with the Court of Appeal's Order of 20 June 2019, the Secretary of State has now retaken the decisions which were the subject of the Claimant's challenge. The methodology for the analysis on which those decisions are based is set out in detail in our letter of 7 July 2020. Paragraphs 11 to 16 of that letter explain that, in assessing whether individual incidents of concern might amount to breaches of IHL, the MOD has had particular regard to the guidance as to the relevant principles of IHL contained in the User's Guide, and the judgments of the Divisional Court and the Court of Appeal. It is clear, and is confirmed, that the Secretary of State's analysis has not been confined to or by the definitional elements of "war crimes" or "grave breaches".
10. The Claimant does not purport to challenge the legal or factual findings of the Courts below nor has it identified any free-standing point of law of general public importance which ought to be considered by the Supreme Court. Rather it seeks to perpetuate an academic dispute between the parties by putting forward a series of abstract propositions as to what "serious violation of IHL" might mean and requiring the Secretary of State to indicate whether or not she accepts those propositions. This is manifestly not an appropriate basis for an appeal to the Supreme Court.
11. It is emphasised that the Court of Appeal expressly rejected the Claimant's invitation to provide an abstract definition of "serious violations of IHL" in order to assist the Secretary of State in the decision-making process in the future. At §165 the Court of Appeal rightly stated:

"In our view, it would not be appropriate to seek to give some abstract definition of the concept of "serious violations" of IHL since so much depends on the precise facts. We also remind ourselves that the function of judicial review is generally to assess the lawfulness of past executive action, not to give advice for the future. Judicial review is in this regard highly fact-specific. Furthermore, we have to recall that the context in which the issue arises here is not one in which the Secretary of State is sitting like a court adjudicating on past violations but rather in the context of a prospective and predictive exercise as to whether there is a clear risk that arms exported under a licence might be used in the commission of a serious violation of IHL in the future."
12. Moreover, the Claimant has itself previously accepted that it would be inappropriate for the definition of "serious violations of IHL" to be aired in the abstract in the Supreme Court. Its application for permission to appeal on Grounds 2 and 4 was predicated solely on the basis that *"if permission to appeal were granted [to the Secretary of State on Ground 1] ... it would be desirable for the Supreme Court to consider all the points in dispute before the Court of Appeal...It would pursue an appeal on those grounds only if the Secretary of State were granted permission to appeal against the quashing of the decisions on ground 1."* This was reinforced in the concluding paragraph of the Claimant's application, which stated that: "CAAT

accepts that it would not be appropriate to grant permission to appeal on grounds 2 and 4 alone. Accordingly, if permission to appeal is refused to the Secretary of State on ground 1, it should also be refused to CAAT on grounds 2 and 4."

13. In circumstances where the Secretary of State has now retaken the decisions which were the subject of this challenge and stated that she intends to withdraw her appeal to the Supreme Court, it follows that the Claimant's appeal on Grounds 2 and 4 must also fall away. We note that your letters of 14 and 22 July 2020 do not suggest that there is any basis on which the Claimant's appeal on Ground 2 might continue.
14. We would therefore be grateful if you could confirm that the Claimant does not intend to continue with its appeal (on the terms suggested in the draft Consent Order which was sent under cover of our letter of 7 July 2020).
15. Given the proximity of the end of term and the need for this to be resolved before the end of term, we request that you provide the necessary confirmation by 11am on Thursday 30th July, failing which we will make an application to the Supreme Court for the withdrawal of all grounds of this appeal.

Yours sincerely



Alexis Cooke
For the Treasury Solicitor

D +44 (0)20 7210 4675
F 020 7210 3330
E alexis.cooke@governmentlegal.gov.uk