

Claim No: CO/1306/2016

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN

on the application of

CAMPAIGN AGAINST ARMS TRADE

Claimant

-and-

THE SECRETARY OF STATE FOR BUSINESS INNOVATION AND SKILLS

Defendant

WITNESS STATEMENT OF

EDWARD BELL

I EDWARD THOMAS BELL, OF THE DEPARTMENT FOR INTERNATIONAL
TRADE, 1 VICTORIA STREET, LONDON, SW1H 0ET, SAY AS FOLLOWS

1. I am the Head of the Export Control Organisation ("ECO") in the Department for International Trade ("DIT"), which is the UK's export licensing authority. As Head of ECO I am the lead official responsible for exports controls in DIT and I have held this position since January 2013.
2. I am duly authorised to make this statement on behalf of the Secretary of State. In making this statement I am drawing on my own knowledge of the matters in issue as well as matters that I am aware of having read the documents exhibited.

The Secretary of State

3. Following the recent creation of the new Department for International Trade, responsibility for export controls has been transferred, by administrative means, from the Secretary of State for Business, Innovation and Skills to the new Secretary of State for International Trade. However, until arrangements for transferring the relevant legal rights, liabilities and obligations from the Secretary of State for Business, Innovation and Skills to the Secretary of State for International Trade have been completed, legal proceedings brought in relation to the Secretary of State for Business, Innovation and Skills, can continue in his name and may be transferred to the Secretary of State for International Trade in due course. I will refer in this statement to the new Department for International Trade where appropriate, rather than the Department for Business, Innovation and Skills ("BIS").

The scope of this statement

4. I am making this statement to assist the Court in relation to the challenges that have been made to the Secretary of State's December 2015 decision to continue to grant new licences for the sale or transfer of arms or military equipment to the Kingdom of Saudi Arabia ("KSA"); and the Secretary of State's decision not to suspend extant export licences for the sale or transfer of

arms and military equipment to the KSA. Consequently, the focus of this statement will be on how the Secretary of State for Business, Innovation and Skills and, since 13 July 2016, the Secretary of State for International Trade (hereafter "the Secretary of State") has reached decisions in relation to the granting of export licences for the sale or transfer of arms and military equipment to the KSA during the conflict in Yemen; and, in particular, to explain why the decision was made that the clear risk threshold for mandatory refusal under Criterion 2c of the Consolidated EU and National Arms Export Licensing Criteria ("the Criteria") has not been met.

I. OVERVIEW OF DIT PROCESS

5. The Secretary of State has overall responsibility for the UK's export licensing process and is responsible for:
 - a. The statutory and regulatory framework of export controls (i.e. what items and activities are controlled); and
 - b. The decision to grant or refuse an export or trade control¹ licence, and, where necessary, to suspend or revoke extant licences in accordance with the applicable legislation and announced policy.
6. In exercising these powers the Secretary of State seeks and takes into account advice from a number of other Government Departments, principally the Foreign and Commonwealth Office ("FCO"), the Ministry of Defence ("MOD") and the Department for International Development ("DFID").

¹ Trade control licences cover trafficking or brokering activity between two third countries where the transaction or deal is brokered in the UK or by a UK person overseas. The present matter is concerned only with export licences.

7. Each licence application is assessed on a case-by-case basis against the Criteria, which put into effect the EU Common Position 2008/944/CFSP of 8 December 2008, defining common EU rules governing control of exports of military technology and equipment and further developments in EU export control law and international obligations. A copy of the Criteria is exhibited at EB1 to this statement.²

8. An export or trade control licence will not be granted by the Secretary of State if to do so would breach any aspect of the Criteria. Respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law, as set out in Criterion 2 of the Criteria, are key considerations when deciding whether to grant an export licence.³ The particular questions asked by the Secretary of State under the Criteria, in relation to the supply of arms and military equipment to Saudi Arabia during the conflict in Yemen, are set out in section IV below.

9. The assessment of a licence application is handled from start to finish through a secure digital system. Once a licence application is received,⁴ the Export Control Organisation in DIT carries out a number of initial checks to ensure the documentation is complete, including: a search for relevant denial notices from other Member States of the EU and of international export control

² There are a number of Open General Export Licences (OGELs) that can be used to export certain military items to KSA. These are pre-published licences that can be used by exporters that are registered via the ECO's licensing database, SPIRE. OGEL holders must meet all specified terms and conditions and are subject to compliance audits. OGELs are generally used for lower risk items. OGELs are only granted where to do so is compliant with the Consolidated Criteria.

³ "Respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law" is the heading of Criterion 2. Application of the relevant test to be applied in that regard (as set out in the text of Criterion 2) is addressed below.

⁴ Applications are submitted electronically to ECO via the SPIRE licensing database.

regimes in relation to essentially identical transactions⁵; a search as to whether the named individuals or entities are listed in sanctions regimes; a search of databases of entities of concern; and a check for the provision by the applicant of an End User Undertaking. End User Undertakings (EUUs) are signed declarations by end users confirming how they will use exports. They are an important part of the risk assessments of proposed exports using the Criteria. In addition, qualified personnel in DIT conduct a technical assessment to verify that the proposed exports or activities are subject to control.

10. Following these initial checks the application, with its supporting technical and end user documentation, is sent to advisers in other Government Departments (as identified below) to consider whether the proposed exports or activities are compatible with the Criteria. These departments have expertise in areas relevant to the consideration of export licence applications against the Criteria, such as human rights, international obligations and defence.

11. The decision by the Secretary of State to grant or refuse a licence takes full account of the recommendations made by these Departments.⁶ Ultimately however the responsibility for making the decision rests with the Secretary of State. The majority of decisions are made by officials on behalf of the Secretary of State. Licence applications that may be particularly sensitive may be referred to Ministers. I discuss below the involvement of Ministers in relation to the decisions that are under challenge in these proceedings.

⁵ The international export control regimes are groups of States that work together to prevent the proliferation of conventional arms and weapons of mass destruction by agreeing common lists of items that should be subject to control and exchanging information relevant to their aims. The four regimes are the Wassenaar Arrangement, Missile Technology Control Regime, Nuclear Suppliers Group and Australia Group.

⁶ This is consistent with the description of roles and responsibilities of other Government Departments in the licensing process set out in Annex A of the Government's UK Strategic Export Controls Annual Report 2015 published 21 July 2016. A copy is exhibited at EB2.

12. In the event that any advisory Government Department or DIT recommends refusal, the application is referred to a cross-Departmental Refusals Meeting for a case review. If agreement on how to proceed is not reached at this meeting, the case is referred to Ministers for a final decision. The Secretary of State makes the final decision in these cases but Ministers from the advisory Departments, principally the FCO and MOD, provide recommendations to help him reach a decision.

II. WHO MAKES THE ASSESSMENT

13. Each advisory Government Department is responsible for assessing aspects of the Criteria according to its competence. Summarised below is the Department responsible for taking the lead with respect to each criterion (identified with reference to the heading used in the Criteria to describe each criterion):
 - a. **Criterion 1** – Respect for the UK's international obligations and commitments, in particular sanctions adopted by the UK Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations. *FCO leads*
 - b. **Criterion 2** – 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. *FCO leads*
 - c. **Criterion 3** – The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts. *FCO leads*

- d. **Criterion 4** – Preservation of regional peace, stability and security.
FCO leads
- e. **Criterion 5** – The national security of the UK and territories whose external relations are the UK's responsibility, as well as that of friendly and allied countries. *MOD leads*
- f. **Criterion 6** – The behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.
FCO leads
- g. **Criterion 7** – The existence of a risk that the items will be diverted within the buyer country or re-exported under undesirable conditions.
FCO and MOD both lead
- h. **Criterion 8** – The compatibility of the transfer with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources. *DFID leads*
14. The FCO is the Department with responsibility for assessing the compatibility of proposed exports or activities with Criterion 2, including 2c which provides: *"Having assessed the recipient country's attitude towards the relevant principles established by international human rights instruments, the Government will 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"*.
15. Assessment of Criterion 2 necessarily involves consideration of foreign affairs. Responsibility for these issues lies with the Foreign Secretary. Advice from

the Foreign Secretary, or officials acting on his behalf, is therefore required to enable the Secretary of State, or officials acting on his behalf, to reach a decision to grant or refuse a licence on the basis of Criterion 2. Where appropriate, the FCO will take into account information provided by the MOD in its assessment of Criterion 2.

16. Similarly with Criterion 7 referenced in Section V below, the advice of the Defence Secretary, or officials acting on his behalf, is also required to enable the Secretary of State to reach a decision to grant or refuse a licence on the basis of Criterion 7.

III. SUSPENSION MECHANISM AND REVOCATIONS

17. The Secretary of State has the power to suspend extant licences (in article 32 of the Export Control Order 2008). This means that an exporter is temporarily prevented from using a valid (extant) licence that they already hold. The Secretary of State also has the power to suspend licensing. This means that the processing of licence applications in the system, and of any new applications that might be received during the period of suspension, is halted and no decisions are taken.

Suspensions

18. The Secretary of State's policy is to consider suspending licensing and extant licences where, in the light of new evidence and information, it would be considered that a proper risk assessment against the Consolidated Criteria would be difficult. Such a situation might arise where conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult.

19. A Review of Export Policy following the Arab Spring, where a number of licences were revoked and the processing of new licence applications for some destinations was halted for an extended period of time, resulted in a Written Ministerial Statement (WMS) by the then Foreign Secretary on 13 October 2011. The review *"identified areas where our system could be further strengthened to enable Ministers to respond rapidly and decisively to the outbreak of conflict, instability or unpredictable events in other countries"*. One of the measures was: *"...a mechanism to allow immediate licensing suspension to countries experiencing a sharp deterioration in security or stability. Applications in the pipeline would be stopped and no further licences issued, pending Ministerial or departmental review."* A copy is at EB3.
20. This policy was set out in detail by the then Secretary of State by WMS on 7 February 2012:

"The new suspension mechanism will allow the Government to quickly suspend the processing of pending licence applications to countries experiencing a sharp deterioration in security or stability. Suspension will not be invoked automatically or lightly, but triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult. A case-by-case assessment of a particular situation will be necessary to determine whether a licensing suspension is appropriate."

"Any decision to suspend will be taken by the Licensing Authority based on advice from relevant Government Departments and reporting from our diplomatic posts. Parliament, industry and the media will be informed of any suspension."

"Suspension will be tailored to the circumstances in play and will not necessarily apply to all export licence applications to a country, but may instead be for applications for particular equipment (for example crowd control goods), or for applications for equipment going to a particular end-user."

"If a decision to suspend is made, work on licence applications in the pipeline will be stopped and no further licences issued pending ministerial review. Once the suspension is lifted, applications will not be required to be resubmitted."

Revocations

21. The Secretary of State also has the power to revoke licences: the power is contained in article 32 of the Export Control Order 2008 – see extract from the Order attached at EB4. This means the licence in question is no longer valid.
22. In its 2014 Report (HC 186), the Committees on Arms Export Control (CAEC) made the following recommendation: *“The Committees recommend that the Government states in its Response... the grounds on which the Government has the right to revoke export licences for controlled goods that it has approved.”* A copy of the relevant extract is at EB5. In response, the Government stated:

“The 2008 Order does not specify the grounds on which a licence may be revoked. In practice the reasons include:

- (i) As a result of the imposition of EU or UN sanctions;*
- (ii) Where there has been a change in Government policy in respect of the export of certain goods, or the export of specified goods to a certain destination, and the proposed export is no longer consistent with the revised policy;*
- (iii) Where there has been a change in circumstances in the destination country or region such that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies;*
- (iv) Where new information has come to light about a particular export which indicates that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies;*
- (v) Where an exporter has failed to comply with the terms and conditions of the licence, or as a result of enforcement action by HMRC/UKBA;*
- (vi) For administrative reasons, such as a company ceasing to trade and therefore no longer being able to use the licence, or where the exporter requests an amendment to a licence and revoking and re-issuing it is simpler than making an amendment.”*

IV. THE SECRETARY OF STATE'S DECISIONS THAT ARE BEING CHALLENGED

23. On 9 and 12 November 2015 solicitors for the Claimant wrote to the Secretary of State; copies are exhibited at EB6. In their letters the Claimant requested information about:

- a. the licences for export to KSA that the ECO had issued for military equipment that could be used in Yemen;
 - b. whether the Government had reviewed its decision to continue issuing these licences; and
 - c. the role of UK service personnel in Saudi Arabia and any safeguards that had been put in place.
24. Officials from BIS, FCO and MOD met on 16 November to coordinate the response to the letters. A draft letter was submitted for approval to the Secretary of State on 3 December 2015. A copy of the email to the Secretary of State's office requesting approval is attached at EB7. The Secretary of State approved the letter on 9 December 2015 and it was sent that day. A copy of the letter is at EB8.
25. On 8 January 2016 the Claimant submitted a letter before claim and shortly afterwards the Secretary of State asked for advice from the Foreign Secretary. A copy of the letter before claim is at EB9.
26. On 1 February 2016, the Secretary of State received the Foreign Secretary's advice (exhibited at EB10) that the Secretary of State should not suspend extant licences and nor should he suspend the processing of new licence applications for the export of arms to KSA. The Foreign Secretary's recommendation was that licences for arms exports to KSA should continue to be assessed on a case-by-case basis, against the Criteria.
27. On 4 February 2016 a submission was made to the Secretary of State recommending that he agree in principle with the Foreign Secretary's advice but that he should defer a final decision until legal advice had been received in relation to the proposed response to the letter before claim. A copy of that submission is at EB11. The submission highlighted concerns with the "gaps in knowledge" regarding KSA airstrikes. However, it was concluded that FCO had sufficient information to continue to make proper assessments against the

Criteria. The FCO's submission to the Foreign Secretary was provided as an annex. As confirmed in an email of 5 February 2016, the Secretary of State noted the advice and was content with the recommendation.

28. A further submission to the Secretary of State was made on the 10 February 2016 following receipt of the legal advice. A copy of the submission is exhibited at EB12.
29. Together with colleagues I met with the Secretary of State on the evening of the 10 February 2016. I summarised the discussion in an email the subsequent day which is exhibited at EB13. In the meeting, I expressed the view that it might be more prudent to suspend licences. However, I noted that the FCO view was that they had sufficient information to continue to assess licence applications on a case-by-case basis despite not being in possession of complete information. The FCO was the lead Department on Criterion 2 and their view therefore carried particular weight. At the end of the discussion the Secretary of State said that he would consider the matter overnight.
30. A further meeting was held between the Secretary of State, the BIS Permanent Secretary, and my colleagues on 11 February 2016. A copy of the meeting note is at EB14. At the end of the discussion, the Secretary of State concluded that the decision to continue exporting to Saudi Arabia was finely balanced, but given in particular the advice of the Foreign Secretary and Defence Secretary, he was minded to continue to permit exporting. He noted that the situation in Yemen was continuously evolving, and that this decision could change. The Secretary of State explained that he wanted the situation to be monitored carefully, so that he could be advised of any changes. Ideally, he wanted weekly reports from the FCO and MOD on the situation so that, should the evidence suggest that the Criteria for exporting to KSA were no longer met, he could take a decision to suspend export licences.
31. It was agreed that a letter would be sent to the Foreign and Defence Secretaries, and that the Permanent Secretary would write to his counterpart

in the FCO asking for weekly updates on the situation in Yemen. These letters were sent on the evening of 11 February 2016 and included the following text:

"This is a difficult issue and one I have considered very carefully. On the basis of the advice you have provided, I am currently minded not to suspend licensing and not to suspend extant licences.

"Nevertheless, in view of the uncertainty and gaps in information available I have requested weekly updates from the FCO, MOD and Embassy on latest reports from the region including more detail on the impact of Saudi airstrikes. Should new evidence that the 'clear risk' threshold has been breached come to light I will suspend licensing."

32. These letters were discussed at a meeting at Cabinet Office on 12 February 2016. It was agreed that a weekly update would be provided for all members of the National Security Council⁷. An email I wrote to the Secretary of State's office setting out what had been decided at the meeting is exhibited at EB15.
33. Responses from the Foreign Secretary and Defence Secretary were received over the weekend of 13/14 February 2016. Copies are exhibited at EB16.
34. On 15 February 2016, the Secretary of State spoke to the Foreign Secretary who indicated that the sort of weekly advice requested by the Secretary of State was unnecessary because there was already a process for the Foreign Secretary, rather than the National Security Council, to provide advice to the Secretary of State on Criterion 2. It was subsequently agreed that I would attend fortnightly briefings on the situation in Yemen so that I could advise the Secretary of State of any changes which might impact on licensing decisions.

⁷ The National Security Council (NSC) is a Cabinet Committee and is the main forum for collective discussion of the Government's objectives for national security. It is chaired by the Prime Minister.

35. Following his discussion with the Foreign Secretary, the Secretary of State agreed that the draft reply to the Claimant should be sent. That was done on 16 February 2016.

The Foreign Secretary's continuing position and advice has been that licence applications can and should continue to be assessed on a case-by-case basis against the Criteria. I have attended fortnightly cross-Whitehall meetings at which the situation has been reviewed. Copies of my emails summarising the discussions at those meetings is attached at EB17. These meetings have provided insight into the political, military and humanitarian situation in Yemen. This has enabled me to brief the Secretary of State effectively and to ensure that the situation is kept under regular review.

36. Throughout the conflict in Yemen applications to export military goods to KSA and its coalition partners have continued to be assessed on a case-by-case basis against the Criteria.
37. Eighteen licence applications to supply the Royal Saudi Air Force have been referred directly to the Secretary of State for consideration during the conflict, based on advice from the FCO and MOD, only one of which was referred in the period since December 2015. Copies of the emails relating to this application are attached at EB18. These applications included licences for Paveway guided bombs and all were approved.
38. In March 2016, a number of Trade control licences for small arms and ammunition were refused because of risk of diversion to undesirable end use (Criterion 7), which I discuss further below.

V. DIVERSION OF WEAPONRY

39. The assessment of any licence involves a consideration of the risk of diversion pursuant to Criterion 7. The Secretary of State, in considering advice

provided by the FCO and MOD, therefore considers the risk of diversion when assessing licences for the export of military equipment to KSA. The Secretary of State considers a number of factors in this assessment:

- a. Does the end-user have a legitimate need for this equipment? For example, who they are, what activities are they known to be involved in, who they are linked to, and whether they purchased this equipment before.
- b. Is the end-use credible? Are the goods designed for the stated end-use; are they of the right technical specification?
- c. Are the quantities reasonable and proportionate to the stated end-use?
- d. Does all the information in the application and supporting documentation tell a consistent story? Are there doubts about the veracity of any of the information or documentation?
- e. Does the end-user have proper means to safeguard the equipment? Does the recipient state have proper controls over possession, transfers and exports (as appropriate)?
- f. Does corruption in the destination country indicate a higher risk of diversion?
- g. Are the types of goods known to be subject to illicit procurement? Are there known or suspected illicit procurement channels in the country or region? Is there any evidence of past diversion from this end-user or country?

h. Are any intermediaries involved? What is known about them?

40. In relation to the conflict in Yemen, the Secretary of State has refused a number of licences because of the risk of diversion:

a. In 9 April 2015, 3 Standard Individual Export Licences⁸ ("SIELs") were revoked and Yemen was removed as a permitted destination from one Open Individual Export Licence⁹ ("OIEL") and

b. In March 2016, 7 individual trade control licences ("SITCLs") to supply ammunitions and arms to KSA were refused.

41. The Secretary of State considers that the risk of diversion of the equipment that has been licensed for export to KSA to be very low. This has been based, in each case, on the value and the nature of the equipment.

VI. COMMITTEE ON ARMS EXPORT CONTROL

42. In March 2016, the Committees on Arms Export Control ("CAEC")¹⁰ launched an inquiry into the use of UK-manufactured arms in the conflict in Yemen. The inquiry looked at the size of arms sales to the Gulf region and asked questions about the role that trade plays in advancing UK interests there. It examined whether weapons manufactured in the UK have been used by Saudi Arabia in Yemen and if any of the Criteria had been breached.

⁸ These licences permit a named exporter to export specific items to specific end-users in specific destinations.

⁹ These licences permit a named exporter to export multiple shipments of specific goods to specific countries; the end-user does not normally need to be specified.

¹⁰ The CAEC comprises four select committees – Business, Defence, Foreign Affairs, and International Development – meeting together to examine the government's expenditure, administration and policy on arms exports and other controlled goods.

43. On 13 April 2016, the FCO submitted written evidence to the CAEC. On 27 April 2016, Anna Soubry, the then Minister of State for Small Business, Industry and Enterprise at BIS gave oral evidence to the CAEC, along with Ministers from the FCO, MOD and DFID.
44. The CAEC is expected to report on its inquiry after the summer recess. Further information is available on the CAEC's website.¹¹

I believe that the facts stated in this statement are true.

SIGNED



DATED

5 AUGUST 2016

¹¹ <http://www.parliament.uk/business/committees/committees-a-z/other-committees/committee-on-arms-export-controls/>