Claim No. CO/3579/2020

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-

SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant

SUMMARY GROUNDS OF DEFENCE

INTRODUCTION

1. These Summary Grounds respond to the Claimant's Amended Statement of Facts and Grounds (**"ASFG"**) dated 20 October 2020. The Claimant seeks permission to challenge the decisions, retaken by the Secretary of State on 7 July 2020:

   a. not to suspend extant licences for the sale or transfer of arms and military equipment to the Kingdom of Saudi Arabia (**"KSA"**) for possible use in the conflict in Yemen; and

   b. to continue to grant further licences for the sale or transfer of arms and military equipment to KSA for possible use in the conflict in Yemen (**"the New Decisions"**).

2. The New Decisions were retaken pursuant to the Order of the Court of Appeal dated 20 June 2019 in earlier proceedings brought by the Claimant against the Secretary of State[1] (**"the First Proceedings"**), in which the Claimant challenged the equivalent decisions

[1] *R (Campaign against Arms Trade) v Secretary of State for International Trade* [2017] HRLR 8 (DC) and [2019] EWCA Civ 1020 [2019] 1 W.L.R. 576 (CA)

taken by the then Secretary of State and communicated to the Claimant on 9 December 2015. That challenge was rejected by the Divisional Court (Burnett LJ and Haddon Cave J) but was upheld, in part, by the Court of Appeal (Sir Terence Etherton MR, Irwin LJ and Singh LJ). For the reasons given in its OPEN and CLOSED judgments dated 20 June 2019, the Court of Appeal substantially endorsed the Secretary of State's decision-making processes but held that the Secretary of State had not sought *"to assess the likelihood of a breach of IHL having been committed by the Coalition in any specific case".*[2] The Court of Appeal directed that *"The question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced… At least the attempt had to be made."*[3]

3. This was the Court of Appeal's only criticism of the Secretary of State's decision-making process. The Secretary of State has therefore developed her existing methodology in accordance with the legal approach identified by the Court of Appeal. It is on the basis of this revised methodology, which is described in more detail in the CLOSED Summary Grounds, that the Secretary of State has reached the New Decisions.

4. The Claimant does not suggest that the Secretary of State has failed to comply with the Court of Appeal's direction that she must: (i) assess the likelihood of a breach of IHL having been committed in any specific case; and (ii) ask whether there was an historic pattern of breaches of IHL on the part of the Coalition/KSA (the only basis on which the decisions were quashed for reconsideration by the Secretary of State). Instead, four grounds of review are advanced in the ASFG:

   a. No proper basis for conclusion that violations are limited to those identified by the Secretary of State (§§ 51 – 55 of the ASFG);
   b. No proper basis for conclusion that no "pattern" of violations existed (§§ 56 – 61 of the ASFG);
   c. No proper basis for conclusion that Criterion 2C is not met despite "established" record of past "isolated" violations (§§ 62-66 of the ASFG);
   d. Misdirection as to (i) "serious violations" of IHL; and (ii) the need to consider whether there is impunity in KSA for such serious violations (§§ 64-78 of the ASFG).

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2 Court of Appeal OPEN Judgment, §83.
3 *Ibid*, § 138.

5. The Secretary of State submits that permission for judicial review should be refused on the basis that none of the grounds is properly arguable:

   a. Grounds 1 to 3 are re-statements of the Claimant's central contention in the First Proceedings that the "findings" of violations of IHL made by UN bodies and other NGOs raised a presumption of a "clear risk" under Criterion 2C and/or that, in light of those "findings", it was irrational for the Secretary of State to have come to any other conclusion that there was a "clear risk" under Criterion 2C. This contention was rejected by both the Divisional Court and the Court of Appeal;[4]
   b. Ground 4 is merely a re-run of the arguments advanced as Grounds 2 and 4 in the Court of Appeal in the First Proceedings[5]. Those arguments were rightly rejected in the First Proceedings and there is no basis for them now to be accepted.

THE CONTEXT

The legal context

6. The Secretary of State accepts the summary of the legal framework set out at §§ 35-44 and 46 of the ASFG.

7. In addition to the material from the User's Guide which is cited by the Claimant, the Secretary of State notes the following:

   a. §2.10 identifies *"The relevant principles established by instruments of international humanitarian law"* as follows:

      "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

[4] See, in particular, Divisional Court OPEN Judgment, §§ 86, 205, 208 and Court of Appeal OPEN Judgment, §§ 134, 135.

[5] Ground 2 in the Court of Appeal was "whether there are mechanisms in place to ensure accountability for violations of IHL committed by the armed forces" and Ground 4 was that the Divisional Court had failed to answer the question whether the term "serious violations" of IHL in Criterion 2c was synonymous with "grave breaches" of the Geneva Conventions and war crimes under international law or, as CAAT submitted, referred to serious violations of IHL more generally, and should have resolved that issue in CAAT's favour: see § 49 of the Court of Appeal OPEN Judgment.

attacks, the rule of proportionality, the rule on feasible precautions, the rule on superfluous injury or unnecessary suffering and the rule on environmental protection…"

b. The non-exhaustive list of *"relevant questions"* in §2.13 includes the following (clearly demonstrating that they are intended to be indicative and applied as relevant, rather than required to be considered serially):

- 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 stated end user have adequate procedures in place for stockpile management and security, including for surplus arms and ammunition?

8. As to the meaning of "serious violations" of IHL, the Divisional Court held, at § 16 of its OPEN Judgment, that:

"… 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)

9. The Secretary of State accepts this finding and therefore that the concept of *"serious violation"* is broader than the concept of *"war crimes"*, and that it may in principle be committed without intent, recklessness or any mental element – for instance by a failure to take feasible precautions.

10. However, the Secretary of State emphasises that the question in this context concerns the risk of *"serious violations"* being committed by the KSA. For the reasons set out at §§ 46 to 49 below, the Secretary of State does not consider that it is necessary or appropriate for the Court to import into the Criterion 2C threshold *"specific meanings"* which have been developed in the context of individual criminal responsibility.

The Court Of Appeal's Decision

11. In allowing the Claimant's first ground of appeal in the First Proceedings,[6] the Court of Appeal made the following findings:

    a. The major NGOs, including the UN Panel of Experts, had a major contribution to make in recording and analysing events on the ground in the Yemen conflict. However, the Secretary of State had access to a great deal of information which the NGOs and the UN Panel could not see.[7]
    b. The evidence coming from the NGOs and the UN Panel of Experts was considered in each case where a concern was raised.[8]
    c. The processes of analysis undertaken by the MOD and the Foreign Office were, as the Divisional Court had held, *"rigorous and robust"*, *"multi-layered"* and *"carried out by numerous expert government and military personnel."*[9]
    d. Those advising the Secretary of State were all along keenly alive to the question of possible violation of IHL and its impact on the continued supply of weapons.[10]
    e. There was no doubt that the UK made sustained efforts in offering training, support and in other ways at all levels to emphasise the importance of observance of IHL to KSA.[11]
    f. However, *"… the question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which was required to be faced… At least the attempt had to be made."*[12]
    g. It was not the case that there would only be one answer on future risk if historic violations were found to have taken place. §2.13 of the User's Guide clearly contemplates that past violations may be assessed to be "*isolated incidents*". The Claimant conceded, and the Court of Appeal agreed, that this assessment was for the Secretary of State and her advisers.[13]

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6 "[T]hat the evidence shows that the Secretary of State's consideration of Saudi Arabia's past and present record of respect for IHL, including whether a pattern of violations could be discerned, was fundamentally deficient."
7 Court of Appeal OPEN Judgment § 134.
8 *Ibid.* §135.
9 *Ibid.* §136.
10 *Ibid*. §137.
11 *Ibid*. §137.
12 *Ibid*. §138.
13 *Ibid*. §144

12. The Claimant's second ground of appeal (replicated in Ground 4 of this challenge) asserted that the Secretary of State had erred in failing to ask certain of the 21 questions identified in §2.13 of the User's Guide. The Court of Appeal, rejecting this ground of appeal, agreed with the Divisional Court that:

    a. the User's Guide does not purport to require that each and every question mentioned must be posed: these are questions, set out in a non-exhaustive manner, which the decision-maker may or may not consider;[14]
    b. there was no additional requirement founded in rationality that the Secretary of State had to ask these specific questions. In the context of this particular case, it was reasonably open to the Secretary of State to focus on other matters.[15]

13. The Claimant's fourth ground of appeal[16] (also replicated in ground 4 of this challenge) sought to establish that the Secretary of State had misdirected herself as to the meaning of *"serious violations"* of IHL. The Court of Appeal:

    a. rejected the Claimant's submission that the Divisional Court had erred in law in misunderstanding the meaning of the term "serious violation of IHL";[17]
    b. rejected the Claimant's submission that the Secretary of State had erred in her approach to the term in the decision-making process;[18]
    c. refused the Claimant's invitation to provide a definition of "serious violations of IHL" to the effect that even a single incident could amount to a serious violation.[19]

14. Importantly, the Court of Appeal emphasised, at § 165, 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 alleged 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."*

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14 *Ibid*. §151.
15 *Ibid.* §153.
16 Permission was refused in respect of the Claimant's third ground of appeal.
17 Court of Appeal OPEN Judgment, §158.
18 *Ibid*. §164.
19 *Ibid.* §165.

The broader context

15. The Claimant focuses principally on "findings of violations" made by competent UN bodies, including the Security Council Panel of Experts on Yemen, and other NGOs. These reports are of course relevant and they have been included in the analysis undertaken by the Ministry of Defence ("**MOD**").[20] As already noted, the Court of Appeal made a series of findings as to the proper place of these matters in the Secretary of State's decision making. These reports also need to be seen in the broader context of the conflict in Yemen.

16. As the Divisional Court noted in the First Proceedings:[21]

> *"There can be little doubt as to the seriousness of the military conflict in Yemen, and the threat which it is perceived to pose to Saudi Arabia and the stability of the wider region."*

17. The Coalition of nine States, led by KSA, intervened at the express request of President Hadi in March 2015 *"to protect Yemen and its people from continuing aggression by the Houthis"*. UN Security Council Resolution 2216, passed in April 2015, affirmed the legitimacy of President Hadi and condemned the unilateral actions taken by the Houthis. The conflict has continued (with occasional ceasefires) since then.

18. The Coalition campaign has primarily been conducted by airstrikes. In the context of this high intensity air campaign, the number of allegations of breaches of IHL is comparatively low. The number of credible allegations (that is allegations in respect of which the MOD assesses that the alleged events are likely to have happened, irrespective of whether they might be breaches of IHL) is lower still. Moreover, the number of credible allegations has fallen rapidly since April 2015 and there have been extended periods during which no credible allegations assessed to be attributable to KSA have been made.

19. It is also necessary to bear in mind the nature of the Houthi warfare and tactics. This context is not relied on as providing any justification for violations of the principles of IHL, but it is important in illustrating the limitations of relying on eye-witness accounts

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[20] Divisional Court OPEN Judgment, § 208(iv); Court of Appeal OPEN Judgment, § 135.
[21] Divisional Court OPEN Judgment, § 45.

and analysis of observations on the ground and the difficulties in assessing whether individual airstrikes may constitute breaches of IHL.

20. The peace process is currently being led by UN Special Envoy, Martin Griffiths. In the South of Yemen, a Saudi-brokered agreement to implement the Riyadh Agreement has resulted in the formation of a new cabinet between the Yemeni Government and the Southern Transitional Council. Special Envoy Griffiths continues to engage the Yemeni parties in his peace proposals, which are based on humanitarian and economic measures, a nationwide ceasefire and a resumption of a comprehensive political process. However, the Houthis continue to carry out offensives on Ma'arib city, east of Sana'a and to launch cross border attacks into Saudi Arabia.

The decision-making process

21. The Secretary of State's decision-making process, and the information which feeds into that process, was described in detail at §§ 87 to 175 of the Divisional Court's OPEN Judgment. In summary:

    a. The relevant question for the Secretary of State is whether there is a clear risk that the items to be licensed might be used in the commission of a serious violation of IHL.
    b. In addressing that question, the Secretary of State focuses on the three key factors identified in § 2.13 of the User's Guide, namely: (i) the recipient's past and present record of respect for IHL; (ii) the recipient's intentions as expressed through formal commitments; and (iii) the recipient's capacity to ensure that equipment or technology is used in a manner consistent with IHL.
    c. The Secretary of State's assessment is informed by the following particular strands of information and analysis:
        i. MOD analysis of allegations of violations of IHL which are reported in the press or social media or which are brought to its attention by, for instance, NGOs or foreign governments;
        ii. An understanding of KSA military processes and systems, obtained in particular through the Defence Attachés at the British Embassy in Riyadh and UK Liaison Officers located in the Saudi Arabian Air Operations Centre in Riyadh and further

informed by the logistical support and training provided to KSA by the UK and others;

iii. Engagement with the KSA, including dialogue at the highest political, diplomatic and military levels;

iv. Post-incident dialogue, including with respect to investigations;

v. Public and private commitments made by Saudi Arabian officials regarding compliance with IHL;

vi. Broader analysis of developments in Yemen relevant to IHL compliance.

d. These strands of information are collated by officials in the Foreign, Commonwealth and Development Office (**"FCDO"**) into regular "IHL Updates" and ad hoc updates as required. The Export Control Joint Unit (**"ECJU"**) administers the UK system of export controls and brings together officials from the Department for International Trade (**"DIT"**), the FCDO and the MOD. It is hosted by DIT. The FCDO, through its officials in ECJU and the Foreign Secretary, provides advice on the Consolidated Criteria to the Secretary of State in relation to all applications for licences to export air combat platforms and associated components to Saudi Arabia that are likely to be used by the Royal Saudi Air Force in Yemen.

22. As noted above, this process has been endorsed by both the Divisional Court and the Court of Appeal, save for the single flaw identified by the Court of Appeal. In response to that flaw, the MOD's analysis of individual allegations of IHL violations (**"the IHL Analysis"**) has been developed to include steps (e) to (i) in the summary below:

a. The allegations which come to the MOD's attention are recorded on a database known as "The Tracker". The Tracker also records all information and intelligence which MOD is able to glean from the various sources to which the UK has access, including details released by the Joint Incidents Assessment Team (**"JIAT"**).[22]

b. For each incident, the analysis records, *inter alia,* the alleged numbers of civilian casualties, alleged damage to civilian infrastructure and any information or

[22] The JIAT was established by Saudi Royal Decree in January 2016 to investigate alleged breaches of IHL by the Saudi-led Coalition in Yemen.

intelligence regarding Coalition air activity in the area, targeting and/or likely causes of the incident.

c. The information available to the UK includes broader contextual knowledge and intelligence and summaries of JIAT investigations.

d. As described above, the MOD first assesses whether an individual allegation is credible and, if so, seeks to identify which of the Coalition States might be responsible for that event.[23]

e. Following the Court of Appeal's judgment, the MOD has applied a further stage of analysis, initially to the incidents on the Tracker which were assessed to be credible and likely to have been caused by the KSA (**"Credible KSA"**).

f. For each of these incidents, an assessment has been attempted across the four principles of IHL which are most relevant in this context, namely: proportionality, feasible precautions, distinction and necessity.

g. The Tracker records the assessment in relation to violation of IHL and the rationale for that assessment. The analysis also identifies (and records on the Tracker) apparent or potential trends across the incidents of concern (whether or not specific incidents are assessed on an individual basis to constitute possible breaches of IHL).

h. This analysis was then extended to incidents which were assessed to be credible and: (i) attributable to the UAE (**"Credible UAE"**); (ii) attributable to one of the other Coalition partners (**"Credible Other"**); and (iii) where it has not been possible to attribute the incident to any particular Coalition member (**"Credible Not Known"**).

i. There is a further category of incidents, which are assessed to be credible, but for which the MOD does not have sufficient information to carry out any further assessment (**"Credible Unable to Assess"**).

23. The experience of the MOD in attempting this exercise has borne out the difficulties for a non-party to a conflict in reaching a reliable view on whether another sovereign State is responsible for breaches of IHL which were highlighted by the Divisional Court at §181(ii) of its OPEN Judgment:

> *"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*

[23] This step in the analysis was added in July 2018, following an *ad hoc* review by the MOD to consider whether there were possible improvements to its processes which might further improve the analysis it provides.

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 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 incidental civilian loss of life, injury or damage…"

24. In light of these inevitable limitations, and bearing in mind the Court of Appeal's express acknowledgment (at §165 of its OPEN Judgment) that this exercise does not require the Secretary of State to engage in a court-like adjudication of alleged past violations but takes place in the context of a prospective and predictive analysis, the IHL Analysis has:

    a. evaluated whether it is possible that each credible incident constitutes a breach of IHL or whether it is unlikely that it represents a breach;
    b. factored "possible" IHL breaches into the overall Criterion 2C Analysis on the basis that they are established breaches of IHL.

25. By setting the threshold as "possible", the IHL Analysis has captured the widest range of potential IHL breaches as a base for assessing the prospective risk as required by Criterion 2C. However, in a number of incidents, it is simply not possible to make an assessment due to insufficient information being available. This has been recorded on the Tracker and, where relevant, these incidents have been included in the identification of potential trends.

26. A summary of the conclusions reached in the IHL Analysis as at October 2019 is provided in the CLOSED Summary Grounds.

27. A small number of incidents have been assessed as *"possible"* violations of IHL. They have therefore been factored into the overall Criterion 2C Analysis on the basis that they are violations of IHL. The MOD has analysed whether these "violations" are indicative of (i) any patterns of non-compliance; (ii) a lack of commitment on the part of Saudi Arabia to comply with IHL; and/or (iii) a lack of capacity or systemic weaknesses which might give rise to a risk of IHL breaches. The MOD has also looked for patterns and trends across the incidents which have been assessed as being unlikely to be breaches of IHL and for which there is insufficient information to make an assessment. In making this assessment, the MOD has not applied a prescriptive approach, but has, for instance, looked

for similarities in the factual nature of the incidents, the reasons/explanations for the incidents and the timescale in which they have occurred. This analysis has not revealed any such patterns, trends or weaknesses.

28. The IHL Analysis is just one part of the Criterion 2C Analysis. In reaching her decision, the Secretary of State has taken into account the full range of information available to the Government. Further details and examples of this thematic analysis are provided in the CLOSED Summary Grounds.

GROUND 1: NO PROPER BASIS FOR CONCLUSION THAT VIOLATIONS LIMITED TO THOSE IDENTIFIED BY THE SECRETARY OF STATE

29. In accordance with the methodology set out above, the MOD has considered each credible allegation in the light of all the information, intelligence and expertise available to it.

30. The Claimant, at §§54-55 of the ASFG, complains that the Secretary of State has not justified her conclusion that there have only been a small number of *"possible"* violations and that her *"rejection"* of the open source reporting is not *"reasonable or justified"*. The characterisation of the open source reporting as creating some sort of legal presumption, or inference of irrationality, or burden of explanation on the Secretary of State to explain why she disagrees with these "findings", has rightly been rejected by the Divisional Court and the Court of Appeal. The Secretary of State is not required to accept the "findings" of these bodies but is entitled to analyse all the information available and to reach her own assessment as to whether each incident constitutes a "possible" violation of IHL.

31. Although it is denied that there is any burden on the Secretary of State to explain why she has reached a different conclusion in relation to whether specific incidents are assessed to be breaches of IHL, it is noted that, of the 23 incidents which are highlighted in the ASFG and the witness statement of Ann Feltham:

    a. A number are assessed by the MOD to be *"possible"* breaches of IHL;

    b. Some are assessed by the MOD not to be credible;

c. Some are assessed by the MOD to be unlikely to be breaches of IHL; and

d. For some there is insufficient information for the MOD to make an assessment.

32. The MOD's analysis of these 24 incidents is summarised in the CLOSED Annex to the CLOSED Summary Grounds of Defence. There is no basis to suggest that the Secretary of State's approach to the assessment of these, or any of the, allegations of concern is irrational.

GROUND 2: NO PROPER BASIS FOR CONCLUSIONS THAT NO "PATTERN" OF VIOLATIONS EXISTED

33. Ground 2 repeats the same error identified above. At §§59(1)-(4) of the ASFG, the Claimant asserts that:

a. The OPEN evidence *"overwhelmingly"* establishes repeated serious violations of IHL;
b. In explaining her decision, the Secretary of State has offered no explanation why the findings of the UN agencies and NGOs are wrong;
c. The UN Panel of Experts has identified the repeated absence of military targets as of concern and, in CAAT's submission, absent any indication of a military target, an attack must, without more, be treated as a *prima facie* breach of Article 48 of Additional Protocol I; and
d. The OPEN evidence confirms the existence of a pattern of conduct, including a repeated failure by KSA to take "all feasible precautions".

34. As set out above, the Secretary of State is entitled to analyse all the information available to her and to reach her own conclusions, both as to whether individual incidents constitute violations of IHL and as to whether there is evidence of a pattern of violations. Indeed, the Claimant rightly conceded, before the Court of Appeal in the First Proceedings, that the question whether any violations are *"isolated incidents"* and the effect that may have on the "clear risk" test is a matter for the Secretary of State and her advisers.[24] In this

[24] Court of Appeal OPEN Judgment, §144.

regard, it is emphasised that the MOD's consideration of patterns and trends of concern has not been confined to those incidents which are assessed to be *"possible"* breaches of IHL. The MOD has also looked across incidents which have been assessed as unlikely to be breaches of IHL or in respect of which there is insufficient information to make an assessment, in order to identify whether there are broader indications of systemic weaknesses or a lack of commitment on the part of KSA to comply with IHL. No evidence of any such pattern has been found.

35. At §59(5), the Claimant asserts that the Secretary of State has failed to consider alleged violations of IHL breaches other than airstrikes in determining whether there is a pattern of non-compliance with principles of IHL by KSA. It is asserted by the Claimant that this is contrary to the approach required by the Court of Appeal and is wrong in principle. However, the IHL Analysis has been developed in response to the Court of Appeal's direction that the Secretary of State is required to address the question whether there was a historic pattern of breaches of IHL by KSA in the conduct of airstrikes in Yemen.[25] There is therefore no basis, either from the terms of §§138-139 of the Court of Appeal's OPEN Judgment, or from the context of the First Proceedings, for the Claimant's contention that the Secretary of State is required to include in the IHL Analysis alleged breaches of IHL which were not related to airstrikes.

36. In any event, the Claimant's contention ignores the fact that the IHL Analysis is only one part of the overall Criterion 2C Analysis. The Secretary of State has taken into account all relevant information – including broader allegations of breaches of IHL – in considering more broadly KSA's intentions and capacity with regard to IHL compliance.

37. Further, under this ground, the Claimant contends that the Secretary of State appears to have misdirected herself in adopting the position that *"special caution"* is not required in her assessment of KSA's compliance with IHL. This argument is based on a misreading of Criterion 2 which imposes quite separate obligations (two negative and one positive) on the Government in three distinct situations. It provides that the Government will:

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[25] This is clear from the summary of the Claimant's evidence at §§61-80 of the Divisional Court's OPEN Judgment.

a. not grant a licence if there is a clear risk that the items might be used for internal repression;
b. exercise special caution and vigilance in granting licences to countries where serious violations of human rights have been established by competent bodies of the UN, the Council of Europe or the EU; and
c. not grant a licence if there is a clear risk that items might be used in the commission of a serious violation of IHL.

38. The difference in the phrasing and structure of these paragraphs is not accidental. Criterion 2A and 2C both deal with situations where there is a *"clear risk"* that items to be exported might be used directly for internal repression/serious violations of IHL. Criterion 2B is not based on a direct link between the items to be exported and the potential harm or breach, but on a more tenuous link. In this scenario, exports are not prohibited, but the Government is required to exercise *"special caution and vigilance"*. The Claimant's assertion, at §59(7) of the ASFG, that *"special caution"* must be applied to an assessment of whether items might be used in the commission of a serious violation of IHL is simply wrong.

39. Even if this threshold were applicable to Criterion 2C, there can be no suggestion that the Secretary of State has not applied *"special caution and vigilance"* at all times. The Divisional Court highlighted the *"anxious scrutiny – indeed […] what seems like anguished scrutiny at some stages…"* applied in the IHL Analysis and the Secretary of State's decisions.[26] The Court of Appeal upheld the Divisional Court's conclusions regarding the rigorous and robust nature of the decision-making process.

40. In summary, there is no basis for asserting that the Secretary of State's conclusion that there is no "pattern" of violations is irrational.

GROUND 3: NO SUSTAINABLE BASIS FOR CONCLUSION THAT CRITERION 2C IS NOT MET DESPITE "ESTABLISHED" RECORD OF PAST "ISOLATED" VIOLATIONS.

[26] Divisional Court OPEN Judgment, §209.

41. The Court of Appeal emphasised, at §144 of its OPEN Judgment, that it is not the case that there would only be one answer to the assessment of future risk if historic violations were found to have taken place. This is consistent with §2.13 of the User's Guide, which emphasises that *"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."* The Claimant conceded in the First Proceedings that the assessment of future risk, if historic violations were found to have taken place, would be a matter for the Secretary of State.

42. It is clear, both from the evidence which is summarised in the judgments in the First Proceedings and the summary in paragraph 24 (above), that the Secretary of State has, in carrying out the assessment of future risk under Criterion 2C, taken account of a wide range of information relating to KSA's attitude towards and capacity to comply with principles of IHL. There is no basis for the Claimant's contention that her approach and/or her conclusion is irrational.

GROUND 4: MISDIRECTION AS TO (I) "SERIOUS VIOLATIONS" OF IHL, AND (II) THE NEED TO CONSIDER WHETHER THERE IS IMPUNITY IN KSA FOR SUCH SERIOUS VIOLATIONS.

43. As noted above, both of these grounds have already been decided against the Claimant by the Court of Appeal as Grounds 2 and 4 of the appeal in the First Proceedings.

44. At §66 of the ASFG, the Claimant relies on the fact that the Court of Appeal granted CAAT permission to appeal to the Supreme Court on both of these points as justifying an argument that the grounds should be argued again "*on the basis of up-to-date facts and on the Secretary of State's current decision"*. The Claimant argues that "*if and to the extent that any part of the Court of Appeal's decision binds the Court in this claim, the Court will be invited to grant permission for a leapfrog appeal*". Critically, however, the Claimant fails to explain the basis on which permission to appeal was granted. In seeking permission to appeal, the Claimant expressly accepted that it would not be appropriate to grant permission to appeal on Grounds 2 and 4 alone, but merely contended that, if permission were granted to the Secretary of State to appeal to the Supreme Court, the Claimant invited

the Court of Appeal to *"grant CAAT permission to appeal on grounds 2 and 4 so that the Supreme Court can consider all points in issue before the Court of Appeal."* It was on this parasitic basis that permission to appeal was granted. The Secretary of State does not accept that this provides any proper basis for the Claimant to reopen these issues in these proceedings.

45. Further, contrary to the Claimant's assertion at §69 of the ASFG, there has been no fundamental change in the factual circumstances such that the Secretary of State is now required to consider whether there is impunity in KSA despite the Court of Appeal's findings in the First Proceedings,. As the Court of Appeal emphasised, at §165 of its OPEN Judgment, the assessment of past violations (which the Secretary of State has now undertaken) is not equivalent to a court's adjudication of allegations of IHL. Indeed, the Secretary of State's assessment expressly treats all "possible" breaches of IHL as though they were established breaches, for the specific purpose of the IHL analysis – that means it is inapt to consider whether there has been prosecution and punishment of individuals in relation to those incidents, which might in fact not have involved actual breaches of IHL. The conclusions which have been drawn by the Secretary of State also do not create any additional obligation on the Secretary of State to address any or all of the indicative questions listed in §2.13 of the User's Guide. In the present context, relevant factors in assessing the risk of violations occurring in the future include, for instance, whether systems put in place by KSA are robust in preventing potential breaches of IHL and whether KSA is willing to investigate incidents of concern, identify their causes and learn from mistakes. Rationality does not require that the Secretary of State's assessment of future risk must address specific questions regarding KSA's capacity to prosecute and punish individuals for violations of IHL.

46. As to the alleged misdirection regarding "*serious violations*" of IHL, the Claimant persists in its attempt to characterise the Secretary of State's approach to this concept as being unduly narrow and technical. During the course of the First Proceedings, the Secretary of State expressly accepted, in correspondence and in her skeleton argument in the Court of Appeal, that the meaning of *"serious violation"* was not necessarily limited to war crimes and grave breaches (cf her position before the Divisional Court which the Claimant sets

out at §75 of the ASFG[27]). The Court of Appeal, at §163 of its OPEN judgment, accepted the Divisional Court's assessment that the decision-making process had included consideration of incidents of non-deliberate conduct and considered whether there may have been a pattern of such incidents. The Court of Appeal rejected the Claimant's contention that the Secretary of State had misdirected herself and refused the Claimant's invitation to provide a definition of "*serious violations*".

47. In response to pre-action correspondence preceding these proceedings, the Secretary of State once again explained that she had not adopted a narrow or technical approach to the IHL Analysis or the broader Criterion 2C risk assessment:

> "*The IHL Analysis considers whether each allegation constitutes a possible breach of the principles of IHL…*[28] *The IHL Analysis does not consider the seriousness of these possible breaches by reference to any separate, specific criteria. The Court of Appeal identified, at § 161 of its OPEN judgment, the obligations which IHL imposes on a state in conducting its operations in the course of an armed conflict and those principles are factored into the IHL Analysis. Each potential breach of those principles has been factored into the overall C2C Analysis on the basis that it is inherently serious. Again. The potential IHL breaches from which to assess the prospective risk for Criterion 2C. For the avoidance of doubt, the Secretary of State accepts that any one incident, depending on its facts and wider context as understood by the Secretary of State on the basis of all the material available to her, might lead to an overall assessment that there is a "clear risk" for the purpose of Criterion 2C.*"[29]

48. The Claimant's persistent attempts to require the Secretary of State (and the Courts) to accept that specific propositions of law must be adopted as correct statements of the law are manifestly inappropriate in a context where:

    a. the issue for the Secretary of State is whether there is a risk that a State will commit serious violations of IHL – not whether an individual is responsible for such a violation;

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27 In correspondence before the hearing in the Court of Appeal the Secretary of State confirmed that she did not challenge the Divisional Court's finding at §16 and accepted that the meaning of "*serious violation*" is not necessarily limited to war crimes and grave breaches. Irwin and Flaux LJJ gave permission to the Claimant 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 of the judgment on permission to appeal). Consequently, the only point at issue before the Court of Appeal on this Ground was whether in fact the Secretary of State's decision making did wrongly elide these concepts.

28 I.e. the principles of proportionality, distinction, necessity and the obligation to take all feasible precautions.

29 Letter from GLD to Leigh Day dated 27 August 2020.

b. there is little, if any, State practice or jurisprudence concerning the adjudication and determination of breaches of IHL as a matter of state responsibility and difficult procedural and substantive questions remain; and

c. in any event, the Secretary of State is engaged in a predictive exercise, not an exercise in adjudication.

49. The Secretary of State's approach is not narrow or technical and there has been no error of law in her approach.

COSTS CAPPING ORDER

50. The Claimant's application for a protective costs order should be rejected:

    a. The claim is not properly arguable.
    b. The burden to the public purse of defending this claim would be substantial. In the circumstances, it is not fair and just to make the Order.

51. Alternatively, there should be a reciprocal costs capping order.

CONCLUSION

52. In these circumstances, the Court is invited to refuse permission and to order that the Claimant pays the costs of the Acknowledgement of Service, these Summary Grounds and the application under section 6 of the Justice and Security Act 2013, in the amount of £72,604.67 (see Schedule annexed).

SIR JAMES EADIE QC
JONATHAN GLASSON QC
JESSICA WELLS
JACKIE McARTHUR

January 2021