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Your Ref:

Our Ref: REC/EAK/00065492/10

Date: 18 September 2020

## **BY EMAIL ONLY**

Dear Secretary of State

## **PROPOSED CLAIM FOR JUDICIAL REVIEW**

### **The Claimant**

Campaign Against Arms Trade  
Unit 4, 5-7 Wells Terrace, London N4 3JU

### **Defendant's reference details**

Unknown

### **Claimant's legal advisers**

Leigh Day Solicitors  
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### **Details of the decision being challenged**

1. The decision of the Secretary of State of International Trade notified to the proposed Claimant on 7 July 2020 that there is not a clear risk that the export of arms and military equipment to Saudi Arabia might be used in the commission of a serious violation of international humanitarian law, with the result that she will (a) resume granting licences for the transfer of military equipment to the Kingdom of Saudi Arabia ("**KSA**") for possible use in Yemen and (b) that she will not

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suspend or revoke existing licences for the transfer of military equipment to KSA for possible use in Yemen.

## Interested parties

None.

## Factual Background

2. The background to the conflict in Yemen, and the involvement of the KSA -led Coalition in that Conflict is set out in detail in the judgment of the Divisional Court in *R (Campaign Against Arms Trade) v. Secretary of State for International Trade* [2017] HRLR 8 [39 – 45, 61 – 79, and 87 – 175] (“**CAAT DC Judgment**”) and by the Court of Appeal in *R (Campaign Against Arms Trade) v. Secretary of State for International Trade* 1 WLR 5765 [4 – 11] (“**CAAT CA Judgment**”). That background is not repeated here.
3. The basis of the decision under challenge (at paragraphs 20-21 of the letter of 7 July 2020) is that:

“20 ... Some of these incidents have been assessed as “possible” violations of IHL and 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 clear risk of IHL breaches. The MOD has similarly 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.

21. This analysis has not revealed any such patterns, trends or weaknesses. It is noted, in particular, that the incidents which have been assessed to be possible violations of IHL occurred at different times, in different circumstances and for different reasons. The Secretary of State assesses that these are isolated incidents.”

## Legal Framework

4. The legal framework is summarised by the Divisional Court in CAAT DC Judgment 8 [4 – 24] and by the Court of Appeal in CAAT CA Judgment [12 – 25]. That background is not repeated here in detail.
5. For present purposes, it suffices to record that the Secretary of State has taken her decision under the Consolidated EU and National Arms Export Licensing Criteria (“**the Consolidated Criteria**”), which implements the UK’s obligations under Common Position 2008/944/CGSP, 8 December 2008. Relevantly, Criterion 2 (c) provides “[h]aving assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, the Government will [...] (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”. As the User Guide to the Common Position explains “[t]he combination of “clear risk” and “might” in the text should be noted. This requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression” (User Guide § 2.7).
6. Criterion 2 (b) requires the Secretary of State to “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 the competent bodies of the UN, the Council of Europe or by the European Union”. Given the numerous findings of breach by competent

UN Bodies (such as the UN Panel of Experts on Yemen), the Kingdom of Saudi Arabia is a country falling into this category, with the result that “special caution” must be exercised in making licencing decisions for the export of arms to Saudi Arabia. The Consolidated Criteria provides “[i]n 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”.

7. On 16 September 2019, the EU Council adopted a new User Guide on the application of Common Position 2008/944/CGSP (the terms of which the Consolidated Criteria seek to give effect to). Article 13 of the Common Position provides that “[t]he User’s Guide to this Common Position, which is regularly reviewed, shall serve as guidance for the implementation of this Common Position”. As regards “clear risk” the User Guide makes clear that a “thorough assessment”, “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 [...]”.

## **Grounds of Challenge**

### **(1) No proper basis for conclusion that no “pattern” of violations**

8. The Secretary of State’s conclusion that there existed no “patterns and trends” of violations and that the (assumed) violations are merely “isolated incidents” is fundamental to the Secretary of State’s conclusion that the Criterion 2 (c) test is not met. However, based on the OPEN explanation of the decision, the Secretary

of State's conclusion is not legally sustainable in light of the approach she has adopted.

9. The Secretary of State's letter of 7 July 2020 explains her approach. In particular, she makes clear her analysis of each individual incident is of limited scope (letter of 7 July §§ 18-19). The process adopted is that "credible" allegations identified in the MOD's "tracker" system are subjected to an "IHL Analysis". This involves, *inter alia*, a process by which an incident is evaluated as to whether it is a "possible" violation of IHL, or whether it is "unlikely" that it represents such a breach. Possible breaches are then treated as "established" breaches for purposes of the overall Criterion 2 (c) assessment. The Secretary of State then considers whether such breaches disclose a "pattern", or whether they are merely "isolated" incidents. As regards this process:

- (i) The described process of assessing individual incidents does not involve analysis of each incident beyond identifying whether the incident is a "possible" breach. Certainly, there is no indication of any conclusions being reached as to the nature of an individual incident beyond this threshold assessment. There is also no indication of any more detailed assessment of each incident beyond this (see letter of 7 July §§ 10- 19). (If this is incorrect, then please clarify).
- (ii) Each such "possible" breach is then assumed to constitute a breach of IHL and the overall Criterion 2 (c ) assessment is conducted on the basis that these incidents are breaches of IHL. The Secretary of State's conclusion is that only a "small number of incidents" constitute "possible" violations of IHL (letter of 27 August 2020, § 4). No indication is disclosed

of the number of incidents which are rated as involving “possible” violations of IHL.

- (iii) No attempt is made, in any incident (and even where this is possible) <sup>1</sup> to assess the likelihood that IHL has been breached in a specific incident, or the seriousness and gravity of the breach, or the extent to which the breach may have been more than accidental.
- (iv) The Secretary of State’s analysis of “possible” violations does not consider the seriousness of any alleged past violation (see letter of 27 August 2020 § 17).

10. In order to answer the question as to whether violations exist as part of a pattern, or whether they are simply “isolated incidents”, it is insufficient merely to identify a violation as “possible” and not to subject the incident to further detailed analysis, in those incidents where this is possible. In *Campaign Against Arms Trade v. Secretary of State for International Trade* [138] the Court of Appeal made clear that such analysis is possible in “many” such incidents. However, the Secretary of State has eschewed such an approach. This materially undermines the Secretary of State fundamental conclusion that past violations are “isolated”, and that no “pattern” can be discerned.

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<sup>1</sup> The Claimant accepts that in a significant proportion of incidents, it will not be possible to reach a firm view as to whether IHL has been breached beyond a conclusion that it is possible that IHL has been breached. But in a significant proportion of incidents, there is substantial publicly available information about the incident, from reliable sources, a more detailed assessment of the nature and likelihood of a violation in an individual incident is possible.

## **(2) Material error in assessment of existence of “pattern” of violations**

11. Further if all “possible” breaches are treated as “established” breaches for purposes of the Secretary of State’s Criterion 2 (c) assessment then – based on the OPEN evidence - the only conclusion reasonably open to the Secretary of State is that (a) those breaches are not “isolated”, in the sense that term is used in the User Guide § 2.13 and / or (b) there exists a “pattern” of violations, as that term used in the User Guide § 2.13.

12. The overwhelming body of findings by authoritative UN agencies, including the UNSC Panel of Experts on Yemen as well as respected NGOs establish (a) a significant number of past violations of IHL, many of which are “serious” (b) patterns of conduct underpinning such violations exist. Discernible patterns include: the rules of IHL which have been repeatedly violated; the persons subject to the attack (e.g. medical personnel or facilities) and the circumstances in which the attack occurred. Repeatedly the UN Panel of Experts, and others, have found that KSA has taken insufficient precautions prior to attack. This is a classic pattern of behaviour, based on a failure to take the basic steps required by IHL prior to conducting a lethal attack. CAAT submitted a substantial body of findings by the UN and other agencies to the Secretary of State prior to her decision. The Secretary of State is referred again to that material. In the context of the Secretary of State’s approach – which is to treat “possible” violations as established violations – there is no rational basis for a conclusion that past violations are merely “isolated”, nor a finding that no pattern exists. It is noted that no reasons are given for the Secretary of State’s conclusions about the absence of a pattern of conduct.

### **(3) Material error in assessment of “credible” allegations**

13. The Secretary of State’s “IHL Analysis” of “credible” allegations appears to wrongly exclude allegations of violations of IHL other than those relating to the use of “fixed-wing aircraft”. In her letter of 7 July 2020, the Secretary of State explains that following the Court of Appeal’s judgment in *Campaign Against Arms Trade v. Secretary of State for International Trade*, “the MOD has engaged in further analysis of all of the incidents of concern recorded on the Tracker which the MOD assesses are credible – that is, the information and intelligence available indicates that the alleged events are likely to have happened and to have involved fixed wing aircraft”. This approach also gives rise to serious error. It leaves out of account alleged violation of IHL not perpetrated by fixed wing aircraft. As a result, it appears that such incidents are not individually subject to the “IHL Analysis” and assessed as to whether they are “possible” breaches of IHL. Excluding such allegations from the assessment of individual incidents is inconsistent with the approach the Court of Appeal said was required in the assessment of a pattern of violations (see CAAT CA Judgment [138-139]).

### **(4) Unsustainable conclusion as to incidents which constitute “possible” violations of IHL**

14. Given that the Secretary of State’s conclusion on Criterion 2 (c) hinges on the absence of a “pattern” (based on the identified “possible” violations) and the related conclusion that past violations are “isolated”, the rationality of the Secretary of State’s analysis critically depends on which incidents are assessed as “possible” violations for purposes of her assessment. The Secretary of State has declined to state in OPEN correspondence how many violations she has designated as “possible” violations, but has stated that “[w]e have assessed that



there were a small number of incidents which have been treated for the purposes of this analysis as violations of IHL” (see letter of 27 August 2020). It therefore follows that in the substantial majority of incidents which were identified by the UN Panel of Experts as actual violations (applying the beyond reasonable doubt standard), the Secretary of State has reached the view that the incidents were not even “possible” breaches of IHL.

15. Such a conclusion is unsustainable.

- a. First, as the Secretary of State has repeatedly emphasised there are significant “gaps” in her knowledge as regards the military activities of KSA and the Coalition (for example, limited access to operational intelligence on targeting and so forth). Logically, such incidents must be treated as “possible” violations, unless there is a reasoned justification for not doing so. No such process is apparent in the OPEN description of the Secretary of State’s approach.
- b. Further (and in any event), the publicly available investigative findings of authoritative bodies is overwhelmingly to the effect that a large number of actual violations have occurred. No authoritative body which has examined the situation in Yemen has concluded that the violations perpetrated by KSA have been isolated. Thus, based on the OPEN evidence, there is no basis on which a decision-maker could rationally conclude other than that a large number of “possible” violations had occurred, at the very least. The Secretary of State has therefore materially erred in her approach to identifying “possible violations”. This would inevitably impact on her assessment as to whether a pattern could be discerned among this group of “possible” violations.

**(5) Failure properly to consider whether Criterion 2 (c) is met despite “isolated incidents” conclusion**

16. Even if (which is not accepted) the Secretary of State was entitled to conclude that there was no “pattern” of violations and any violations have merely been “isolated” incidents, the Secretary of State has failed to consider whether there remains a clear risk that weapons “might” be used in violation of IHL notwithstanding this conclusion. Such a possibility required consideration because:

- (i) First, a “serious violation” of IHL for purposes Criterion 2 (c) can be committed in a single incident, and absent either recklessness or intention on the part of the KSA and absent any indication of a pattern of conduct. This is understood to be common ground between the parties. This means that where a number of isolated “serious” violations have occurred in the past (even if not part of a pattern), there may remain a clear risk that a further “serious violation” could occur, even absent any historic pattern.
  
- (ii) Second, as made clear by the User Guide, even where no pattern can be discerned, a clear risk may still arise. The User Guide states “[w]here 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”. KSA has a well-documented history of impunity of state officials, as indicated in reports by both the UN, the US State Department and others. Although KSA has reported passing files to prosecutorial authorities in respect of a small number of incidents in Yemen, there have been no reported prosecutions as far as CAAT is aware.

The absence of any real threat of prosecution is centrally relevant to the question of risk. The findings of the Joint Incident Assessment Team have been subject to serious criticism by the UN and by human rights bodies, including Human Rights Watch. There is no indication the Secretary of State adequately considered the issue of impunity, nor as to the conclusions reached. Instead, it appears the Secretary of State's conclusion is premised on the lack of a "pattern" of violations.

## **Serious Violations of IHL**

17. We note that we still await a response to our letter concerning our third ground of appeal before the Supreme Court regarding the concept of serious violations of IHL. In proceedings before the Supreme Court, you say that there is now no issue between us in light of the new decision you have taken. As explained in correspondence, and in our consent order, we understand that you now accept that the concept of "serious violation" of IHL does not necessarily require any mental element (whether intent or recklessness). In addition, we understand you agree that a single incident may, on its own, constitute a serious violation of IHL, irrespective of whether other violations have, or may have, also occurred. We also understand that your position to be that you have approached your reconsidered decision on this basis.

18. However, given that we are awaiting a formal response from your in respect of our proposed consent order, we reserve our position as to whether the Secretary of State has approached this aspect of the Criterion 2 (c) test lawfully in her new decision.

## ADR proposals

The Claimant is willing to consider any ADR proposals made by the Defendant but in light of the history of the decision-making process considers that the proposed claim is unlikely to be suitable for ADR.

## Details of information and documents sought

The Defendant is invited to provide full and proper particulars of the decision-making process and the reasons for it, including:

- The number of cases where a “possible” violation was identified.
- The dates, facts and circumstances of those cases.
- The dates, facts and circumstances of those cases where a “possible” violation was not found.
- The reasons why the Secretary of State has concluded that there is no “pattern” of violations and why the identified “possible” violations were considered to be merely “isolated”
- Please provide a full explanation of all of the factors the Secretary of State considered in deciding whether identified “possible” violations (a) constituted a “pattern” and (b) were “isolated”.
- The Ministerial Submission and other documents leading to the decision under challenge analysing and recording the above matters.

Furthermore:

- (1) Please confirm whether you accept that KSA is a country in respect of which “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” as per Criterion 2 (b) of the Consolidated Criteria.

- (2) Please confirm whether KSA has in place legislation which enables the prosecution and punishment of violations of IHL, as defined in the Geneva Conventions 1 – IV and additional protocols I and II to the Geneva Conventions. Please explain whether, and how, the Secretary of State assessed this in reaching her decision.
- (3) Please confirm whether KSA has a judicial system capable of prosecuting and punishing state officials, including senior state officials, responsible for violating IHL or IHRL. Please explain whether, and how, the Secretary of State assessed this in reaching her decision.

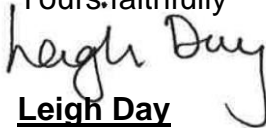
## **Address for reply and service of court documents**

As per above letterhead.

## **Proposed reply date**

We invite the Secretary of State to reply by Friday 25 September 2020.

Yours faithfully

  
**Leigh Day**

*cc: Government Legal Department*