

**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 INTERNATIONAL TRADE**

**Defendant**

**-and-**

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

**Interveners**

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**CLAIMANT'S SUBMISSIONS ON DRAFT ORDER**

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**Introduction**

1. A draft order is attached to these submissions. It is mostly agreed. The parts not agreed are indicated in square brackets.
2. There remains one principal issue in dispute between the parties: permission to appeal. The Claimant invites the Court to grant permission to appeal under CPR r. 52.6(1) because:
  - a. an appeal would have real prospects of success; and
  - b. in any event, the importance of the issue supplies a compelling reason for an appeal to be heard.
3. If permission to appeal is granted, the Court is invited to stay enforcement of the (agreed) costs order pending the final determination of the appeal.

### **Limb (a): Real prospects of success**

4. The Claimant submits that there is, at least, a real prospect that the Court of Appeal will find that the Court erred in one or more of the following three respects. The Court has already heard detailed argument on these point – and that argument is not repeated here. But it is submitted that the following grounds of appeal each have a real prospect of success.

#### Ground 1: Error of approach to the open source material and findings

5. The Secretary of State had to start by considering Saudi Arabia’s “past and present record of respect for IHL”. This involves looking at whether “a pattern of violations could be discerned” (User’s Guide §2.13).
6. The reports relied upon by the Claimant (including the 2015 and 2016 reports of the UN Expert Panel) provided strong *prima facie* evidence of a pattern of violations of IHL, some of them serious.
7. Rationality required the Secretary of State either to accept that there has been a pattern of violations (but then conclude that the “clear risk” test was still not met because, despite what happened in the past, Saudi Arabia would improve in the future) or to conclude, relying on other evidence, that there has not been any such past pattern.
8. But the open evidence establishes that the Secretary of State has done neither. Neither the Tracker, nor the evidence as to engagement with the Saudi military nor the evidence of Saudi/JIAT investigations provides any evidential basis to discount or reject the *prima facie* evidence that there has been a pattern of IHL violations.
9. This Court may be right to say that the Secretary of State is under no duty to make a judgment about “every past incident” (see at [181]) and that it was “not legally necessary to engage directly with everything that had been said by others on the topic” (see at [208(8)]). But it was not enough to conclude that the open source findings had been “taken into account” (see at [208(4)]). Rather, as the Claimant submitted in its reply submissions, the Secretary of State was obliged to form a judgment about a sufficient number to of the incidents in which breaches of IHL have been found to displace the *prima facie* evidence of a pattern of such violations. On the open evidence (and indeed, on the special advocates’ summary of the closed evidence), he has not done so.

#### Ground 2: Error in relation to the duty to consider Saudi Arabia’s past record of compliance with IHL

10. The Court erred in concluding that the Secretary of State was not required even to ask the questions identified in the User’s Guide and recorded at [178] of the judgment. Given that the Common Position itself provides that the User’s Guide “shall serve as guidance for the implementation of this Common Position”, and the User’s Guide makes consideration of the recipient’s “past and present record of compliance with IHL”, the Secretary of state could not lawfully reach a conclusion as to whether the “clear risk” test was met without either knowing the answer to the questions there set

out or explaining why, exceptionally, he had decided not to investigate those matters (any of which could have been investigated by a simple request for information to the Saudi government).

Ground 3: Meaning of “serious violations of “IHL”

11. Underlying the Court’s analysis of all of the Claimant’s grounds is a fundamental question as to whether the term “serious violations” of IHL in Criterion Two (c) of the Consolidated Criteria was synonymous with war crimes under international law (as asserted in the Defendant’s skeleton argument) or (as the Claimant submitted) referred to serious violations of international humanitarian law more generally, as explained by the International Criminal Tribunal for the Former Yugoslavia in *Tadic* (see also the wording of Articles 89 and 90(2)(c)(i) of Additional Protocol I to the Geneva Conventions).
12. If the Claimant is correct in this regard, this is a further reason why it was unsustainable for the Secretary of State to reach the conclusion that the “clear risk” test was not met.

**Limb (b): Compelling reason why an appeal should be heard**

13. Irrespective of this Court’s view of the Claimants’ prospects, this is a paradigm case where the public significance of the issue justifies the grant of permission to appeal. The point requires little elucidation, but the following points may be noted:
  - a. These proceedings are the first occasion on which the legal scheme established by the Consolidated Criteria has been considered.
  - b. The approach in this case is likely to affect the approach adopted by the government to the export of military equipment to many states involved in war or military hostilities, both now and in the future. It is also likely to be influential in other jurisdictions.
  - c. The gravity of the issue is recognised by the Court at [27]. It has been the subject of reports by three Parliamentary Select Committees, one of which decided expressly to await the outcome of these proceedings.

**Martin Chamberlain QC**  
**Conor McCarthy**

*5 July 2017*