

IN THE COURT OF APPEAL (CIVIL DIVISION)

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPEAL
FROM THE HIGH COURT OF JUSTICE (DIVISIONAL COURT)

THE RT. HON. LORD JUSTICE BURNETT AND THE HON. MR JUSTICE
HADDON-CAVE

BETWEEN:

THE QUEEN
on the application of
CAMPAIGN AGAINST ARMS TRADE
Claimant/Appellant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE
Defendant/Respondent

-and-

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

RESPONDENT'S STATEMENT OPPOSING PERMISSION TO APPEAL¹

Introduction

1. The Secretary of State submits that, for the reasons set out below, permission to appeal should be refused on all of the OPEN grounds. There are no "real prospects" that any of the grounds of appeal will be allowed and there is no other compelling reason why permission should be granted. For reasons set out in its CLOSED Statement the Secretary of State submits that the CLOSED grounds of appeal equally fail to meet the threshold for permission to appeal to be granted.
2. The Claimant has put forward four grounds of appeal from the judgment of Burnett LJ and Haddon-Cave J. None of the grounds discloses any arguable error of law or principle and none has a real prospect of success. Grounds 1 and 2 are no more than an impermissible attempt to obtain a second factual review of the evidence; in circumstances in which the Divisional Court conducted the most careful and extensive analysis of the facts. Grounds 3 and 4 are both based on a selective reading of passages of the judgment; and, even if (which is denied)

¹ Served pursuant to §19 of CPR PD 52C. The Respondent has endeavoured to comply with paragraph 19(b) of PD52 but apologises to the Court for the fact that, owing to the number of Grounds advanced by the Appellant, it has been necessary to slightly exceed the prescribed page limit in both the OPEN and CLOSED Statements.

they had a basis in principle, neither would be capable of undermining the Court's subsequent analysis.

3. There is no other compelling reason to grant leave. As Burnett LJ and Haddon-Cave J rightly observed when refusing permission to appeal: *"That this judicial review was concerned with a very serious issue does not justify an appeal which, in essence, would require the Court of Appeal to conduct a fresh review of the thousands of pages of material placed before us in open and closed."*²

Grounds 1 and 2

4. The Claimant contends that the Divisional Court:
 - (a) should have found that the Secretary of State's consideration of Saudi Arabia's past and present record of respect for international humanitarian law ("IHL") was *"fundamentally deficient"*³ and that this deficiency could not be cured by any of the other material which was considered by the Secretary of State;⁴ and
 - (b) wrongly concluded that the Secretary of State did not need to ask himself the questions set out at §2.13 of the User's Guide.
5. The Divisional Court rightly held, at §179, *inter alia* that: (i) the relevant question for the Secretary of State under Criterion 2C is whether there is a clear risk that items to be licensed might be used in the commission of a serious violation of IHL; (ii) the User's Guide, which constitutes non-binding guidance, suggests that the Secretary of State's assessment should include three key matters, one of which is the recipient country's past and present record of respect for IHL; and (iii) it is for the Secretary of State to decide how to conduct his inquiry into the three key matters. The Divisional Court analysed the evidence regarding the procedures, inquiries and analysis undertaken by the Secretary of State in the course of some 88 paragraphs of the OPEN judgment (and in greater detail in the CLOSED judgment). Its correct overall conclusion at §192 was that *"There is no sustainable public law criticism of the scope of the inquiries made on his behalf or the quality of the information available to him. The evidence shows beyond question that the apparatus of the State, ministers and officials, was directed towards making the correct evaluations for the purposes of the Consolidated Criteria."*
6. Although characterised by the Claimant as an "error of approach", these grounds are nothing more than an attempt to reopen the Court's findings of fact.

Ground 3

7. The Claimant asserts that the Divisional Court applied the wrong approach by not applying a more stringent review of the evaluation carried out by the

² Order dated 21 July 2017 at §8.

³ Claimant's Skeleton Argument, §29.

⁴ *Ibid.* §30.

Secretary of State. That is untenable when the passage on which particular reliance is placed is read (as it must be) in its context and not in isolation.

8. The Divisional Court explained the approach to be taken to the Claimant's rationality challenge in detail in §§ 25 to 35. That passage of the judgment must be read as a whole. The approach adopted by the Divisional Court was plainly correct. Specifically, the Court:
 - (a) noted that the nature of judicial review (including questions of rationality) is context-specific (*per* Lord Mance in *Kennedy v Charity Commission* [2015] AC 455 at [51]);
 - (b) agreed with the Claimant that the decision at issue was of exceptional gravity and required a "*rigorous and intensive*" standard of review;
 - (c) agreed with the Claimant that Criterion 2C sets a legal test and does not admit of additional "*political*" considerations; and
 - (d) held that it did not follow from the rigorous and intensive standard of review that the Court should stray into areas which are "*properly the domain of the executive*"; and emphasised that the process of evaluation is informed by diplomatic and security expertise which the Court does not possess.

9. The Divisional Court's approach was entirely in accordance with established authority. Furthermore, it cannot seriously be suggested, in light of the Court's thorough scrutiny of all of the evidence, that the Court was inappropriately deferential to the Secretary of State. It in fact subjected the evidence to a "*rigorous and intensive*" review as it stated it would. Significantly, the Claimant's conclusion on this ground, at §38 of its Skeleton Argument, merely recycles its complaints from Grounds 1 and 2.

Ground 4

10. Finally, the Claimant contends that the Divisional Court failed to determine whether "*serious violations*" as used in the Consolidated Criteria was synonymous with "*grave breaches*" of the Geneva Conventions and war crimes.

11. However, the Divisional Court expressly held, at § 16, that the term "*serious violation*" **includes** "*grave breaches*" and "*war crimes*" (the word "*includes*" was emphasised in the original by the Court). It therefore agreed with the Claimant's position, as set out in §41 of its skeleton argument. Moreover, at §18 of the judgment, the Divisional Court expressly highlighted a distinction between "*grave*" and "*serious*" breaches, indicating that the latter would incorporate reckless as well as intentional conduct.

12. In any event, it is clear from the judgment⁵ that (i) the Divisional Court did not approach the Criterion 2C threshold on the basis that it was necessary to establish a clear risk that licensed items would be used to commit war crimes or grave breaches; and (ii) the Divisional Court did not find that the Secretary of State had imposed any such limitation on his analysis.

No compelling reason

13. The Secretary of State submits that there is no “*compelling reason*” why an appeal should be heard. No serious and important issue of principle has been identified calling for ruling by the higher Courts. The context generally is a serious one of course. However, that is not a basis for concluding that there is a compelling reason for an appeal.
14. As the Divisional Court’s judgment indicates, this case turned on the facts. As noted at §60 of the judgment, the Divisional Court was presented with “voluminous” evidence by both parties, some of which was highlighted during the course of the three-day hearing, all of which (both OPEN and CLOSED) was subsequently reviewed by the Court. At §212, the Court records that “*Mr Chamberlain QC accepted and averred that this is not a case where the Court needs to be concerned that it is unsighted on any part of the information on which the decision was taken.*” The level of detail and the depth of scrutiny with which the Court has engaged with this claim are plain from the face of the OPEN and CLOSED judgments. It is submitted that there is no good basis for granting permission.

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20 October 2017

⁵ See, e.g., § 208(4): “*It is clear from the evidence that the third party reports upon which the Claimant relies were taken into account by the Secretary of State at each stage ... The reports were often directed at broader considerations than International Humanitarian Law violations.*”