Court of Appeal Ref: T3/2017/2079
Claim No. CO 1306/2016

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/Applicant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant/Respondent

-and-

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

Interveners

CLAIMANT'S AMENDED SKELETON ARGUMENT IN SUPPORT OF PERMISSION TO APPEAL

References to the Core Bundle (CB) are in the format [CB/Page]. References to the Supplementary Bundle (SB) are in the format [SB/Page]. References in the format [§1] refer to paragraph numbers.

Estimated pre-reading time: 4-5 hours

Estimated time for any oral permission hearing: 1 day

Estimated time for substantive appeal hearing: 2 days

Essential Pre-Reading: Judgment of the Divisional Court [CB/49-106]; Skeleton Arguments of Parties on Permission [CB/18-45]; Consolidated EU and National Arms Export Licensing Criteria [SB/26-32]; User's Guide to Council Common Position 2008/944/CFSP [SB/9-13]; Report of UN Panel of Experts on Yemen, 26 January 2016, Sections I, V, VI and Annexes 52-56 and 60-62 [SB/58-76 and SB/79-112]; Report of UN Panel of Experts, 11 January 2017, Section VIII (A) [SB/462-468] Written Ministerial Statement, 21 July 2016 [SB/131-132].

Preamble

1. Campaign Against Arms Trade ("**the Claimant**") originally filed a Skeleton Argument on 15 September 2017. On 24 January 2018, Irwin LJ ordered that the application for permission to appeal be adjourned to a hearing before two Lords Justices and gave permission for the parties to amend or supplement their submissions. He directed that each party produce a single consolidated set of submissions. This Amended Skeleton Argument contains the Claimant's consolidated submissions. It includes responses to the Respondent's Statement Opposing Permission to Appeal, filed on 20 October 2017.

Introduction

2. These proceedings were brought by the Claimant to challenge the legality of decisions made by the Government in relation to the licensing of arms exports to the Kingdom of Saudi Arabia ("**KSA**"), for possible use in the conflict in Yemen.

3. In June 2016, Gilbart J granted the Claimant permission to apply for judicial review of:

   (a) the on-going failure to suspend extant export 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) the decision, communicated on 9 December 2015, to continue to grant new licences for the sale or transfer of arms or military equipment to KSA.

4. A declaration was made under s. 6 of the Justice and Security Act 2013; special advocates were appointed; and OPEN and CLOSED evidence was served by the Secretary of State.

5. In a joint report in September 2016, two House of Commons select committees recommended the immediate suspension of licences for the export of arms to KSA.[1] A

[1] *The use of UK-manufactured arms in Yemen,* First Joint Report of the Business, Innovation and Skills and International Development Committees of Session 2016-17 (HC 679) [SB/510-574].

third select committee concluded that "it is difficult for the public to understand how a reliable licence assessment process would not have concluded that there is a clear risk of misuse of at least some arms exports to Saudi Arabia".[2] It did not recommend immediate suspension, but noted that "[t]he courts are the appropriate body to test whether or not HMG is compliant with the law".[3]

6. After a 3-day hearing in February 2017 (partly in OPEN, partly in CLOSED), the Divisional Court (Burnett LJ and Haddon-Cave J) gave OPEN and CLOSED judgments on 10 July 2017. They dismissed the claim and refused permission to appeal.

7. This renewed application is made on the basis that: the Claimant has a real prospect of establishing that the Divisional Court erred in one or more of the respects set out below (CPR r. 52.6(1)(a)); and, in any event, the public importance of the issues provides a compelling reason for the grant of permission to appeal (CPR r. 52.6(1)(b)).

8. The Claimant was able to bring these proceedings because (i) its lawyers are acting on the basis of a conditional fee agreement under which they will receive nothing unless the claim succeeds; and (ii) Gilbart J granted a protective costs order ("**PCO**") capping its liability for the Secretary of State's costs at £40,000, together with a reciprocal cap on the Claimant's recoverable costs. If permission to appeal is granted, the Claimant will be unable to proceed with the appeal without a further costs capping order. An application for a costs capping order has been made. This is addressed in an application already before the court.

Overview and summary of the Claimant's case

9. The export of arms and military equipment from the United Kingdom to Yemen is regulated by the Export Control Act 2002 ("**the 2002 Act**"). Section 9 of the 2002 Act permits the Secretary of State to give guidance as to the exercise of his licensing powers. The Secretary of State has formulated and laid before Parliament guidance in the form of the Consolidated EU and National Arms Export Licensing Criteria ("**the Consolidated Criteria"**). These incorporate and adopt as Government policy criteria set out in EU Common Position 2008/944/CFSP ("**the Common Position**"). They also give effect to the UK's obligations under the United Nations Arms Trade Treaty, signed in 2013 ("**ATT"**) as well as other international obligations.

2 *The use of UK-manufactured arms in Yemen,* Fourth Report of the Foreign Affairs Committee of Session 2016-17 (HC 688) §14 [SB/575-657].

3 Ibid §111.

10. Criterion Two of the Consolidated Criteria provides that "the Government will… (b) 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; (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" ("**IHL**") (emphasis added).

11. The conduct of the conflict has been the subject of numerous investigations and findings by international bodies and officials, including in particular the UN Panel of Experts on Yemen ("**the UN Expert Panel**"), a body established by the UN Security Council with the support of the UK. It has both the expertise and the mandate to investigate and make findings on (among other things) breaches of IHL by the parties to the conflict in Yemen, including the KSA-led coalition. It has produced two detailed investigative reports in January 2016 and January 2017, each of which finds the KSA-led coalition has perpetrated violations of IHL in its air campaign in Yemen, some of them serious. In the latter report (which was before the Divisional Court in closed and has since been published), the UN Expert Panel identifies 10 cases in which it is "almost certain" that there was a violation of IHL; and concludes that some of these may amount to war crimes. Similar findings have been made by senior UN Officials with a mandate to investigate the situation in Yemen, including the UN High Commissioner for Human Rights. Similar conclusions have been reached by other UN officials. Reputable non-governmental organisations ("**NGOs**") have reached the same conclusions following detailed investigations (in many instances on the ground in Yemen and relying on first hand, eye-witness evidence). The European Parliament ("**EP**") has also concluded that KSA has committed serious violations of international law and that any exports of arms would breach the EU Common Position.

12. On any view, these reports constitute compelling *prima facie* evidence of a pattern of violations of IHL by KSA, some of them serious.

13. The Claimant has, from the outset, accepted that the Secretary of State was not obliged to accept the conclusions of the UN Expert Panel, NGOs, the EP or others. But those conclusions could only be rejected on the basis of cogent evidence that is rationally capable of displacing them. This could, in principle, be evidence showing that the organisations, or their investigative methods, are unreliable; or it could be on the basis of evidence from other sources (OPEN or CLOSED) that was unavailable to them. For example, the Secretary of State might have access, through the UK's military liaison channels or otherwise, to information that a particular attack resulting in widespread

civilian casualties had been directed, on the basis of apparently reliable intelligence, at a *bona fide* military target.

14. It was not the Claimant's case that the Secretary of State was required to form a definite conclusion about each and every incident in which a violation of IHL was alleged.[4] But rationality did require him either: (a) to form a view about a sufficient number of them to displace the clear OPEN evidence showing a pattern of IHL violations, some serious; or (b) to accept that there *was* a pattern of such violations in the past and then go on to consider whether, in the light of that pattern, there was a clear risk of UK-supplied weapons being used in the commission of a serious violation of IHL in the future.

15. What the Secretary of State could not do, consistently with his own policy and the requirements of public law rationality in this field, is simply ignore – or reach no conclusion on – the question whether there was, as the UN Expert Panel, NGOs, the EP and others had said, a pattern of violations of IHL by KSA. Both as a matter of policy and as a matter of logic, the existence of otherwise of such a pattern had to be the starting point for any lawful analysis.

16. In this case, the Secretary of State's own evidence shows that his analysis of this crucial first question was fundamentally deficient. The Secretary of State's OPEN evidence contained nothing that undermined the expertise or methodology of the UN Expert Panel, or of the NGOs, or of the EP. Contrary to what he had said to the Claimant and to Parliament, he had not drawn the conclusion that there had been no violation of IHL.[5] Rather, he had simply not concluded that there had been. The Divisional Court treated this difference as unimportant. In fact it was crucial. According to the Special Advocates' OPEN summary of the CLOSED evidence, the Secretary of State had made no routine attempt to consider (even in private) the question whether, in any particular case, there had or had not been a violation of IHL. And the Secretary of State's OPEN evidence confirms that, despite maintaining a database recording incidents of concern ("**the Tracker**"), in the majority of cases (some three quarters in later reporting periods), the Secretary of State was unable to identify any legitimate military target.

[4] The Court appears to have understood the Claimant's case in this way: Judgment [52] and [180] [CB/66 and CB/97]. Yet the Claimants had made clear in written reply submissions, at §1(d), that their submission "does not entail that the SoS must form a concluded view about each and every incident where an IHL violation is alleged" (emphasis in original) [CB/155a].

[5] The Secretary of State had to correct earlier statements made to Parliament.

17. This meant that, taking his own evidence at its highest the Secretary of State had no proper basis for discounting the apparently reliable reports that KSA had committed repeated violations of IHL, some serious. But, on the Secretary of State's case, he needed no such basis. On his case, he was under no duty to "find or explain" why views expressed by the UN Expert Panel or any other third parties are "wrong": SGR §46 [CB/236]. All that was required was that these views be "taken into account". The Divisional Court accepted this. In doing so, it erred in four respects:

(1) It erred in its approach to the open source material and to the findings by the UN Expert Panel, NGOs, the EP and others of past violations of IHL. As a matter of rationality, it was not enough that this apparently compelling evidence was "taken into account".

(2) It erred in concluding that there was no need for the Secretary of State to ask questions that were (a) identified as pertinent in the User's Guide (Commission guidance about the interpretation and application of the EU Common Position) and (b) obviously relevant to the risk of future serious violations of IHL, or even to explain why he had chosen not to do so.

(3) It erred in applying too deferential a standard of review. Such a standard had no place where the Consolidated Criteria required, not a judgment about what was in the national interest, but a factual assessment, on the basis of evidence, of the risk that KSA would commit serious violations of IHL using UK-supplied weaponry.

(4) It erred in failing to determine whether the term "serious violations" as used in the Consolidated Criteria, the Common Position and the ATT was synonymous with "grave breaches" of the Geneva Conventions and war crimes under international law (as asserted by the Secretary of State) or (as the Claimant submitted) referred to a wider category of non-trivial violations of international humanitarian law, as explained by the International Criminal Tribunal for the Former Yugoslavia in its *Tadic* judgment. Had it determined that question in the Claimant's flavour, as it should have done, it would or should have concluded that:

(a) the Secretary of State had approached the question whether there had been a pattern of past violations of IHL by KSA on an incorrect legal basis; and

(b) this was a further reason why the Secretary of State's conclusion that the "clear risk" test was not met was unsustainable.

18. The Claimant also relies on CLOSED grounds of appeal. It understands that these have been advanced by the Special Advocates in a separate document and may be further supplemented pursuant to the order of Irwin LJ.

Factual background

19. The factual background to the Claimant's challenge is set out in detail in the High Court Judgment [61]–[130] and [134]–[135]. In summary, the key points are as follows:

(1) A conflict commenced in around March 2015 between the mainly Houthi forces loyal to the former Yemeni president Ali Abdullah Saleh and forces loyal to the government of Abdrabbuh Mansur Hadi: see Judgment, [39]-[45]. On 25 March 2015, a coalition of states led by KSA[6] launched a military campaign in support of pro-government forces in Yemen: see Judgment, [41]. (Although the Divisional Court's findings were limited to the evidence before it at the hearing in February 2017, it may be noted that the UN High Commissioner for Human Rights has noted the conflict had intensified in the first three months of 2017.[7] The number of recorded airstrikes in the first half of 2017 was already greater than the number for the whole of 2016.)[8]

(2) The United Kingdom has granted licences (and refused to suspend existing licences) for the supply of a range of military equipment and technology to KSA for use in Yemen, including ordnance for air strikes, gun turrets, ammunition, military communications equipment, components for military helicopters and jet aircraft: see Claimant's SFG § 10. Since December 2015, the FCO Arms Export Policy Team has made 10 recommendations that licences be granted for the transfer of arms or military equipment to KSA for possible use in Yemen: Judgment, [99].

6 States participating in the Coalition include Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait and Bahrain. In addition, Djibouti, Eritrea and Somalia have made their airspace, territorial waters and military bases available to the coalition.

7 SB/477

8 It is accepted that, in considering permission to appeal, this Court must focus on whether the decision of the Divisional Court was wrong on the evidence before it. However, information as to the continuation of the conflict is included here lest it should be said that the public importance of determining this issue is in any way diminished.

(3) The humanitarian impact of the conflict has been immense. Critical civilian infrastructure, including hospitals, medical clinics, schools and sewerage treatment facilities have been destroyed by documented coalition air strikes.[9] A widespread cholera epidemic has consequently broken out and much of the country faces famine.

(4) The responsibility for violations of IHL in the prosecution of its air campaign in Yemen has been investigated and subject of findings by independent international institutions with expertise in the investigation of violations of IHL and human rights law. They include, *inter alia*, the UN Expert Panel, the UN High Commissioner for Human Rights, reputable NGOs (whose findings and investigative methodology are regularly accepted by the UK Government as reliable in other contexts), the EP and others. The evidence about these findings is set out in the Judgment at [61]–[80] and in the Claimant's Statement of Facts and Grounds ("**SFG**") at §§11-25 [CB/251-257]. Each of these investigations has concluded that KSA has committed repeated violations of IHL, some of them serious. These include, *inter alia*, targeting which is indiscriminate in nature; failing to respect the principle of distinction between civilians and combatants in military attacks; failing to take "all feasible precautions" in attack to avoid death or injury to civilians; and causing disproportionate death or injury to civilians. On a significant number of occasions, KSA airstrikes have resulted in mass civilian casualties.

(5) In 2016, the UN Expert Panel concluded that the Coalition targeted civilians in air strikes, by bombing residential neighbourhoods and by treating by treating the entire city of Sa'dah and the region of Maran as military targets. It concluded that Sa'ada was "systematically" targeted and "devastated" by coalition strikes and that the "targeting of an entire city was in direct violation of international humanitarian law", that such violations were carried out "in certain cases" in a "widespread and systematic" manner and in "grave violation" of the principles of distinction, proportionality and precaution.[10]

[9] See eg UN Panel of Experts Report, January 2017 §131, where the Panel stated that "violations [of international humanitarian law] associated with the conduct of the air campaign are sufficiently widespread to reflect either an ineffective targeting process or a broader policy of attrition against civilian infrastructure". Report S/2017/81 [SB/462-476].

[10] §128 [SB/64].

(6) In 2017, the UN Expert Panel reported on its detailed investigation of 10 KSA air strikes (a very small proportion of the total number about which concerns had been raised), together resulting in 292 civilian fatalities, including at least 100 women and children. The Panel found it "almost certain" that the Coalition did not comply with IHL in each of the 10 incidents investigated and that "some of the attacks may amount to war crimes".[11] In 8 of the 10 incidents investigated, the Panel found no evidence of a legitimate military target. The Panel further found that an attack on Hajjah Hospital on 15 August 2016, leaving 19 dead further violated specific IHL rules relating to the protection of hospitals and medical personnel, the protected of the wounded and sick and those *hors de combat* (whom it is impermissible to target under IHL).[12] Finally the Panel found that "violations associated with the conduct of the air campaign [by KSA] are sufficiently widespread to reflect either an ineffective targeting process or a broader policy of attrition against civilian infrastructure".

20. The Divisional Court explained the coalition's internal investigations and their findings at [128]-[133]. Essentially:

(1) Prior to July 2016, KSA had shared with the UK Government the results of just one investigation into one attack. This was an attack on a Médecins Sans Frontieres hospital in Haidan on 25 October 2015. The investigation exonerated KSA of violating IHL on the basis that the strike was a "mistake": Crompton 1 §53.

(2) Following international pressure, the Joint Incidents Analysis Team ("**JIAT**") was established in February 2016: see Judgment [130]. It published its first findings in August 2016. On 4 August and 6 December 2016, JIAT made known the results of around 14 investigations: Crompton 2 §23.

(3) The Secretary of State relied on the limited investigations said to have been conducted by KSA and, more recently, JIAT, as providing reassurance that the "clear risk" test in Criterion Two (c) has not been met: Crompton 1 §§52-55 & Crompton 2 §23.

[11] §127 [SB466-467].

[12] §128.

(4) The Divisional Court faithfully recorded the Claimant's submission that there was "little comfort to be gleaned" from the existence of these investigatory procedures because: (a) they had been too slow (as recognised by Tobias Elwood MP, Parliamentary Under Secretary for Foreign and Commonwealth Affairs, in a statement to the House of Commons on 12 January 2017), they had been too few in number (the 14 reports to date amounted to only 5% of the total number of incidents reported) and (c) and JIAT reports and methodology and the "exiguous" published summaries have been the subject of justifiable criticism (in particular by Human Rights Watch in a letter to JIAT on 13 January 2017): see Judgment, [132]. However, without rejecting any of these points, it held that KSA's "growing efforts to establish and operate procedures to investigate incidents of concern" was "of significance and a matter which the Secretary of State was entitled to take into account as part of his overall assessment of the Saudi attitude and commitment to maintaining [IHL] standards": see Judgment [133]. (In any event, it may be noted that there was very little evidence of any such efforts at the time when the challenged decisions were taken.)

21. The Secretary of State relied on a selection of statements made by various KSA Government officials said to indicate "positive steps in relation to IHL compliance": see Judgment [134]–[149]. Some of these statements were taken into account when concluding in February 2016 that arms exports could continue. The documents available in OPEN do not, however, indicate any engagement with other statements (in some cases made by the same senior officials), which have been condemned by the UN Expert Panel as disclosing or reflecting a lack of understanding of fundamental rules of IHL:

(1) On 8 May 2015, Brigadier General Assiri (then and now, the official spokesman for the KSA-led coalition) issued what has become known as the "the May Declaration". Its purpose was to declare the entirety of the Houthi-controlled city of Sa'dah and the area of Maran to be military targets. The declaration was intended for public consumption. General Assiri's remarks at that news conference on 9 May 2015 are quoted in the Judgment, at [138]. The UN Expert Panel noted that the targeting of an entire city was "in direct violation of [IHL]".

(2) On 1 February 2016, Brigadier General Assiri spoke to Reuters about coalition military operations along the Yemen/KSA border, which has been the site of

significant hostilities. He informed Reuters: "[n]ow our rules of engagement are: you are close to the border, you are killed": Judgment [139].

(3) The Divisional Court held at [140] that "viewed in context, neither of these statements indicates that the Coalition were, or were intent on, employing targeting practices that were incompatible with [IHL], or that there was a clear risk that they would do so". It was wrong to do so.

(4) Insofar as the Divisional Court held that the May Declaration was "in accordance with proper practice" by providing a warning to civilians affected by military operations (Judgment [142]), it entirely missed the point being made by the UN Expert Panel. It is, of course, appropriate to warn civilians of impending attacks. But giving such a warning does not absolve a state of the obligation to observe the principle of distinction. Even with a warning, it is – as the UN Expert Panel said – a violation of IHL to treat as a military target an entire city in which many tens thousands of citizens live. Yet the evidence shows that is precisely what KSA did. Having given the warning, the cities of Saada and Marran were "systematically targeted and devastated" by KSA.

(5) Insofar as the Divisional Court thought the 1 February 2016 statement had been "designed to encourage civilians to leave the vicinity of the border" (Judgment, [142]), it may have been correct. But it was still, on its face, a clear threat to act in flagrant violation of IHL.

(6) These matters show that the Divisional Court erred in its understanding of IHL and in its assessment of the key evidence relied upon to demonstrate KSA's lack of respect for and understanding of it. In any event, the key point was that, so far as apparent from the OPEN document before the Secretary of State, he had not grappled with this evidence.

22. As explained in the Divisional Court's Judgment at [88], the Secretary of State relied on six strands of information and analysis in support of his conclusion that the "clear risk" test was not met. In respect of several of them, both OPEN and CLOSED material were considered: see Judgment [89]. The factual background to each of these strands of information is set out at [91]-[175].

23. Before considering these in more detail, three preliminary points should be noted:

(1) The Government does not routinely form any conclusion about whether IHL may have been, or is likely to have been, violated in particular incidents: see the Special Advocates' Note. Indeed, with one possible exception, it appears

that the Government has not have reached a view as to whether IHL is likely to have been violated in any particular incident in Yemen.[13]

(2) The Government has not formed a view as to whether the findings of the UN Expert Panel, NGOs or the EP (that serious violations of IHL have occurred) are right or wrong. Those findings are simply "taken into account".

(3) In forming its "overall assessment", the Government chose not to seek information in respect of a wide range of matters with an important bearing on respect by KSA for IHL. These questions are set out in detail in the Claimant's SFG §§45-46 and include matters to which the User Guide to Common Position 2008/944 expressly directs the attention of decision-makers.

24. The process followed by the MOD is described in the Judgment [104]-[125]. But the following points are important:

(1) Allegations of breaches of IHL come to MOD from a variety of sources, including media, NGO reporting and UN bodies [SB/354/§41-SB/355/§42].

(2) All such "incidents of concern" are recorded in a central database known as "the Tracker" [SB/355/§43]. As at January 2017, some 251 incidents had been recorded on the Tracker; Judgment [111].

(3) The issues addressed by the MOD in its "analysis" are: whether (a) it is possible to identify a specific incident; (b) the incident was likely to have been caused by a Coalition strike; (c) it is possible to identify the Coalition nation involved; (d) a legitimate military object is identified; and (e) the strike was carried out using an item that was licensed under a UK export licence [SB/356/§46].

(4) Issue (b) (whether the incident was likely to have been caused by a coalition airstrike) is one to which sensitive material, in particular "Mission Reports", may be relevant. But even here, the Ministry of Defence has "no insight into incidents caused by artillery attacks or attack helicopters as we have almost no visibility of Coalition ground force operations" [SB/358/§54].

[13] The possible exception is the attack on the Funeral in October 2016 in which around 140 civilians were killed and which was "strongly condemned" by the UK ambassador to the UN, presumably reflecting an acceptance the part of the government that the killings were not justified under international law [SB/395-397].

(5) When considering issue (d) (whether a legitimate military object is identified), the MOD "do not have access to any of the operational intelligence which the Coalition use" and "without being directly inside the RSAF [Royal Saudi Arabian Air Force] targeting process and understanding the rationale and the specific situation on the ground at the time of a strike… are not in a position to interpret whether a target was legitimate or not from a Mission Report" [SB/359/§57].

(6) The evidence makes clear that it is even more difficult to assess "dynamic" than pre-planned targeting and that the assessment in January 2016 was that "procedures for dynamic targeting were less robust" than procedures for pre-planned targeting: see Crompton §§60 & 66B [SB/189 and SB/191-192].

(7) The issues considered by the MOD do not include "the alleged consequences of a strike, including the reported civilian casualties": Watkins 2 §26 [SB/405]. This is significant. It means that, even in those cases where there is an identifiable military target, the MOD (and the UK Government generally) is in no position to gainsay what appears from other reports about casualty numbers. Some very general statements about the casualty numbers in reports can be found in the evidence, e.g. "high levels of civilian casualties can raise concerns, particularly around the proportionality criteria": Crompton §58 [SB/189]). But the analysis conducted by the MOD does not appear to involve its own assessment of the compatibility of the strike with the principle of proportionality under IHL.

(8) Nor, apparently, does the MOD consider whether the strike was against a target (such as a hospital) that attracts special protection under IHL. So, it appears, the MOD (and the UK Government generally) does not analyse whether a strike involves a breach of (for example) Article 11 of Additional Protocol II. This is a matter of some importance given that aerial attacks on hospitals and clinics by the KSA-led coalition have been a feature of the conflict: see generally the material from Médécins Sans Frontières [SB/133-170].

(9) It is therefore clear that the information gathered by MOD is insufficient to enable the MOD (or the UK Government generally) to say "whether the responsible party's actions are assessed as compliant with IHL or not" (as stated in GLD's letter of 16 February 2016 [SB/120-130]), or even "whether any [IHL] concerns are raised by the strike (Summary Grounds §23(c) [CB/228]).

25. As is clear from above, the role of the MOD is limited to gathering certain information on particular incidents. The MOD does not even purport to analyse whether IHL has been, or may have been, complied with in any particular incident by KSA. It would not be possible to perform such an analysis on the basis of the information gathered. In any event, the Secretary of State's evidence has consistently been that the MOD has been unable to identify a military target in the majority of cases [SB/206-207]] In the later reporting periods, the MOD has been unable to identify a military target in three quarters of the cases examined [SB/460-461].

26. In addition to the tracker system, the Defendant also relies on the insight the MOD is said to have into KSA military processes and procedures in respect of operations in Yemen: Judgment [121]-[125] [CB/81-82]. There are, however, a number of important limitations in to the MOD's insight into KSA processes, not recorded in the Judgment:

    (1) The MOD "do not have access to any of the operational intelligence which the Coalition use" and "without being directly inside the RSAF [Royal Saudi Arabian Air Force] targeting process and understanding the rationale and the specific situation on the ground at the time of a strike… are not in a position to interpret whether a target was legitimate or not from a Mission Report" [PW 1: SB/359/§57].

    (2) The UK Government's insight into KSA targeting processes is largely limited to one category of aerial strike. As the FCO documents reveal, the MOD "only has insight into Saudi processes in respect of pre-planned strikes" but has "very little insight into so-called 'dynamic' strikes – where the pilot in the cockpit decides when to despatch munitions – which account for a significant proportion of all strikes": see FCO Advice, February 2016 [SB/115-119]. This is significant. Although not recorded in the Divisional Court Judgment, the evidence makes clear that it is even more difficult to assess "dynamic" than pre-planned targeting and that the assessment in January 2016 was that "procedures for dynamic targeting were less robust" than procedures for pre-planned targeting: see Crompton §§60 & 66B [SB/189 and SB/191-192]. It is understood a similar position pertains in respect of artillery strikes. The Government's evidence reveals no insight into processes in place to ensure effective and IHL compliant targeting in this regard.

27. Since October 2015 the FCO has produced a series of "IHL Updates" for the Secretary of State, based on the MOD's tracker system as well as input from UK diplomatic staff in Riyadh and Washington and ministerial contacts with their KSA counter-parts: see Judgment [150] [CB/90]. At times, these updates have noted thematic concerns (e.g.

the January 2016 update expresses concern that "two thirds of the allegations concerned attacks on hospitals"): Crompton 1 §66 [SB/191]). But they do not seek to form or express a view as to whether KSA has, or may have, violated IHL in any specific incident during the reporting period.

Legal framework

28. The legal framework governing the export of military equipment to KSA is set out in full in the Judgment at [4]-[38] and in the Claimant's SFG §§32-42 [CB/259-266].

29. The relevant requirements of IHL (derived in particular from the four Geneva Conventions of 1949, Additional Protocols I and II and customary international law) are set out in full at SFG §39 [CB/262-265]. They include:

    (a) the obligation to take all feasible precautions in attack: SFG §39.1;

    (b) the protection for medical clinics and transport: see Articles 11-13 APII;

    (c) the protection of objects indispensable to the civilian population: SFG §39.3;

    (d) the prohibition on indiscriminate attacks: SFG §39.4);

    (e) the prohibition on disproportionate attacks: SFG §39.5;

    (f) the prohibition on attacks directed against civilian objects and/or civilian targets: SFG §39.6;

    (g) the obligation to investigate and prosecute: SFG §39.7;

    (h) the obligation to make reparation: SFG §39.8.

Ground 1: Error of approach to the open source material and findings of past breaches of international humanitarian law ("IHL") by KSA

Overview

30. The Secretary of State, in his Statement Opposing Permission to Appeal §6, characterises grounds 1 and 2 as "nothing more than an attempt to re-open the Court's findings of fact". That is, with respect, wrong.

31. The essential argument of the Claimant on ground 1 is that both the Secretary of State and the Divisional Court made a fundamental error of approach in relation to the independent OPEN evidence showing a pattern of violations of IHL, some of them

serious. Where, as here, there is a body of independent evidence demonstrating such a pattern, rationality requires the Secretary of State to consider that evidence and reach a view about whether such a pattern has been shown or not. This is because the existence of a pattern of violations is, given the Secretary of State's own policy and the considerations set out in the User's Guide, obviously and centrally relevant to the question whether there is a "clear risk" that UK-supplied weapons might be used to commit serious violations in the future.

32. The Claimant's argument before the Divisional Court was not that the Secretary of State had reached the wrong factual conclusion on this question. It was that, on his own evidence, he had failed to reach any conclusion (even in private); and that as a result he had failed to have regard to a centrally and obviously relevant factor. This was a classic public law error, which vitiated his decision (which the evidence showed had been "finely balanced"). The Divisional Court's failure to identify this error was itself an error of approach, which this Court can and should correct.

The starting point: was there a pattern of violations of IHL?

33. It was common ground that the Secretary of State was obliged to *start* by considering Saudi Arabia's "past and present record of respect for IHL" (albeit that this was only the beginning of the analysis). The analysis that the Secretary of State was required to perform included consideration of whether "a pattern of violations could be discerned": User's Guide §2.13 [SB/9-13]. On any view, if there was such a pattern, that fact was relevant to the question whether there was a clear risk that KSA would commit serious violations of IHL in the future.

34. As noted above, the Claimant accepts that it is possible – in the abstract – to imagine a lawful decision to continue to licence exports to a State whose past record showed a pattern of violations, but there would need to be very strong evidence to justify a conclusion that, despite this pattern of past violations, there was no clear risk that weapons might be used to commit serious violations in the future. At a minimum, the existence of a pattern of violations in the past would colour the extent to which commitments by the state (or other matters) could be relied upon to negative the "clear risk".

The OPEN evidence of a pattern of violations of IHL, some of them serious

35. The reports relied upon by the Claimant (including the 2016 and 2017 reports of the UN Expert Panel) constituted an overwhelming body of evidence establishing that there *was* a pattern of violations of IHL, some of them serious. These violations

continued to occur *after* training had been provided to some KSA military personnel by the UK Government and *after* statements had been made by KSA officials that were relied upon by the Secretary of State as indicating respect for IHL.

36. The Claimant always accepted that it was in principle open to the Secretary of State to reject the conclusions drawn in these reports if there were reason to regard them as unreliable, or if there were other evidence – not available to the authors – to contradict them. But, as set out below, neither the Secretary of State nor the Divisional Court said that there was such evidence.

The Secretary of State's defective approach to the pattern of violations of IHL established by the OPEN evidence

37. As noted above, it was not the Claimant's case that the Secretary of State was required to form a judgment about every violation of IHL identified in the OPEN reports. The Divisional Court may therefore have been right to say (at [181]) that the Secretary of State is under no duty to make a judgment about "every past incident" and (at [208(8)]) that it was "not legally necessary to engage directly with everything that had been said by others on the topic" (emphasis added). But, as a matter of logic and rationality, it was necessary either (i) to consider a sufficient number of these incidents to displace the conclusion that there was a pattern of past violations or (ii) to accept that there was a pattern of past violations and then consider whether, notwithstanding that pattern, there were reasons to suppose that KSA's conduct would improve in the future.

38. The OPEN evidence establishes that the Secretary of State has simply not engaged with the question whether – as the reports overwhelmingly show – there has been a pattern of violations of IHL, some of them serious. It was his case that he was under no duty to "find or explain" why the reports are wrong (SGR §46 [CB/234]) and that it was sufficient simply to "take them into account" without reaching any conclusion about them generally or individually.

39. The Divisional Court was wrong to say that this point "fails on the facts": Decision Refusing Permission to Appeal, §4 [CB/215-216]. The Secretary of State's own evidence showed that, in the great majority of incidents of concern recorded by the Tracker (some three quarters in some of the later reporting periods), the MoD was unable to identify any military target. This did not mean that there was no such target, but it did mean that the Tracker (and the Secretary of State's own sources of information) could not provide a basis for displacing the conclusions in the UN Expert Panel and other reports that a pattern of violations of IHL had been established.

The other material relied upon by the Secretary of State and the Divisional Court could not cure this defect

40. The Divisional Court placed great emphasis on other aspects of the material considered by the Secretary of State as relevant to the assessment of the risk that KSA would commit serious violations of IHL in the future – in particular, information obtained through the UK Government's engagement with KSA. But, if the Secretary of State's analysis of KSA's "past and present record" of compliance was deficient, none of these other matters could cure the defect. It is enough for the Claimant to show that the Secretary of State's assessment of one key factor was flawed.

41. In any event, the Divisional Court also erred in its conclusions on the other matters taken into account by the Secretary of State:

    (1) The OPEN evidence of the investigations by JIAT provided no basis for concluding either that there has been no pattern of violations of IHL or that effective steps have been taken to prevent such violations from recurring, given that (a) JIAT had been slow in producing its reports; (b) it had produced reports into only a very small percentage of reported incidents (5%); and (c) its methodology and reports had been subject to justifiable and unanswered criticism: see generally §19(4) above.

    (2) The statements of KSA military officials relied upon by the Claimant, some made contemporaneously with those relied upon by the Government, provided good evidence that KSA both adopted and advertised targeting practices that were in flagrant disregard for IHL. The Divisional Court was wrong to conclude otherwise: see §21 above. The failure to attach weight to these statements was a further flaw in both the Secretary of State's decision and the Divisional Court's judgment.

Ground 2: Error in relation to the Secretary of State's failure to ask the questions identified in the User's Guide

42. Like ground 1, ground 2 identifies an error of approach in both the Secretary of State's and the Divisional Court's reasoning.

43. In its Judgment, at [178], the Divisional Court set out a series of questions, identified as relevant in the User's Guide, which the Claimant submitted the Secretary of State was bound to ask and answer when assessing Criterion Two (c). These included: (i) whether the state in question has legislation in place prohibiting violations of IHL; (ii) whether there are mechanisms in place to secure accountability of members of the

armed forces for breaches of IHL; and (iii) whether there is an independent and functioning judiciary capable of punishing members of the armed forces who violate IHL. The Claimant's case was that, by failing to ask these questions, the Secretary of State had breached his common law duty to "ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly": *Secretary of State for Edcuation and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1065, per Lord Diplock.

44. On the evidence before the Divisional Court, the state of the Secretary of State's knowledge on these matters was as follows:

(1) In his response to Leigh Day's letter before claim, the Secretary of State explained that the government is "not in a position to advise on the domestic legislation of the KSA" [SB/120-130]. By the time of the decision under challenge there was no OPEN evidence to show that he had taken any steps at all to acquaint himself with the state of KSA law on this topic, whether by making its own enquiries (perhaps through the UK post in KSA) or by asking the KSA Government. Yet, it is difficult to think of a more basic or necessary starting point when examining "the recipient's past and present record of respect for [IHL]" (the first of the general topics mentioned in §2.13, which the Secretary of State says <u>was</u> considered). Each of the four Geneva Conventions contains a materially identical obligation on States to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article": see eg Article 146 of GC IV. Equally, it is hard to imagine how one could properly evaluate KSA's "capacity to ensure that military equipment is used in a manner consistent with IHL" (the third question the Secretary of State says he considered (SGR CB/223/§15]) without knowing whether KSA had domestic law prohibiting and criminalising breaches.

(2) As with the state of the KSA law, the Secretary of State's response to the Claimant's letter before action makes clear that he *does not know* whether KSA has *ever* prosecuted or punished a member of its armed forces for a breach of IHL. He also *does not know* whether KSA has ever instigated any form of disciplinary investigation into any of its armed forces in respect of an allegation of breach of IHL (in the Yemen conflict or elsewhere) [SB/129]. Despite the claimed close liaison with KSA officials, the question has apparently not been asked. Yet the importance of accountability measures,

including the availability of sanctions, is clear from both the User's Guide and the ICRC's recently published *Arms Transfer Decisions: A Practical Guide* [SB/498-500/§4.3].

(3) In similar vein, there is no evidence of any consideration of the question whether KSA has an independent and functioning judiciary capable of prosecuting serious violations of IHL. That may be though a striking omission, given the conclusion reached in 2014 by the US State Department in its report on KSA that:

> "The law provides that judges are independent and are subject to no authority other than the provisions of sharia and laws in force. Nevertheless, the judiciary was not independent, as it was required to co-ordinate its decisions with executive authority, with the king as final arbiter."

45. The Divisional Court held as follows:

(1) The principles governing the extent of the *Tameside* duty were those set out in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261, at [100]. The "basic test" was" "Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same?" See Judgment [37]-[38] [CB/63-64].

(2) The User's Guide contained non-binding guidance only: Judgment [179(2)]. The questions identified in the User Guide were "merely the sort of questions which the decision-maker might consider in order to assist him or her in addressing the three key matters highlighted in paragraph 2.13 [of the User Guide]": Judgment [179(5)]. These were: "the recipient's past and present record of respect for IHL"; "the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment… is used in a manner consistent with IHL".

(3) It was for the Secretary of State to decide how to inquire into these three matters. The fact that he did not expressly address each of the subsidiary questions does not mean that he failed to discharge his *Tameside* duty: Judgment [179(vi) & (vii])].

46. If correct, the effect of this is that:

(1) The Secretary of State can properly conclude that there is no "clear risk" that UK weapons "might" be used in the commission of serious violations of IHL without having any idea (i) whether the state in question has legislation in place prohibiting violations of IHL, or (ii) whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL, or (iii) whether there is an independent and functioning judiciary capable of punishing members of the armed forces who violate IHL.

(2) It does not matter whether the Secretary of State's ignorance of these matters is because arises because of a deliberate decision not to inquire into them. Not only is there no duty to inquire into these matters; there is also no duty to explain why no such inquiry has been undertaken.

47. This was wrong as a matter of law:

(1) Article 13 of the Common Position provides that the User's Guide "shall serve as guidance for the implementation of this Common Position". That means that it should be regarded as having a status similar to that of statutory guidance (i.e. guidance provided for by statute) in domestic law. In the case of statutory guidance, it is well established that public law imposes a duty (a) to follow the guidance or (b) to provide "cogent reasons" for departing from it: see e.g. *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, at [21], per Lord Bingham.

(2) The User's Guide introduces the questions set out at §2.13 with the words "relevant questions include…" That suggests that these questions are to be regarded as relevant unless – at minimum – there is some cogent reason for not asking them. But the Government's OPEN evidence contained no reason whatsoever for not asking or answering these questions. It was not said, for example, that it would have been unduly onerous or practically difficult to examine whether KSA law prohibits violations by the armed forces of IHL.

(3) In any event, even if compliance with the *Tameside* duty could be reduced to the question whether it was *rational* for the Secretary of State to take a decision without asking or answering the questions in the User's Guide, the answer to the latter question is context-specific, as the formulation in the *Plantagenet Alliance* case makes clear. One important part of the present context is the obligation, under Criterion Two (b), to exercise "special caution

and vigilance" in a case (such as the present) 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".

(4) In that context, one good way of answering the question is to consider what the position would be if (i) there were no legislation in place prohibiting violations of IHL, (ii) there were no mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; and (iii) there were independent and functioning judiciary capable of punishing members of the armed forces who violate IHL. If those were the facts, and they were known to the decision-maker, could he rationally leave them out of account? Obviously not. They would be of such central importance to KSA's "past and present record" of compliance with IHL (and therefore to any assessment of the risk of future serious violations of IHL) that it would be irrational to leave them out of account – particularly in a case where the decision was, on the Secretary of State's own case, "finely balanced". They would be "so relevant that they must be taken into account": see *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, at [63], per Sedley LJ. It must follow that a decision-maker who simply chooses not to ask these questions also acts irrationally if, as here, he cannot provide cogent reasons for doing so.

Ground 3: Incorrect approach to standard of review

48. Grounds 1 and 2 disclose errors that vitiate the Divisional Court's judgment, even on its own findings as to the appropriate standard of review. However, ground 3 discloses an error of law in the identification of the appropriate standard.

49. The Divisional Court found that "the evaluation [carried out by the Secretary of State] has parallels with making national security assessments" and that the evaluation concerns "matters of judgment and policy [that] are recognized as primarily matters for the executive". It referred to *Secretary of State for the Home Department v Rehman* [2003] 1 A.C. 153, at [50]. Such an approach was not apposite in the present case:

(1) The passage cited from *Rehman* provides no support for the analogy drawn. In the passage in question, Lord Hoffman was addressing the effect of the phrase "in the interests of national security" in s. 15 (3) of the Immigration Act 1971. He said:

> "What is meant by 'national security' is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. But there is no difficulty about what 'national security' means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."

(2) By contrast, the legal test to be applied by the Secretary of State under Criterion Two (c) of the Consolidated Criteria does not permit, let alone require, evaluation of policy considerations analogous to whether a measure is in the interests of national security. The test involves as assessment of the risk that UK weaponry will be used in the commission of a serious violation of IHL. That involves an assessment of future risk, founded on an evidence-based analysis of the state's record of compliance with IHL in the past.

(3) On the contrary, the test to be applied by the Secretary of State is analogous to that routinely applied in removal or deportation cases, where the Secretary of State, relying on a wide range of country information and other sources, must decide whether an individual faces a "real risk" of conduct amounting to persecution or in contravention of Articles 2 or 3 ECHR. In such cases, as here, the analysis is prospective, requiring an evaluation of "risk as to future conduct in dynamic and changing situations": *cf.* Judgment [29]. Such cases also require the evaluation of risk in "factually complex situations": *cf.* Judgment [30]. In many removal cases, decisions are made in reliance on those with "considerable specialised knowledge, experience and expertise" of a wide range of matters including, by way of example, expertise pertaining to respect for fundamental rights in the third country by national authorities or others, the policies and practices of foreign agencies, ethnographic country information and so forth. Of course, all such evidence must be approached forensically, giving due weight to specialist expertise where appropriate in the normal manner. Yet, there is no suggestion in cases requiring such expertise that "the executive's assessments in this area are entitled to great weight" (*cf.* Judgment [31]) or, more generally, that the courts' role should be

limited by the need not to "stray into areas which are properly the domain of the executive": Judgment [27].

(4) The context imports a need to apply a stricter, rather than a looser, standard of review. Criterion Two (b) of the Consolidated Criteria (which, in turn, reflects the requirements of Article 2 of the EU Common Position) provides that the Defendant must "exercise special caution and vigilance in granting licences... 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" (emphasis added). The Secretary of State accepts that Saudi Arabia falls into this category. The duty on the Secretary of State to exercise special caution and vigilance should, in turn, condition the approach of the Court in reviewing the manner in which the Defendant has taken its decision. It is relevant as regards both the extent of the *Tameside* duty (*R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), per Popplewell J at [121]) and the standard of review of the substantive decision which is "context dependant" (*Kennedy v Information Commissioner* [2014] 2 WLR 808, per Lord Mance at [51]). As a result, the Court erred in affording the Defendant too great a margin of discretion in his decision-making.

50. The Divisional Court's erroneous self-direction that it was appropriate to defer to the executive in this context was material because it emboldened the Court to conclude that:

(1) there was no need for the Secretary of State to reach conclusions on the correctness of the reports of the UN Expert Panel, NGOs, the EP and others that there was a pattern of violations of IHL by KSA, some of them serious; and

(2) there was no need even to ask certain key questions identified as important in the User's Guide.

51. In its Statement Opposing Permission to Appeal, the Defendant does not seriously engage with the substance of this argument. Instead, it says that Ground 3 is based on a "selective reading" of the Divisional Court's judgment and notes that the Court also stated: that it would adopt a "rigorous and intensive" standard of view; that Criterion 2 (c) does not admit consideration of "political" factors; and that the nature of judicial review, including the question of rationality, is "context specific".

52. These findings do not address, must less defeat, this ground of appeal. In its judgment, the Divisional Court explained that "a rigorous and intensive standard of review… does not mean that the court should stray into areas which are properly the domain of the executive in accordance with the statutory scheme" (Judgment [27]) and that that "the evaluation" under Criterion 2 (c) concerns "matters of judgement and policy [which are] are recognised as primarily matters for the executive" (Judgment [33]). Taken with the inapposite approach to deference adopted in *Rehman*, these were misdirections as to the manner in which the review was to be conducted.

Ground 4: Failure to rule on the meaning of "serious violations of IHL"

The significance of the dispute over interpretation

53. As noted above, the Divisional Court did not rule on the meaning of "serious violation" of IHL. It noted simply that that phrase "*includes*" "grave breaches" and "war crimes": Judgment [16]. It went on to note, by reference to Article 8 of the Statute of the International Criminal Court, that a "grave breach" required a mental element "i.e. a wilful or deliberate or intentional act": Judgment [18].

54. But this left unresolved a dispute between the parties over the correct interpretation of the phrase "serious violation" of IHL, which can be found Articles 7(b)(i) and (ii) of the ATT, in the EU Common Position and in the Consolidated Criteria. The Secretary of State's position (see its skeleton argument below at §§38-39[CB/167-168]) was that "the term 'serious violation' … is synonymous with 'war crimes' and 'grave breaches' as defined, in particular, in the Geneva Conventions". "Grave breaches" describe a particular category of war crime enumerated in the Geneva Conventions in respect of which additional obligations are imposed on States.[14] War crimes require proof of *mens rea* – i.e. intent or recklessness on the part of individual commanders or soldiers.

55. The Claimant's position, by contrast, was that the term "*serious violation*" (as distinct from "*grave breach*") includes, but is not limited to, war crimes. As reflected in the terms of relevant provisions of the Geneva Conventions and the settled jurisprudence of international tribunals, it refers to any violation of "a rule protecting important values" which "involves grave consequences for the victim. The focus of inquiry is on the state, not the individual. The violation is denoted as "serious" because of the nature of the rule violated and the gravity of its consequences.

[14] The Geneva Conventions (and customary IHL) imposes additional, specific obligations on States with regard to "grave breaches" including a duty to search for, and extradite, those suspected of involvement in such crimes and also a duty to take steps to suppress and punish such crimes.

56. This dispute mattered (and continues to matter) for two reasons:

(1) If the broader interpretation of "serious violations" is correct, the Secretary of State consideration of the "clear risk" test was vitiated by an error of law. The materiality of this error can be seen from the October 2015 FCO update (referred to in the Judgment at [153]-[154]). There, the FCO advised: "given that we do not have evidence establishing *deliberate incidents* that could amount to an International Humanitarian Law breach by Saudi Arabia… we do not currently assess that extant export licences need to be revisited in relation to Criterion Two (c)" (emphasis added). This shows that the Government's consideration of the "clear risk" test depended critically on its restrictive understanding of the term "serious violations". Nothing in the Secretary of State's Statement Opposing Permission to Appeal suggests the contrary.

(2) Indeed, if the Claimant's broader interpretation of "serious violations" is correct, the conclusion that there is no clear risk is plainly unsustainable, given the OPEN source material and the lack of any other evidence to displace the conclusions drawn by the UN Expert Panel, NGOs, the EP and others.

<u>The proper interpretation of the phrase "serious violations"</u>

57. In IHL instruments, the terms "grave breach" and "serious violation" are *not* interchangeable:

(1) Article 90 of Additional Protocol I to the Geneva Conventions ("**AP I**") provides for the establishment of international fact finding commissions. Article 90(2)(c) provides for the jurisdiction of such commissions stating that they shall be competent to "enquire into any facts alleged to be *a grave breach* as defined in the Conventions and this Protocol *or other serious violation of the Conventions or of this Protocol*". The language clearly indicates that "serious violations" denotes a broader category than "grave breaches".

(2) Similarly, Article 89 of AP I imposes a duty on states to cooperate with the UN "in situations of *serious violations* of the Conventions or of this Protocol". The term "grave breach" – used in other parts of AP I – was not used.

(3) The International Committee of the Red Cross ("**ICRC**") commentary on Article 89 of AP I (which was cited to the Divisional Court) asks, and

attempts to answer, the question whether "serious violations" is synonymous with "grave breaches":

> "3591. The principal elements of the answer can be found in Article 90 (International Fact-Finding Commission), of which the above-mentioned paragraph 2(c)(i) distinguishes grave breaches as defined in the Conventions and the Protocol, and other serious violations of the Conventions or of the Protocol. *The latter term therefore refers to conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of 'grave breaches'.*
>
> 3592. We do not need to have in mind exactly what conduct could fall under this definition, to be able nevertheless to distinguish three categories that qualify:
>
> - isolated instances of conduct, not included amongst the grave breaches, but nevertheless of a serious nature;
> - conduct which is not included amongst the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances;
> - 'global' violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol."

(4) The ICRC has returned to the issue in its newly published commentary *Arms Transfer Decisions: A Practical Guide*, which addresses the concept of "serious violations". It states §3.3:

> "Violations of IHL are serious if they endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or [protected] objects (e.g. civilian objects or infrastructure) or if they breach important universal values. The most serious violations of IHL involve causing death or injury or the destruction or unlawful taking of property. *War crimes are serious violations of IHL that entail individual criminal responsibility and that*

States have the obligation to prosecute and punish pursuant to treaty or customary law." (Emphasis added.)

This correctly identifies war crimes as a specific kind of "serious violation" (viz. those that entail individual criminal responsibility).

58. The same distinction has repeatedly been drawn in the jurisprudence of international tribunals between "grave breaches" of IHL (which give rise to individual criminal responsibility) and "serious violations" more generally:

(1) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**"), whose jurisdiction was limited to "serious violations of international humanitarian law" by Security Council Resolution 808 (1993), explained the concept in its seminal *Prosecutor v. Tadic* judgment (IT-94-1). At [94] it said this:

> "The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3: [15]
>
> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met … ;
>
> (iii) *the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.* Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law' although it may be regarded as falling

[15] At the relevant time Article 3 stated: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property."

foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule." (Emphasis added.)

As can be seen from the above, the requirement that the violation be serious is distinct from the requirement that it entail the individual criminal responsibility of the perpetrator.

(2) The same approach has been endorsed and applied in a series of subsequent cases and can be regarded settled as a matter of international law (see e.g. *Prosecutor v. Galic* IT-98-29-T [§§ 106-108]; *Prosecutor v. Delalic*, Appeals Chambers, Judgment IT-96-21A [§§ 127 and 136).

Secretary of State's position

59. In his Statement Opposing Permission to Appeal §11, the Secretary of State does not engage with these points at all. He says simply that the Divisional Court "agreed with the Claimant's position" and "expressly highlighted a distinction between 'grave' and 'serious' breaches, indicating that the latter would incorporate reckless as well as intentional conduct".

60. There is nothing in the judgment to indicate that the Divisional Court considered that it was resolving any dispute on the meaning of the term "serious violation". In any event, it was not Claimant's position that the only difference between a "serious violation" and a "grave breach" was that the former included reckless conduct. More fundamentally, if the Divisional Court had in fact resolved the dispute in favour of the Claimants, it would have had to go on to consider whether its conclusion meant that the Secretary of State's decision had been taken on a flawed legal basis. On the evidence, the answer to that question was "Yes".

Closed grounds of appeal

61. It is understood that the Special Advocates consider that there are also closed grounds of appeal, which can and will be advanced by them. The Claimant relies on those grounds in addition to those set out here.

Compelling reason why an appeal should be heard

62. Irrespective of this Court's view of the Claimants' prospects, this is a case where the public importance of the issue justifies the grant of permission to appeal. The point requires little elucidation, but the following points may be noted:

(1) The conflict in Yemen has continued and intensified since the judgment of the Divisional Court in this case. There have been numerous new allegations, from reputable sources, of violations of IHL by Saudi Arabia[16]. For that reason, it is vital that the principles governing the assessment of the "clear risk" test are correctly articulated.

(2) These proceedings are the first occasion on which the legal scheme established by the Consolidated Criteria has been substantively considered. 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.

(3) The gravity of the issue is recognised by the Divisional Court at [27]. It has been the subject of reports by three Parliamentary Select Committees. Two of them recommended that arms exports to KSA should be suspended. One decided expressly to await the outcome of these proceedings.

Conclusion

63. For these reasons, the Court is invited:

(1) to grant permission to appeal;

(2) to allow the appeal; and

(3) to grant the relief claimed at §8 of the SFG[17], or such relief as it considers appropriate.

[16] For example, see Statement of behalf of the Humanitarian Coordinator for Yemen, Jamie McGoldrick, on mounting civilian casualties in Yemen: https://reliefweb.int/sites/reliefweb.int/files/resources/HC%20Statement_IHL_EN_27%20Dec%202017%20FINAL.pdf

[17] CB/250-251

MARTIN CHAMBERLAIN QC

CONOR McCARTHY

6 February 2018