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Case No: CO/1306/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2017

Before :

LORD JUSTICE BURNETT
and
MISTER JUSTICE HADDON-CAVE

- -

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**	**Intervenors**

- -

Martin Chamberlain QC & Conor McCarthy
(instructed by **Leigh Day Solicitors**) for the **Claimant**
James Eadie QC, Jonathan Glasson QC, Kate Grange, Jessica Wells & Alex Cameron
(instructed by **Government Legal Department**) for the **Defendant**
Sudhanshu Swaroop QC, Nikolaus Grubeck & Anthony Jones
(instructed by **Debevoise & Plimpton LLP** for the **First to Third Intervenors**
Zachary Douglas QC & Blinne Ní Ghrálaigh (instructed by **Gowling WLG (UK) LLP**) for the **Fourth Intervenor**
Angus McCullough QC & Rachel Toney (instructed by **SASO**) as **Special Advocates**

Hearing dates: 7th, 8th & 10th February 2017

- -

Approved Judgment

Lord Justice Burnett and Mr Justice Haddon-Cave:

INTRODUCTION

1. The issue in this claim for judicial review is whether the Secretary of State for International Trade, who since July 2016[1] has had responsibility for licensing the export of arms, is obliged by law to suspend extant export licences to the Kingdom of Saudi Arabia and cease granting new licences, to conform with Government policy to deny such licences where there is "a clear risk that the arms might be used in the commission of a serious violation of International Humanitarian Law". The claim springs from the conflict in Yemen and the border areas of Saudi Arabia. It focusses on airstrikes conducted by a coalition led by Saudi Arabia ("the Coalition") in support of the legitimate government of Yemen against the Houthi rebellion. The Claimant submits that the body of evidence available in the public domain, in particular from respected human rights organisations and international monitoring agencies, not only suggests but dictates the conclusion that such a clear risk exists. Since no other conclusion was rationally open to the Secretary of State, it is no longer lawful to license the sale of arms to Saudi Arabia.

2. The Secretary of State resists the Claimant's case with the aid of open evidence and argument. In addition, there is a closed case. Cranston J made a declaration pursuant to section 6 of the Justice and Security Act 2013 enabling the Secretary of State to rely upon closed material without disclosure to the Claimant. Special Advocates were appointed. There is a statutory procedure to ensure that anything relied upon as closed evidence that can be disclosed without damage to the relevant public interests is produced to the Claimant. That procedure was followed. After the conclusion of the open argument, we heard further submissions in a closed hearing attended by the Secretary of State and the Special Advocates.

3. This is our open judgment in which we explain our reasons for dismissing the claim.

THE LEGAL FRAMEWORK

Domestic and EU regime governing arms sales

4. On 26th October 2000 the Secretary of State announced to Parliament consolidated criteria relating to export licensing decisions. They were known as the "Consolidated EU and National Arms Export Licensing Criteria". They reflected a voluntary EU Code of Conduct on Arms Exports agreed in 1998. Section 9(3) of the Export Control Act 2002 ("the 2002 Act") required the Secretary of State to "give guidance about the general principles to be followed when exercising licensing powers." By subsection (8), the Consolidated Criteria were to be treated as guidance for the purposes of section 9, unless varied or withdrawn.

5. The detail of controls on the export of arms, military goods and allied equipment is contained in delegated legislation, namely the Export Control Order 2008. Article 26 provides for the grant of a licence to export. Article 32 allows the Secretary of State to amend, suspend or revoke a licence already granted.

[1] Following the creation of the new Department for International Trade in July 2016, responsibility for export controls was transferred from the Secretary of State for Business, Innovation and Skills to the Secretary of State for International Trade (under S.I. 2016/992).

Common Position

6. In December 2008, the Member States of the European Union adopted European Council Common Position 2008/944/CFSP ("The Common Rules Governing the Control of Exports of Military Technology and Equipment"). The Common Position built upon the Consolidated Criteria of 1998. It sounds only in international law as an agreement between the Member States, rather than being part of EU Law. But the Secretary of State has adopted much of the Common Position as guidance under section 9 of the 2002 Act. As such, it represents the policy which the Government have stated will be applied when considering the grant of export licences. It is uncontroversial that, as a matter of public law, the Government must abide by their policy in granting or refusing export licences. It is not suggested on behalf of the Secretary of State that he has stepped outside the four corners of the policy, although legally entitled to do so, in circumstances identified in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at para 21 *per* Lord Dyson.

7. The new Consolidated Criteria, as they continued to be called for this purpose, were set out in a written statement to Parliament made on 25th March 2014 by the Secretary of State. The statement noted the developments in international law, since the earlier iteration of the Consolidated Criteria was adopted, including the adoption by the United Nations General Assembly on 2nd April 2013 of an international arms trade treaty. The earlier iteration contained eight criteria. The Secretary of State continued:

> "The Government believe that the procedures for assessing licence applications and our decision-making processes are robust and have stood the test of time. We also believe that the eight criteria continue adequately to address the risks of irresponsible arms transfers and are fully compliant with our obligations under the EU common position and the arms trade treaty. Nevertheless it is appropriate to update these criteria in light of developments over the last 13 years. In particular: the list of international obligations and commitments in criterion 1 has been updated; there is explicit reference to international humanitarian law in criterion 2; and the risk of reverse engineering or unintended technology transfer is now addressed in criterion 7 rather than criterion 5. There are minor changes to improve the clarity and consistency of the language throughout the text. None of these amendments should be taken to mean that there has been any substantive change in policy. … As before they will not be applied mechanistically but on a case-by case basis taking account of all relevant information available at the time the licence application is assessed. While the Government recognise that there are situations where transfers must not take place, as set out in the following criteria, we will not refuse a licence on the grounds of purely theoretical risk of a breach of one or more of the criteria. In making licensing decisions I will continue to take

into account advice received from FCO, MOD, DFID, and other Government Departments and agencies as appropriate."

Criterion 2

8. This application for judicial review is primarily concerned with Criterion 2 of the Consolidated Criteria:

> "*The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.*
> Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the Government will:
> a) not grant a licence if there is a clear risk that the items might be used for internal repression;
> b) exercise special caution and vigilance in granting licences, 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) <u>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</u>.
> For these purposes items which might be used for internal repression will include, inter alia, items where there is evidence of the use of these or similar items for internal repression by the proposed end-user, or where there is reason to believe that the items will be diverted from their stated end use or end user and used for internal repression.
> The nature of the items to be transferred will be considered carefully, particularly if they are intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment; summary or arbitrary executions; disappearances; arbitrary detentions; and other major violations of human rights and fundamental freedoms as set out in the relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.
> In considering the risk that items might be used for internal repression or in the commission of a serious violation of international humanitarian law, the Government will also take account of the risk that the items might be used to commit gender-based violence or serious violence against women and children." (emphasis added)

9. The Claimant's case is that, given the available evidence, sub-criterion (c) of Criterion 2 is met.

10. The Consolidated Criteria also provide:

> "In 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".

User's Guide

11. Article 13 of the Common Position referred to a "User's Guide" to "serve as guidance for [its] implementation" which would be regularly reviewed. The up-to-date version of that guidance is dated 20th July 2015. It was produced by the Council of the European Union. The introduction explains that it is intended to help Member States apply the Common Position. It does not replace the Common Position "but summarises agreed guidance for the interpretation of its criteria and implementation of its articles. It is intended for use primarily by export licensing officials." It is a long document with a section dealing with each of the eight criteria, described as "the best practices for the interpretation of" each criterion. There is also a section on "licensing practices" which has no bearing on this claim for judicial review. The general introduction to the "criteria guidance" explains its purpose:

> "The purpose of these best practices is to achieve greater consistency among Member States in the application of the criteria … by identifying factors to be considered when assessing export licence applications. <u>They are intended to share best practice in the interpretation of the criteria rather than to constitute a set of instructions</u>; <u>individual judgement is still an essential part of the process, and Member States are fully entitled to apply their own interpretations</u>. The best practices are for the use of export licensing officials and other officials in government departments and agencies whose expertise *inter alia* in regional, legal (e.g. human rights, public international law), technical, development as well as security and military related questions should inform the decision-making process." (emphasis added)

12. The passage we have underlined from the introduction is important in understanding the status of the guidance as an aid to the interpretation of the Common Position as a matter of international law. It bears tangentially upon the Secretary of State's policy set out in the Consolidated Criteria because he accepts that officials have regard to it when making decisions on export licences or giving advice to ministers.

13. The Claimant's arguments focussed, in particular, on two paragraphs in the section of the User's Guide relating to the best practices for the interpretation of Criterion 2. Those paragraphs deal with "clear risk":

> "2.13 *Clear risk.* A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of a serious violation of international humanitarian law 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 <u>and</u> the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

> Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where 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."

14. A list of 21 non-exhaustive "relevant questions" follows, including "Does the recipient country educate and train its military officers as well as the rank and file in the application of the rules of international humanitarian law? (e.g. during military exercises)".

International Humanitarian Law

15. Paragraph 2.11 of the User's Guide defines "serious violations" of International Humanitarian Law as follows:

> "Serious violations of international humanitarian law include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non-international armed conflict, which it defines as war crimes (Article 8, sub-sections b, c and e; for the full text of the Rome statute, see http://legal.un.org/icc/statute/romefra.htm)."

16. Thus, the term "serious violation" is a general term in International Humanitarian Law which *includes* "grave breaches" and "war crimes" as defined, in particular, in the four Geneva Conventions, Additional Protocol 1 and in Article 8 of the Rome Statute of the International Criminal Court ("ICC").

17. Article 8 of the ICC Statute provides in relation to international armed conflicts as follows:

> "**Article 8: War crimes**
>
> ... 2. For the purpose of this Statute, "war crimes" means:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (i) Wilful killing;
>
> (ii) Torture or inhuman treatment, including biological experiments;
>
> (iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; ...

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; ...

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; ..."

18. Article 8 of the ICC Statute requires a mental element for a "grave" breach, *i.e.* a wilful or deliberate or intentional act. In our view, the generic term "serious breach" would include reckless as well as deliberate or intentional acts.

19. Paragraph 2.6 of the User's Guide explains that violations of International Humanitarian Law do not have to be systematic or widespread in order to be considered as "serious" for the Criterion 2 analysis. Paragraph 2.6 also makes it clear that, notwithstanding any analysis by competent bodies of the UN or EU, the final assessment of whether or not violations are considered to be "serious" must be done by the Member State.

20. Paragraph 2.7 suggests, in the context of weapons being used for internal repression, that the combination of "clear risk" and "might" in the text of Criterion 2 requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression.

21. The User's Guide also summarises the main principles of International Humanitarian Law relating to the use of weapons in an armed conflict as follows:

> "2.10 The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rules of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection."

22. The relevant principles of International Humanitarian Law are codified in the Four Geneva Conventions of 1949 and the Additional Protocols I and II of 1977and in customary international law. They include the following: (1) Obligation to take all feasible precautions in attack; (2) Effective advance warning of attacks which may affect the civilian population; (3) Protection of objects indispensable to civilian population; (4) Prohibition on indiscriminate attacks; (5) Prohibition on disproportionate attacks; (6) Prohibition on attacks directed against civilian objects and/or civilian targets; (7) Obligation to investigate and prosecute; (8) Obligation to make reparation.

23. The 'Principle of Distinction' prohibits an attack directed against civilians:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." (Additional Protocol I to the Geneva Convention, Chapter II "Civilians and Civilian Population", Article 48; and see also Article 8(2)(b)(i) of the Rome Statute of the International Criminal Court).

24. The 'Principle of Proportionality' prohibits an attack launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (see Article 8(2)(b)(iv) the Rome Statute of the International Criminal Court). The 'Principle of Proportionality' permits belligerents to carry out proportionate attacks against military objectives, even when it is anticipated that civilian deaths or injuries will inevitably occur as a result. As the Turkel Commission[2] explained (pp.101-102):

> "According to the principle of proportionality, expected incidental loss of civilian life, injury to civilians or damage to civilian objects may be lawful (albeit regrettable) if they are not 'excessive' relative to the concrete and direct military advantage anticipated from the attack."

Relevant principles of domestic public law

Rationality

25. The nature of judicial review, including questions of rationality or reasonableness of the decision, is context-dependent. As Lord Mance explained in *Kennedy v Charity Commission* [2015] AC 455 at [51]:

[2] 'Turkel Commission Report, Part II, Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (February 2013) at p.109, §57 - http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf.

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich *in R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531, where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion,
>
> > 'the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'".

26. Mr Chamberlain QC submitted that the decision here was of exceptional gravity and required a 'rigorous and intensive' standard of review. He prayed-in-aid the fact that Criterion 2b itself refers to "special caution and vigilance" and submitted that the Secretary of State was not involved in exercising a 'political' judgement in any sense but rather the application of a legal test, *i.e.* the "clear risk" test in Criterion 2c.

27. We agree the nature of the decision in this context, involving as it does risk to life, necessitates a rigorous and intensive standard of review but that does not mean that the Court should stray into areas which are properly the domain of the executive in accordance with the statutory scheme. We have looked carefully at all the evidence to decide whether the decisions in this case were properly open to the Secretary of State.

28. We also agree with Mr Chamberlain QC that the test in Criterion 2c sets a legal test against which the Secretary of State must make an evaluation, and it does not import or admit of additional 'political' considerations. The Consolidated Criteria allow political considerations to inform some aspects of decision-making, but not those under Criterion 2. The question that the Secretary of State answers calls for an assessment of what has happened in the past to inform an evaluation of the future. The process is imbued with assessments of how a friendly foreign government will act which is informed by diplomatic and security expertise which the Court does not possess.

29. We accept the following points made by Mr Eadie QC as conditioning the nature of the review to be carried out by the Court. First, the assessment under Criterion 2c is 'predictive' and involves the evaluation of risk as to future conduct in a dynamic and changing situation. It is, therefore, appropriate for review to be on rationality grounds (see *R (Lord Carlile) v Home Secretary* [2015] AC 945 *per* Lord Sumption at [32] and Lady Hale at [88]; see also Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at [57]). As stated by Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [29]:

> "Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen."

30. Secondly, the assessment under Criterion 2c involves the evaluation of risk of extremely complex facts and information drawn from a wide variety of sources (including sensitive sources not publicly available) (*c.f.* Lord Sumption in *Lord Carlile* at [32] and Lord Reed in *Bank Mellat v HM Treasury* [2014] AC 700 at [93]).

31. Thirdly, the assessment under Criterion 2c involves the decision-maker drawing on advice from those with considerable specialised knowledge, experience and expertise in the field, including diplomats and military personnel. That expertise means that the Executive's assessments in this area are entitled to great weight (see Lord Hoffmann in *Rehman* at [57] and Lord Sumption and Lady Hale in *Lord Carlile* at [32] and [88] respectively).

32. Fourthly, the assessment under Criterion 2c is made on the basis of advice from government departments and ministers and officials at the highest level, including the Foreign Secretary.

33. Fifthly, the role of the Court can properly take into account that there is an expectation, consistent with democratic values, that a person charged with making assessments of this kind should be politically responsible for them (see Lord Hoffmann in *Rehman* at [62] and Lord Sumption in *Lord Carlile* at [32]). In the present case, ministers have appeared before the Parliamentary Committees on Arms Export Controls and the All-Parliamentary Group on Yemen; ministers have also spoken in parliamentary debates on Yemen, made oral and written statements, responded to urgent questions and answered a wide range of parliamentary questions and ministerial correspondence.

34. Sixthly, the evaluation has parallels with making national security assessments. They are matters of judgement and policy and are recognised as primarily matters for the executive (see *Rehman* at [50] per Lord Hoffman; and *c.f.* also *Harrow Community Support Limited v. Secretary of State for Defence* [2012] EWHC 1921 (Admin) at [24]).

35. For these reasons, in our view, the particular context of this case necessitates that considerable respect should be accorded to the decision-maker by a Court.

Tameside duty

36. A public body has a duty to carry out a sufficient inquiry prior to making its decision. As Lord Diplock explained in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (at pages 1064-5):

> "It is not for any court of law to substitute its own opinion for [the Secretary of State's]; but it is for a court of law to determine whether it has been established that in reaching his decision… he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 , per Lord Greene MR, at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint

himself with the relevant information to enable him to answer it correctly?"

37. We take the general legal principles to be applied as conveniently summarised by the Divisional Court in *R. (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB); [2015] 3 All E.R. 261 at [100] as follows:

> "1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> 2. Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R(Khatun) v Newham LBC [2005] QB 37 at §35, per Laws LJ).
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406).
>
> 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301; cited with approval by Laws LJ in (R(Khatun) v Newham LBC (supra) at §35).
>
> 5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (*R (London Borough of Southwark) v Secretary of State for Education* at page 323D).
>
> 6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407 at 466G)."

38. The Divisional Court formulated the basic test as follows at [139]:

> "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?"

BACKGROUND

The conflict in Yemen

39. Saudi Arabia and Yemen are contiguous and share a 1,800 km border. Since early 2015, Yemen's capital city, Sana'a, and parts of central and southern Yemen have been in the control of Houthi rebels backed by former Republican Guard Forces loyal to former President Saleh. The Houthi are a Shia-Zaydi movement from the north of Yemen.

40. On 24th March 2015, the President of Yemen, President Hadi, wrote to the United Nations requesting support "by all necessary means and measures, including military intervention, to protect Yemen and its people from continuing aggression by the Houthis". A further letter was sent on 26th March 2015 from the Gulf Cooperation Council countries endorsing President Hadi's request.

41. On 25th March 2015, a coalition of nine states led by Saudi Arabia (Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait, Qatar and Bahrain) responded to a request for assistance by President Hadi and commenced military operations against the Houthis in Yemen.

42. On 14th April 2015, the UN passed Security Council Resolution 2216 (2015) affirming the legitimacy of President Hadi and condemning the unilateral actions taken by the Houthis.

43. Hostilities took place during 2015 and 2016, notwithstanding numerous ceasefire attempts, and continue to this day. Coalition military operations have taken the form primarily of airstrikes led by Saudi Arabia against the Houthis, together with some ground operations. The Saudis have reported numerous cross-border incursions and missile attacks by the Houthi, including use of SCUD missiles. There have been reports of attacks by Houthi forces on Coalition shipping in the Red Sea. As of early 2017, Houthi forces continue to occupy Sana'a, and ground fighting remains significant in the Northern Provinces and around Taizz. The Saudis have reported 745 Saudi soldiers and border guards killed along the Southern front, and over 10,000 injured since March 2015.

44. Terrorist organisations, such as Al-Qaeda in the Arabian Peninsula ("AQAP") and Daesh (also known as "ISIS"), have taken advantage of the on-going instability and ungoverned space in Yemen. This has complicated the picture and led to increased anti-terror operations in the region led by US forces.

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

CHALLENGE

46. On 8th January 2016, the Claimant's solicitors, Leigh Day, wrote a letter before claim alleging that the UK Government was acting unlawfully in continuing to grant export licences, and in not suspending extant licences, for the supply of UK-produced military equipment to Saudi Arabia that could be used in Yemen.

47. In its response of 16th February 2016 to the Claimant's letter before claim, the Government Legal Department stated as follows:

> "8. … [T]he MOD monitors all incidents of alleged [International Humanitarian Law] violations by the Coalition that come to its attention... The available information is assessed to identify whether... the responsible party's actions are assessed as compliant with [International Humanitarian Law] or not."

48. In answer to a Parliamentary question on 17th March 2016, the Secretary of State for Defence, the Rt Hon. Sir Michael Fallon MP said:

> "The Royal Saudi Air Force are flying British-built aircraft in Yemen, and have been provided with precision-guided Paveway weapons. The Government is satisfied that the extant licences for Saudi Arabia are fully compliant with the UK's export licence criteria. No export licences for Saudi Arabia have been reviewed in the last year. We continue to keep all arms sales under close review."

49. By these judicial review proceedings, the Claimant challenges (a) the continuing failure of the Secretary of State to suspend export licences for the sale or transfer of arms and military equipment to Saudi Arabia for possible use in the conflict in Yemen and (b) the decision communicated on 9th December 2015 to continue to grant new licences of this nature.

50. The Claimant pursues three main grounds of challenge:

    i) Ground 1: Failure to ask correct questions or make sufficient inquiries.

    ii) Ground 2: Failure to apply the 'suspension mechanism'.

    iii) Ground 3: Irrational conclusion that Criterion 2c was not satisfied.

SUBMISSIONS

Claimant's submissions

51. Mr Chamberlain QC's principal submissions on behalf of the Claimant in what amounted essentially to a 'rationality' challenge under all three Grounds were as follows:

    i) First, there was a formidable body of "reliable" evidence from international bodies, open sources and non-governmental organisations ("NGOs"), which demonstrated that the Coalition had committed serious and repeated breaches of International Humanitarian Law during the Yemen conflict. This material

gave rise to what amounted to a rebuttable presumption that the clear risk in Criterion 2c was established.

ii) Secondly, the Secretary of State could only rationally disagree with a finding in relation to a particular incident by an apparently authoritative body (such as a UN body or an NGO) if he based his conclusion on a proper analysis of the finding, gave cogent reasons for discounting it and cited evidence demonstrating why the finding should be rejected.

iii) Thirdly, the material went far beyond establishing a "clear risk" that UK-exported military equipment "might" be used in breach of International Humanitarian Law; and a rational decision that there was no "clear risk" would have to be based on other compelling evidence and analysis capable of negativing the clear (and only) conclusion which could be drawn from the material (*c.f.* Sedley J *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1, at [27]).

52. He also argued that the Secretary of State had a duty to investigate every reported incident to determine whether, in fact, it amounted to a breach of International Humanitarian Law.

53. Mr McCullough QC, Special Advocate supporting the Claimant, submitted that the 'mass of evidence' of breaches of International Humanitarian Law assembled by the Claimant suggested there is *prima facie* a manifestly "clear risk" that UK-supplied weapons might be used in serious breach of International Humanitarian Law and would require 'compelling evidence' to be displaced in any sustainable assessment that no clear risk exists.

54. In essence, the Claimant's primary case was that the open source evidence raised a presumption of a "clear risk" under Criterion 2c which could not rationally be rebutted. Mr McCullough QC submitted that logic pointed to the "clear risk" test being met.

Intervenor's submissions

55. Mr Swaroop QC adopted the Claimant's submissions on behalf of the First, Second and Third Intervenors.

56. In addition, Mr Swaroop QC sought to argue a further point, which did not form part of the Claimant's pleaded case. The Defendant was in breach of Criterion 1 of the Consolidated Criteria (which deals with respect for the UK's international obligations) because he had failed to consider the UK's obligations reflected in Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (which prohibits aiding or assisting another state in the commission of internationally wrongful acts). Mr Swaroop QC agreed in argument that it was not the function of this Court to find in these proceedings that Saudi Arabia had breached international law, which would have been a necessary stepping stone to a conclusion that the Secretary of State had misapplied Criterion 1. In these circumstances, it is difficult to see that Criterion 1 has any relevance.

Defendant's submissions

57. Mr Eadie QC's submissions in response on behalf of the Secretary of State can be summarised as follows:

i) The process of decision-making in relation to arms exports involves multiple Government departments and includes those at the very top of Government. The Secretary of State seeks advice from other specialist departments, in particular, the Foreign and Commonwealth Office ("FCO") and the Ministry of Defence ("MOD"). The matter was at all material times given the fullest and most careful consideration.

ii) The process is one of continual review and involves consideration and judgement at all levels within Government by officials with particular expertise to make those judgements.

iii) The judgements required are prospective and predictive. The question is: 'Knowing what we know, is there a clear risk that materials we supply to foreign states might be used in breach of International Humanitarian Law?' Past judgements can inform, but they are by no means determinative.

iv) The judgements involve multiple layers of people and expertise. But in war situations, hard facts are often difficult to come by and assess. This is true even when the UK itself is fighting and even when the foreign state in question is friendly.

v) The context includes foreign relations and diplomatic judgements. It is no accident that UK diplomats, including Ambassadors, have been involved in a process of decision-making, which is more personalised than the norm.

58. In essence, the Defendant's case is that the decision-making processes have been conducted at the highest levels of government and on the basis of careful assessments of relevant information. Mr Eadie QC prays-in-aid the fact that the Foreign Secretary himself has recognised that some of the decisions have been "extremely finely balanced"; and submits that serious and concerning developments in the Yemen conflict have had to be assiduously and conscientiously evaluated as part of the decision-making process. He further submits:

> "All of those elements serve to highlight the thoroughly ambitious nature of the Claimant's rationality and *Tameside* challenges. At the heart of both public law concepts lies the recognition that substantial respect is to be afforded to the judgements of the Secretary of State. No doubt in some contexts arguments can be mounted that the margin of discretion to be afforded the decision maker is a narrow one because the issue is a tolerably straightforward one (whether at the point of considering the information/matters feeding into the substantive decision or in relation to the actual decision itself). The present context is as far away from that sort of case as it is possible to imagine. Properly analysed, the Secretary of State's December 2015 decisions and the continuing decisions thereafter cannot be impugned on either rationality or *Tameside* grounds and this judicial review should be dismissed." (skeleton argument, paragraph 1)

THE ISSUE

59. The central issue is whether the Secretary of State was entitled to conclude on the evidence and advice available to him, both open and closed, that there was no "clear risk that the [UK licensed] items might be used in the commission of a serious violation of international humanitarian law" in Yemen. The subsidiary issue is whether he sufficiently informed himself in *Tameside* terms.

Approach

60. The evidence presented by both sides in this case has been voluminous. We are grateful for the considerable effort that the legal teams have taken to present it in a form which makes it comprehensible and digestible. We were taken to a limited amount of the detail during the hearing. For the most part, the large amount of material was left with us to read and consider. The approach which we have taken is to undertake a thorough review of all the Open and Closed materials in order to achieve the following: (i) a detailed understanding of the processes, procedures and methodology which the Secretary of State had in place to assess the risks in question; (ii) a clear idea of the precise manner in which, in practice, the Secretary of State operated these processes, procedures and methodology in the light of evidence and materials which came to his attention at each stage; (iii) a comprehensive picture of the evidence and materials available to the Secretary of State as regards the reported incidents and as regards the Saudi Arabia authorities; (iv) an objective view as of the quality, scope, sources and reliability of the numerous strands of open and closed evidence and materials; and (v) an overall assessment of the judgement call made by the Secretary of State at each stage, in the light of (i), (ii), (iii) and (iv).

ANALYSIS OF EVIDENCE

Claimant's evidence

61. The Claimant relies upon a large volume of evidence which it submits demonstrates 'overwhelmingly' that Saudi Arabia has committed repeated and serious breaches of International Humanitarian Law during the conflict in Yemen, in particular, by committing indiscriminate or deliberate airstrikes against civilians. The Claimant's evidence runs to many hundreds of pages. It includes reports from the following bodies: United Nations; European Parliament; Council of the European Union; International Committee of the Red Cross; Médecins Sans Frontières; Amnesty International; Human Rights Watch; House of Commons Committee; and the press. For the most part, it does not distinguish between the activities of the different members of the Coalition.

62. The Claimant lists 72 reports of potential 'serious breaches' of International Humanitarian Law which are described as 'committed by' or 'attributed to' the Coalition. These include airstrikes which have killed civilians, airstrikes which have used 'cluster' munitions, airstrikes which have targeted schools and medical facilities, and a naval blockade. The Claimant relies, in particular, upon reports by the following bodies:

    i) United Nations: 31 incidents

ii)	European Parliament:	2 incidents
iii)	Médecins Sans Frontières:	8 incidents
iv)	Amnesty International:	19 incidents
v)	Human Rights Watch:	12 incidents
		72 incidents

63. It is not necessary, or indeed possible, to rehearse all of the evidence relied upon by the Claimant in detail in this judgment. It is sufficient to highlight, as Mr Chamberlain QC helpfully and succinctly did, key aspects of the evidence in order to give a flavour of the large volume of material available in the public domain during the relevant period which pointed to 'serious breaches' of International Humanitarian Law by the Coalition. We set out below some of the most striking material relied upon by the Claimant in chronological order.

Chronology of reports

64. In June 2015, Human Rights Watch issued a report[3] (having conducted field investigations in Saada City[4] on 15th and 16th May 2015 during a five-day ceasefire, interviewing 28 local residents and examining impact craters and dozens of buildings damaged or destroyed by airstrikes) which concluded that:

> "While many coalition strikes were directed at legitimate military targets in [Saada City], Human Rights Watch identified several attacks that appeared to violate international humanitarian law, also known as the laws of war, and resulted in numerous deaths and injuries.
> Coalition attacks struck at least six residential houses not being used for military purposes. One attack killed 27 members of a single family, including 17 children. The airstrikes also hit at least five markets for which there is no evidence of military activity. Aerial attacks on an empty school and a crowded petrol station appear also to have violated the laws of war."

65. On 9th July 2015, the European Parliament passed a resolution, which included:

> "G. [W]hereas on several occasions air strikes by the Saudi-led military coalition in Yemen have killed civilians, in violation of international humanitarian law, which requires all possible steps to be taken to prevent or minimise civilian casualties; …"[5].

66. In November 2015, Human Rights Watch issued a further report[6] regarding 10 airstrikes (having interviewed victims and witnesses, searched for possible military targets in the vicinity, and spoken to medical staff who treated the injured) which concluded that:

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[3] Report from Human Rights Watch: *"Targeting Saada – Unlawful Coalition Airstrikes on Saada City in Yemen"* (June 2015).
[4] Also spelt Sa'dah City.
[5] European Parliament Resolution P8_TA-PROV (2015)0270 (dated 9th July 2015), para. G.
[6] Report from Human Rights Watch: *'What military target was in my brother's house?' Unlawful Coalition Airstrikes in Yemen* (November 2015), p. 1.

> "This report documents 10 coalition airstrikes from April through August that appear to have violated international humanitarian law, the laws of war. …
> In the cases discussed in this report, which caused at least 309 civilian deaths and wounded at least 414 civilians, Human Rights Watch found either no evident military target, or that the attack failed to distinguish civilians from military objectives."

67. In January 2016, a UN Panel of Experts issued a report[7] (having conducted interviews with eye witnesses, including refugees, humanitarian organisations, journalists and local activists and considered satellite imagery) which concluded that:

> "128. The coalition's targeting of civilians through air strikes, either by bombing residential neighbourhoods or by treating the entire city of Sa'dah or region or Maran as military targets, is a grave violation of the principles of distinction, proportionality and precaution. In certain cases, the Panel found such violations to have been conducted in a widespread and systematic manner. …
>
> 140. On 8 May, the entire city of Sa'dah and region of Maran were declared 'military targets' by the coalition. Sa'dah remains one of the most systematically targeted and devastated cities in Yemen, attributable to coalition airstrikes and the targeting of the entire city in direct violation of international humanitarian law… Sa'dah also faced systematic indiscriminate attacks, including on hospitals, schools and mosques. …
>
> 151. The denial of humanitarian assistance is constitutive of a war crime regardless of whether it occurs in an international or a non-international armed conflict… However, the commercial blockade also has an impact on the social and economic rights of the people of Yemen and, as such, on the right to life."

68. On 25th February 2016, the European Parliament passed a further resolution:

> "N. [W]hereas some EU Member States have continued to authorise transfers of weapons and related items to Saudi Arabia since the war started; whereas such transfers are in violation of Common Position 2008/944/CFSP on arms export control, which explicitly rules out the authorising of arms licences by Member States if there is a clear risk that the military technology or equipment to be exported might be used to commit serious violations of international humanitarian law and to undermine regional peace, security and stability; …"[8].

69. On 20th April 2016, the UN Secretary General issued a report[9]:

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[7] UN: *Final Report of the Panel of Experts on Yemen established pursuant to Security Council Resolution 2140 (2014)* (as amended by Resolution 2216 (2015) (January 2016).
[8] European Parliament Resolution P8_TA-PROV (2016)0066 (dated 25th February 2016), para. N.
[9] UN Secretary General's Report on *Children and Armed Conflict* A/70/836-S/2016/360 (20th April 2016), paras. 171 and 228.

> "171. The United Nations verified 42 attacks on schools, with the largest number in Amanat al-Asimah (12), Ta'izz (10) and Sa'dah (10). Of the attacks, 57 per cent were attributed to the coalition…."
> "228. … In Yemen, owing to the very large number of violations attributed to the two parties, the Houthis/Ansar Allah and the Saudi Arabia led Coalition are listed for killing and maiming [children] and attacks on schools and hospitals".

(It should be noted, however, that on 6th June 2016 the UN Secretary General agreed to remove the listing of Saudi Arabia from the above report's Annex pending a review of the cases cited in the report[10]. That review is still pending.)

70. In August 2016, Amnesty International issued a report[11] which concluded that:

> "The Saudi Arabian-led coalition forces have killed and wounded civilians, in unlawful airstrikes which failed to distinguish between military targets and civilian objects in Houthi-controlled areas.
> Amnesty International has documented hundreds of cases of civilians, many of them children and women, killed whilst asleep in their homes or going about their daily activities…"

71. On 14th September 2016, the House of Commons Business, Innovation and Skills and International Trade Committees[12] published a joint report which concluded:

> "In the case of Yemen, it is clear to us that the arms export licensing regime has not worked. We recommend that the UK suspend licences for arms exports to Saudi Arabia, capable of being used in Yemen, pending the results of an independent, United Nations-led inquiry into reports of violations of [International Humanitarian Law], and issue no further licences. In addition, the UK Government should investigate whether any licences so far issued have led to the transfer of weapons which have been used in breach of [International Humanitarian Law]. This suspension must remain in place until such time as the UN-led inquiry can provide evidence that the risk that such exports might be used in the commission of serious violations of [International Humanitarian Law] has subsided." [107]

72. On the same day, the House of Commons Foreign Affairs Committee[13] published a separate report, which noted:

> "In the face of widespread allegations of violations of international humanitarian law in Yemen, 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. At present, the Government's export licensing policy towards Saudi Arabia could be interpreted as not living up to the UK's

[10] see UN press release here: http://www.un.org/press/en/2016/sgsm17824.doc.htm
[11] Report from Amnesty International: *Yemen: 'Nowhere safe for civilians': Airstrikes and ground attacks in Yemen* (August 2015), p. 7.
[12] "*The use of UK-manufactured arms in Yemen"* (HC 679).
[13] "*The use of UK-manufactured arms in Yemen*" (HC 688).

> robust and transparent regulations, nor upholding the UK's international obligations." [113]

73. The Committee did not recommend a suspension of export licences, but, having referred to the fact that this claim was currently before the High Court, did say:

> "The courts are the appropriate body to test whether or not HMG is compliant with the law." [111]

74. On 25th October 2016, the UN Committee on the Rights of the Child [14] issued a Report that it was deeply concerned by "credible, corroborated and consistent information that the State party, through its military operation in Yemen, has been committing grave violations of children's rights":

> "(a) Hundreds of children have been killed and maimed as a result of indiscriminate air strikes and shelling by the State party-led coalition on civilian areas and camps for internally displaced persons, of unexploded cluster bomb sub-munitions and other unexploded ordnance, and of the dozens of attacks carried out on schools and hospitals;
>
> (b) Prohibited tactics such as inducing starvation as a method of warfare have been used by the State party-led coalition against civilians, including children…;
>
> (c) More than 3 million children in Yemen face life-threatening levels of malnutrition and thousands are currently at risk of dying from diseases owing to the dire humanitarian crisis, the destruction of civilian infrastructure critical to the maintenance of basic services and the imposition from both sides of obstacles to the delivery of humanitarian assistance;
>
> (d) In 2015, more than half of the attacks perpetrated on schools were attributed to the State party-led coalition…; these attacks continued in 2016, leaving millions of children in need of emergency access to education." [38]

75. In our view, this claim does not turn on the reports of Committees of Parliament, but we record that they should be viewed cautiously as "evidence" in judicial review proceedings. There is an obvious danger that a party will invite the Court to agree, or disagree, with the conclusions of a Committee of Parliament, and thereby question it. Article 9 of the Bill of Rights 1689 precludes that course.

Ann Feltham's witness statement

76. In a witness statement dated 10th October 2016 prepared for these proceedings, the Claimant's Parliamentary Co-ordinator, Ann Feltham, said:

> "It has been well documented and reported by journalists and researchers on the ground in Yemen that there continues to be

[14] CRC, Concluding observations on the combined third and fourth periodic reports of Saudi Arabia (25th October 2016), CRC/C/SAU/CO/3-4.

> compelling evidence of serious violations of [International Humanitarian Law] conducted by both sides to the Yemeni conflict, including by the Saudi-led coalition, particularly regarding the coalition air strikes."

77. Ms Feltham highlighted a series of reports of alleged International Humanitarian Law violations by the Coalition, including the following:

    i) An airstrike on a school in Northern Yemen during the weekend of 13-14th August 2016 killing at least 10 children (which was subsequently condemned by the UN Secretary General, Ban Ki-moon).

    ii) A bombing attack on a Médecins Sans Frontières-sponsored Abs hospital in Hajjah governorate in northwest Yemen on 15th August 2016.

    iii) Airstrikes on a water well in Beit Saadan on 10th September 2016 hitting workers drilling for water and civilian bystanders, which is said to have killed 30 people.

    iv) Multiple airstrikes at the port city of Hodeidah, for instance on 21st September 2016, killing and injuring women and children (which also drew public condemnation by the UN Secretary General, Ban Ki-moon); and airstrikes hitting warehouses, fishing boats and other civilian economic infrastructure "significantly affecting the ability of the Yemeni population to obtain enough food" and "depriving the locals of livelihoods and rendering the children at risk of severe malnutrition".

    v) An airstrike on 8th October 2016 on a funeral hall, known as the Great Hall, at Sana'a killing some 140 people attending a funeral for the father of a Houthi political figure (which led to condemnation from the UN Office for the Coordination of Human Rights Affairs).

78. Ms Feltham explained that the Claimant's data has been collected "through open sources" and "cross-referenced" from sources such as local and international news agencies and media reports, social media accounts, reports from international and national NGOs, official records from local authorities, and reports from human rights groups; and where independent reporting is not available, the data has been cross-referenced with sources from opposing sides to the conflict "to ensure it is as accurate and impartial as possible". The materials annexed to her statement include reports from the UN, the Office of the High Commissioner for Human Rights, Médecins Sans Frontières, Amnesty International, Oxfam, BBC and Hansard.

79. Ms Feltham cites a UN overall casualty figure from March 2015 to September 2016 of 10,963 civilians, including 4,014 killed, and a UN statement from the UN High Commissioner for Human Rights dated 23rd September 2016 that there has been a 40% increase in civilian casualties since the suspension of peace talks. These figures refer to the overall number of casualties from all hostilities and not just those from coalition activities.

80. We return to consider the evidence in relation to some of these incidents in more detail below.

Intervenors' evidence

Human Rights Watch, Amnesty International and Rights Watch (UK)

81. The Intervenors strongly supported the Claimant's case. The First, Second and Third Intervenors served a detailed summary of the post-March 2016 attacks, together with substantial evidence relating to the subsequent investigations running to over 300 pages. These Intervenors referred to a series of instances in the period from March 2016 onwards in which civilians had been killed "as a result of apparently indiscriminate, or, at least, poor targeting". They highlighted in particular the following:

    i) Two airstrikes on a market in the village of Mastaba in northwestern Yemen killing at least 97 civilians and potentially around 10 Houthi fighters, citing the Human Rights Watch report of this incident.[15]

    ii) Reports from Amnesty International as to 16 civilian casualties between July 2015 and April 2016 as a result of sub-munition explosions from cluster-bombs used by the Coalition.

    iii) The same bombing attack on the Médecins Sans Frontières-sponsored Abs hospital in Hajjah governorate in northwest Yemen on 15th August 2016 (referred to above) but which is said to have killed 10 people.

    iv) The same airstrikes on the water drilling facility near Beit Saadan on 10th September 2016 (referred to above) but which is said to have killed 31 civilians and injured 42 more.

    v) The same airstrike on 8th October 2016 on a funeral hall at Sana'a (referred to above as the Great Hall incident) but which is said to have killed over 100 people and wounded over 500 more.

    An airstrike on 6th December 2016 deploying cluster munitions near two schools in northern Yemen, killing two civilians and wounding at least six.

Oxfam

82. In their written submissions, the Fourth Intervenor submitted that there was "a considerable body of evidence in the public domain and before the court, establishing a pattern of serious violations of International Human Rights Law by the [Saudi-led Coalition] in Yemen". The Fourth Intervenor highlighted, in particular, that the Coalition's blockade of and attacks on Yemeni ports, agricultural land, warehouses, water-wells and humanitarian aid which it submitted were capable of constituting a violation of the civilian population's right to food and water, as well as violations of equivalent rules of International Humanitarian Law. The Fourth Intervenor argued that the evidence established not just a risk of UK weapons exported to Saudi Arabia being used to commit or facilitate serious violations of International Humanitarian Law in the future, but also the fact that they have already been used in that manner in the past.

[15] Human Rights Watch, 'Yemen: US Bomb Used in Deadliest Market Strike' (7th April 2016).

83. The Fourth Intervenor also cited the findings and conclusions of the UN Panel of Experts on Yemen and the Report of the UN Committee on the Rights of the Child (see above).

84. The Fourth Intervenor further relied upon the warning by the Secretary of State for International Development, Rt Hon. Justine Greening MP, in September 2015 that "millions" of Yemenis were "at risk of starving by the end of the year" and submitted that there is no indication that the Government's own stark warnings on serious violations of the right to food, water and life of the Yemeni population were taken into account by the Secretary of State in authorising arms exports to Saudi Arabia for use in Yemen.

85. In addition, the Fourth Intervenor filed a detailed statement by Josephine Hutton, the Regional Programme Manager for the Middle East, which stated that:

> "The number of casualties rose dramatically after the collapse of the cessation of hostilities in August 2016" and that "[Saudi Arabia-led coalition] airstrikes on civilian targets have continued into 2017".

Observations

86. The Claimant's basic case is that in the light of all the above material, it was irrational for the Secretary of State to have come to any other conclusion than that Criterion 2c was triggered. We pause to observe that these materials represent a substantial body of evidence suggesting that the Coalition has committed serious breaches of International Humanitarian Law in the course of its engagement in the Yemen conflict. However, this open source material is only part of the picture. It is necessary to consider carefully what information and sources of information and analysis the Secretary of State had when coming to his decisions at each stage on Criterion 2c.

The Secretary of State's evidence

Defendant's case

87. The Secretary of State takes issue with the essential reliability of the reports relied upon by the Claimant and Intervenors. He submits that the Government put in place a rigorous and comprehensive system for analysing reports of incidents and determining whether, at any stage, a "clear risk" of "serious" breaches of International Humanitarian Law existed such that arms sales to Saudi Arabia should be suspended or cancelled. The Secretary of State's case is that, at all material times, he was able and entitled rationally to conclude that, on the basis of open and closed material, notwithstanding the NGO and other reports, Criterion 2c was not satisfied.

88. Mr Eadie QC submits that the Secretary of State's assessment is informed by the following particular strands of information and analysis:

i) A considered analysis by the Ministry of Defence ("MoD") of all International Humanitarian Law allegations that come to its attention, predominantly arising from air strikes in Yemen;

ii) An understanding and knowledge of Saudi Arabian military processes and procedures, including by reference to information provided by the Defence

Attaché at the British Embassy in Riyadh and UK Liaison Officers located in Saudi Arabia Air Operations Centre in Riyadh. This understanding and knowledge is also informed by logistical and technical support and training provided to Saudi Arabia and engagement with the Saudi targeting process at the strategic, operational and tactical levels;

iii) Continuing engagement with Saudi Arabia including meetings at the highest level of the respective governments.

iv) Post-incident dialogue, including with respect to investigations, which are kept under close review;

v) Statements by Saudi Arabian officials, including public commitments to International Humanitarian Law compliance; and

vi) Analysis of developments in Yemen relevant to International Humanitarian Law compliance of the Coalition, including regular International Humanitarian Law updates (and occasional ad hoc updates) which draw together a wide range of information (principally from the Foreign Office and the MoD) on the International Humanitarian Law situation, including updates from the MoD on alleged incidents of International Humanitarian Law violations that have recently come to its attention.

89. Mr Eadie QC submits that each strand takes into account a wide range of sources and analyses, including those of a sensitive nature to which the third parties cited by the Claimant and Intervenors simply do not have access. Mr Eadie QC also relies upon a considerable volume of closed material.

90. We turn to consider the Defendant's open evidence (and consider the closed material in our separate Closed Judgment).

Defendant's open evidence

91. The Defendant's case was primarily contained in detailed witness statements from three senior officials: Neil Crompton, the Director of the Middle East and North African Directorate ("MENAD") at the Foreign Office, Peter Watkins, the Director General Security Policy at the MoD and Edward Bell, the Head of the Export Control Organisation at the Department for International Trade.

Secretary of State's role

92. The Foreign Office and the MoD have key roles in advising the Secretary of State on arms exports. The Secretary of State receives recommendations direct from the Foreign Secretary on arms export licensing decisions. The Foreign Secretary and Foreign Office, in turn, receive information and analysis from the MoD.

Role of the Foreign Office

93. Mr Crompton explained the process by which officials in the Foreign Office draw together the advice given to the Foreign Secretary on the Consolidated Criteria in relation to the export of arms and military equipment to Saudi Arabia and the basis for this advice. The process involves close liaison between three bodies: MENAD, the

Arms Exports Policy Team[16] and the Department for International Trade, together with consultation with British diplomatic posts, geographical desks, legal advisers and the Human Rights and Democracy Department in cases where the end destination of a proposed export is of concern. The advice on the Consolidated Criteria is used to inform the Foreign Secretary's recommendation to the Secretary of State on licensing decisions. He explained that the advice is drawn from a range of sources both from within Government departments and external organisations including NGOs, although much of it is necessarily sensitive for national security reasons and consequently cannot be referred to in detail in open court.

94. The Department for International Trade seeks advice from other Government departments on export licence applications. The Arms Export Policy Team coordinates the advice provided by the Foreign Office to the Department for International Trade. The FCO (through the Arms Export Policy Team) provides advice on the Consolidated Criteria to the Department for International Trade on all applications for licences to export material to Saudi Arabia and Yemen.

95. Mr Crompton explained that an initial assessment is made against the four mandatory criteria (Criteria 1-4) with particular focus on Criterion 2c. Where Foreign Office ministers conclude that the threshold for refusal has been met, Foreign Office advice to the Department for International Trade is to refuse an export licence. Where Foreign Office Ministers conclude that there is no "clear risk" under the four mandatory Consolidated Criteria, an assessment is then made against the other four non-mandatory Criteria (Criteria 5-8) to determine whether, on balance, the arguments favour approval or refusal. Once all of the Consolidated Criteria have been considered, it is permissible under Article 10 of the EU Common Position for other factors to be taken into account when making the licensing decision, including for instance the effect of proposed exports on (i) the UK's economic, commercial and industrial and social interests; (ii) the UK's international relations; (iii) collaborative defence operations or procurement projects with allies or EU partners; and (iv) counter-terrorism cooperation. Consideration of these factors cannot, however, override mandatory refusals.

96. The Arms Export Policy Team handles up to 16,000 licence applications for licences to export items to a wide range of countries each year. It has a staff of 13 who conduct a case-by-case risk assessment of each application. Most are straightforward.

97. The Foreign Office prepares and promulgates regular International Humanitarian Law updates concerning compliance in Yemen, together with *ad hoc* updates covering significant changes in the situation. The full updates have been provided in the closed evidence.

98. The relevant information for applications for licences to export to Saudi Arabia is collated by the Yemen team in MENAD. Before being sent to the Department for International Trade, the Arms Exports Policy Team's recommendations in relation to all applications for precision-guided weapons systems and munitions that are likely to be used by the Saudi Royal Air Force in Yemen are first sent to the Foreign Secretary for comment who is requested to give a decision in respect of "particularly sensitive or finely balanced applications".

[16] Now part of the Export Control Joint Unit ("ECJU").

99. Redacted copies of the 10 recommendations which have been sent by the Arms Export Policy Team to the Foreign Secretary since December 2015 are contained in the open material (and full copies in the closed material). To date, all the Arms Exports Policy Team's recommendations to the Department for International Trade have been to grant the licences for such exports to Saudi Arabia.

MoD's role

100. Mr Watkins explained the roles of those within the MoD responsible for monitoring and analysing allegations of International Humanitarian Law violations in Yemen. There are three teams within the MoD which are involved in this process. First, the Operations Directorate within the MoD who are responsible for recording allegations of International Humanitarian Law violations, updating ministers and senior officials within the MoD and liaising with other Government departments, including the Cabinet Office and the Foreign Office, the Department for International Trade (and its predecessor) and the Department for International Development. Secondly, the Permanent Joint Headquarters J3 (Current Operations) ("the Joint HQ") are responsible for collating information pertaining to the allegations and establishing the facts of each allegation, so far as they can be established. Thirdly, the Central Legal Services are responsible for providing specialist legal advice on International Humanitarian Law to ministers and officials within the MoD.

The Role of the Department for International Trade

101. Mr Bell explained that the Secretary of State has ultimate and overall responsibility for the UK's export licensing policy and in particular for (a) the statutory and regulatory framework of export controls (*i.e.* what items and activities are controlled) and (b) the decision to grant or refuse an export or trade control licence and, where necessary, to suspend or revoke extant licences in accordance with the applicable legislation and announced policy.

102. Mr Bell further explained that in exercising these powers the Secretary of State seeks, and takes into account, advice from a number of other Government departments, principally the Foreign Office, MoD and Department for International Development. The Foreign Office leads on Criterion 2 issues and, where appropriate, will take into account information provided by the MOD. An export or trade control licence will not be granted by the Secretary of State if to do so would breach any aspect of the Consolidated Criteria. The assessment of a licence application is handled on a case–by-case basis from start to finish through a secure digital system.

Six strands of information relied upon by the Secretary of State

103. We turn to consider the six strands of information and analysis relied upon by the Secretary of State as elucidated by Mr Eadie QC.

(1) MoD's methodology and analysis of allegations of International Humanitarian Law violations

104. Many sources are considered by the MoD, including the United Nations, European Union and NGOs, media reports, and reports from foreign governments, the Foreign Office, the British Embassy in Riyadh and the Department for International Development. Alleged International Humanitarian Law violations listed by the Operations Directorate are then analysed by the Joint HQ and Defence Intelligence.

The 'Tracker'

105. Mr Watkins explained that the MoD monitors media and NGO reports for allegations of breaches of International Humanitarian Law. These are recorded by the Operations Directorate officials in a central database known as "the Tracker". The Tracker is shared with the Joint HQ and comprises (i) a summary of the alleged International Humanitarian Law incidents that the MoD has been tracking; and (ii) an analysis of newly reported alleged International Humanitarian Law incidents or new evidence about previously reported allegations. The Tracker is a key tool for the Foreign Office officials when preparing the regular International Humanitarian Law updates for the Secretary of State.

106. When adding a new incident to the Tracker, the Operations Directorate will assign a serial number to the allegation, according to the order in which each incident has been logged. The Tracker is in a tabular format with 6 columns comprising: (a) the date of the alleged incident; (b) the nature of the alleged incident; (c) the source of the information regarding the alleged incident; (d) the key details of the alleged incident; (e) an assessment of whether or not the alleged incident was likely to have been caused by a Coalition strike (entitled "UK Assessment"); and (f) an assessment of whether a legitimate military target has been identified (entitled "Evidence of Target").

107. The Joint HQ, and in certain circumstances Defence Intelligence, then analyse the incident to seek to verify the substance of the allegation, in particular (i) whether it is possible to identify a specific incident, (ii) whether the incident was likely to have been caused by a Coalition strike, (iii) whether it is possible to identify the Coalition nation involved, (iv) whether a legitimate military object is identified, and (v) whether the strike was carried out using an item that was licensed under a UK export licence. Priority is given to the most serious incidents which have given rise to the most serious international concern and attention. Mr Watkins explained that some allegations are so imprecise, *e.g.* allegations that an airstrike has been carried out "during the past two months" or "somewhere in Hajjan governorate" or "in the vicinity of Sana'a" that it is impractical to investigate further and the date and location will be marked on the Tracker as "not known".

Quantitative analysis - Number of incidents tracked by the MoD

108. As at 1st August 2016, the Tracker included 208 allegations from a variety of sources, some of which recorded the same incident. These comprised the following: 24 allegations of strikes had been reported directly to the UK Government by those affected or foreign governments through the Foreign Office or the Department for International Development; 109 allegation had been reported by NGOs, including Amnesty International, the Mwatana Organisation, Human Rights Watch, Save the Children Fund and Médecins Sans Frontières; 62 allegations had been reported in the press or on social media (Operations Directorate officials conduct regular searches for reports of allegation of International Humanitarian Law breaches in Yemen in sources such as Middle East Eye, Press TV, Twitter, Sky News, the Intercept, the BBC, Reuters and the Independent); 45 allegations had been reported by international organisations, in particular, the UN Panel of Experts report dated 26th January 2016, Office of the High Commissioner for Human Rights, the United Nations High Commissioner for Refugees, the United Nations International Children's Emergency Fund and the World Health Organisation.

109. Mr Watkins explained that the Operations Directorate received an official advance copy of the United Nations Panel of Exports Report and used the information provided to record the allegations on the Tracker for analysis. The report was also revisited in July 2016 as part of a routine review of analysis by officials. The Operations Directorate officials were able to use Annexes 52-56 and Annexes 61-62 of the report to identify and record specific allegations on the Tracker. Only allegations raised by the report that were not already recorded on the Tracker were added. However, the Tracker has now been developed to reflect the cross reporting of allegations. As such, 39 allegations on the Tracker can now be linked to the UN Panel of Experts Report.

110. Up until 1st August 2016, the MoD was tracking 208 incidents of potential concern, of which around a third are assessed as probable Coalition strikes. Of these probable Coalition strikes, the MOD has been unable to identify a legitimate military target for the majority of strikes.

111. At 13th January 2017, the number of allegations of possible International Humanitarian Law breaches in Yemen included in the Tracker had increased to 251 incidents.

Claimant's list of 72 incidents

112. We turn to consider the Claimant's list of 72 'potential serious breaches' of International Humanitarian Law which are described as either 'committed by' or 'attributed to' the Coalition.

113. Mr Watkins' numerical analysis of the Claimant's 72 allegations has not been the subject of serious challenge by the Claimant. He explains that 14 are duplicate reports. 14 are general statements, as opposed to specific examples of individual allegations (namely, numbers 1, 10, 17, 21, 23, 25, 26, 27, 29, 30, 31, 32, 33 and 40). These latter 14 allegations include allegations of ineffective warning (*e.g.* 10), general damage to infrastructure or civilian damage (*e.g.* 21). They also include allegations that, even if proved, would not amount to breach of International Humanitarian Law such as the use of mercenaries (*e.g.* 29), or the banning of UN officials from Yemen (*e.g.* 23), or that the UK had not lobbied hard enough to stop the airstrikes (*e.g.* 31). As to the duplications, allegations 10, 43 and 62 refer to the same incident; allegations 57 and 69 refer to the same incident; and allegations 19, 20, 34, 36, 37, 29 and 41 all refer to the same three incidents.

114. Of the remaining 44 allegations relating to Coalition activity, 41 were already on the MoD's Tracker. The MoD admit to being unaware of allegations 6, 11 and 13 relating to a strike on Al Dhaleel Bridge, on Duaij village and on a car travelling from Al Jawf to Sana'a respectively. These were added to the Tracker following receipt of the Claimant's claim for judicial review on 8th March 2016. However, as Mr Watkins states, there remains insufficient information for further analysis of them to be completed.

115. It is important to note, therefore, that in quantitative terms the MoD is monitoring on its Tracker a significantly greater number of allegations than the net 44 identified and listed by the Claimant.

Qualitative analysis – sources of information available

116. It is clear that the MoD and Joint HQ have available to them a much wider range of information upon which to base their assessment of incidents than that to which the NGOs and others, upon whose reports the Claimant's rely, have access.

117. As Mr Watkins explained, the sources of information available to the MoD include, notably: (i) coalition fast-jet operational reporting data passed to the UK Liaison Officers; (ii) sensitive MoD sourced imagery which can represent a more comprehensive, high resolution and immediate picture than that provided by third party commercial imagery; and (iii) other reports and assessments, including UK Defence Intelligence reports and some initial battle damage assessment which makes an assessment of the impact of a strike on the intended target. Much of this information is sensitive and necessarily cannot be referred to in detail in open session for national security reasons, but we have had sight of it in closed material.

118. Since August 2016, the Joint HQ has continued to refine and improve the Tracker and in August and November 2016 the MoD directed an increase in resources to ensure that the advice to the Foreign Office was as comprehensive as possible.

119. The Secretary of State served closed materials in relation to the Tracker which we consider in the closed judgment.

General Observation

120. We should emphasise the volume of material generated each month by the MoD and Foreign Office was considerable and demonstrates the genuine concern and scrutiny that the MoD and Foreign Office were determined to give to the report of incidents of International Humanitarian Law violations in Yemen and the question of Saudi compliance with International Humanitarian Law in the conflict. This was no superficial exercise. It has all the hallmarks of a rigorous and robust, multi-layered process of analysis carried out by numerous expert Government and military personnel, upon which the Secretary of State could properly rely. We endeavour now to illustrate its flavour.

(2) UK knowledge of Saudi Arabia military processes and procedures

121. It is clear from the evidence that the UK has considerable insight into the military systems, processes and procedures of Saudi Arabia adopted in Yemen, notwithstanding that it is not a member of the Coalition or a party to the conflict. This stems from the UK's longstanding friendly relationship with Saudi Arabia and their close co-operation in defence matters. Mr Watkins' evidence was that the UK provides personnel who give practical support in four ways: the UK has (i) a considerable number of military personnel and officials working at the British Embassy in Riyadh who are in regular contact with their Saudi counterparts; (ii) the UK has liaison officers located at Saudi operational HQ; (iii) the UK has British service personnel providing logistical and technical support to projects for the Royal Saudi Armed Forces; and (iv) the UK has trainers and training to improve the general capability of the Saudi Arabian Armed Forces.

122. In particular, as regards (i), the Defence Attaché at the British Embassy Riyadh (a brigadier or equivalent) holds regular meetings with senior Saudi Military leaders and Her Majesty's Ambassador to Saudi Arabia, who enjoys privileged access to Saudi

leadership. Both can raise concerns over International Humanitarian Law allegations at senior levels in the Saudi Arabian government.

123. As regards (ii), UK Liaison Officers located in the Saudi Arabian military HQ have a significant degree of insight into Saudi Arabia's targeting procedures and processes and access to sensitive post-strike Coalition mission reporting. The RAF Chief of Air Staff Liaison Officer in Riyadh has unparalleled access to the decision-makers in the Saudi Air Force HQ. The MoD has knowledge of Saudi Arabian targeting guidance to reduce civilian casualties, including time sensitive Special Instructions and Air Operational information. Coalition operational lawyers are present in the Saudi Ministry of Defence and at Saudi Air Operations Centre and provide reviews of specific targets and investigations into civilian casualties. The Attaché and liaison officers have noted examples of Saudi concern to minimise civilian casualties in pre-planned targeting processes.

124. As regards (iii), the UK provides significant logistical and technical support to the Saudi military. In particular, the MoD Saudi Armed Forces Projects team comprising over 200 UK armed forces and MoD civilian personnel, provide significant advice to the Saudi military on the military equipment supplied by BAE Systems.

125. As regards (iv), the MoD provides significant training to the Saudi armed forces in relation to targeting and compliance with International Humanitarian Law, including (a) International Targeting Courses in 2015 and 2016, (b) individual training in relation to precision-guided munitions (such as Paveway IV and Storm Shadow), and (c) Qualified Weapons Instructors Courses for Saudi Typhoon pilots. In addition, the MOD has supported the development of the Coalition Joint Incident Assessment Team ("JIAT") and delivered training sessions in Saudi Arabia on the process of investigating alleged violations of International Humanitarian Law in May and September 2016.

(3) UK engagement with Saudi Arabia

126. There has been extensive political and military engagement with Saudi Arabia with respect to the conduct of military operations in Yemen and International Humanitarian Law compliance. In particular, there have been meetings and phone calls involving (i) the Prime Minister (who met the King of Saudi Arabia on 27th January and 6th December 2016), (ii) the Foreign Secretary (who met the Saudi Foreign Minister in Riyadh 14th November 2015 and 11th December 2016) (iii) the Secretary of State for Defence, (iv) the Minister of State for Defence Procurement, (v) the Foreign Office Minister for the Middle East and Africa, (vi) the Vice-Chief of the Defence Staff, (vii) the Chief of the Air Staff, (viii) the Deputy National Security Adviser, (ix) the Defence Senior Adviser to the Middle East, (x) the Director General of MoD Saudi Armed Forces project, (xi) the Director General of Security Policy in the MoD, (xii) the Assistant Chief of the Air Staff, (xiii) Her Majesty's Ambassador to Saudi Arabia and (xiv) the Defence Attaché to the UK Embassy in Saudi Arabia.

127. Mr Watkins summarised the Secretary of State's perspective on engagement by the Saudis with the UK as follows:

> "The Saudis have always been receptive to UK offers to provide training and advice to help them improve their processes and they have changed their approach. Examples include: sending more personnel on

> targeting training …; being more transparent with NGOs and hosting visits; establishing the investigations committee using UK-provided advice on standards; and preparing investigation reports with the intent of publicly identifying lessons. They have accepted offers to help train their legal advisors and allowed legal advisors to visit from the UK. They have allowed UK liaison officers access to their systems from the start of the campaign, reflecting the confidence developed through our longstanding relationship."
>
> "The Saudis continue to seek to improve their processes and increase the professionalism of their Armed Forces and continue to be receptive to UK offers to provide training and advice, as demonstrated by the JIAT workshop… and [Special Instructions] workshop…. The Saudis have been receptive to high-level military visits from the UK including into the [Saudi Air Ops Centre], and have shown a willingness to learn from UK experience and take on-board UK advice. I assess that our engagement since August has further helped the [Royal Saudi Air Force] develop their capabilities and practices, and we have increased confidence that the RSAF operate in a manner compliant with the standards demanded by the Law of Armed Conflict."

(4) Saudi investigations into incidents and establishment of JIAT

128. It is clear from the evidence that, far from being immune to international criticism and concern as to civilian casualties alleged to have been caused by the Coalition in the Yemen conflict, Saudi Arabia has been mindful of concerns expressed, in particular, by the UK. It is also clear from the evidence that Saudi Arabia has sought positively to address these concerns, in particular by conducting investigations into incidents and setting up a permanent investigatory body.

129. The Saudi Government has mounted specific investigations into incidents of concern, for instance into the Medecins Sans Frontieres hospital incident in Haidan on 25th October 2015, the 3rd December 2015 attack on a mobile clinic in Taiz and the 15th March 2016 attack on the marketplace in Mastaba, Haijah province.

130. On 1st February 2016, the Saudi Government announced the establishment of JIAT, to assess reported incidents of civilian casualties, investigation procedures and mechanisms of precision targeting. The Saudi Government confirmed the creation of this team in a formal letter to the UN Security Council on 1st February 2016 from the Saudi Permanent Representative to the UN:

> "Upon instructions from my Government, I have the honour to attach herewith the Statement issued by the Arab Coalition Forces to Restore Legitimacy in Yemen (Coalition). The Statement includes the following:
>
> 1. The Coalition's reaffirmation of its respect, commitment and compliance with the rules of international humanitarian law and international human rights law.

> 2. The Coalition deeply regrets every human casualty in Yemen; and reaffirms that all possible measures are taken to protect all civilians in Yemen.
>
> 3. The Coalition reaffirms its support and cooperation with the United Nations and all the relevant humanitarian organizations to ensure the protection of all civilians in Yemen.
>
> 4. The establishment of an independent high-level team (Team) of civilian and military experts to assess reported incidents of civilian causalities, investigation procedures, and mechanisms of precision targeting. The Team is expected to issue a comprehensive and objective report covering each incident individually and containing recommendations and lessons learnt.
>
> 5. The Team will cooperate fully with the Yemeni National Committee in investigating alleged human rights abuses; and the relevant United Nations entities, including the United Nations Security Council 2140 Sanctions Committee and its Panel of Experts, pursuant to their mandates.
>
> We take this opportunity to once again urge the Security Council to demand that all parties, and in particular the Houthis and their allies, ensure the protection of civilians…"

131. On 4th August 2016 the Coalition announced the JIAT conclusions of eight investigations, including into the 3rd December 2015 attack and the 15th March 2016 attack (see above). On 6th December 2016 JIAT released the results of a further 5 investigations, including its investigation into the Abs Hospital incident on 15th August 2016.

Claimant's criticisms of Saudi Arabian investigations

132. The Claimant submitted that there is little comfort to be gleaned from the existence of the Saudi investigatory procedures because (a) they have been too slow (as recognised in a statement to Parliament on 12th January 2017 by Tobias Ellwood MP, the Parliamentary Under Secretary for Foreign and Commonwealth Affairs), (b) they have been too few in number (the 14 JIAT reports to date amounted to only 5% of the total number of incidents reported), and (c) and the JIAT reports and methodology and the 'exiguous' published summaries have been the subject of criticism (in particular by Human Rights Watch in a letter to JIAT date 13th January 2017).

133. In our view, however, the Saudi's growing efforts to establish and operate procedures to investigate incidents of concern is 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 International Humanitarian Law standards.

(5) Public statements by Saudi Arabia officials and post-incident dialogue

134. The Secretary of State relies on regular public statements by Saudi officials addressing alleged International Humanitarian Law violations and confirming Saudi Arabia's commitment to International Humanitarian Law compliance. These

statements include, *e.g.* (i) a statement dated 1st February 2016 issued in Riyadh in which the Coalition Force Command expressed regret at media and other reports of International Humanitarian Law violations and called for "a more careful and professional approach based on the use of trustworthy sources and reliable evidence before such allegations are published"; (ii) a presentation to the Royal United Services Institution on 29th February 2016 by the official spokesman for the Coalition forces, General Assiri, in which he described Coalition efforts to avoid civilian casualties; and (iii) an article written by the Saudi Ambassador in "*The Daily Telegraph"* on 29th February 2016 re-iterating Saudi Arabia's commitment to conduct an International Humanitarian Law compliant regime.

135. In May 2016, the Saudi Government issued a detailed statement re-affirming its commitment to compliance with International Humanitarian Law and explaining the practical steps they were taking to ensure compliance with International Humanitarian Law, including setting strict rules of engagement:

> "Among the most important mechanisms and procedures of these rules in this matter are the following:
>
> 1. Mechanisms and procedures of targeting:
>
> 1. Identifying the military targets undergoes several stages. It starts from choosing a target, analyzing it and confirming that it's a military target through several sources to ensure not to make any mistakes when targeting every site in the Yemen is supposed to be civilian unless the contrary is decisively proved.
>
> 2. Constantly working on developing the list of sites that are prohibited from being targeted including sites of civilian presence, places of worship, diplomatic quarters, international governmental and non-governmental organizations and committees, and cultural sites. The list is updated constantly and sent in a periodic basis, to all the levels of the coalition forces to insure that all the specialists are aware of it.
>
> 3. Legal advisers shall be constantly employed to work with planning and targeting cells in order to study the proposed target and approve them so no location is targeted unless assured of its legitimacy and compatibility with the international humanitarian law.
>
> 4. The coalition forces use precise and guided weapons, in spite of their high cost in addition to the lack of international legal commitment on the countries to use them, in order to avoid any mistakes, collateral damages and casualties.
>
> 5. The coalition forces in Yemen tend to drop warning publications in the areas where military targets exist as a protective measure before any operation to ensure that civilians are not in the vicinity of these locations.

6. The coalition forces in Yemen seek, during the conduct of their military operation, to constantly develop the usual targeting mechanisms, and their accomplishments in this regard include the following:

- Constant development of the specialists' capabilities in the coalition forces in the field of the targeting mechanisms through conducting specialized courses in this field with some international centers such as (San Remo) institute for international humanitarian law specialized in armed conflicts, and with collaboration with some friendly countries in the field of training specialists in these matters.

- Increasing the number of coalition forces in Yemen within the perimeter of collateral damage which may resulted from targeting procedures that have a wide scope in comparison with what is applied in other countries.

- Applying additional review elements of choosing targets to increase the level of assurance regarding the legitimacy of targeted site.

- Adding protective procedures to prevent any errors including restraining bombings only after taking permission from observers on the front line who assure that there are no civilians in the vicinity of the targets.

2. After-targeting assessment and investigation procedures against accident claims.

    1. After-targeting assessment procedures:

    - After each targeting operation a review and an analysis must be performed based on the operation records and reports of army units conducting the operation to check the accuracy of targeting operation and if there's any unexpected collateral damage.

    - Quick assessment process to benefit from each operation assessment outcomes and avoid any future mistakes.

    - Referring any targeting operation that caused unexpected collateral damages (if any) to the internal investigation (Accidents Office).

    2. Conducting investigations concerning claims about targeting civilians, civilian facilities and humanitarian organizations:

    - Coalition forces supporting legitimacy in Yemen are keen on establishing a separate investigation team in every incident regarding any of their operations. One of these efforts is establishing an office for accident at Air Force HQ

> to investigate each claim with a number of procedures. Some of these procedures are:
> - Listing all sites targeted in the areas of claims.
> - Reviewing after mission reports in the plane and from the forward air controller (FAC)
> - Reviewing sorties recordings at the claim area
> - Analyze investigations outcomes and take the legal necessary procedures including:
>   a. Declaring all investigation results.
>   b. Commitment to compensate for all collateral damage
>   c. Take all precautions to avoid any mistakes, and to develop all targeting devices.
>   d. Take action in questioning any convicted person with such incidents."

Observations

136. The Claimant suggests that public statements by Saudi officials were merely aspirational, *i.e.* expressing a mere intention to 'seek' to adhere to International Humanitarian Law. In our view, however, as part of wider, complex patchwork of evidence, the Secretary of State was entitled to take them fully into account when determining whether there was the necessary risk for Criterion 2c purposes. It is not necessary for us to reach a primary conclusion on this aspect of the evidence. We can see no reason to consider it impermissible for the Secretary of State to conclude that such statements were more than aspirational. They represented a re-affirmation of Saudi Arabia's commitment to compliance with International Humanitarian Law standards in Yemen and an explanation of the steps being taken by Saudi Arabian forces to ensure such compliance and avoid civilian casualties. In these circumstances, in our view, such statements by Saudi officials represented another positive factor of some significance which the Secretary of State was entitled to take into account in his overall assessment.

Brigadier General Assiri's statements

137. The Claimant relied upon public statements made by Brigadier General Assiri, the official spokesman for the Coalition forces, on 8th May 2015 and 1st February 2016 which it submitted indicated 'targeting practices' by the Coalition that were 'flagrantly incompatible' with International Humanitarian Law and, in particular, incompatible with (a) the rule of distinction, *i.e.* the need to distinguish between military and civilian targets, and (b) the prohibition on indiscriminate targeting, and showed a 'cavalier disregard' for International Humanitarian Law.

138. On 8th May 2015, Brigadier Assiri issued what has become known as the "the May Declaration" regarding the military targeting of Saada and Ma'aran, which the Claimant submitted heralded the indiscriminate bombing of Saada:

> "Starting today and as you all remember we have declared through media platforms and through the leaflets that were dropped on [Ma'aran and Saada], and prior warnings to Yemeni civilians in those two cities, to get away from those cities where operations will take place. This warning will end at 7 p.m. today and coalitions forces will

> immediately respond to the actions of these militias that targeted the security and safety of the Saudi citizens from now and until the objectives of this operation are reached.
> We have also declared Saada and Ma'aran as military targets loyal to the Houthi militias and as a result the operations will cover the whole area of those two cities and thus we repeat our call to the civilians to stay away from these groups, and leave the areas under Houthi control or where the Houthis are taking shelter."

139. On 1st February 2016, Brigadier Assiri announced in relation to the Saudi/ Yemeni border:

> "Now our rules of engagement are: you are close to the border, you are killed".

140. In our judgment, when viewed in context, neither of these statements indicates that the Coalition were, or were intent on, employing 'targeting practices' that were incompatible with International Humanitarian Law, or that there was a "clear risk" that they would do so.

141. In the 8th May 2015 statement, Brigadier Assiri was highlighting that the civilian population in Saada and Ma'aran had been put on notice through social media and leaflet drops to evacuate prior to military action by the Coalition over the two cities. This was in accordance with proper practice: International Humanitarian Law requires adequate advanced warning to be given to civilians who may be affected by military attacks.

142. In the 1st February 2016 statement, Brigadier Assiri was reacting to the serious circumstances at the border at the time: Houthi forces were targeting Saudi positions along the border with missile and other attacks, causing numerous Saudi civilian and military casualties. The more obvious view of this statement is that it was designed to encourage civilians to leave the vicinity of the border and Houthi rebels and thereby minimise risk. The situation persisted. As Mr Watkins put it regarding operations during the second half of 2016:

> "A significant proportion of air operations are on the Saudi Arabian/ Yemen border, where the Houthis have continued to attack Saudi Arabia with cross boarder raid, missiles and rockets, creating a persistent threat on Saudi Arabia's southern border, which has resulted in at least 90 Saudi civilian deaths. SCUD missiles have landed which potentially brings Riyadh and Mecca in range of attack. Indeed, on 27 October a Ballistic Missile was intercepted by Saudi missile defence systems 40km from Mecca, with the intended target assessed as being Jeddah international airport."

143. It is also right to view Brigadier Assiri's statements in the context of his numerous other public statements and utterances to the Western media and think tanks in which he has emphasised the Coalition's commitment to International Humanitarian Law and avoiding civilian casualties. We mention two by way of illustration.

144. In an article dated 9th December 2016, following a visit to the Coalition headquarters and interview with (by then) Major General Assiri, the BBC journalist, Frank Gardner, wrote:

> "The Saudi officers went to great lengths to insist they comply with international Rules of Engagement (ROE) and LOAC [Law of Armed Conflict]. They showed me their "No-Strike List" (NSL) which includes more than 30,000 sites all over Yemen, including refugee camps and hospitals.
>
> Those Rules of Engagement state clearly: - Do not target any facility identified on the No-Strike List. - Presume all structures, objects, persons in Yemen are civilian unless otherwise apparent. They also explained their "Targeting Cycle", a circular chart detailing how air strikes are planned and executed, including a sign-off by a lawyer for every target chosen by the intelligence cell.
>
> "If we plan a target," a senior Saudi intelligence officer told me, "it's going to go through this cycle. If it's close to a mosque or a hospital then we don't hit it."
>
> But I pointed out this is exactly what has been happening, repeatedly, in Yemen, for the past 20 months.
>
> Coalition officers admit there have been some mistakes - but they reminded me that even the US Air Force, with its vast experience, has hit wrong targets in Afghanistan and recently at Deir Az-zour in Syria.
>
> "When you conduct a war in such circumstances," said Maj Gen al-Assiri referring to Yemen, "where the militias melt in with the civilians, it is too difficult.
>
> "Mistakes could happen, and we do what is necessary to protect the civilians. We are here to protect the civilians, we are not here to harm the civilians," he added."

145. In a press conference on 31st January 2016, Major General Assiri stated:

> "If you remember at the beginning of the crisis we mentioned that we have limits for the military operation, there is not targeting for infrastructure, residential areas or places where civilians exist if there are hostile elements there, as I mentioned in the previous press conference we have accurate intelligence regarding the places of command and control centres, in addition to information regarding locations of arms stores and facilities belonging to the Houthi militia inside the residential buildings, hotels and other buildings that are hard to attack, where there could be a great loss among civilians, so we have what we call tactical patience and we do not deal with such targets."

146. In the same press conference, Major General Assiri admitted that targeting mistakes had been made in relation to the airstrike on 25th October 2015 involving the Médecins Sans Frontières Hospital at Hidan.

Statement regarding 'cluster' munitions

147. On 23rd May 2016, the First Intervenor, Amnesty International, wrote to the Prime Minister seeking an inquiry into the use of UK-supplied BL-755 'cluster' munitions by the Coalition in Yemen.

148. The Secretary of State for Defence responded by letter on 26th June 2016 saying that the Government took the allegation very seriously and was causing inquiries to be made. He explained that the UK had not supplied cluster munitions to Saudi Arabia since 1989 and had adopted and signed the Convention on Cluster Munitions in 2008. The UK Government raised the matter with the Saudi-led Coalition at senior levels.

149. On 19th December 2016, Major General Assiri issued a statement on behalf of the Coalition confirming that there had been limited use of UK-manufactured 'BL-755' cluster munitions by Coalition aircraft, that they had been used against legitimate military targets, and that Saudi Arabia had decided to cease use of these cluster munitions. The UK Defence Secretary made an oral statement to the House of Commons the same evening welcoming the Coalition statement.

(6) The role of the Foreign Office and MENAD, including International Humanitarian Law Updates

150. Mr Crompton explained that the Yemen team in MENAD carefully monitors developments in Yemen. Since October 2015, MENAD has produced updates specifically addressing International Humanitarian Law risks which are sent to the Foreign Secretary regularly. The updates include input from a wide variety of sources, including (i) the British Embassies in Riyadh and Washington, (ii) information about ministerial or other high level contacts between the UK and Saudi Arabia, and (iii) the MoD who send an update on newly reported incidents of alleged International Humanitarian Law violations. A draft "update" is sent to Foreign Office legal advisors, who provide input following the Arms Exports Policy Team's initial assessment of whether there is a "clear risk" of a "serious violation" of International Humanitarian Law.

151. The International Humanitarian Law updates are detailed documents which include (i) a summary of alleged incidents of International Humanitarian Law violations, including any specific incidents of concern; (ii) an overview of what has changed since the last update; (iii) a summary of UK efforts to support Saudi Arabia's International Humanitarian Law compliance; (iv) a report on the US position; and (v), an overall analysis of Saudi Arabia's attitude towards the principles of International Humanitarian Law. The International Humanitarian Law updates also include as annexes the MoD's summary and table of alleged incidents and a list of the 'Extant' and 'Pending' export licences. In addition, *ad hoc* updates are also sent to the Foreign Secretary on occasion.

International Humanitarian Law updated summaries

152. We turn to consider the summaries of the Foreign Office updates for October and November 2015 and January, March, June, July, October and December 2016 and January 2017 which give a useful picture of the how the UK Government has approached the application of Criterion 2c in practice. The summaries are taken from the most part from Mr Crompton's evidence. We will cite in detail from the text of the January 2016 International Humanitarian Law update by way of illustration.

The October 2015 Update

153. The October 2015 update summarised the alleged incidents of International Humanitarian Law violations and included, in Annex B, a summary of the MoD's analysis of the most recent allegations in spreadsheet form. The update, at paragraph 7, expressed concern at the "worrying levels of civilian casualties in some reports" and noted that "high levels of civilian casualties can raise concerns particularly around the proportionality criteria". The update notes that intent is a key element in assessing International Humanitarian Law compliance, and acknowledges that there is often insufficient information to determine intent. However, it is also clear from the update that those making the assessment were well aware that "a consistent pattern of non-deliberate incidents (with the same cause and without remedial actions being taken to address that cause) could amount to a breach" (emphasis added).

154. The October 2015 Update further noted:

> "We have taken into account recent NGO reports in our assessment and we are ensuring that we are meeting our responsibility to avoid any risk of "wilful blindness". In the light of all these considerations, the update concluded, at paragraph 9, that "On the information currently available, given that we do not have evidence establishing deliberate incidents that could amount to an International Humanitarian Law breach by Saudi Arabia, in particular in relation to items previously supplied by the UK we do not currently assess that extant export licences need to be revisited in relation to Criterion 2c" (emphasis in original).

The November 2015 Update

155. The November 2015 update again expresses concern about the picture of civilian casualties and the damage to civilian infrastructure and, in particular, raises concern about the attack on a Médecins Sans Frontières hospital in Haidan, Northern Yemen on 25 October 2015. The update records that its information about Saudi targeting indicates that it remained broadly consistent with NATO standards, but notes that most coalition missions were employing dynamic targeting which was more difficult to assess. The update notes, however, that "[e]mbedded UK military personnel have visibility of Saudi reporting of strikes and have conducted target training".

156. The update records that a consistent pattern of non-deliberate incidents that have the same cause and where remedial action is not taken to address that cause could amount to a breach.

157. The attack on the Médecins Sans Frontières hospital in Haidan was of particular concern, and rightly pressed by the Claimant. We have noted that, on 31st January 2016, Brigadier Assiri announced the result of the investigation into that incident. He publicly acknowledged that the hospital had been incorrectly struck and attributed it to a procedural error. Thus, as the March 2016 update in due course indicates, although this incident was of very real concern, because the Saudis admitted responsibility for the attack and put in place procedures to prevent a recurrence, the assessment remained that there was not a clear risk for the future that Saudi forces would commit serious International Humanitarian Law violations.

The January 2016 Update

158. A redacted version of the January 2016 update is included in the open documents. This is of particular interest because it focusses on the letter before claim dated 8th

January 2016 from Messrs Leigh Day on behalf of the Claimant. The January 2016 update is a closely reasoned 19-page document comprising (i) a review of the Claimant's letter before action, (ii) a detailed analysis of the application of the Consolidated Criteria in the light of current reports, and (iii) a consideration of the relative merits of a suspension or moratorium of granting licences. Under the heading "YEMEN – Saudi led Coalition compliance with [International Humanitarian Law]", it includes (iv) a summary of incidents up to 10th January 2016, (v) an analysis of "What has changed since October 2015?", (vi) a summary of MoD monitoring, (vii) a summary of UK action to date (including training and best practice), (viii) a summary of the US position and (ix) an overall assessment of Saudi compliance with International Humanitarian Law. The Tracker is annexed to the update at Annex B.

159. The summary of incidents records that "MoD has tracked 114 alleged incidents of potential concern" of which "over a third" are assessed as probable Coalition strikes. It states that "MoD has been unable to identify a legitimate military target for the majority of strikes" and specifically refers to three allegations of strikes on Médecins Sans Frontières' hospitals (on 26th October 2015, 2nd December 2015 and 10th January 2016). Under the heading "Saudi targeting", the update states:

> "MoD remain of the view that the Saudi targeting process for pre-planned targeting complies with NATO standards including a clear definition of what constitutes an acceptable military target, a recognisable process to assess potential civilian casualties (including tests of proportionality) and post incident battle damage assessment. However Saudi processes governing dynamic targeting are less robust than those governing their pre-planned targeting and we have little insight into these. […It is assessed that an increased proportion of airstrikes now involves dynamic targeting…]. We continue to engage with Saudi Arabia to better understand the dynamic targeting processes and to help improve any processes (as may be necessary). …"

160. The January 2016 update referred to NGO reports, including those alleging the use of cluster munitions over Sana'a on 6th January, and explains its methodology of investigating and tracking new incidents which come to MoD attention. Mr Crompton explained that the allegation that cluster munitions had been used by the Coalition caused great concern and immediate steps were taken to establish what had happened.

161. The January 2016 update also referred to the MoD's analysis of the UN Panel of Experts Report and commented:

> "Whilst just 18 out of 119 allegations are considered incidents of concern […] MoD have also alerted us to the addition to their list of seven historical allegations, from NGOs, of cluster munitions use, and some further open source reports which have come in the past few days and require further analysis. This predicted increase in incidents of concern, which will take the total to approximately 145, is not due to a recent change in Coalition behaviour but due to the way in which MoD learns about historical incidents".

162. The January update also made the comment:

> "Such a small percentage of potential incidents of concern does not of course diminish the seriousness of the individual incidents. The figure is included to provide a quantifiable context in which risk assessments can be conducted, in particular to assist with analysis in relation to any allegations of systemic or process based failure by the Saudis to adhere to [International Humanitarian Law]."

163. The January update concludes:

> "Overall assessment of Saudi compliance with [International Humanitarian Law].
>
> - From all of the information available, we have not reached the view that there has been a violation (including a serious violation) of [International Humanitarian Law] by Saudi Arabia. In relation to some of the incidents, there is insufficient information to conclude that Saudi Arabia have violated [International Humanitarian Law] in relation to any individual strikes in the Yemen conflict. However, we nonetheless have significant concerns around [International Humanitarian Law] compliance in relation to some Saudi Arabia processes and the judgement as to whether the threshold has been met is finely balanced. […] We will need to monitor and follow up on these closely – in line with the […] about vigilant monitoring and doing all we can, using all channels available, actively to seek to address any concerns we may have. …"

164. The January 2016 update recommended that:

> "The Foreign Secretary advises BIS [Department of Business, Innovation and Skills] not to suspend extant licences and not to suspend the processes of new licence applications for the export of arms to Saudi Arabia.
>
> The Foreign Secretary agrees that licences for arms exports to Saudi Arabia should continue to be assessed on a case-by-case basis, against the Consolidated Criteria."

The March 2016 Update

165. The March update recorded that UK MoD had offered training. An update was also provided on the Saudi Arabian announcement of 31 January 2015 that they intended to form an independent high-level team to assess and verify incidents of concern. It noted that the MoD were investigating 10 new allegations of incidents which had occurred since January 2016. Of these, just over half were assessed by the MoD to be likely Coalition attacks. The March update also noted that there had been continued high level engagements with the Saudis.

The May 2016 Update

166. The May 2016 update recorded a significant reduction in air strikes since the cessation of hostilities started on 10 April. High-level contact between the UK and Saudi Arabia had continued.

The June 2016 Update

167. The June 2016 update noted that it was broadly accepted that the cessation of hostilities continued to hold. The update again noted that there had been no further announcements of results of investigations into incidents of concern. However JIAT had commenced its work and JIAT had received advice and training from the UK. The June update also referred to a report from Amnesty International which alleged that UK made BL-755 cluster munitions had been used by the Coalition.

The July 2016 Update

168. The July 2016 update was produced to inform the new Foreign Secretary of the latest position. Accordingly, it replicates in part the June update. In addition, MENAD produced two background documents explaining the arms export approval process. In relation to the cessation of hostilities, it is noted that the cessation of hostilities was being significantly challenged. The July 2016 update refers to further analysis relating to the allegation by Amnesty International regarding the use of cluster munitions.

169. The update further reported on meetings between Médecins Sans Frontières and the Saudi MoD, Ministry of Foreign Affairs and others. Médecins Sans Frontières remained concerned about the lack of investigations. The UK would continue to facilitate this relationship.

The October 2016 Update

170. The October 2016 update recorded that, before the Great Hall incident, the assessment had been that the "clear risk" threshold had not been met, despite the resumption of hostilities and the increased risk of further incidents of concern due to the high level of air operations. It was noted that the Saudi authorities and military appeared to be increasingly engaged with the importance of International Humanitarian Law compliance and were making efforts to decrease the risk of violations. They had initiated urgent investigations. It was noted that the complexity of the circumstances was unprecedented.

The December 2016 Update

171. The December 2016 update recorded various areas of progress, whilst noting that there were still a number of concerns. Advice from the Foreign Office Arms Exports Policy Team was that, although the assessment remained finely balanced, the 2c Criterion threshold had not been reached and that the advice to the Secretary of State should be to continue to license arms exports to Saudi Arabia.

The January 2017 Update

172. The January 2017 IHL update indicates that the steady trend of incremental improvement has continued with no major incidents of concern.

Ad hoc updates

173. In addition, *ad hoc* updates were provided to the Foreign Secretary on a regular basis (*e.g.* informing him of the alleged use of cluster munitions in Sana'a in January 2016, the strike against the Médecins Sans Frontières clinic in Saada in January 2016, the

United Nations Panel of Experts Report and the cessation of hostilities which commenced in April 2016).

174. In addition, the Foreign Secretary received oral updates from officials and was briefed on developments in the conflict, including when there were incidents of concern. For example, when knowledge of the Great Hall incident was received, the Foreign Secretary's office was updated orally and further information was included in the October Update which was just about to go to him. In the case of the alleged air strike on the Al-Zaydiya security compound (alleged to be a prison by some), the facts were uncertain at the time. The Coalition informed the British Government that it was a security compound used by the Houthi-Saleh forces and was a legitimate military target. The Foreign Secretary was not immediately briefed, but the relevant Parliamentary Under Secretary of State was informed on the limited information available at the time.

Great Hall and other incidents

175. The precise steps taken by the Secretary of State and his advisers following reports of the Great Hall strike and other incidents of serious concern are the subject of detailed evidence in the closed materials. We consider these in our closed judgment.

GROUNDS OF CHALLENGE

176. We turn to consider further specific points and issues arising under the Claimant's three specific Grounds of challenge.

Ground 1: Failure to ask correct questions and make sufficient enquiries

177. The Claimant alleges that the Secretary of State failed to ask the correct questions or make sufficient enquiries.

(1) 'Failure to ask questions identified in the User's Guide'

178. The Claimant submits that the Secretary of State failed to consider questions identified as relevant by the EU Guidance which it was necessary to consider to make a lawful risk assessment in accordance with Criterion 2c. The questions relied upon are those set out at pages 50 and 55 of the EU Guidance. They include (as formulated in the Claimant's Grounds):

i) Whether there is national legislation in place prohibiting and punishing violations of International Humanitarian Law and whether the recipient country adopted national legislation or regulations required by the International Humanitarian Law instruments to which it is a party.

ii) Whether mechanisms have been put in place to ensure accountability for violations of International Humanitarian Law committed by the armed forces and other arms bearers including disciplinary and penal sanctions.

iii) Inquiry into the recipient's past and present record of respect for International Humanitarian Law and the recipient's intentions, which the Guidance states "should" form part of a "thorough assessment of risk".

iv) Whether the recipient country has failed to search for (or prosecute) its nationals responsible for violations of international humanitarian law and whether the recipient is a Party to the Rome Statute for the International Criminal Court.

v) Whether the recipient country has failed to take action to prevent or suppress violations committed by its nationals.

vi) Whether there is an independent and functioning judiciary in the recipient country capable of prosecuting serious violations of International Humanitarian Law.

179. In our judgment, the legal position and the structure and construction of Criterion 2 and paragraph 2.13 of the User's Guide may be summarised as follows:

i) The relevant question for the Secretary of State to ask under Criterion 2c is whether there is a clear risk that the items to be licensed might be used in the commission of a serious violation of International Humanitarian Law.

ii) The User's Guide is non-binding guidance. This is clear from the explanation in its "Introductory Note":

> "The User's Guide is intended to help Member States apply the Common Position. It does not replace the Common Position in any way, but summarises agreed guidance for the interpretation of its criteria and implementation of its articles. It is intended for use primarily by export licensing officials."

iii) In order to carry out "a thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international humanitarian law" when addressing the Criterion 2c question, the User's Guide suggests that Secretary of State's inquiry should include three key matters in particular:

(a) the recipient country's past and present record of respect for International Humanitarian Law;

(b) the recipient country's intentions as expressed through formal commitments;

(c) the recipient country's capacity to ensure that the equipment or technology transferred is used in a manner consistent with International Humanitarian Law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

iv) Paragraph 2.13 of the User's Guide states that "isolated incidents" of International Humanitarian Law violations are not necessarily indicative of the recipient country's attitude towards International Humanitarian Law but a "pattern of violations" or failure to punish violations should be cause for serious concern.

v) The list of suggested "relevant questions" of the User's Guide (see pages 50, 55 and 56) are merely indicative of 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. The policy articulated by the Secretary of State did not commit the Government to consider that suggested non-exhaustive list serially. Neither does the Guide itself indicate such an approach.

vi) The flexibility properly and lawfully inherent in the inquiry process was wide and it was for the Secretary of State to decide how to go about inquiring into the three key matters highlighted in paragraph 2.13 and what specific subsidiary questions to ask or inquiries to make.

vii) The fact that the Secretary of State did not expressly consider or address each or any of the subsidiary questions does not mean that he failed to discharge his *Tameside* duty.

(2) 'Failure to investigate every incident'

180. Mr Chamberlain QC and the Special Advocates advanced a separate submission on behalf of the Claimant, namely that there was a failure by the Secretary of State to make a determination of the likelihood of a breach of International Humanitarian Law having been committed by the Coalition in relation to each and every past specific incident about which concern had been expressed. The Special Advocates argued that this is 'plainly a failure to make sufficient inquiry and/or is irrational and/or a failure to take relevant information into account'.

181. We disagree for the following reasons:

i) We consider that it is not necessary, nor is it practical, for a judgement to be made by reference to International Humanitarian Law about every past incident to make an assessment under Criterion 2c. Neither Criterion 2c nor paragraph 2.13 of the User's Guide mandates such an exercise, whether expressly or implicitly. An inquiry into "the recipient's past and present record" does not require a quasi-judicial examination of every previous incident in which a breach of International Humanitarian Law is suspected to have taken place, or a determination of whether a breach did take place; or a statistical assessment of likelihood. The October 2016 update (see paragraphs 153 – 154 above) reflects the evaluative nature of the exercise performed by the Secretary of State. It recognises, for example, that the fact that it cannot be said that a series of events *were* violations of International Humanitarian Law (or serious violations) does not render consideration of the incidents irrelevant.

ii) The impracticality of such an exercise is self-evident. The close relationship between the UK Government and Saudi Arabia places them in a position to garner more direct information about Saudi decision making than outside observers. Nonetheless, there would be inherent difficulties for a non-party to a conflict to reach a reliable view on breaches of International Humanitarian Law by another sovereign state. A non-party would not be likely to have access to all the necessary operational information (in particular, knowledge of information available at the time to the targeting decision-maker forming the basis of the targeting decision). An International Humanitarian Law analysis is necessarily a sophisticated exercise involving a myriad of issues, for

instance: (a) whether there was a military necessity to strike the target; (b) whether there was a distinction drawn between military objectives and civilians and civilian objects; (c) whether the intended target was perceived to be a 'military' objective; (d) whether any expected incidental civilian loss of life, injury or damage was 'proportionate' to the expected military gain; and (e) whether all feasible precautions were taken to avoid and minimise incidental civilian loss of life, injury or damage.

iii) In any event, Criterion 2c is focussed on a *prospective* assessment based on an overall judgment of all the information and materials which the decision-maker State considers appropriate and has available to it. The question to be determined is whether the material clear risk exists. The task is a classic 'risk assessment'. This involves looking at all the information in the round, of which the recipient's "past and present record" is part. Past and present conduct is one indicator as to future behaviour and attitude to International Humanitarian Law, but not necessarily determinative. Other factors may include, for instance: (i) the nature of the conflict; (ii) the sophistication of the intelligence-gathering, equipment and training of those charged with the targeting exercise; and (iii) their willingness to learn from mistakes.

182. We note that neither the Claimant, nor the NGOs or other sources relied upon by the Claimant, had access to the information available to the targeting decision maker or information as to the basis of the targeting decisions made. The Claimant's case depends largely upon inferring violations of International Humanitarian Law on the basis of the reports of civilian casualties and damage. However, International Humanitarian Law is much more sophisticated than this, and the analysis required necessarily complex. Moreover, the forward-looking evaluation is with regard to the risk of serious violations of International Humanitarian Law.

(3) 'Limitations of the Tracker'

183. The Claimant suggested that the MoD's analysis in the 'Tracker' was confined to asking whether it is possible to identify a "legitimate military target" in relation to each incident. This is not correct. The MoD's analysis was much more wide-ranging and sophisticated than that. The MoD's analysis was, moreover, valuable and instructive: (i) it provided information as to the pattern, frequency, nature and intensity of Coalition attacks; (ii) it assisted in identifying whether a military object was within the vicinity of the alleged incident; (iii) it enabled focus on investigating incidents of particular concern (*e.g.* the Great Hall incident); (iv) it enabled areas of priority and particular concern to be raised and discussed with Saudi Arabia; and (v) it ensured that particular incidents were made the subject of investigation by the Coalition.

184. The Claimant relied upon the fact that a significant proportion of incidents listed on the Tracker did not refer to a "legitimate military target". This does not mean, however, that there was in fact no "legitimate military target" which was the subject of the airstrike or that none was ever identified at the time.

185. The Claimant and the Special Advocates sought to rely upon the fact that the Tracker originally included a column headed "International Humanitarian Law Breach" which was subsequently removed. We are satisfied, however, that the explanation for this was simply that, when the Tracker was initially created, the MoD thought they would

be able to determine definitively whether there had been individual allegations of breaches of International Humanitarian Law in relation to each of the incidents logged; however, when it realised in July 2016 that this was not possible the column heading was changed. In our view, the point does not materially advance the Claimant's case. At all material times the coalition's "past and present record" was viewed by the Defendant through the prism of International Humanitarian Law for the purpose of achieving an appropriate Criterion 2c analysis.

(4) 'Failure to make position clear to Parliament'

186. The Claimant and the Special Advocates also criticised the Secretary of State for failing to make his position clear to Parliament as to what assessments were, and were not, being carried out regarding alleged breaches of International Humanitarian Law in Yemen. They sought to rely upon inconsistencies in Parliamentary responses on the topic. We do not think that there is legal significance in this point. The inconsistencies were infelicities of expression which, when pointed out, were corrected. In a ministerial statement to Parliament on 21st July 2016 by Tobias Elwood MP, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, corrected earlier statements made to Parliament by the Foreign Secretary and Minister of State. Mr Elwood explained that the Foreign Secretary should have said on 12th and 15th February 2016 that "we have not assessed that there has been a breach of International Humanitarian Law by the coalition"; and he explained that the Minster of State should have said on 8th July 2016 "the MOD has not assessed that the Saudi-led coalition is targeting civilians". In our view, the point does not materially advance the Claimant's case.

(5) 'Risk of diversion of weapons not sufficiently considered'

187. The Claimant alleges in its written Grounds that "the Defendant does not appear to have considered adequately the risk of diversion of weaponry in Yemen" (paragraph 48 of Claimant's Grounds). This allegation of breach of Criterion 7 of the Consolidated Criteria was not pursued in oral submissions but we deal with it briefly.

188. In our judgment, the evidence suggests that, at all material times, proper consideration was given to the Criterion 7 risks.

189. Mr Bell explained that the factors to which regard is had in making the Criterion 7 assessment including asking questions such as: (a) Does the end-user have a legitimate need for this equipment? (b) Is the end-use credible? (c) Are the quantities reasonable/proportionate to the stated end-use? (d) Does all the information in the application and supporting documentation tell a consistent story? Are there doubts about the veracity of any of the information or documentation? (e) Does the end-user have proper means to safeguard the equipment? Does the recipient state have proper controls over possession, transfers, exports (as appropriate)? (f) Does corruption in the destination country indicate a higher risk of diversion? (g) Are the type of goods known to be subject to illicit procurement? Are there known or suspected illicit procurement channels in the country or region? Is there any evidence of past diversion from this end-user / country? (h) Are any intermediaries involved? What is known about them?

190. Mr Bell also points to instances where licences have been refused by the Secretary of State because of a risk of diversion to undesirable end-users. Mr Bell states that the

Secretary of State considers the risk of diversion of the military equipment exported to Saudi Arabia to be "very low". There is no reason to doubt that conclusion.

191. For these reasons, in our judgment, there is no basis for a public law challenge under Criterion 7.

Summary

192. The reality of the position is that the Secretary of State has available to him and his advisers a significant amount of information relating to the conflict in Yemen and the conduct of Saudi Arabia as part of the Coalition. 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.

Ground 2: Failure to apply the 'suspension mechanism'

193. The Claimant submitted that the Secretary of State wrongfully failed to suspend arms sales to Saudi Arabia.

The relevant policy

194. The Export Control Order 2008 does not set out the circumstances in which export or trade licences will be suspended. This was addressed as a matter of policy following a Government announcement on 13th October 2011.

195. The policy was articulated in a statement to Parliament by the Secretary of State for Business, Innovation and Skills on 7th February 2012:

> "The new suspension mechanism will allow the Government to quickly suspend the processing of pending licence applications to countries experiencing a sharp deterioration in security or stability. Suspension will not be invoked automatically or lightly, but triggered for example when conflict or crisis conditions change the risk suddenly or make conducting a proper risk assessment difficult. A case-by-case assessment of a particular situation will be necessary to determine whether a licensing suspension is appropriate.
>
> Any decision to suspend will be taken by the Licensing Authority based on advice from relevant Government Departments and reporting from our diplomatic posts. Parliament, industry and the media will be informed of any suspension.
>
> Suspension will be tailored to the circumstances in play and will not necessarily apply to all export licence applications to a country, but may instead be for applications for particular equipment (for example crowd control goods), or for applications for equipment going to a particular end-user.
>
> If a decision to suspend is made, work on licence applications in the pipeline will be stopped and no further licences issued pending

> ministerial review. Once the suspension is lifted, applications will not be required to be resubmitted."[17]

196. Accordingly, the Secretary of State's policy is to consider suspending licensing and extant licences where, in the light of the new evidence and information, it would be considered that a proper risk assessment against the Consolidated Criteria would be "difficult". The policy makes clear that suspension will not be invoked "automatically or lightly" but on a "case by case" basis. Such a situation might arise, he explained, where conflict or conditions change the risk suddenly, or made conducting a proper risk assessment difficult. This occurred, *e.g.*, following the Arab Spring when some licences relating to affected countries were suspended in October 2013.

197. The Claimant submitted that the Secretary of State's decision on 11th February 2016 refusing to suspend arms export licences to Saudi Arabia, and his continuing refusal to suspend thereafter was irrational. First, because of "uncertainty and gaps in information available" admitted by the Secretary of State on 11th February 2016 when explaining his decision not to suspend licensing or extant licences. Secondly, because the Secretary of State was not in position to assess whether the findings of *e.g.* the UN Panel of Experts and other UN agencies could be rejected. Thirdly, because the Secretary of State was not in a position to form his own view as to whether Criterion 2c was satisfied without first knowing the results of Saudi Arabian investigations. Fourthly, because of the difficulties in making an assessment when the MoD *e.g.* only tracked a small percentage of Coalition airstrikes carried out and had little insight into dynamic targeting.

198. In our judgment, however, the Secretary of State was reasonably able (i) to assess the gaps in his knowledge and 'known-unknowns' against what information and materials he did have and how critical or not the gaps were, (ii) to test and assess the reliability of the United Nations' and NGO's findings against the other sources of information at his disposal and (iii) to assess the significance of his knowledge (or lack of it) as to Saudi Arabian investigations into individual incidents. Moreover, these matters were factors in an overall assessment to be made by the Secretary of State in relation to Criterion 2c in the light of the wide range of sophisticated first-hand and other evidence available to him. In these circumstances the Secretary of State's decision not to suspend at any stage cannot be said to have been irrational or unlawful.

Ground 3: Irrationally in concluding that there was no "clear risk" under Criterion 2c

199. We turn to consider the Claimant's rationality challenge in the light of the evidence, which we have sought to summarise.

200. We have set out above in detail the evidence relied upon by the Claimant, in particular the reports by the NGOs. We have set out the key aspects of the Defendant's open evidence as to the governmental structures and systems which were in place to inform and advise the Secretary of State when making arms export licensing decisions and the respective roles of the Foreign Office, MoD and Department for International Trade. We have also discussed extensively the sources and strands of information and evidence available to the Secretary of State.

General observations

[17] Hansard WS 7 Feb 2012: Column 7WS [AB: C1-C9].

201. In our view, the following general matters are clear from the evidence.

i) The process of governmental decision-making as to arms export licencing is a highly sophisticated, structured and a multi-faceted process, involving, as Mr Eadie QC submitted, multiple Government departments, all levels within Government including those at the very top of Government, judgement by officials at many levels of seniority with particular expertise to make those judgements, and judgements which are prospective and predictive.

ii) There is a significant *qualitative* difference between the risk analysis which the government agencies involved in the decision-making process are able to carry out, on the one hand, and the reports of the NGOs and press as to incidents in Yemen, on the other. The government system involves drawing upon, and drawing together, a large number of significant strands and sources of information, including evidence and intelligence not available to the public, NGOs or press, including through close contacts with the Saudi military. By contrast, the reports of the NGOs and press of incidents suffer from a number of other relative weaknesses. These include, that such organisations often have not visited and conducted investigations in Yemen, and are necessarily reliant on second-hand information. Moreover, ground witnesses may draw conclusions about airstrikes without knowledge of all the circumstances.

iii) There were gaps in the analysis of the Foreign Office and MoD of the situation. The UK is a bystander in this volatile conflict, is not a member of the Coalition, and the MoD is not involved in identifying targets and does not have access to the operational intelligence. But the Government's knowledge and experience of Saudi Arabia, borne of its close contacts, place it well to make the necessary assessment for the purpose of Criterion 2c.

iv) The MoD has a coherent evidence-gathering system using the Tracker. Major incidents of concern coming to the attention of the MoD were the subject of intense scrutiny and activity by the MoD and Foreign Office, involving immediate inquiries and exchanges with the Saudi authorities. The Great Hall strike on 8th October 2016 provoked an immediate reaction from the Foreign Secretary, who raised concerns with his Saudi counterpart and tweeted: "Spoke to Saudi Foreign Minister Al Jubeir earlier. Raised concerns about attack #Sanaa #Yemen, vital urgent investigation underway". The UK Permanent Representative in the United Nations also made a statement on 31st October 2016:

> "All sides need to show restraint. We were shocked and appalled by the terrible loss of life in the airstrikes on a funeral hall in Sana'a earlier this month. We immediately underlined our deep concern at Ministerial level with the Saudi government."

v) The question of arms sales to Saudi Arabia for use in Yemen was the subject of intense, genuine concern and debate by those officials charged with advising the Foreign Secretary and Secretary of State. This is apparent from the documents surrounding the advice and recommendations made by the Foreign Secretary to the Secretary of State in early February 2016.

February 2016 documents

202. On 1st February 2016, the Foreign Secretary advised the Secretary of State not to suspend arms export licences to Saudi Arabia and recommended that licences for arms exports "should continue to be assessed on a case-by-case basis". On 4th February 2016, the Head of Policy at the Export Control Organisation at the Department for Business, Innovation and Skills, wrote a submission to the Secretary of State recommending that he agreed in principle with the Foreign Secretary's recommendations but that he should defer a final decision until legal advice had been received following Leigh Day's letter before claim dated 8th January 2016. A redacted copy of the submission is exhibited to Mr Bell's statement. It is instructive to have regard to the frank and candid terms in which the submission is expressed:

> "**FCO Advice**
>
> 7. …. In considering the Foreign Secretary's recommendation you should read the submission and its annexes made by FCO officials…. In summary their arguments are as follows:
>
> - MOD have been tracking 114 incidents of potential [International Humanitarian Law] concern; [only a very, very small percentage of the overall coalition airstrikes carried out, have been tracked]. Preliminary analysis of the UN Panel of Experts' Report has identified a further 19 allegations, bringing the total to 'approximately 145'.
>
> - Based on 'all the information available', however, the FCO maintain that "we have not established any violations of [International Humanitarian Law] by the Coalition in this conflict".
>
> - FCO do acknowledge that there are gaps in their knowledge but they say there are 'always some gaps in our knowledge when we are conducting Consolidated Criteria assessments in relation to exports to any country'. In this case they consider that they are 'in possession of sufficient information, despite not being in possession of complete information, to conduct a Consolidated Criteria assessment'. They consider that the flow of information they receive from the [*redacted*] from Post, and from open sources including NGOs, 'continues to provide adequate detail and context to make an informed assessment against the Consolidated Criteria'.
>
> - Saudi Arabia is 'seeking to comply with [International Humanitarian Law] and broadly has [International Humanitarian Law]-compliant processes in place'. In addition, 'Given the very small percentage of incidents which are considered as being of potential concern, it is not clear that a pattern of violations can be discerned'. They conclude that while 'there is a risk, that risk is not clear'".
>
> - [*redacted*]
>
> 8. In addition, subsequent to the FCO submission, Saudi Arabia publicly announced the result of an investigation into a strike on a Médecins Sans Frontières' clinic on 26 October 2015, including the processes they found they could improve.

Our Concern

9. While FCO appear confident about their ability to make proper assessments against the Consolidated Criteria we do have concerns about the acknowledged gaps in knowledge about Saudi targeting processes and about the military objectives of some of the strikes….. We are also concerned that FCO/MOD appear only to have insight into Saudi processes in respect of pre-planned strikes and have 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]".

10. On the other hand, we accept that the arguments are finely balanced and that the FCO is the competent authority to assess compliance with Criterion 2 of the Consolidated Criteria. They make clear robust statements that there is enough evidence and note that there are always gaps in information when making an assessment. On that basis, we recommend accepting *in principle* the Foreign Secretary's advice.

11. But this should be conditional on advice from Counsel and [senior Government lawyers] due in the next few days, concerning the Government's response to Leigh Day solicitors [*redacted]."*

203. On 11th February 2016, Mr Bell e-mailed the Permanent Secretary at the Department of Business, Innovation and Skills in the following terms:

> "We briefed the Secretary of State at his Commons' office last night [*i.e.* 10th February]. He clearly recognises the graveness of the issues. It was a positive and frank discussion with the SoS and [Special Advisor] asking all the right questions; [*redacted*]
>
> To be honest – and I was very direct and honest with the SoS – my gut tells me we should suspend. This would be prudent and cautious given the acknowledged gaps in knowledge about Saudi operations. I put this directly to the SoS in these terms. [*redacted*] And the FCO is the competent authority to make these assessments. …"

204. On 11th February 2016, a meeting took place at which the Secretary of State decided to accept the Foreign Secretary's advice. Mr Bell exhibits the record of the minutes of the meeting:

> "SoS summarised that the decision to continue exporting to Saudi Arabia was finely balanced, but given the discussions he had had and the advice he had received from [*redacted*] Foreign Secretary (FS) and Defence Secretary (DS) he was minded to continue exporting. He noted that the situation was continuously evolving, and that this decision could easily change.
>
> As a result he wanted the situation to be monitored carefully, so that he could be advised of any changes. Ideally, he wanted weekly reports from the Foreign Office and MoD of the situation, so that should the evidence suggest that we can no longer meet the criteria for exporting

> to Saudi Arabia, then he can take the decision to suspend export licences.
>
> [The Permanent Secretary] suggested he write to the Permanent Secretary in the FCO, MoD and DfID, copying in the Ambassador to Saudi Arabia, noting that this is a developing situation, and asking for their assistance with regular updates, and to notify BIS of any changes immediately."

Claimant's overarching argument

205. The Claimant's overarching argument is that the third party reports - in particular (i) the reports of United Nations agencies (including the United Nations Panel of Experts), (ii) the reports of the European Parliament, (iii) the reports of UK Parliamentary Committees[18], (iv) the reports of NGOs, (v) the reports of the Claimants and Intervenors and (vi) press and other media reports - raising allegations of numerous breaches of International Humanitarian Law by the Coalition in Yemen, raised a presumption of a "clear risk" under Criterion 2c of "serious violations" of International Humanitarian Law which could not rationally be rebutted, *i.e.* they create an presumption of irrationality on the part of the Secretary of State.

206. The Claimant also argued that the third party report cast a burden upon the Secretary of State to analyse and explain why he rejects their findings before himself concluding that there is no clear risk for the purposes of Criterion 2c of serious violations of International Humanitarian Law.

Discussion

207. The Claimant and the Intervenors naturally place heavy reliance on the numerous third party reports in 2016 of civilian casualties and allegations of breaches of International Humanitarian Law by the Coalition in Yemen. However, in our view, the third party reports do not raise any legal presumption that Criterion 2c is triggered, although, as the Secretary of State accepts, their content must be properly considered in the overall evaluation.

208. The following points are pertinent:

    i) The fact that civilian casualties have occurred does not without more mean that a breach of International Humanitarian Law has taken place, still less a serious breach. Customary international law and International Humanitarian Law have long recognised that civilian casualties in military conflicts will occur. The 'Principle of Distinction' prohibits intentional attacks against civilians; and the 'Principle of Proportionality' prohibits attacks which anticipate excessive civilian casualties.

    ii) The question of whether a breach of International Humanitarian Law has in fact taken place following civilian casualties is often necessarily a complex and fact-sensitive question requiring careful investigation.

    iii) Even if isolated incidents of International Humanitarian Law violations by a recipient country are considered likely to have taken place, that does not

[18] We have referred to Article 9 of the 1689 Bill of Rights in this connection in paragraph 75 above.

automatically trigger Criterion 2c. It does not mean that there should be a finding that that there is a clear risk that licensed items might be used in the commission of serious violations of International Humanitarian Law. This appears from paragraph 2.13 of the EU User's Guide cited above but which we set out again here for convenience:

> "…[I]solated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where 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."

(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 when considering his decision under Criterion 2c, together with all the other information and analyses available to him. The reports were often directed at broader considerations than International Humanitarian Law violations.

(5) For example, in the United Nations Panel of Experts Report the following considerations are evident:

(a) The mandate for the report was wide: it was to monitor the implementation of sanctions measures.

(b) The Report refers to 119 allegations of International Humanitarian Law violations by the Coalition but does not contain a detailed or comprehensive explanation or analysis of them.

(c) The allegations of International Humanitarian Law violations are, in many instances, very general (see *e.g.* paragraph 123 "all parties to the conflict in Yemen have violated the principles of distinction, proportionality and precaution…"; paragraph 137 "The Panel documented 119 Coalition sorties related to violations of [International Humanitarian Law]" ; Annex 47 "Attacks on farms and agricultural areas – 3" and "Attacks on mosques – 3").

(d) Many of the alleged violations included in the report are not set out in any detail and, as Mr Watkins explains, consequently could not be recorded by the MoD on the Tracker (see *e.g.* Annex 54 which refers to "3 cases of attacks on fishing vessels and dhows, and 2 cases of attacks upon fishing markets and their communities", but only goes on to provide information about two of these attacks).

(e) The sources used to compile the report were necessarily limited and are not *qualitatively* as sophisticated as the sources available to the MoD. Section V of the Report covers "Acts that violate international humanitarian law and human rights law and cross-cutting issues". Paragraph 121 describes the methodology of this section, noting that the Panel conducted interviews with refugees, humanitarian organisations, journalists and local activists, and that it obtained

commercial satellite imagery to assist in substantiating certain "widespread" or "systematic" attacks. By contrast, the MoD is able to base its analysis on a wide range of information including sensitive MoD sourced imagery which secures a more comprehensive and immediate picture than that provided by third party commercial imagery.

(6) It is clear the Secretary of State and his advisers treated the allegations drawn to their attention in the third party reports seriously and as a matter of concern. When MENAD received an advance copy of United Nations Panel of Experts Report, they immediately forwarded it to the MoD. The MoD then carried out a preliminary assessment of the 119 allegations. Some 39 allegations were eventually added on the MoD tracker as a result of the Report. The UN Panel of Experts Report was carefully considered in the January 2016 update. It was concluded that the additional allegations were concerning but they did not warrant a change in the overall analysis of the risk of future non-compliance with International Humanitarian Law by the Saudi authorities. It was decided that further work was required by MoD to identify whether the alleged attacks had been carried out by the Royal Saudi Air Force, rather than one of its coalition partners. MENAD also requested further information from the United Nations Panel of Experts with regards to seven of these incidents but no further detail has been forthcoming to date.

(7) The Government's formal response to the Parliamentary committees set out its position:

> "The Government is confident in its robust case-by-case assessment and is satisfied that extant licences for Saudi Arabia are compliant with the UK's export licensing criteria.
>
> We continue to assess export licence applications for Saudi Arabia on a case-by-case basis against the Consolidated EU and National Arms Export licensing Criteria, taking account of all relevant factors at the time of the application. The key test for our continued arms exports is whether there is a clear risk that those exports might be used in a commission of a serious violation of International Humanitarian Law (IHL). A licence will not be issued for any country, including Saudi Arabia, if to do so would be inconsistent with any provision of the mandatory Criteria, including where we assess there is a clear risk that the items might be used in the commission of a serious violation of [International Humanitarian Law].
>
> The conflict in Yemen is being monitored closely, and relevant information gathered from that monitoring is taken into account as part of the careful risk assessment for the licensing of exports to Saudi Arabia.
>
> Our export licensing system allows us to respond quickly to changed circumstances, with the option to suspend or revoke any export licence, including those for Saudi Arabia, where we consider that this is a necessary and appropriate step."

(8) It is clear why the Secretary of State took the view that he did that Criterion 2c was not triggered, notwithstanding the various third party reports that came to his, and his advisers', attention. His assessment of all the material in the light of the advice tendered by officials and fellow ministers was that the necessary risk was not established. We should add that it was not legally necessary for him to engage directly with everything that has been said by others on the topic.

"Finely balanced" decision

209. In our view, the fact that senior officials were advising the Secretary of State that the decision was "finely balanced", and the Secretary of State himself expressly acknowledged that this was the case, is instructive. It points to the anxious scrutiny - indeed at what seems like anguished scrutiny at some stages - given to the matter and the essential rationality and rigour of the process in which the Secretary of State was engaged. The picture was acknowledged to be far from a black and white. The decision involved balancing a series of complex and competing factors. Such self-evidently finely balanced judgements are paradigm matters for evaluation and decision by the Executive in conformity with the scheme established by Parliament. They are, of course, subject to scrutiny in the High Court, but with a suitable recognition of the institutional competence of those charged with the decision-making process. So it is in this case. The Claimant appeared at one stage to suggest that because the Government themselves considered the decision to be finely balanced that would enable a Court more readily to interfere. On the contrary, in an area where the Court is not possessed of the institutional expertise to make the judgments in question, it should be especially cautious before interfering with a finely balanced decision reached after careful and anxious consideration by those who do have the relevant expertise to make the necessary judgements.

CONCLUSION

210. In conclusion, in our judgment, the open and closed evidence demonstrates that the Secretary of State was rationally entitled to conclude as follows: (i) the Coalition were not deliberately targeting civilians; (ii) Saudi processes and procedures have been put in place to secure respect for the principles of International Humanitarian Law; (iii) the Coalition was investigating incidents of controversy, including those involving civilian casualties; (iv) the Saudi authorities have throughout engaged in constructive dialogue with the UK about both its processes and incidents of concern; (v) Saudi Arabia has been and remains genuinely committed to compliance with International Humanitarian Law; and (vi) that there was no "clear risk" that there might be "serious violations" of International Humanitarian Law (in its various manifestations) such that UK arms sales to Saudi Arabia should be suspended or cancelled under Criterion 2c.

211. The evidence supports Mr Watkins' summary of the current perspective of the UK Government regarding the "attitude, ability and direction of travel of the Saudi Armed Forces":

> **"**In a previous witness statement I commented on the attitude, ability and direction of travel of the Saudi Armed Forces. The Saudis continue to seek to improve their processes and increase the professionalism of their Armed Forces and continue to be receptive to UK offers to provide training and advice, as demonstrated by the JIAT

> workshop … and [Special Instructions] workshop. The Saudis have been receptive to high-level military visits from the UK including into the SAOC [Saudi Air Ops Centre], and have shown a willingness to learn from UK experience and take on board UK advice. I assess that our engagement since August has further helped the RSAF [Royal Saudi Airforce] develop their capabilities and practices, and we have increased confidence that the RSAF operate in a manner compliant with the standards demanded by the Law of Armed Conflict."

CLOSED MATERIAL

212. 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. He pointed out that the closed material procedure enables the Court to consider the full range of evidence before the Secretary of State. We agree. The advantage of the closed material procedure is that we have had full access to all the facts and materials relied upon by the Secretary of State. We have considered the closed materials in our closed judgment. It is sufficient to record here that the closed material, in our view, provides valuable additional support for the conclusion that the judgements made by the Secretary of State were rational.

RESULT

213. For the reasons we have given above and in our closed judgment, we are satisfied that the Claimant's challenges (a) to the Secretary of State's refusal to suspend export licences for the sale or transfer of arms and military equipment to Saudi Arabia for use in the conflict in Yemen and (b) to the Secretary of State's decision of 9th December 2015 and continuing decision to grant new such licences, fail.

214. In the result, the Claimant's claim for judicial review is dismissed.