



Neutral Citation Number: [2018] EWCA Civ 1010

Case Nos: T3/2017/2079 and 2079B

IN THE COURT OF APPEAL CIVIL DIVISION
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LORD JUSTICE BURNETT AND MR JUSTICE HADDON-CAVE
[2017] EWHC 1726 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2018

Before :

LORD JUSTICE IRWIN
LORD JUSTICE FLAUX

Between :

THE QUEEN on the application of	<u>Claimant/</u>
CAMPAIGN AGAINST ARMS TRADE	<u>Appellant</u>
- and -	
THE SECRETARY OF STATE FOR INTERNATIONAL	<u>Defendant/</u>
TRADE	<u>Respondent</u>
-and-	
(1) AMNESTY INTERNATIONAL	
(2) HUMAN RIGHTS WATCH	
(3) RIGHTS WATCH (UK)	
(4) OXFAM	<u>Interveners</u>

Martin Chamberlain QC and Conor McCarthy (instructed by **Leigh Day Solicitors**) for the **Appellant/Claimant**
James Eadie QC, Jonathan Glasson QC, Kate Grange QC and Jessica Wells (instructed by **Government Legal Department**) for the **Defendant/Respondent**
Angus McCullough QC and Rachel Toney (instructed by the Special Advocates' Support Office) appeared as **Special Advocates**

Hearing date: 12 April 2018

RULING

1. This is the Ruling of the Court to which both of us have contributed.
2. It is important to re-emphasise that we have not conducted an appeal, but are merely considering permission to appeal, thus whether the grounds advanced are arguable. This Ruling is not a reportable judgment.
3. The export of arms and military equipment from the United Kingdom is regulated. The obligations arise from the United Nations Arms Trade Treaty 2013 and from policy criteria set out in the European Union Common Position 2008/944/CFSP (“The Common Position”). The Secretary of State has formulated and laid before Parliament guidance in the form of the Consolidated EU and National Arms Export Licensing Criteria.
4. As we have said, the criteria arise from treaty obligations and International Humanitarian Law, but have become law in the United Kingdom by Act of Parliament, the Export Control Act 2002. And because the criteria have been laid before Parliament, it is important to emphasise that the constraints on arms sales were laid down by Parliament, and have not been imposed by the courts.
5. The criterion central to this case is:

“Criterion 2(c): [HMG should] not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law” [IHL]
6. It is obvious that withholding this licence, or renewal of this licence, is likely to have significant implications for the international relations of the United Kingdom, and potentially for employment in the United Kingdom. It is also the case that those implications are matters in respect of which the government has special knowledge, expertise and responsibility: they are matters for the executive and not the courts. In the course of argument these matters have been given the shorthand “political considerations”, although in truth they are deeper and broader than “politics”. They might include, for example, anticipation of the consequences of the cessation of arms sales to Saudi Arabia, including a judgement as to whether that would likely make matters worse rather than better, in Yemen. However, such considerations do not form part of the criteria for the grant or withholding of a licence to export arms. Parliament did not permit sales, otherwise in breach of the criteria, to be justified on such a basis. They are considerations extraneous to the decision and to the legality of the decision. The Secretary of State has not sought to justify the decision on such a basis and has deployed no evidence or argument based on such considerations.
7. Because we are concerned only to decide whether an appeal may arguably succeed, and/or whether there are other compelling reasons (such as the public importance of the issues raised) why permission to appeal should be granted, this Ruling will be brief.
8. The challenge here is to the Defendant/Respondent’s “failure” to suspend export licences for the sale of arms to Saudi Arabia and his decision to grant new licences for arms exports, communicated to the Claimant/Appellant on 9 December 2015. For convenience we refer to these as “the decision”.

9. We give permission to appeal on Ground 1. It seems to us arguable that the Secretary of State, as a rational decision-maker, had an obligation to make some realistic overall assessment of whether, and if so to what extent, there had been historic serious violations of IHL by the coalition in the Yemen. There was no legal or evidential presumption at play. It is arguable the obligation arose from the facts as a necessary part of assessing the future risks.
10. We give permission to appeal on Ground 2, which in our view runs alongside Ground 1.
11. It is arguable that the matters addressed in Grounds 1 and 2 were material to the decision challenged.
12. We refuse permission on Ground 3. In our judgment it is not arguable that the Divisional Court misdirected itself to the nature or character of the Review it had to conduct. We accept the Respondent's submissions in paragraph 24 of the updated statement.
13. We grant permission on Ground 4. In our view it is arguable that there was an elision of meaning between "grave breaches" of IHL, "war crimes" and "serious violations" of IHL, which may have been material because of some of the advice given bearing on the decision.
14. There is Closed evidence in this case, of great importance. However, it is possible for us to address the Closed Grounds in Open as follows:
 - i) Closed Grounds (2) and (3) are really parasitic on Ground (1). Unless Ground (1) is made out, we would not consider Grounds (2) and (3) arguable. Closed Ground (1) is of very similar import to Open Ground (1).
 - ii) We do consider Closed Ground (1) to be arguable, although the last line of the Ground requires amendment to read simply: "... by reference to past violations".
 - iii) Permission is therefore granted to argue Closed Ground (1), and to argue Closed Grounds (2) and (3) as consequential matters.