

20 June 2019

PRESS SUMMARY

The Queen (on the application of Campaign Against the Arms Trade) (Appellant) v Secretary of State for International Trade (Respondent) [2019] EWCA Civ 1020

On appeal from: [2017] EWHC 1726 (Admin)

JUDGES: Sir Terence Etherton MR, Lord Justice Irwin, Lord Justice Singh

This summary is provided to assist in understanding the Court of Appeal’s decision. It does not form part of the reasons for the decision. The full OPEN judgment of the Court of Appeal is the authoritative document. The full OPEN judgment of the Court of Appeal and a copy of this media summary are available at www.judiciary.uk. There is in addition a CLOSED judgment dealing with matters of national security.

This appeal concerns the lawfulness of the grant by the UK government of export licences for the sale or transfer of arms or military equipment to the Kingdom of Saudi Arabia, for possible use in the conflict in Yemen. The appeal is from the order of the High Court of 10 July 2017, which dismissed the claims of the appellant, Campaign Against the Arms Trade, (“CAAT”) for judicial review. The High Court concluded that the government decision was lawful.

This is a claim for judicial review. The courts are not concerned with the merits of the sale of arms to Saudi Arabia. Different people in society will have different views on that, but that is not a matter for the courts, who are only concerned with the law and whether the decision by government was lawful.

The Court of Appeal read and heard extensive evidence and argument, both in open court and, for national security reasons, in closed hearing, which enabled the court to consider a large amount of highly sensitive material. The position of CAAT was presented in closed hearings by special advocates, who were able to see all the closed material, and make submissions on its behalf on the facts and the law. The court is satisfied that all relevant material was considered.

The Court of Appeal has concluded that the process of decision-making by the government was wrong in law in one significant respect.

Part of the legal test under the Export Control Act 2002, the Export Control Order 2008 and the Common Position adopted by the Member States of the European Union in December 2008, is in what is known as “Criterion 2”. This means the exporting state must consider “the recipient country’s attitudes” towards the principles of “international humanitarian rights instruments” and international human rights law. Criterion 2 stipulates that Member States:

“shall ... deny an export licence if there is a clear risk that the ... equipment might be used in the commission of serious violations of international humanitarian law”.

The error of law identified concerns one part of the process followed by government in considering that “clear risk ... of serious violations”. The government made no concluded assessments of whether the Saudi-led coalition had committed violations of international humanitarian law in the past, during the Yemen conflict, and made no attempt to do so.

The evidence shows that the government has consistently engaged closely with Saudi Arabia, in an attempt to avoid breaches of international humanitarian law and to minimise or avoid civilian casualties in the Yemen conflict. The evidence demonstrates that these efforts have been genuine and extensive. There is considerable evidence as to the “attitude” of Saudi Arabia, and their expressed desire to avoid violations of international humanitarian law. The government argued that these steps were sufficient as a basis for a “finely balanced” judgement in favour of continued supply of weaponry.

The court has concluded, as a matter of law, that this was an error. On these facts, there was a legal obligation (as a matter of rationality) to make a systematic assessment of past possible violations, not necessarily in every case but, where possible, before deciding whether there is a clear risk of future serious violations. On that point, the appeal has succeeded and the decision of the High Court is overturned.

The other arguments made on behalf of CAAT have been rejected.

The decision of the court today does not mean that licences to export arms to Saudi Arabia must immediately be suspended. CAAT did not ask for such an order. It does mean that the UK government must reconsider the matter, must make the necessary assessments about past episodes of concern, allowing for the fact that, in some cases, it will not be possible to reach a conclusion. The government must then estimate the future risks in light of their conclusions about the past.