Neutral Citation Number: [2025] EWHC 173 (Admin)

Case No: AC-2023-LON-003634

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2025

Before :

MR JUSTICE CHAMBERLAIN

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Between :

THE KING **on the application of** **AL-HAQ**	**Claimant**
- and -	
SECRETARY OF STATE FOR BUSINESS AND TRADE	**Defendant**
- and -	
(1) OXFAM **(2) AMNESTY INTERNATIONAL UK** **(3) HUMAN RIGHTS WATCH**	**Interveners**

- -

Philippa Kaufmann KC, Blinne Ní Ghrálaigh KC, Zac Sammour, Rayan Fakhoury, Mira Hammad, Courtney Grafton, Jagoda Klimowicz, Aliya Al-Yassin and Aislinn Kelly-Leith (instructed by **Bindmans LLP**) for the **Claimant**
Sir James Eadie KC, Sir Michael Wood KC, Richard O'Brien KC, Jessica Wells, Kathryn Howarth, Jackie McArthur and Jonathan Worboys (instructed by **Government Legal Department**) for the **Defendant**
Marie Demetriou KC, Professor Philippa Webb, Ali Al-Karim and Alastair Richardson (instructed by **Leigh Day**) for the **First Intervener**
Jemima Stratford KC, Conor McCarthy, Anthony Jones and Hugh Whelan (instructed by **Deighton Pierce Glynn**) for the **Second and Third Interveners**

Hearing date: 18 November 2025

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Approved Judgment

This judgment was handed down remotely at 10am on 30 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1. The claimant is an independent Palestinian human rights organisation. It brings this claim to challenge decisions made by the defendant Secretary of State about the licensing of exports for military and dual-use goods destined, directly or indirectly, for Israel. Its context is Israel's military campaign in Gaza following the attack by Hamas on 7 October 2023.

2. This judgment explains the decisions I have made about which parts of this claim should now go forward for hearing and which should not. It is made following hearings on 3 September and 18 November 2024 and in the light of further written materials from the defendant (filed on 20 December 2024) and claimant (filed on 10 January 2025). In addition, I have considered letters dated 14 January 2025 from the defendant and 16 January from Deighton Pierce Glynn on behalf of Amnesty International and Human Rights Watch, the second and third interveners.

3. None of the written arguments in this case addressed the consequences of the ceasefire agreement between Israel and Hamas, which was reported on 15 January 2025 and came into effect on 19 January 2025. I have proceeded on the basis that the ceasefire makes no difference to the substantive or procedural issues in the case. To date, neither party has suggested the contrary, nor has any of the interveners.

Procedural background

4. This claim was filed on 6 December 2023, supported by a Statement of Facts and Grounds ("SFG") challenging the then ongoing decision of the defendant to continue to grant export licences and to maintain existing licences. Three grounds of challenge were advanced over 138 paragraphs (40 pages). The grounds identified alleged errors in the application of the Strategic Export Licensing Criteria ("SELC") in the light of evidence about Israel's military campaign in Gaza to date. The latest version of the SELC was published in December 2021 and constitutes a statement of government policy in this area, which aims to ensure compliance with the UK's international obligations in this area, including under the Arms Trade Treaty.

5. Permission was refused on the papers by Eyre J on 19 February 2024. On 26 April 2024, following a directions hearing, Swift J ordered that the renewed application for permission be considered at a rolled-up hearing with a time estimate of 3 days, to commence no later than 22 October 2024. He also gave directions for the defendant to apply for a closed material procedure and for the claimant to file an Amended Statement of Facts and Grounds ("ASFG") and further evidence. On 14 June 2024, Farbey J made a declaration under s. 6 of the Justice and Security Act 2013.

6. In the meantime, the defendant had made decisions not to revoke or suspend export licences on 18 December 2023, 8 April and 28 May 2024. There was then a change of government following the general election on 4 July 2024. The new government indicated that it would be reviewing the position.

7. On 23 July 2024, Swift J directed a further hearing on 3 September 2024 to determine applications for extensions of time and issues about disclosure. The claimant served its ASFG on 16 August 2024. It advanced 11 grounds of challenge, presented over 397 paragraphs (144 pages). The decisions challenged were (a) the failure to suspend existing licences, (b) the grant of new licences between 7 October and 13 November 2023 and (c) the subsequent decisions not to revoke or suspend export licences.

8. On 2 September 2024, the day before the hearing directed by Swift J, the Government announced the suspension of licences authorising the export of items that might be used in carrying out or facilitating Israeli military operations in the current conflict in Gaza, save for licences for the export of components for the F-35 fighter jet. This has been referred to as the "F-35 Carve Out".

9. The hearing on 3 September 2024 was listed before me. Everyone accepted that the decision taken on the previous day changed the complexion of the case. I accordingly gave directions for the defendant to provide OPEN and CLOSED disclosure of all materials relevant to the decision taken on 2 September 2024, for the claimant to serve a Re-amended Statement of Facts and Grounds ("RASFG") and for the defendant to serve a position statement. There would then be a further directions hearing on 18 November 2024.

10. The claimant served its RASFG on 23 October 2024. This advanced 13 grounds of challenge, over 536 paragraphs (220 pages). Grounds 1-7 were challenges to the original decisions made prior to 2 September 2024. Grounds 8-12 were challenges to the F-35 Carve-Out. Ground 13 was a separate challenge to the decision of 2 September 2024 not to suspend other licences.

11. The claimant's position (set out in writing and orally at the hearing on 18 November 2024) was the court should determine grounds 1-7 even though they related to decisions which had been superseded, because: (i) they overlap with the grounds of challenge to the F-35 Carve Out decision and (ii) they ought to be determined in the public interest anyway.

12. The defendant's position (again set out in writing in an OPEN Position Statement and at the hearing) was that: (i) permission to amend the SFG to include grounds 1-7 should be refused; (ii) permission to apply for judicial review should be refused in relation to those grounds; and (iii) as to grounds 8-13 in the RASFG, the claimant should be directed to issue a new claim with a properly formulated pleading, which the Secretary of State could then respond to in the normal way.

13. At the hearing, it became clear that one of the key issues I would have to determine was to what extent (if any) determination of grounds 8-13 would require the court to determine grounds 1-7. This has been referred to as the "linkage" issue. To form a final view on that issue, I decided that it would be necessary to see the Secretary of State's pleaded response to grounds 8-13 in the RASFG. I accordingly gave directions for the Secretary of State to file a statement of case responding to grounds 8-13 and make written submissions on the "linkage" question. I made clear that there would be no further opportunity to respond to grounds 8-13. I also gave directions for the claimant to reply on the "linkage" issue. As I have noted in paragraph 1 above, those were filed on 20 December 2024 and 10 January 2025 respectively.

14. In the latter document, the claimant invited the court to fix a five-day hearing to consider the lawfulness of the decision of 2 September 2024 and to stay consideration of the challenge to the previous decisions. Also on 10 January 2025, the claimant provided a Re-re-amended Statement of Facts and Grounds ("RRASFG"). It was said to be "intended to reflect al-Haq's case as to the nature and scope of the 'linkage' between Grounds 2-7… and Grounds 12 and 13". This document strikes through parts of the RASFG but also pleads new matters. It refocuses the challenge on the December 2023 and April and May 2024 decisions, deleting the original challenge to the earlier decisions. It deletes ground 1 altogether and recharacterises grounds 2-7 as "errors 1-6", said to be relevant to all decisions (those of December 2023, April and May 2024 *and* 2 September 2024). The previous ground 13 is deleted and replaced with a new ground challenging the decision not to suspend other licences for the purposes of "sending a political signal" (one of the options presented to Ministers by officials). The new document contains 536 paragraphs over 227 pages, though some of this is struck through.

The Secretary of State's current position

15. The Secretary of State's Grounds of Resistance summarise the Government's current stance, following the decision of 2 September 2024, as follows (omitting footnotes):

> "7. The September Decision followed the assessment by the Foreign Secretary that Israel is not committed to complying with international humanitarian law ('IHL'). That assessment was based, in summary, on the IHL Cell's analysis that Israel had committed possible breaches of IHL in relation to humanitarian access and the treatment of detainees which undermined Israel's statements of commitment to IHL overall, including in the conduct of hostilities. This assessment in turn informed the Foreign Secretary's recommendation to the Trade Secretary that there is a clear risk that certain items might be used to commit or facilitate a serious violation of IHL and that suspension was therefore required in accordance with Criterion 2(c) of the Strategic Export Licensing Criteria ('SELC').
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> 8. The September Decision excluded from the scope of the suspension, licences for the export of F-35 components ('the F-35 Carve Out'). The F-35 Carve Out should not in principle apply to licences for F-35 components which could be identified as going to Israel. The F-35 Carve Out is based on detailed advice from the Defence Secretary explaining the collaborative nature of the F-35 programme. The Defence Secretary's advice concluded that:
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> > '… it is not possible to suspend licensing F-35 components for use by Israel without wide impacts to the whole F-35 programme. Such a suspension of F-35 licensing leading to the consequent disruption for partner aircraft, even for a brief period, would have a profound impact on international peace and security. It would undermine US confidence in the UK and NATO at a critical

> juncture in our collective history and set back relations. Our adversaries would not wait to take advantage of any perceived weakness, having global ramifications.'"

16. On the question of linkage, the Secretary of State makes the following overarching point (again omitting footnotes) at para. 14 of the Grounds of Resistance:

> "a. Before the September Decision, the Foreign Secretary concluded that on the information and advice available to him the only conclusion open to him was that the threshold of a clear risk of a serious violation of IHL had been met in relation to licences authorising the export of items that might be used in carrying out or facilitating IDF military operations in Gaza. Consequently the only options put to the Defendant in the 30 August 2024 Ministerial Submission were to suspend (either items which were assessed to be for use in military operations in Gaza, or all licences for use by the IDF, even those which were assessed not to be for use in the current conflict). The Defendant himself accepted, without caveat, that there was a clear risk that Israel might commit a serious violation of IHL in the future, including in the conduct of hostilities and including through the use of F-35s.
>
> b. As noted above, the Foreign Secretary specifically acknowledged that 'Israel's actions in Gaza continue to lead to immense loss of civilian life, widespread destruction to civilian infrastructure, and immense suffering.' The broad scope of allegations regarding Israel's conduct of hostilities has been a central focus of the IHL Compliance Assessment Process. However, it was recognised that the difficulties of gaining timely access to sensitive military information, including targeting information, perceived military advantage and necessity made it unlikely that the IHL Cell would be able to reach a conclusive IHL judgment in relation to the majority of incidents.
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> c. The premise for the F-35 Carve Out was thus that there was a clear risk that Israel might commit serious violations of IHL in the conduct of hostilities including through the use of F-35s. The risk was therefore taken as established, including in relation to the conduct of hostilities. Moreover, there was no need to seek further to finesse or calibrate that clear risk, even leaving aside the difficulties of trying to do so.
>
> d. In those circumstances, the F-35 Carve Out decision making did not turn on any such finessing or calibration of risk…"

17. At para. 19, the Secretary of State submits as follows:

> "There is no arguable need to resolve Proposed Grounds 2 to 5. Given (i) the forward-looking nature of this assessment, and (ii) the fact that the Defendant's 'good reason' for departing from

> the SELC, namely the interests of international peace and security, was, for reasons explained at §§137-139 below, a matter of such gravity (the existence and magnitude of which the Claimant does not challenge) that it would have overridden any such further evidence of serious breaches of IHL, the errors alleged in Proposed Grounds 2 to 5 are irrelevant to Proposed Ground 12."

A summary of the grounds of challenge and the Secretary of State's response to them

18. I have based my analysis of the claimant's grounds on the RASFG filed pursuant to my directions on 23 October 2024. This is the document to which the Secretary of State has responded. I have, however, made references to the RRASFG filed on 10 January 2025, but have borne in mind that the Secretary of State has not had any proper opportunity to respond to this.

Ground 1

19. Ground 1 alleged an irrational failure to engage the suspension mechanism in the immediate aftermath of 7 October 2023. As it has been struck through in the RRASFG, and the claimant no longer pursues it in relation to the decision taken on 2 September 2024, it is not necessary to say anything further about it.

Grounds 2-7

20. Grounds 2-7 allege a series of legal flaws in the approach to the SELC criteria prior to 2 September 2024. In the RRASFG, these are re-characterised as "errors". They are: a misdirection in the approach to the assessment of compliance in the conduct of hostilities in relation to criterion 2(c) (ground 2, error 1); a failure to take into account relevant considerations and/or irrational conclusions in relation to the criterion 2(c) assessment (ground 3, error 2); a failure to take into account factors which directly undermine formal Israeli assurances of commitment to IHL in relation to criterion 2(c) (ground 4, error 3); a failure to make reasonable enquiries relevant to criterion 2(c) (ground 5, error 4); a failure to have regard to and/or properly to apply other SELC criteria (ground 6, error 5); and errors of law/material misdirections in relation to other SELC criteria (ground 7, error 6).

21. In the RASFG filed on 23 October 2024, grounds 8-13 are headed "Grounds relevant to the September 2024 decision". In the RRASFG filed on 10 January 2025, the six identified "errors" are said to be relevant to all the challenged decisions, including that of 2 September 2024.

Ground 8

22. Ground 8 challenges the F-35 Carve Out on the basis that it involves misdirections as to the UK's obligations in international law under: (a) Common Article 1 of the Geneva Conventions (and equivalent obligations in customary international law ("CIL")); (b) Articles 6 and 7 of the Arms Trade Treaty; (c) Article 1 of the Genocide Convention (and equivalent obligations in CIL); and (d) the customary rules on State responsibility (as

reflected in Articles 16 and 41(2) of the International Law Commission's Articles on State Responsibility).

23. The Secretary of State submits that alleged breaches of the UK's international law obligations are non-justiciable; and this is so even though the Secretary of State reached conclusions about the extent of these obligations. Alternatively, when determining the legality of the Secretary of State's conclusions on the interpretation and application of international law, the court should limit itself to considering whether the Secretary of State's view was "tenable"; and the challenged conclusions all meet that standard.

Ground 9

24. Ground 9 alleges that, insofar as the F-35 Carve Out is contrary to CIL, it is also contrary to domestic common law.

25. The Secretary of State submits that this ground rests on a mischaracterisation of the relationship between CIL and domestic common law. The rules of CIL relied upon here cannot be assimilated into the common law consistently with a proper respect for the separation of powers and the foreign act of State doctrine.

Ground 10

26. Ground 10 is that the F-35 Carve Out gives rise to a significant risk of facilitating offences under the International Criminal Court Act 2001, which make most serious violations of international humanitarian law ("IHL") offences in domestic law.

27. The Secretary of State submits that the F-35 Carve Out does not give rise to any significant risk of accessorial liability on the part of any relevant actor in the UK and in any event the ascription of such liability would depend on a conclusion that Israeli principals were guilty of substantive offences with the relevant *mens rea*. Such a conclusion is prohibited by the foreign act of State doctrine.

Ground 11

28. Ground 11 is that the F-35 Carve Out is based on an irrational assessment of the impact of suspension, because the government ought to be able to exclude parts supplied as part of the F-35 programme from use by Israel.

29. The Secretary of State responds that the decision in this regard is based on detailed advice by the Defence Secretary and the contention that the decision was irrational is not made out.

Ground 12

30. Ground 12 is that there is no good reason for departing from the SELC because the Secretary of State "erred in his assessment of the nature and extent of the risk created by the F-35 Carve Out". It was not enough to reach a conclusion that there was a clear risk that UK-supplied weapons might be used to commit a violation of IHL. The Secretary of State had to grapple with the "extent and quality" of that risk. Reference is made back to grounds 2-5.

31. As to this, the Secretary of State submits as follows at para. 140 of the Grounds of Resistance:

> "Even if (which is denied) there were any error in the methodology applied to the assessment of Israel's conduct of hostilities prior to the September Decision, they are irrelevant to the narrow challenge which the Claimant seeks to bring in Proposed Ground 12. The Defendant's assessment, in the September Decision, was that there is a clear risk that Israel might commit a serious violation of IHL in the future, including in the conduct of hostilities and including through the use of F-35s. There were no caveats to this clear risk assessment nor to the conclusion that suspension was required under the SELC. In other words, given the forward-looking nature of this assessment, this element of risk would not have weighed more heavily in the balance even if the Defendant had adopted a different approach to the analysis of Israel's conduct of hostilities and even if that different approach had led him to reach a different conclusion on Israel's compliance with IHL in that regard."

Ground 13

32. As pleaded in the RASFG on 23 October 2024, ground 13 challenges the decision not to suspend other licences on the ground of a failure to give reasons. In the RRASFG filed on 10 January 2025, after receiving disclosure relevant to the 2 September 2024 decision, the claimant now proposes to challenge the decision not to suspend all licences for the export of military and dual use goods to Israel (an option which was proposed by officials to the Secretary of State on 2 September 2024, but rejected). The decision is said to be flawed by reference to the failure identified in ground 12 and the failure to take into account the falsity of Israel's bilateral assurance to the UK as to its compliance with IHL.

Principles

33. There are four key procedural principles relevant to the decisions before me.

34. First, in the vast majority of cases, judicial review is a two-stage procedure. The permission stage shields defendants from the burden of having to respond to claims that are not reasonably arguable. A rigorous approach to the scrutiny of claims at the permission stage enables the court to ensure that its limited judicial and other resources are focussed on cases raising genuinely arguable points. However, the "rolled-up" hearing – where permission and the substance are considered on the same occasion – has been a feature of judicial review procedure in exceptional cases for many years.

35. In deciding whether to order a rolled-up hearing, the court has to balance a number of factors, typically including the following:

    (a) *The importance of a quick, final decision:* Compared to many types of claim, judicial review claims are in general dealt with relatively quickly, even without

special directions for expedition. However, there may be cases where there are good reasons for the claim to be determined even more quickly. The case for expedition may be particularly strong where the claim raises issues of public importance. In such cases, a quick, final determination that a defendant has acted lawfully can serve just as important a purpose in vindicating the rule of law as a final judgment upholding a challenge.

(b) *Would a rolled-up hearing be likely to result in a final decision more quickly than a separate permission stage?* In most cases, permission can be considered on the papers relatively quickly and, if permission is refused, a permission hearing listed relatively quickly after that; by contrast a rolled-up hearing will generally take longer to prepare for and list. If there is a prospect that permission may be refused on all grounds, a separate permission stage may result in a final decision more quickly than a rolled-up hearing. But in some cases, it may be apparent at a relatively early stage that there is a reasonable prospect of permission being granted on one or more grounds. A permission stage might result in permission being granted on some points and not others, with the possibility of an appeal before a substantive hearing, giving rise to a complex and potentially lengthy procedure. If so, the judge might take the view that a separate permission stage is likely to elongate the process of reaching a final decision on the claim and instead order a rolled-up hearing.

(c) *Would a rolled-up hearing be substantially longer than a permission hearing?* In most cases, a permission hearing with a time estimate of 30 minutes or 1 hour will be much less burdensome for the defendant (and will use considerably less of the court's resources) than a rolled-up hearing. However, in some exceptional cases, the difference will be less pronounced. In some cases, it may be obvious that, even if there were to be a separate permission stage, any permission hearing would have to be listed for substantially longer than 30 minutes or 1 hour. In complex cases, permission hearings listed for one day or more are not unknown. This may not be much less than the time estimate for a rolled-up hearing.

(d) *Would a rolled-up hearing impose a greater burden on the defendant? How much greater?* In most cases, the burden imposed on a defendant at the permission stage is relatively modest (where summary grounds are sometimes very concise and evidence is not generally expected), whereas that imposed at the substantive stage is greater. But in some cases, particularly those turning on pure points of law or where the matters requiring evidence are relatively limited in scope, the difference between what is required at a rolled-up hearing and what is required at the permission stage may be less pronounced.

36. Second, the courts have deprecated the trend towards "a rolling approach to judicial review" in which fresh decisions arising after the original challenge are sought to be challenged by way of amendment. In general, fresh decisions should be challenged by fresh claims: see *R (Dolan) v Secretary of State for Health* [2020] EWCA Civ 1605, [2021] 1 WLR 2326, [118], and the cases cited there. *Dolan* makes clear that exceptions should be rare. There are, however, cases where exceptions may be justified. One scenario is where a new decision is taken at a late stage of the proceedings, the new decision is challenged and the public interest demands an authoritative determination of the legality of the new decision on an expedited basis. If so, the court may take the view

that a need for fresh proceedings would cause undesirable delay and therefore allow the new decision to be challenged by way of amendment. However, even then, careful consideration should be given to whether the directions should allow for consideration of the arguability of the amended claim before any final or rolled-up hearing.

37. Third, the court is wary of permitting claims to be brought where the grounds of challenge are overly long and complex: see *Dolan* [119]. Judicial review typically involves consideration of the legality of a challenged decision against a wholly or mostly uncontentious factual background. That is not to say that the court can never determine factual disputes: see *Administrative Court Judicial Review Guide* 2024, §11.2.3. However, the utility of judicial review, particularly in fast-moving areas of public policy, depends on the court's ability to deliver an authoritative determination within a reasonable time. This means that the scope of the challenge, particularly as respects disputed matters of fact, must be kept within manageable bounds. CPR 54A PD para. 4.2 now limits the Statement of Facts and Grounds to 40 pages. Permission may be given to exceed the limit, but applications for such permission should be approached with caution. A statement of case substantially exceeding the 40-page limit raises a flag signalling the need to consider with care whether the scope of the challenge is realistically manageable.

38. Fourth, it is well-established that courts should not opine on academic or hypothetical issues in public law cases other than in exceptional circumstances where there is good reason in the public interest to do so: *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213, [2020] 4 CMLR 17, [208]-[210]. The exceptional cases in which it is appropriate to determine an academic issue include those involving "a discrete point of statutory construction which does not involve detailed consideration of the facts, and where large numbers of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future": *R v Secretary of State for the Home Department ex p. Salem* [1999] 1 AC 450, 456. It is much less likely that it will be appropriate to determine an academic dispute which requires the resolution of contentious allegations of fact.

Discussion

Overview

39. The decision of 2 September 2024 heralded a very substantial change of approach to the licensing of arms exports to Israel. Up until that point, the Government's position was that there was no "clear risk" that arms exported from the UK might be used by Israel to commit a serious violation of IHL in Gaza. Since 2 September 2024, the Government has been unequivocal in its assessment that Israel is *not* committed to complying with IHL and that, accordingly, there *is* a clear risk of a serious violation of IHL by Israel in Gaza, including in the conduct of hostilities.

40. The Government appears to have used the term "clear risk" because that is the term used in criterion 2c of the SELC. The satisfaction of the criterion is a binary matter: it is either satisfied or it is not. The Government has decided that it is. The claimant agrees. In justifying the F-35 Carve-Out, the Government accepts in terms that there is a clear risk that F-35 components might be used to commit a serious violation of IHL in Gaza. The justification for the exemption is based on independent national and international security considerations.

Grounds 1-7

41. Insofar as they are properly characterised as challenges to the decisions prior to 2 September 2024, I can see no value in the court determining any of grounds 1-6. If it did, it would be asking whether the Secretary of State should have concluded that the "clear risk" test was met more quickly than he did, or in more trenchant terms, or by a process different from the one it in fact adopted. In general, the court does not spend time scrutinising the way a decision was taken where the claimant takes no issue with the overall result.

42. This is very far from the kind of case envisaged in *Salem*, where it might exceptionally be appropriate to determine an academic challenge. As the RASFG of 23 October 2024 makes clear, determining grounds 1-6 as challenges to the earlier decisions would involve considering an enormous quantity of potentially contested factual evidence about events on the ground in Gaza and about the processes by which the Government went about assessing whether the "clear risk" threshold was reached. A hearing to determine these matters (no doubt with OPEN and CLOSED evidence) would be likely to take weeks rather than days. Moreover, the precise circumstances obtaining when the now superseded decisions were taken are unlikely ever to be replicated.

43. I turn, then, to the claimant's argument that the matters relied on in grounds 2-6 are relevant to the legality of the 2 September 2024 decision. The principal grounds to which the earlier errors are said to be relevant are ground 12 and ground 13 (the new version of which is pleaded for the first time in the RRASFG filed on 10 January 2025). The "linkage" arises, on the claimant's case, because the evidence enabled the Secretary of State to say more than just that there was a "clear risk" of UK-supplied weapons being used to commit a serious violation of IHL and, had he appreciated the true nature and extent of the risk, his decision might have been different.

44. The Grounds of Resistance, however, make clear that the F-35 Carve-Out decision involved balancing (i) the clear risk that F-35s with UK supplied components might commit serious violations of IHL in Gaza against (ii) the damage to national and international security to which a ban on the export of those components would give rise. When deciding what weight to give to (i), the Secretary of State did not consider it necessary "further to finesse or calibrate that clear risk" (Grounds of Resistance, para. 14(c), cited at para. 16 above). This was because (ii) was "a matter of such gravity… that it would have overridden any such further evidence of serious breaches of IHL" (Grounds of Resistance, para. 19, cited at para. 17 above).

45. If and when the court comes to determine grounds 12 and 13, it will have to decide whether it was rational and otherwise legally permissible to regard national/international security as an overriding consideration and/or to decline to calibrate further the extent of the risk that Israel might commit serious violations of IHL. If not, it may be necessary to consider whether, even if the Secretary of State had carried out the analysis required, it is highly likely that the outcome would not have been substantially different (s. 31(2A) of the Senior Courts Act 1981). Ultimately, if the claimant succeeds and the court is not persuaded to refuse relief, the Secretary of State will have to re-take the decision, having first undertaken a "calibrated" analysis of the risk of a serious violation of IHL.

46. I have borne in mind the claimant's submission at para. 25 of its Reply:

> "If the Defendant were ordered to calibrate the risk and retake the decision, the new decision would still be unlawful if the Defendant were to replicate the methodological flaws which undermined his Criterion 2(c) assessment itself. Insofar as such errors are identifiable at this juncture, they should therefore be addressed by the Court now in order to ensure that any relief granted is effective."

47. But in my judgment it would be wrong to make assumptions at this stage about the process that would be followed if the F-35 Carve Out decision and/or the decision not to suspend non-Gaza licences had to be retaken. In any event, as noted above, the resolution of grounds 2-6 would take a great deal of time and effort by all parties and the court. It would be unjustified to require that now just because (i) grounds 12 and/or 13 might succeed and (ii) the decision might have to be retaken and (iii) in retaking the decision the Secretary of State's process might resemble the one which preceded the challenged decisions.

48. I therefore reject the submission that it is necessary to consider the matters pleaded in grounds 2-6 of the RASFG in determining grounds 12 or 13.

49. I have also considered grounds 7 and 8. There is considerable overlap between these two grounds, because they allege incompatibility with the same treaty provisions and doctrines of CIL. But, as pleaded in the RASFG on 23 October 2024, ground 7 challenges the earlier decisions and ground 8 challenges the F-35 Carve Out. Ground 8 is fully pleaded and requires no reference to ground 7.

50. I therefore refuse permission to amend the SFG to plead grounds 1-7 as set out in the RASFG filed on 23 October 2024.

Grounds 8-12

51. Grounds 8-12 challenge the F-35 Carve Out decision. If they succeed, and subject to s. 31(2A) of the Senior Courts Act 1981, the outcome will be that the decision to licence the export of F-35 components will have to be revisited. It follows that grounds 8-12 are not academic. The question for me is about the best procedural route for determining them.

52. I have considered the four matters I identified at para. 35 above in the light of the Secretary of State's Grounds of Resistance:

    (a) *The importance of a quick, final decision:* The F-35 Carve Out decision is one of considerable public importance in the UK and more broadly. There is a powerful public interest in a quick, final determination of its legality, one way or the other.

    (b) *Would a rolled-up hearing be likely to result in a final decision more quickly than a separate permission stage?* The Grounds of Resistance raise cogent objections to grounds 8-10, based on domestic principles of justiciability. However, to determine issues of justiciability, it is often necessary to consider the substance of the international law relied upon, at least to some degree. Although there is extensive case law on the justiciability of grounds of challenge based on asserted

incompatibility with international law, the issue has not been examined in the context of the SELC (a policy which necessarily involves express consideration by the decision-maker of compatibility with international law). In my judgment, there is a real prospect that a court considering this issue at the permission stage would regard one or more of grounds 8-12 as arguable. If permission were refused on one or more grounds, there is the real prospect of an appeal. In all the circumstances, a separate permission stage would be likely to delay a final authoritative determination of the issues in the case.

(c) *Would a rolled-up hearing be substantially longer than a permission hearing?* A permission hearing on grounds 8-12 would be likely to take at least a day and possibly more, given the need to consider complex and extensive case law on justiciability. A rolled-up hearing on those grounds would take a little longer – perhaps 3 or 4 days – provided that it is clear that the hearing will not involve consideration of any part of ground 12 which relies on the material in grounds 2-7. A rolled-up hearing would accordingly be longer than a permission hearing, but not substantially so. If restricted in scope as I have indicated, it would be realistically manageable.

(d) *Would a rolled-up hearing impose a greater burden on the defendant? How much greater?* There is no doubt that a rolled-up hearing would impose a greater burden on the defendant than a permission hearing. However, if the parts of the claim which relate to the material pleaded in grounds 1-7 are excised, the difference may not be very substantial. The points in issue are likely to be mainly legal ones. The Secretary of State's case on those points is fully set out in the Grounds of Resistance and the accompanying witness statement. Even if some further evidence is required, the additional burden of a rolled-up hearing is, in my judgment, a manageable one.

53. In the light of these matters, I shall grant permission to amend the SFG to plead grounds 8-12 as set out in the RASFG of 23 October 2024 (to which the Secretary of State has responded in the Grounds of Resistance). There will be a rolled-up hearing of the claim as respects those grounds. The hearing should be listed on an expedited basis. However, a hearing before the end of the Hilary Term is now likely to be very difficult to achieve. The hearing should be listed in the Easter Term.

54. As to the RRASFG filed on 10 January 2025, the position is different. That document has not been the subject of any response. It may be that some of the amendments contained in that document (e.g. paras 525A-525D) could usefully be permitted on the basis that they clarify the scope of ground 12. However, I shall not permit any amendments (such as that in para. 528A) whose purpose is to incorporate by reference the material in grounds 1-7. I hope that the parties can agree an order that reflects this decision. I shall direct a further case management hearing as soon as possible after this judgment is handed down to ensure that matters are procedurally in order and that no-one is in any doubt about the scope of the rolled-up hearing. If any party wishes to submit that the ceasefire is relevant to the directions I should give, they can do so on that occasion.

Ground 13

55. Ground 13, in its current guise, was pleaded for the first time in the RRASFG filed on 10 January 2025. The Secretary of State has not had an opportunity to respond to it, other than in the letter of 14 January 2025. Given my decision on grounds 8-12, however, it would be procedurally sensible for that ground to be considered at the rolled-up hearing to be listed in the Easter Term, save insofar as it incorporates the material in grounds 2-7. I invite the parties to agree a form of order which reflects this.

Interveners

56. I shall address the position of the interveners at the case management hearing. It seems to me quite possible that, even given the narrowed scope of the rolled-up hearing, they will have something useful to add by way of submissions and/or evidence. However, it is important that the need to resolve their status in the proceedings does not give rise to any further delay, so I shall direct now that the witness statement and supporting evidence served with the Grounds of Resistance should be served on them forthwith. This will enable them to make informed submissions at the hearing.