Neutral Citation Number: [2025] EWCA Civ 1433

Case No: CA-2025-001763

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
The Rt Hon Lord Justice Males and The Hon Mrs Justice Steyn
[2025] EWHC 1615 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2025

Before :

LADY JUSTICE KING
LORD JUSTICE DINGEMANS
Senior President of Tribunals
And
LADY JUSTICE WHIPPLE

Between :

THE KING	**Appellant**
(On the application of Al-Haq)	
- and -	
SECRETARY OF STATE FOR BUSINESS AND TRADE	**Respondent**

- -

Phillippa Kaufmann KC, Raza Husain KC, Blinne Ní Ghrálaigh KC, Zac Sammour, Eleanor Mitchell, Mira Hammad, Jagoda Klimowicz, Aislinn Kelly-Lyth, Catherine Drummond, Aliya Al-Yassin & Rebecca Brown
(instructed by Bindmans LLP) for the **Appellant**
Sir James Eadie KC, Sam Wordsworth KC, Richard O'Brien KC, Jason Pobjoy KC, Jonathan Worboys & Jackie McArthur (instructed by **Government Legal Department)** for the **Respondent**

Hearing date : 9 October 2025

- -

Approved Judgment

This judgment was handed down remotely at 12 noon on 12/11/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Dingemans, Senior President of Tribunals:

Introduction

1. This is the judgment following the hearing of an application for permission to appeal against the judgment of the Divisional Court (Males LJ and Steyn J) dated 30 June 2025 [2025] EWHC 1615 (Admin). Andrews LJ had, by order dated 8 August 2025, adjourned the determination of grounds 1, 2 and 5 of the applicant's Grounds of Appeal to an oral hearing, and refused permission to appeal on the papers on grounds 3, 4 and 6. An application to reopen, pursuant to CPR 52.30, Andrews LJ's written decision to refuse permission to appeal on ground 3, was also referred to the hearing. Finally, and if permission to appeal were to be granted, an application on the part of the applicant for a Costs Capping Order (CCO), seeking a cap of £25,000 on the applicant's liability for costs, and £66,500 on the respondent's liability for costs, was to be determined.

2. The Divisional Court had in its judgment dated 30 June 2025 refused the applicant permission to apply for judicial review of a decision made by the respondent on 2 September 2024 suspending export licences of military and dual-use equipment to Israel, but excluding the supply to the global F-35 programme of F-35 components from the suspension. There was a four day hearing between 13 and 16 May 2025 before the Divisional Court.

3. In addition to the open judgment on 30 June 2025, the Divisional Court also produced a closed judgment dated 20 June 2025. It was not suggested that the closed judgment was relevant to the issues to be determined at this hearing, but I did read the closed judgment. I can confirm that the closed judgment did not raise issues relevant to whether the applications before this court should be granted, and the hearing was conducted in open court and this court's judgments are based on the Divisional Court judgment dated 30 June 2025 and the helpful written and oral submissions from the parties.

Some relevant factual background

4. The relevant facts are set out in detail in the judgment of the Divisional Court which, because this is an application for permission to appeal and to reopen, it is not necessary to repeat. I have set out only a very short factual background to enable the grounds of appeal to be understood.

5. The applicant is an independent Palestinian human rights organisation. The respondent is the Secretary of State for Business and Trade. The Export Control Act 2002 (the 2002 Act) governs the export of arms and other military equipment. The Export Control Order 2008 (SI 2008/31) makes it unlawful to export military goods without a licence. The 2002 Act authorises the respondent to make provision for export controls.

6. The F-35 is a combat aircraft. The F-35 programme is an international collaborative defence programme of eight partner nations which produces and maintains F-35 aircraft. The US is the largest partner contributor, and the UK is the second largest partner contributor to the programme. The UK designs and supplies critical components for the operation of the F-35 aircraft.

7. In addition to the eight partner nations, there are customer nations. Israel is a customer nation for the F-35 aircraft. F-35 aircraft of both partner nations and customer nations are supplied from a Global Spares Pool, of which UK components form a part.

8. Section 9 of the 2002 Act requires the respondent to issue guidance about general principles to be followed when exercising licensing powers. Section 9(5) provides that "any person exercising a licensing power … shall have regard to any guidance which relates to that power".

9. The respondent has issued guidance pursuant to section 9 of the 2002 Act. This is the Strategic Export Licensing Criteria (SELC), which was issued on 8 December 2021, and which updated earlier guidance. SELC contained eight criteria.

10. So far as relevant Criterion One of SELC is headed "Respect for the UK's international obligations and relevant commitments, in particular sanctions adopted by the UN Security Council, agreements on non-proliferation and other subjects, as well as other international obligations". Material parts of Criterion One provide "The Government will not grant a licence if to do so would be inconsistent with, inter alia: … (b) the UK's obligations under the United Nations Arms Trade Treaty; …".

11. Criterion Two of SELC is headed "Respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law". Material parts of Criterion Two provide that:

> "Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, the Government will:
>
> c) Not grant a licence if it determines there is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law.
>
> In considering the risk that items might be used to commit or facilitate internal repression, or to commit or facilitate a serious violation of international humanitarian law, the Government will also take account of the risk that the items might be used to commit or facilitate gender-based violence or serious acts of violence against women or children."

12. In the statement introducing SELC the then Secretary of State for International Trade stated that: "the application of these Criteria will be without prejudice to the application to specific cases of specific measures as may be announced to Parliament from time to time". The statement also emphasised that the criteria would not be applied mechanistically but on a case-by-case basis taking into account all relevant information available at the time.

Some relevant treaty provisions

13. Article 1 of all four Geneva Conventions is in the same terms and is known as the "common article 1". It provides: "The High Contracting parties undertake to respect and to ensure respect for the present Convention in all circumstances."

14. Article 6(2) of the Arms Trade Treaty prohibits the transfer of arms "if the transfer would violate its relevant international obligations under international agreements to which it is a Party". Article 6(3) prohibits the transfer of arms if the State "has knowledge at the time of authorisation that the arms or items would be used in commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party".

15. Article 7 of the Arms Trade Treaty provides, so far as is material, that if the export is not prohibited under article 6, each exporting state party should not authorise export if having assessed the potential that the conventional arms or items be used to "undermine peace and security" or commit or facilitate either "a serious violation of international humanitarian law" or a "serious violation of international human rights law".

16. Article I of the Genocide Convention, so far as is material, provides: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". Article II of that Convention provides that acts of "killing members of the group … causing serious bodily or mental harm to members of the group ... deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part … imposing measures intended to prevent births within the group …" committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" constitutes genocide.

The relevant background and the decision

17. The applicant originally commenced a claim for judicial review on 7 December 2023 challenging the decision, which was ongoing, of the respondent to continue to grant export licences and to maintain existing licences to Israel for the supply of military and dual-use equipment.

18. On 2 September 2024 the respondent made a decision to suspend licences authorising the export of items which might be used in carrying out or facilitating Israeli military operations in Gaza. This was on the basis of the Foreign Secretary's assessment that Israel was not committed to complying with international humanitarian law (IHL), and that the "clear risk" threshold under paragraph 2(c) of SELC was met in relation to licences authorising the export of items that might be used in carrying out or facilitating military operations by the Israel Defense Forces (IDF).

19. In the 2 September 2024 decision the respondent, however, also concluded that suspending licences relating to the supply of F-35 components to the Global Spares Pool was likely to cause significant disruption to the F-35 programme, which would have a critical impact on international peace and security. This was on the basis of advice from the Defence Secretary which concluded that:

> "… 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."

20. The respondent therefore excluded licences for the supply of F-35 components to the global F-35 programme from the suspension decision. This became known as "the F-35 Carve Out".

21. The proceedings were amended so that the applicant challenged the decision dated 2 September 2024 to make the F-35 Carve Out. Chamberlain J, for the reasons set out in a judgment dated 30 January 2025 [2025] EWHC 173 (Admin) directed that there should be a rolled up hearing of the application for permission to apply for judicial review and, if judicial review was granted, the hearing of the claim for judicial review. For the reasons given from paragraph 44 of that judgment he did not permit a challenge to the Government's consideration of the risk of infringement of IHL and other international law obligations by Israel asserting that the Government's methodology to assess risk of infringement of IHL and other international law obligations was wrong and that the risk needed to be calibrated. There was no appeal from that decision, and the matter progressed to the hearing before the Divisional Court. There were six grounds of challenge before the Divisional Court.

The judgment below and the application for permission to appeal

22. In the judgment dated 30 June 2025, which runs to some 72 pages, the Divisional Court refused permission to apply for judicial review in relation to each ground.

23. The Divisional Court held that the 2 September 2024 decision of the respondent was not unlawful. The Court identified the applicant's case that: article 1 of the Geneva Conventions imposed an obligation on the part of the UK to ensure respect for the Conventions by Israel and would be infringed by export of F-35 components; export of F-35 components would violate article 6(2) of the Arms Trade Treaty because the export would violate article 1 of the Geneva Conventions; export of F-35 components would violate article 6(3) of the Arms Trade Treaty because of a risk of the events amounting to the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions and attacks directed against civilian objects or civilians protected as such; export of F-35 components would violate article 7 of the Arms Trade Treaty because of the potential of genocide, crimes against humanity or war crimes occurring; and the F-35 Carve Out violated the Genocide Convention because of the serious risk that genocide would be committed.

24. The Divisional Court held that the grounds of challenge that the respondent was wrong (i) to assess that continued exports of military equipment to Israel would be compatible with Criterion One of the SELC, which requires "respect for the UK's international obligations and relevant commitments" and (ii) in his self-direction that the F-35 Carve Out was consistent with the UK's international law obligations were non-justiciable. The conventions identified by the claimant did not automatically form part of, and had not been incorporated into, domestic law. The matters concern the conduct of international relations and national security which are the domain of the democratically accountable executive. The SELC and the self-direction did not bring about a domestic foothold entitling a domestic court to consider international law. The cases cited in support of the existence of a domestic foothold were each in the distinct context of there

being individual rights arising under an unincorporated treaty in circumstances where its incorporation is pending but confirmed.

25. The Divisional Court addressed, at paragraph 113, whether the Government had sought to comply with its policy under SELC and said:

> "… even if in general it would be open to the court to determine whether the F-35 Carve-Out was in accordance with the guidance contained in the SELC, and thus indirectly to interpret and apply those unincorporated treaties, that could only be so if the Secretary of State had purported to apply that guidance. But he did not do so. Rather, the Decision Letter described the F-35 Carve Out as an exceptional measure and, when announcing the decision to Parliament, the Secretary of State referred to the fact that the SELC themselves recognise that their application would be 'without prejudice to the application to specific cases of specific measures as may be announced to Parliament from time to time'. Clearly the F-35 Carve Out was such a specific measure in an exceptional case."

26. At paragraph 114 the Divisional Court addressed the submission on behalf of the applicant that the only departure from the SELC was from Criterion Two (c) (clear risk of violation of IHL) and that the Secretary of State did purport to comply with Criterion One (respect for international obligations), so that the issue of whether the respondent had complied with his own policy was justiciable. The Divisional Court held that was:

> "… an unrealistic distinction. The fact that the Secretary of State considered that the F-35 Carve Out was consistent with the UK's international obligations does not mean that he was purporting to apply the policy contained in the SELC. The better view is that the F-35 Carve Out was a specific decision taken outside the framework of that policy. That is the way in which the Secretary of State was invited to approach his decision in the Ministerial Submission quoted at para 38 above ('it is open to you to decide to depart from the SELC for F-35 components') and, in our judgment, that is the effect of the decision which he made."

27. The Divisional Court held that it was to be expected that the Government would seek to comply with the UK's international obligations as it understands them to be, and the fact that it says so does not render those obligations justiciable in a domestic court. The "tenability" approach (namely whether the executive's view of the applicable public international law was tenable) should be taken when a decision is on a contentious issue of international law and would impede the executive's conduct of foreign relations.

28. As far as customary international law (CIL) was concerned, the Divisional Court held that the respondent was not wrong to conclude that the F-35 Carve Out was "consistent with the UK's domestic law obligations". CIL does not automatically form part of the common law and what has become known as the *Benkharbouche* test (widespread, representative and consistent practice of states on the point in question, from *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62; [2019] AC 777) was not met. The Court found that despite being prepared

to assume that the obligations stated by the applicant were part of CIL, the evidence at trial fell short. Any CIL rules would have to conform with constitutional principles, such constitutional principles include that the interests of the UK in matters of defence, international peace, national security, and the conduct of foreign relations, and whether the UK would continue to participate in a programme of profound importance for international peace, security and the defence of the UK is reserved to the judgement of the executive. The CIL rules should not be received into the common law so as to constrain the executive on these matters.

29. As to the complaint of ultra vires, the court held that the F-35 Carve Out did not give rise to a significant risk of facilitating criminal offences under the Geneva Conventions Act 1957 and the International Criminal Courts Act 2001. It is a principle of statutory interpretation that Parliament is presumed not to require the performance of statutory power or duty where to do so would facilitate the risk of serious crime, unless Parliament has made the contrary plain (*R v Registrar General ex p Smith* [1991] 2 QB 393). This ground of challenge was based in an overly expansive reading of *Smith*. The court held that the "grave risk to life in the ongoing military operations in the Gaza Strip is not created by the F-35 Carve Out, and would not be removed by suspension of the export from the UK of F-35 parts into the F-35 programme."

30. The Divisional Court held that the reasoning for the F-35 Carve Out did not suffer from a "logical error or critical gap". It was reasonable for the respondent to conclude that there was no realistic possibility of persuading all other partner nations that F-35 exports to Israel should be suspended. The programme is highly integrated, and the principle of cooperation lies at its heart. It would not be possible for the UK to issue a unilateral instruction of this nature, nor would it be possible under the Memorandum of Understanding governing the programme.

31. The court also held that the SELC policy intended "to promote global security and facilitate responsible exports" and "to protect the United Kingdom's security and our expertise by restricting who has access to sensitive technologies and capabilities". The respondent had good reason for departing from this policy as the F-35 Carve Out was necessary to avoid "a critical impact on international peace and security, including NATO's defence and deterrence". A high level of deference was appropriate.

32. Finally, the court held that it was lawful to limit the suspension of exports. A suspension of all military export licences went beyond what was required by the SELC and the decision on whether to take that course was a highly political one. The respondent had taken a thorough decision and not omitted any matters that he ought to have considered. The assessment that Israel is not committed to comply with IHL, past conduct of hostilities, and compliance with Criterion One of the SELC, was at the heart of the decision to suspend licences for export of equipment for potential use in Gaza.

The order made by Andrews LJ and the relevant grounds of appeal

33. The applicant sought permission to appeal and a CCO, and the applications were referred to Andrews LJ. Andrews LJ made the order dated 8 August 2025 referring grounds 1, 2 and 5 to the oral hearing on the basis that the principle of open justice demanded that the question whether permission to appeal should be granted on those three grounds should be seen to be done as a hearing to which the public and press had access.

34. Grounds 1, 2 and 5 are:

> "(1) The Court erred in concluding that the SELC did not provide the requisite "domestic foothold" for the interpretation and application of the international obligations relied upon in Ground 8 (and that the contrary submission was unarguable).
>
> (2) The Court erred in concluding that the customary obligations relied upon by the Appellant were not received into and/or essentially reflected in the common law (and that the contrary submission was unarguable).
>
> (5) The Court erred in finding that the determination of Ground 8 would require the Court to adjudicate upon the lawfulness of Israel's conduct (or the conduct of third states)."

35. Andrews LJ refused permission to appeal in relation to grounds 3, 4 and 6. Ground 3, which is the subject of the application to reopen, is:

> "The Court erred in concluding that the Secretary of State adopted a rational process when deciding whether to depart from his policy (and that the contrary submission was unarguable) and its decision was unjust insofar as it was based on matters which the Appellant had been precluded by an earlier interlocutory decision from challenging."

No reopening of ground 3

36. I will deal with the application to reopen first, because if the decision to refuse permission to appeal on ground 3 is reopened and permission to appeal on this ground is granted, it may have an effect on whether permission to appeal should be granted on other grounds. As noted above, Andrews LJ dismissed ground 3 of the proposed grounds of appeal. The applicant seeks to reopen the ground pursuant to CPR 52.30. CPR 52.30(1) provides:

> "The Court of Appeal or the High Court will not reopen a final determination of any appeal unless— (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy."

37. This provision was considered by the Court of Appeal in *Municipio De Mariana v BHP Group plc* [2021] EWCA Civ 1156; [2022] 1 WLR 919. The judge or court considering such a request to reopen should ask whether the Lord or Lady Justice grappled with the issues, and if they did, whether there was an exceptional mistake, such as wholly failing to understand a point that was clearly articulated.

38. In my judgment it is clear that Andrews LJ did grapple with this proposed ground of appeal. This appears from the reasons that Andrews LJ gave for refusing permission to appeal on ground 3:

"Ground 3 is unarguable. It relates to Ground 12 in the lower court, the only surviving ground on which the CLOSED judgment could possibly have had some bearing although I am inclined to agree with the Special Advocates that it does not really affect the issues raised on appeal. The appellant does not claim that the decision itself was irrational but nevertheless contends that the process by which the decision was reached was irrational.

… In my judgment there is no substance in the related complaint of procedural unfairness regarding the way in which Ground 12 was dealt with in the lower court; if the applicant was dissatisfied with the judgment of Chamberlain J he should have appealed it. The applicant has not been treated unfairly. The Divisional Court was entitled to describe the process adopted by the respondent as careful and thorough. Given that there had been no finding that the methodology was unlawful, and that was not an extant ground of challenge, I do not see any basis on which the Court could possibly have been justified in treating it as if it were. There is no material inconsistency between Chamberlain J's ruling and the position adopted by the respondent before the Divisional Court. The respondent has confirmed that the difficulty in assessing the reliability of much of the information available was a matter which was raised before Chamberlain J.

… In terms of assessing the rationality of the process the Divisional Court plainly applied the correct legal test (at 184) and an appropriate standard of review; one only needs to read the judgment to see that the process was rigorously scrutinised and there is no arguable basis for contending otherwise, regardless of whether the Court expressly acknowledged that that was what it was doing. Affording a high degree of deference to the views of the decision maker is not incompatible with subjecting the process by which a decision is taken to "anxious scrutiny".

… On a fair reading of the Divisional Court's judgment, its reasoning was not circular as alleged and it does support the conclusion that it reached. Whilst it was not contended by the respondent that the risks of suspension could never be outweighed by countervailing risks, there may be cases in which it is obvious from the information/evidence available that the scales will inevitably fall on one side rather than the other without the need to carry out any more detailed calibration. The argument was that this case fell into that category. The Divisional Court was entitled to take the view on all the evidence before it that it was rational in these circumstances for the Secretary of State to conclude that, as matters stood, the serious consequences of the "clear and unqualified" conclusion that Israel was not committed to compliance with IHL, even if it were possible to obtain more reliable information about those

> consequences, could not outweigh the risks of suspension. In such circumstances the absence of an attempt to calibrate the risks in practical terms, with all the difficulties that would entail, does not make the process arguably irrational.
>
> … I am not persuaded that there is any substance in the point made in para 45 of the applicant's skeleton argument. No explanation has been given as to why the Divisional Court should have had regard to the implications of a finding (or absence of a finding) which was relevant, if it was relevant at all, to Ground 1/Ground 8, in the context of an issue about the adoption of a rational process of decision making, let alone why its failure to have regard to those implications had any bearing on the correctness of its decision on Ground 3/Ground12."

39. It was submitted on behalf of the applicant that Andrews LJ had failed to understand the point that was being advanced on behalf of the applicant in relation to ground 3. The relevant background was that the applicant had in the original claim for judicial review sought permission to challenge the methodology used by the Government in assessing whether there was evidence that Israel had failed to comply with IHL or other international law obligations. It was pointed out that the Government had used methodology that had been used when assessing compliance of other states with IHL and other international law obligations who were using arms exported from the UK, which was inadequate in this case. The Government had said that the position in relation to the conflict in Gaza was different from other conflicts. This was because for a variety of different reasons, the Government did not have the evidence to carry out the same assessments as before, so that they could not employ the same methodology. Chamberlain J, when making directions for the hearing of the Divisional Court, had not allowed the challenge to the methodology to go forward to the hearing, as he explained in his judgment dated 30 January 2025.

40. It was submitted on behalf of the applicant that the respondent's position before Chamberlain J and then before the Divisional Court had changed. This was because before Chamberlain J the respondent had submitted that it was clear that the requirement to be able to continue to supply components to the F-35 Global Spares Pool meant that there was no need to calibrate by use of a different methodology the risks of Israel not complying with IHL and other international law obligations. Before the Divisional Court the respondent had given details of its decision making and the Divisional Court had described that as careful and thorough. It was submitted that this change of approach had not been confronted by Andrews LJ.

41. In my judgment it is apparent that the essential nature of the respondent's case remained the same throughout the proceedings, namely that whatever the risk of Israel failing to comply with IHL and other international law obligations, the essential reasons for the F-35 Carve Out would outweigh any such risk. It is right that, in the course of its judgment, the Divisional Court did describe the respondent's decision making as "careful and thorough", and I understand the point made on behalf of the applicant that the comment was made in the absence of any adjudication of their complaints about methodology, and that the applicant's challenge was to the process by which the decision had been made. The Divisional Court did have to consider the respondent's decision making in order to decide the grounds which were before the Divisional Court,

as Andrews LJ pointed out. The Divisional Court was entitled to make the comment that it did about the respondent's decision making, and it was not a comment directed to the methodology adopted by the respondent. The Divisional Court was entitled to find that the process leading up to the decision was rational, even without engaging in issues relating to the methodology of calibrating Israel's risk of not complying with IHL and other international law obligations. This is because the view could be taken that, whatever risks were set on the other side of the balance, the need to continue supplying F-35 component parts to the Global Spares Pool would always outweigh it.

42. In my judgment the applicant has failed to demonstrate that so far as this ground is concerned, the circumstances are exceptional and as a consequence falls short of overcoming the very high hurdle of showing that there should be a reopening of Andrews LJ's decision on ground 3. It cannot be said that the integrity of the proceedings had been critically undermined as a consequence of Andrews LJ's dismissal of the application for permission to appeal. Applications seeking a reopening use up the limited resource of judicial time available in the Court of Appeal to determine appeals.

No real prospect of success on the proposed appeal

43. I therefore turn to the grounds of appeal which were referred to an oral hearing by Andrews LJ to determine whether any of those grounds has a real prospect of success. I have considered each of the grounds carefully, but in my judgment none of those three grounds of appeal has any prospect of success.

44. As to the first ground of appeal, namely "(1) The Court erred in concluding that the SELC did not provide the requisite "domestic foothold" for the interpretation and application of the international obligations relied upon in Ground 8 (and that the contrary submission was unarguable)", I record that the Divisional Court found, in paragraph 113, that "… even if in general it would be open to the court to determine whether the F-35 Carve Out was in accordance with the guidance contained in the SELC, and thus indirectly to interpret and apply those unincorporated treaties, that could only be so if the Secretary of State had purported to apply that guidance. But he did not do so."

45. This was a finding of fact. The finding was based on the terms of SELC and the contemporaneous documents evidencing the advice and decisions, and the finding seems to me to be consistent with those documents. The limitations on appellate courts revisiting findings of fact are very well known. There is nothing in the materials or the witness statements to which our attention was drawn, which would justify this court overturning this finding of fact. The suggestion that, on one reading of the documents, the respondent was only departing from Criterion Two (c) and not other aspects of the SELC policy was described by the Divisional Court as "unrealistic". That was also a finding of fact open to the Divisional Court which was a finding based on its evaluation of the evidence.

46. It was common ground that if those findings of fact could not be challenged then the other bases on which the first ground of appeal was argued, would not lead to a successful appeal. That was because, for example, even if the finding that parts of the challenge to the decision of 2 September 2024 were not justiciable was wrong, as contended on behalf of the applicant, the finding of fact would mean that there was no

inconsistency with the respondent's policy. This is because the respondent had decided, as was contemplated when the policy was announced, see paragraph 12 above, to disapply the policy. Similarly, whether the Government's view of public international law was tenable would not matter, because there would be no policy to give an arguable foothold for the court to interpret the public international law obligations in this area. I will return to these matters under "any other compelling reason to hear the appeal" below.

47. I turn then to the second ground of appeal, namely "(2) The Court erred in concluding that the customary obligations relied upon by the Appellant were not received into and/or essentially reflected in the common law (and that the contrary submission was unarguable)." The customary obligations relied on by the applicant were: "the obligation to ensure respect for the Geneva Conventions"; "the obligation to prevent genocide"; and "the obligation not to facilitate internationally wrongful acts", as appears from paragraph 281 of the Claimant's Skeleton Argument before the Divisional Court. The applicant contended that these norms had been received into or were essentially reflected in the common law.

48. It was common ground that the Divisional Court had correctly identified the two parts of the test, namely: it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation; and secondly that there was not "some positive reason of constitutional law that it will not be" received into the common law.

49. Both parties had some difficulty in determining whether the Divisional Court had assumed, for the purposes of the claim, that there were rules of customary international law as contended for by the applicant. This seems to have been the effect of paragraph 131: "we are prepared to assume, without deciding, that the obligations in question are part of customary international law" which would suggest a "widespread, representative and consistent practice of states on the point". This, as highlighted in the course of submissions, was apparently inconsistent with what was said in paragraph 133: "the material provided to us falls well short of 'a widespread, representative and consistent practice ….'". It might be possible to reconcile the two statements by assuming that the obligations in question were part of international law, but had not yet developed into such a widespread, representative and consistent practice to form part of customary international law that might be received into the common law.

50. We consider that, however the applicant has formulated the customary international law obligations and whatever the content of those obligations in practice (see paragraph 132 of the judgment of the Divisional Court), the Divisional Court was entitled to find that there is no "widespread, representative and consistent practice" of states where one state has assessed that another state is not committed to complying with IHL. That was the material assessment made by the respondent about Israel in this case.

51. Further, the Divisional Court was also entitled to hold, in paragraph 135 of its judgment, that there was some positive reason of UK constitutional law not to receive the customary obligations relied upon by the applicant into the common law, if the receipt of such obligations would have had the effect of preventing the respondent from making the decision about the F-35 Carve Out on 2 September 2024. Parliament had legislated to give effect to the Geneva Conventions and the Genocide Convention, see section 1 the Geneva Conventions Act 1957 and the International Criminal Court Act 2001.

Further, under the constitutional arrangements in the United Kingdom, it is for the executive to determine whether considerations of national security in continuing the supply of F-35 components to the Global Spares Pool should outweigh an assessment by the executive that Israel was not committed to complying with IHL. This means that the second ground of appeal is not arguable.

52. I turn finally to the fifth ground of appeal. This was "(5) The Court erred in finding that the determination of Ground 8 would require the Court to adjudicate upon the lawfulness of Israel's conduct (or the conduct of third states)."

53. This is a reference to paragraph 122 of the Divisional Court judgment where the Court said that "it is an important part of [the applicant's] case that Israel has committed and is committing genocide … while the lawfulness of Israel's conduct under international law is at the heart of the case" which meant that the claim was not justiciable because of the doctrine of foreign act of state.

54. It was stressed on behalf of the applicant that although the applicant had firm views on the legality under international law of Israel's actions in Gaza, and although we were told that Mr Husain KC had addressed the Divisional Court on those views at the start of the hearing, the applicant was relying on the respondent's own assessment about the risk that Israel was not committed to complying with IHL, so that the Divisional Court was wrong to find that the claim was not justiciable on the basis of the foreign act of state doctrine.

55. The short answer to this proposed ground of appeal is the same as that given in relation to the arguments on ground 1 of the appeal about non-justiciability and tenable view of international law, namely that this ground would not enable the applicant to get round the finding of fact made by the Divisional Court that the respondent had decided not to apply SELC. For the reasons already given, the applicant has no prospect of success at challenging that finding of fact. Therefore, even with this ground of appeal, the appeal has no real prospect of success. I will return to consider this ground of appeal when considering whether there is a compelling reason to hear the appeal.

No other compelling reason to hear the appeal

56. I have considered whether there is some other compelling reason to hear the appeal. It is submitted on behalf of the applicant that: the arguments about whether the Divisional Court was right in its conclusions about non-justiciability; the test of a "tenable view" of international law; and act of state; are all independent reasons showing that there is a compelling reason to hear the appeal, even in the face of the finding of fact referred to in paragraphs 25 and 26 above. This would give clarity of law in a difficult area.

57. I do not consider that there is a compelling reason to hear this proposed appeal. Even accepting, for the purposes of illustrating this point, that this court might frame its conclusions about justiciability differently from the Divisional Court, this is still an appeal which has no real prospect of success for the reasons given above. It is not apparent that there are other cases which are awaiting this court's judgment on any of the points of law raised by the grounds of appeal.

58. I have no doubt that any appeal on these grounds of law would be very interesting, and the standard of advocacy would be excellent (as it was before us) but it would be wrong

to grant permission to appeal because of an academic interest in points of domestic constitutional law and public international law. It is relevant to note that, as the Divisional Court judgment was a refusal to grant permission to apply for judicial review, then that judgment (like this judgment), should not normally be cited unless it contains a relevant statement of legal principle not found in reported authority, see Practice Direction (Citation of Authorities) [2001] 1 WLR 1001. The decision has not yet been reported, although it is available on Westlaw and the National Archives.

Conclusion

59. For the detailed reasons set out above, I would refuse permission to appeal. This means that the application for a CCO does not arise.

Lady Justice Whipple

60. I agree.

Lady Justice King

61. I also agree.