Claim No: AC-2023-LON-003634

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N:

THE KING
(On the application of Al-Haq)

Claimant

-and-

SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendant

-and-

(1) OXFAM
(2) AMNESTY INTERNATIONAL
(3) HUMAN RIGHTS WATCH

Interveners

OPEN POSITION STATEMENT OF THE SECRETARY OF STATE

INTRODUCTION

1. As the Court will recall, on 2 September 2024 the Trade Secretary took the decision to suspend licences authorising the export of items that might be used in carrying out or facilitating Israeli military operations in the current conflict in Gaza (**"the September Decision"**).

2. 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[1] 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"**).

3. 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

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[1] 7th IHLCAP Assessment, §§137 and171.

Israel.[2] The F-35 Carve Out is based on detailed advice from the Defence Secretary[3] explaining the collaborative nature of the F-35 programme. The Defence Secretary's advice 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."*

4. As of 2 September 2024, there were 361 extant licences for exports to Israel.[4] Of these, 34 export licences were identified which were assessed to relate to items which could be used for military operations in the current conflict in Gaza (**"red licences"**). Five of those related to F-35 components. The remaining 29 licences were suspended (or amended to remove Israel as a permitted end-user).[5] The remaining licences (**"green licences"**) have not been suspended. In summary:

    a. The red licences included components for combat aircraft, military transport aircraft, military helicopters, targeting equipment, combat naval vessels; and Unmanned Aerial Vehicles and technology for military goods;

    b. The green licences included components for trainer aircraft, air defence systems, training equipment, IED disposal equipment and many other items which are clearly unrelated to military operations in Gaza. In response to a request for further information from the Claimant, the Trade Secretary provided further explanation about the basis on which certain licences have been classified as green.[6]

5. The following key points are emphasised in relation to the September Decision:

    a. The decision is predicated on the assessment that Israel is overall not committed to compliance with IHL in Gaza, including in the conduct of hostilities.

    b. In reaching that assessment, the Foreign Secretary acknowledged that *"Israel's actions in Gaza continue to lead to immense loss of civilian life, widespread destruction to civilian infrastructure, and immense suffering."*[7] The broad scope of allegations regarding Israel's conduct of hostilities has been a central focus of the

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2 Letter from the Principal Private Secretary to the Trade Secretary to the Deputy Principal Private Secretary to the Foreign Secretary, date 2 September 2024.

3 Letter from Defence Secretary to Trade Secretary dated 18 July 2024.

4 Two licences expired on 1 September 2024.

5 On 10th September, it was noted that one licence was suspended in error; this was therefore unsuspended. A further "red" licence was identified as part of an ongoing review of extant licences and was suspended on 25 September 2024. DBT Submission dated 25 September 2024.

6 This further information was provided by letter dated 17 October 2024, cf the complaint at §535 of ASFG2.

7 https://www.gov.uk/government/speeches/foreign-secretary-statement-on-uk-policy-on-arms-export-licenses-to-israel

IHL Compliance Assessment Process.[8] 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.[9] This is particularly so given that Hamas tactics (e.g. embedding military assets in densely populated areas, conducting military operations from inside or near to civilian sites), result in very high numbers of civilian casualties.

c. Alongside Israel's record of compliance with respect to the conduct of hostilities, broader evidence of Israel's commitment to IHL in other areas has been carefully considered., In the September Decision, the negative evidence, including with respect to these other areas of IHL, was assessed to outweigh the positive statements of commitment made by the Israeli Government and Military and the lack of a conclusive picture in respect of the conduct of hostilities (whilst recognising that there were very concerning aspects of those hostilities).

d. In light of that assessment, it follows that the "clear risk" threshold had been crossed and that licences for material which is assessed might be used in carrying out or facilitating military operations in the current conflict in Gaza must be suspended.

e. It did not follow from this assessment that <u>all</u> licences to Israel had to be suspended, but only those in respect of which there is a clear risk that they might be used to commit or facilitate a serious violation of IHL.

f. Notwithstanding the "clear risk" assessment, for the reasons given in the Defence Secretary's advice, it has been determined that there is a good reason to depart from the SELC and not to suspend exports into the F-35 programme. The F-35 Carve Out accepts that there is clear risk that F-35 components might be used to commit or facilitate a serious violation of IHL but determines that in the exceptional circumstances outlined by the Defence Secretary, these exports should nonetheless continue.

6. In light of the September Decision, at a hearing on 3 September 2024 the Court set directions to enable the future scope of this claim to be determined. In summary:

a. All prior case management directions in these proceedings were discharged.

b. The Trade Secretary was to provide disclosure of OPEN and CLOSED material relevant to the September Decision (prioritising material relevant to the assessment of red and green licences and to the F-35 Carve Out).

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8 By way of example only, the 7th IHLCAP Assessment, which provided the basis for the September Decision: addressed allegations of the existence of "kill zones"; analysed 13 of the most concerning incidents out of the 65 allegations which were reported during the assessment period; considered more broadly evidence relating to the principles of proportionality and distinction (noting the difficulty of drawing reliable conclusions in a conflict of this nature); considered the implications of the arrest warrants issued by the International Criminal Court and the further Provisional Measures ordered by the ICJ; analysed the implications of two thematic UN reports published during the assessment period.

9 7th IHLCAP Assessment at §47.

c. The Claimant was to file and serve any amendment to its Statement of Facts and Grounds.

d. The Defendant was directed to serve this Position Statement in response to the Claimant's Amended Statement of Facts and Grounds.

e. A hearing was listed for 18 November 2024, for the Court to give directions as to the scope of the claim.[10]

PROCEDURAL BACKGROUND

7. The original claim was issued on 5 December 2023 and sought to challenge the Trade Secretary's decision *"to continue granting licences and to maintain existing export licences for military and dual-use equipment being exported to Israel either directly or where Israel is the final destination."* Three grounds of challenge were advanced, namely that:

   a. on the premise that the Trade Secretary's decision to continue to grant and not to suspend licences is compatible with Criteria 1(b), 2(c) and 7(g) of the SELC, such conclusion was irrational;

   b. the Trade Secretary had erred in law in applying these three criteria; and

   c. the Trade Secretary had failed to follow the proper procedure in relation to assessment under these three criteria.

8. The Claimant sought the following substantive relief:

   a. an order requiring the Trade Secretary to stop granting, and to suspend all extant, licences of exports to Israel, both directly and where Israel is the final destination; alternatively

   b. an order that the Trade Secretary suspends all licences for exports to Israel on an interim basis, pending the taking of a fresh decision in relation to such exports; and

   c. declaratory relief, in particular as to the interpretation of the applicable law and as to the applicable procedure.

9. On 18 December 2023, the Trade Secretary decided (a) not to suspend extant export licences for military and dual-use equipment being exported to Israel; and (b) not to stop granting export licences, but (c) to keep these decisions under continuing and careful review (**"the December Decision"**) The December Decision was premised on the assessment that, in light of all the evidence available to the Trade Secretary, there was not at present a clear risk that items exported to the Israeli Defence Forces (**"IDF"**) might be used to commit or facilitate a serious violation of IHL.

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10 Order of Chamberlain J, 3 September 2024.

10. The Trade Secretary filed Summary Grounds of Resistance on 12 January 2024. On 19 February 2024, Eyre J refused permission on the papers. The Claimant renewed its application for permission. Prior to the hearing of that application, the Trade Secretary concluded that the court could not properly be invited to dismiss the claim as unarguable, without further disclosure of OPEN and CLOSED material. The Trade Secretary submitted that the appropriate course would be to have a "rolled-up" hearing on permission and the merits. This was ordered by Swift J, who set directions by order dated 24 April 2024.

11. The licensing of exports to Israel was kept under review, in accordance with the detailed process put in place by the Foreign, Commonwealth and Development Office (**"FCDO"**). In accordance with the advice received from the Foreign Secretary, the Trade Secretary took further decisions on 8 April 2024 (**"the April Decision"**) and 28 May 2024 (**"the May Decision"**) not to suspend extant licences.

12. On 16 August 2024, the Claimant applied for permission to amend its Statement of Facts and Grounds. This iteration of the proposed Amended SFG (**"ASFG1"**) ran to 167 pages, comprising 11 grounds, and 13 sub-grounds, of challenge. The decisions sought to be challenged were identified as:

    a. the failure to engage the Suspension Mechanism in October 2023 or thereafter, in response to Israel's military assault on Gaza (**"the Suspension Mechanism Decision"**);

    b. the grant, between 7 October and 13 November 2023 of new export licences for Israel, or with Israel as an end-user (**"the October/November Decisions"**); and

    c. the December, April and May Decisions not to revoke or suspend export licences.

13. The Claimant sought the following substantive relief in ASFG1:

    a. a declaration that the Suspension Mechanism Decisions were unlawful;

    b. a declaration that the October/November Decisions were unlawful;

    c. a declaration that the December, April and May Decisions (and/or any of them) were unlawful; and

    d. an order remitting the matter to the Trade Secretary to be reconsidered in accordance with the judgment of the Court on the basis of up-to-date evidence, including an urgent reassessment of the failure to engage the Suspension Mechanism.

14. Following the September Decision, and the 3 September Order, on 23 October 2024 the Claimant filed and served a further version of its proposed ASFG (**"ASFG2"**).

15. Save for a few minor changes, all of the previous grounds of challenge in respect of the Suspension Mechanism Decision, the October/November Decisions and/or the December, April and May Decisions (**"the Previous Decisions"**) are maintained

(**Proposed Grounds 1-7**). **Proposed Grounds 2 to 7** are also expanded to the September Decision itself.

16. The Claimant additionally seeks to challenge the September Decision on the basis that:

    a. there has been a material misdirection/error of law in the determination that the F-35 Carve Out is consistent with the UK's international obligations (**Proposed Ground 8**);

    b. there has been a material misdirection/error of law in the determination that the F-35 Carve Out is consistent with the UK's domestic legal obligations (**Proposed Ground 9**);

    c. the F-35 Carve Out is *ultra vires* because it gives rise to a significant risk of facilitating crime (**Proposed Ground 10**);

    d. the F-35 Carve Out is based on an irrational assessment of the impact of suspension (**Proposed Ground 11**);

    e. there was no good reason to depart from the policy established in the SELC (**Proposed Ground 12**); and

    f. the Trade Secretary has failed to suspend all export licences to Israel (**Proposed Ground 13**).

17. The Claimant further seeks an order for expedition – although no submissions are advanced in support of that request.

18. In terms of substantive relief, the Claimant now seeks:

    a. a declaration that the approach to and failure to apply the Suspension Mechanism was unlawful;

    b. a declaration that the October/November decisions were unlawful;

    c. a declaration that the December, April and May decisions (and/or any of them) were unlawful;

    d. a declaration that the F-35 Carve Out was unlawful;

    e. an order quashing the F-35 Carve Out;

    f. a declaration that the decision on 2 September 2024 to continue supplying other licensed items to Israel was unlawful; and

    g. an order requiring the Trade Secretary to review his decision to continue supplying other licensed items to Israel.

19. The current procedural position is that the Claimant does not have permission to apply for judicial review in respect of any of its grounds of review. The Claimant's renewed

application in respect of its original SFG was "rolled up" to be heard with the substantive claim. However, the grounds of challenge in the original SFG were overtaken by those proposed in ASFG1 and the substantive relief sought in the original claim has on any view fallen away. The Claimant's application to amend its SFG was in turn overtaken by the Suspension Decision, and ASFG1 have now been overtaken by ASFG2.

20. The Claimant therefore now requires permission to amend its claim as set out in ASFG2 and permission to bring a judicial review claim. Permission is also required to exceed the 40 page limit.[11]

OVERVIEW OF THE TRADE SECRETARY'S POSITION

21. In *R (Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 (**"*Dolan*"**), the Court of Appeal (highlighting previous guidance of the Court of Appeal[12]) expressed particular concern about:

    a. the trend towards a "rolling" approach to judicial review, in which fresh decisions are sought to be challenged by way of amendment; and

    b. the length and complexity of the grounds of challenge (which in *Dolan* ran to 87 pages), noting that *"It is impossible to see how such statements can be regarded as complying with the requirement in the Administrative Court Judicial Review Guide 2020, at para. 6.3.1.1 that the document 'should be as concise as reasonably possible…'"* and that *"a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review."*

22. Contrary to this guidance, the Claimant has produced a pleading which now runs to 220 pages.[13] The factual background – a wide-ranging indictment of Israel's conduct in Gaza - covers 30 pages. A further 80 pages are devoted to a description of the decision-making process from October 2023 to date. 13 grounds, and 21 sub-grounds, of challenge are raised over 70 pages. The Claimant has now adduced 31 pages of witness evidence and 14 pages of documentary evidence. The three interveners have adduced a further 14 pages of submissions and evidence.

23. The vast majority of ASFG2 (culminating in Grounds 1-7) relates to the Previous Decisions. The Trade Secretary's position is as follows:

    a. They have now been superseded by the September Decision. The Trade Secretary has now assessed that there is such a clear risk, and, subject to the F-35 Carve Out, has suspended all relevant exports.
    b. The challenges in relation to the Previous Decisions as set out in Proposed Grounds 1 to 7 are no longer live, exports having now been suspended, and are now academic.

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11 PD54A, §4.2(3).

12 *R (Spahiu) v Secretary of State for the Home Department: Practice Note* [2018] EWCA Civ 2064; *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841.

13 In *R (Gardner) v Secretary of State for Health and Social Care)* [2022] EWHC 967 (Admin), at §148, the court expressed concern that the Statement of Facts and Grounds ran to 100 pages.

c. Further, there is no good reason in the public interest for them to be determined.[14] Indeed, very significant time and resource would be needed to prepare for and determine those historic issues. In relation to that public interest, proportionality (or here, the disproportionality of proceedings directed at historic decisions, now superseded) and the overriding objective are relevant. So too is the fact that there is currently a cost capping order in place under which, even if the claim is successfully resisted, costs recovery would be capped at £25,000.

24. It is asserted that Grounds 2 to 7 relate to *"fundamental errors of approach"* which are also relevant to the September Decision.[15] No general declaration of unlawfulness in respect of the September Decision is sought.[16] This plea is used to seek to make a case that there is ongoing relevance and utility in these historic grounds. However:

a. There is almost no particularisation in support of this assertion. It appears to amount to a suggestion that there was an error in the approach to hostilities.
b. There was plainly no error in the approach to the September Decision.
c. Even if there was such an error, it was of no materiality to the September Decision. That decision was to suspend exports. Thus, any such error would simply have provided a further or different reason for precisely the same decision.
d. If there is any real issue of approach, that can be dealt with in the context of any future decision to lift the suspension or any future decision in another context in which it is said that the same error is made. Not merely can that be done; it is evidently more appropriate for such a decision to be taken in the context of that new decision, and in the light of the then state of facts. If expedition is considered appropriate, the Court will no doubt make such an order.
e. Alternatively, even if it is considered appropriate to determine an issue of principle or approach, there is no good reason for not properly identifying that issue and trying it as such, without the need to divert time and resource into a satellite trial of the facts surrounding the Previous Decisions.

25. As to the grounds which are advanced in relation to the September Decision only, Proposed Grounds 8 to 12 relate to the F-35 Carve Out. They are distinct from the challenges to the Previous Decisions and can be dealt with as such. They will need to be the subject of a responsive pleading by the Trade Secretary by way of Summary Grounds.

26. The same applies to Proposed Ground 13. The only issue raised in this ground is whether the Trade Secretary has rationally identified those exports which might be used to commit or facilitate IDF military operations – and in respect of which there is consequently a "clear risk" that they might be used to commit or facilitate a serious violation of IHL.

27. In these circumstances, the Trade Secretary's position is that:

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14 *R (Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, at §42.
15 ASFG2, §6.
16 ASFG2, §536. The relief sought in respect of the Suspension Decision is limited to the F-35 Carve Out and the decision to continue supplying other licensed items to Israel.

a. Proposed Grounds 8 to 13, in relation to the September Decision should be pursued in a new claim – and in any event, with a properly formulated pleading complying with the *Dolan* guidance.
b. There will need to be a new timetable allowing for a responsive pleading to these Grounds from the Trade Secretary.
c. Permission to amend the claim should be refused in respect of all the other Grounds.
d. Permission to bring a judicial review claim should be refused in relation to the Claimant's original claim.

28. If, contrary to the above, the court considers that the challenges to the Previous Decisions should be permitted to continue, there is no longer any element of urgency to those claims at least.

THE CHALLENGE TO PREVIOUS DECISIONS IS ACADEMIC

29. The principle is that the *"courts should not opine on academic or hypothetical issues in public law cases other than in exceptional circumstances where there is a good reason in the public interest for doing so."*[17]

30. The exceptional nature of the court's discretion to hear public law claims which have become academic was emphasised in *R (Zoolife International Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) at §36. The Court of Appeal in *R (Heathrow Hub Limited) v Secretary of State for Transport*, at §208, approved this review of the authorities and the principles drawn from them. In *R (L) v Devon CC* [2021] EWCA Civ 358, Laing LJ (at § 50) described this test as a *"rigorous filter"*, which was the best way of controlling access to the court for a claim which was no longer live. The Court of Appeal in *Dolan* emphasised that the discretion to hear disputes which have become academic *"must be exercised with caution"*.[18]

31. Examples of "good reasons" militating in favour of exercising the discretion in favour of hearing an academic appeal include:

a. Where a discrete issue of statutory interpretation arises which does not involve detailed consideration of the facts;[19]
b. Where a large number of cases exist or are anticipated so that the issue will most likely need to be resolved in the near future;[20]
c. Where the parties have expended time and money in preparing for and attending the hearing, and the point had been fully argued at the hearing.[21]

32. Examples of reasons why the discretion should <u>not</u> be exercised include:

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17 See, e.g. *R (Heathrow Hub Limited) v Secretary of State for Transport* [2020] EWCA Civ 213 at §208; *R (AA) v Sodexo Ltd* [2023] EWHC 3215 (Admin) at § 42.
18 [2020] EWCA Civ 1605 at §40.
19 *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, at 446 (per Lord Slynn); *R (L) v Devon CC* [2021] EWCA Civ 358 at §56.
20 *Salem; R (L) v Devon CC* [2021] EWCA Civ 358 at §56.
21 *R (L) v Devon CC* [2021] EWCA Civ 358 at §52.

a. The claim is fact specific and context specific;[22]
b. A decision would not lay the foundation for any useful precedent for the future;[23]
c. A challenge to a future decision could be pursued promptly. Judicial review is designed to be practical and effective and the court will respond in a way that it judges will promote the interests of justice and the public interest. Whether expedition and an urgent rolled up hearing would be appropriate in the future would be a matter for a future court; if they are not granted it will be because they are not appropriate;[24]
d. The claimant has momentum and support: *"Whether the Claimant and any supporters would have the resources to bring a future claim, in light of the position in the present claim, is not a reason to allow this claim to proceed to a substantive hearing on an "historic" issue."*[25]

33. Applying these principles, the Trade Secretary submits that the claims in relation to the Previous Decisions are no longer live and are now academic; and that the exceptional discretion for the Court nonetheless to hear such claims is not engaged. Indeed, the pursuit of claims relating to the Previous Decisions would require enormous time and resource, including court time, for no good reason.

34. The pursuit of public law claims is not a matter of right. The Court retains a discretionary, filtering role both at permission and in relation to amendments. Moreover, remedies in judicial review are also discretionary.

35. Licences for items which might be used in carrying out or facilitating IDF operations in the current conflict in Gaza have now been suspended. The practical relief sought by the Claimant in its original SFG[26] and in ASFG1[27] in respect of the Previous Decisions have fallen away.[28] The only relief now sought in relation to the Previous Decisions are declarations of past unlawfulness.

36. This is not a context in which a large number of similar claims exist or might be anticipated (cf *R (L) v Devon CC* (delay in issuing education, health and care plans for children); *R (AA) v Sodexo Ltd* [2023] EWHC 3215 (Admin) (eligibility for Home Detention Curfew, potentially affecting around 3,000 prisoners at any one time, in circumstances where the evidence indicated that Prison Governors were confused by the SSHD's decision making)). The circumstances of this challenge to arms export licensing are as fact- and context-specific as could be imagined. A review of the Previous Decisions

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22 *Hussain v Secretary of State for Health and Social Care* [2022] EWHC 82 (Admin), at §31.
23 *Dolan* at §38.
24 *Hussain* at §§31-32.
25 *Hussain* at §33.
26 An order requiring the Trade Secretary to stop granting new export licences, and to suspend extant licences to Israel (together with any necessary quashing order in relation to decisions already taken (§138(b)); alternatively, an order that the Trade Secretary suspends all licences to Israel on an interim basis, pending a fresh decision (together with any necessary quashing order in relation to decisions already taken (§138(c)).
27 An order remitting the matter to the Trade Secretary to be reconsidered in accordance with the judgment of the Court on the basis of up-to-date evidence, including an urgent reassessment of the failure to engage the Suspension Mechanism.
28 Subject to the challenges to (i) the F-35 Carve Out and (ii) the identification of individual licences falling within the scope of suspension which are distinct from the grounds of challenge against the Previous Decisions.

would provide no useful precedent for any challenge to the licensing process in any future conflict.

37. The licensing of arms exports to Israel is being kept under close and continuous review. It is conceivable, therefore, that the September Decision could itself be overtaken in the future; and exports resumed. However, that provides no justification for continuing with non-live and academic claims:

    a. If that situation were to arise, it would likewise be intensely fact specific. The specific and detailed reasons for any such decision would be the focus of any challenge. If it were to be alleged that error of approach or law vitiated the decision, that allegation could be made and would be determined in the context of the actual decision.
    b. If it is said that there is a need for expedition in determining such a challenge, that also could be, and should be, determined at the time and the in the context of the actual new decision. If there is a good case for expedition, the Court will no doubt order it. The continuation of proceedings relating to non-live historic decisions cannot be justified, even if there is some point of principle arising, on the basis that, even if the Court orders expedition, that will not be quick enough.

38. Turning to the specific grounds relied upon in relation to the Previous Decisions, **Proposed Ground 1** asserts that the failure to engage the Suspension Mechanism was irrational. The scope of the policy, as interpreted by the Divisional Court in *CAAT1*, is rehearsed at §§101-103 of ASFG2. The Claimant does not take issue with any of this. Its complaint, at §§365-370 of ASFG2, is simply that, on the facts of this situation, the Secretary of State should have triggered the Suspension Policy. A declaration of unlawfulness to this effect will not provide any useful precedent for the future.

39. **Proposed Ground 2** asserts that the Trade Secretary misdirected himself in his approach to the assessment of compliance in the conduct of hostilities. The central criticism is that the Trade Secretary uncritically adopted the methodology which was approved by the Divisional Court in *CAAT2* in the context of exports to Saudi Arabia. The Claimant's case is that the approach in *CAAT2* was particular to the facts and circumstances of that case[29] and that *"the SSFCA and SSBT erred in unlawfully fettering their discretion and/or irrationally transposing an approach to an entirely different context where it is in appropriate and incapable of answering the question under Criterion 2(c) as to whether there is a clear risk of serious violations by Israel."*[30] The Claimant's analysis of the role of commitment, capacity and compliance in applying Criterion 2(c) is not accepted. However, the Claimant's own case is that the assessment of, and balance between these three "pillars", is fact specific. A declaration that the Secretary of State adopted an incorrect approach to the assessment of Israel's past compliance with IHL will therefore provide no useful guidance in future cases.

40. **Grounds 3, 4 and 5** are, on their face, almost entirely fact specific. Ground 3 comprises a detailed list of patterns and trends which, it is alleged, the Trade Secretary failed to take into account. Ground 4 lists examples of statements from military personnel, senior Israeli officials and whistleblowers, which, it is said, undermine the Trade Secretary's

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29 ASFG2, §379; §381.
30 ASFG2, §382.

reliance on formal statements of commitment. Ground 5 contends that the Trade Secretary was required, by the *Tameside* duty, to seek information from factual witnesses who had been present in Gaza, with specific examples given of the witnesses and information which would have been available. An *ex post facto* finding of unlawfulness in respect of any of these alleged failures will again provide no useful guidance in future cases, where the fact patterns and available evidence will be different.

41. **Ground 6** raises issues as to the relevance, under other SELC criteria, of Israel's alleged non-compliance with other rules of international law/international human rights law. This ground raises issues of fact, both as to the alleged other breaches said to have been committed by Israel, and also the extent to which these matters were taken into account by the Trade Secretary in reaching the Previous Decisions. Resolution of this Ground will provide no useful guidance for future cases.

42. **Ground 7** asserts that the Trade Secretary has erred in law in his interpretation of the Genocide Convention and the Arms Trade Treaty (**"ATT"**) and in relation to the assessment of a serious risk of genocide and/or breach of the Geneva Conventions. Ground 7 would therefore require the court to pronounce *in abstracto* on the meaning and scope of: (i) Article 1 of the Genocide Convention; (ii) Articles 6(2) and (3) and 7 of the ATT; and (iii) the ICJ's Provisional Measures Orders in *South Africa v Israel*. This ground mirrors the attempt by the Campaign Against Arms Trade to secure a ruling from successive courts as to the meaning of "serious violation of IHL" in the *CAAT1* and *CAAT 2* litigation – an attempt which was firmly rebuffed by successive courts, which emphasised that it is not the role of the courts to give abstract definitions of concepts of this kind, since so much depends on the precise facts. The Court of Appeal emphasised that *"…the context in which the issue arises here is not one in which the Secretary of State is sitting like a court adjudicating on alleged past violations but rather in the context of a prospective and predictive exercise as to whether there is a clear risk that arms exported under a licence might be used in the commission of a serious violation of IHL in the future."*[31] The same caution applies *mutatis mutandis* to Ground 7.

The alleged "*fundamental errors in approach*"

43. The Claimant asserts, at §6 of ASFG2, that Proposed Grounds 2 to 7 *"relate to fundamental errors in approach which underlie all decisions, including the September decision, despite the different outcome."* However, references to the September Decision in the Claimant's elaboration of these grounds are sparse. For convenience, these references are set out in full:

    a. In relation to Ground 2B – *"The SSBT and those advising him continued to misdirect themselves in the September Decision, leading to the conclusion that 'despite the mass casualties of the conflict, it has not been possible to reach a determinative judgment on allegations regarding Israel's conduct of hostilities'. As explained by the SSBT, this asserted inability to assess Israel's (non) compliance with international law was 'in part due to the opaque and contested information environment in Gaza and the challenges of accessing the specific and sensitive information necessary from Israel, such as the intended targets and anticipated civilian harm. For the reasons set out above, this reflects a continuing misdirection*

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31 *R (CAAT) v Secretary of State for International Trade* [2019] EWCA Civ 1020 at § 165.

by the SSBT and a continuing fettering of his own assessment and decision-making powers."[32]

b. In relation to Ground 3A - *"…the SSBT failed – and is continuing to fail – to consider whether Israel's conduct of the ongoing hostilities formed a pattern (or patterns) giving rise to the inference that Israel was not committed to complying with IHL."*[33]

c. In relation to Ground 3C – *"In assessing Israel's record of compliance with IHL, the IHLCAP Assessments made one of three conclusions in respect of each incident considered…As of the September Decision, the IHLCAP Cell had reached that conclusion [insufficient information to decide either way] in 411 of 413 incidents considered."*[34] It is noted that the specific criticisms of the analyses undertaken in the IHL Assessments don't include any criticism of the Seventh IHL Assessment, on which the September Decision was based;

d. In relation to Ground 6A – *"The SSBT (and his advisers) failed to have regard to all criteria as he was required to do in making all of the decisions, including the September Decision."*[35]

e. In relation to Ground 7B – *"The reality is that the SSBT's failure to suspend the export of arms and components to Israel capable of being used by Israel in Gaza in the Prior Decisions, and to allow the continued indirect export of relevant licensed items to Israel, including F-35 parts, in the September Decision breaches: (i) the UK's obligation under Article 1 of the Genocide Convention; and (ii) its obligation in CA1 of the Geneva Conventions to prevent violations thereof."*[36] However, this is a challenge to the F-35 Carve Out, and is replicated in Grounds 8A and 8C.

44. It is unclear whether, and if so how, the remaining 15 sub-grounds of Proposed Grounds 2 to 7 are said to apply to the September Decision. This serves to illustrate the perils of "rolling" challenges. It is not for the Trade Secretary (or the court) to piece together which grounds relate to which decisions. The Claimant is required to plead its case clearly and succinctly.[37]

45. It is therefore unclear precisely what 'continuing' issue of principle is actually being contended for. To the extent that the suggestion of fundamental and continuing error relates to the approach to hostilities in the context of the current conflict in Gaza, the Trade Secretary's position is as follows.

46. **First,** any such point of principle on no view requires a trial of all of the facts and circumstances surrounding the Previous Decisions. On the contrary, it should be capable of clear identification as an issue of principle.

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32 ASFG2, § 400.
33 ASFG2, § 405.
34 ASFG2, § 408.
35 ASFG2, §436.
36 ASFG2, § 459.
37 *Dolan*, § 119.

47. **Secondly,** it is clear that there was no error of approach in the September Decision. In relation to Israel's record of compliance in the conduct of hostilities, it was usually not possible to determined whether allegations amounted to possible violations of IHL. There were some indications that Israel's systems and practices were compliant. However, the overall picture was of obvious concern, especially having regard to the number of civilian casualties and the allegations of breaches of IHL that were being made. That picture of broader concern was not ignored in reaching the decision. The focus on the humanitarian and detention aspects was (as appears to be accepted) entirely appropriate – not least as providing a more solid and detailed basis for consideration of Israel's commitment to IHL. It cannot be said that it was irrational for the Trade Secretary to conclude, on the basis of Israel's conduct and attitude in relation to humanitarian access and the treatment of detainees, that Israel generally lacks commitment to the principles of IHL and that therefore relevant licences relating to the conduct of hostilities in Gaza should be suspended.

48. **Thirdly,** in any event, it is unnecessary to seek to split out and parse the bases relied upon because the September Decision was to suspend. The Claimant does not challenge, indeed positively supports, the decision to suspend. These Proposed Grounds only operate, even if well founded, to provide additional reasons to suspend. But suspension is precisely the decision that has been made. The Proposed Grounds are no longer live/academic for that reason. At best and even if well founded, the Proposed Grounds could do no more than make a case that the September Decision was correct for additional reasons.

49. **Fourthly,** as already noted above, continuing such a challenge cannot be justified by the possibility of some new decision in the future, hypothetically based on the same alleged errors of approach. If such a decision is taken, its legality will need to be judged at the time on its own facts. If such alleged errors are in fact part of the new decision making process, then the challenge can be mounted; and expedition ordered if, on the then facts, the Court is persuaded that that is the right procedural course.

50. For completeness, it is noted that the Claimant contends that determination of Proposed Grounds 2 to 7 would directly affect the determination of Proposed Ground 12. This ground asserts that, in assessing whether there was a "good reason" to depart from the SELC in respect of F-35 components, the Trade Secretary failed properly to balance the risks of suspending F-35 exports against the risk of harm of not suspending these exports. The Claimant asserts that it is not sufficient that the Trade Secretary has identified that there is a "clear risk" that such components might be used to commit or facilitate a serious violation of IHL; that he should have assessed whether, and concluded that, there was a risk of the commission of war crimes or crimes against humanity. On this basis, it is said that the Trade Secretary could not have rationally concluded that there was a good reason to depart from the SELC. The Trade Secretary does not accept the premise of Proposed Ground 12. But in any event, determination of this Ground does not require a determination of all the issues and evidence put forward in Proposed Grounds 2 to 7. Indeed, these arguments and evidence are unlikely to be helpful as they do not focus on the risks arising from the use of F-35s. It would be perfectly possible – and proportionate – for the Claimant to identify with precision the nature and basis of the risk assessment which it is said the Trade Secretary should have undertaken and the basis on which it is alleged that he failed to do so.

CONCLUSION

51. In conclusion, at the hearing on 18 November, the Trade Secretary will invite the Court to direct that:

    (a) Permission to amend the claim to include Proposed Grounds 1 – 7 is refused.
    (b) Permission to bring a judicial review claim in respect of the Claimant's original claim is refused.
    (c) In respect of Proposed Grounds 8 to 13 which relate to the F-35 Carve Out and the licences falling within the scope of the suspension, the Claimant should be directed to issue a new claim, with a properly formulated pleading complying with the *Dolan* guidance. The Trade Secretary will then respond by pleading in the usual way.

52. If contrary to the above, the Court considers that challenges to the Previous Decisions should be permitted to continue, the Trade Secretary will invite the Court to direct that:

    (a) The Claimant file and serve ASFG which comply with the *Dolan* guidance;

    (b) The replacement ASFG should particularise why Proposed Grounds 2 to 7, and which of the (or any) Proposed sub-grounds relate to "fundamental errors of approach" which are relevant to the September Decision;

    (c) That the Defendant be directed to file and serve a pleading in response to the *Dolan* compliant ASFG.

53. Likewise, should the Court take this course, the Trade Secretary submits that there is no need for an expedited timetable, as there is no urgency in relation to the challenges to the Previous Decisions.

54. As a final alternative, should the Court not be minded to direct that the Claimant file and serve a further reamended SFG which complies with the *Dolan* guidance, the Trade Secretary will need to file and serve Detailed Grounds of Defence. The Trade Secretary will invite the Court to permit time in addition to the usual 35 days to respond, in view of the length of the Claimant's ASFG.

12 November 2024

SIR JAMES EADIE KC
RICHARD O'BRIEN KC
JESSICA WELLS
KATHRYN HOWARTH
JACKIE McARTHUR