Neutral Citation Number: [2023] EWHC 1343 (Admin)

Case No: CO/3579/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2023

Before:

LORD JUSTICE POPPLEWELL
and
MR JUSTICE HENSHAW

- -

Between :

THE KING, on the application of CAMPAIGN AGAINST ARMS TRADE	**Claimant**
- and -	
SECRETARY OF STATE FOR INTERNATIONAL TRADE	**Defendant**
- and –	
(1) MWATANA FOR HUMAN RIGHTS **(2) OXFAM**	**Interveners**

- -
- -

Ben Jaffey KC and Conor McCarthy (instructed by **Leigh Day**) for the **Claimant**
James McClelland KC, Admas Habteslasie and **Aarushi Sahore (**instructed by **Bindmans LLP)** for the **First Intervener**
Angus McCullough KC and Rachel Toney (instructed by **SASO**) **as the Special Advocates**
Sir James Eadie KC, Jonathan Glasson KC, Jessica Wells and Karl Laird (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 31 January, 1-2 February 2023

- -

Approved Judgment

.....

Lord Justice Popplewell and Mr Justice Henshaw:

(A) INTRODUCTION

1. This is a claim for judicial review challenging the lawfulness of the decision on 7 July 2020 by the Secretary of State for International Trade to continue granting licences for the export of arms to the Kingdom of Saudi Arabia (to which we will refer simply as Saudi Arabia). She is obliged to cease granting new licences and suspend existing licences where there is "a clear risk that the arms might be used in the commission of a serious violation of International Humanitarian Law". The claim focusses on airstrikes conducted by a coalition led by Saudi Arabia in support of the legitimate government of Yemen against the Houthi rebellion.

2. The claim follows an earlier challenge to the lawfulness of a similar decision by the UK Government in 2015. That claim was dismissed in a closed and open judgment ([2017] EWHC 1754 Admin) by the Divisional Court (Burnett LJ and Haddon-Cave J). An appeal was allowed by the Court of Appeal (Sir Terence Etherton MR, Irwin and Singh LJJ), in a closed and open judgment ([2019] EWCA Civ 1020 [2019] 1 WLR 5765), on one ground, namely that, as part of the process in reaching the decision, the Secretary of State should have attempted to assess the extent to which past incidents involved a breach of International Humanitarian Law ('IHL') by Saudi Arabia. She has done so in reaching her 2020 decision which is now under challenge, but the Claimants ('CAAT') and the Interveners ('Mwatana' and 'Oxfam') contend that the process and decision are flawed on public law grounds and should be undertaken afresh. The main thrust of the challenge is that the Secretary of State has acted irrationally in reaching her decision.

3. The Secretary of State resists the Claimant's case with the aid of open evidence and argument. In addition, there is a closed case. Jay J made a declaration pursuant to section 6 of the Justice and Security Act 2013 enabling the Secretary of State to rely upon closed material without disclosure to CAAT, Mwatana and Oxfam. The statutory procedure has been followed so as to ensure that anything which can be disclosed without damage to the relevant public interests is produced to CAAT and Mwatana, and anything which cannot has been disclosed to the Special Advocates. After the conclusion of the open

argument, we heard further submissions in a closed hearing attended by the Secretary of State and the Special Advocates. This is our open judgment in which we explain our reasons for dismissing the claim. Further reasons are given in a closed judgment.

4. Much of the uncontroversial background is set out in the Divisional Court and Court of Appeal judgments. In order to make this judgment self-standing we have, in places, borrowed from and adopted the language of both judgments, rather than just cross-referring to them, for which we acknowledge a debt of gratitude.

(B) BACKGROUND – THE CONFLICT IN YEMEN

5. The following is a very brief summary of the conflict in Yemen. It draws on and updates the fuller and more detailed account in the open judgment of the Divisional Court.

6. Saudi Arabia and Yemen are contiguous and share a 1,800 km border. Since early 2015 Yemen's capital city, Sana'a, and parts of central and southern Yemen have been in the control of Houthi rebels backed by former Republican Guard Forces loyal to former President Saleh. The Houthi are a Shia-Zaydi movement from the north of Yemen.

7. On 24 March 2015 the President of Yemen, President Hadi, wrote to the UN requesting support "by all necessary means and measures, including military intervention, to protect Yemen and its people from continuing aggression by the Houthis". A further letter was sent on 26 March 2015 from the Gulf Cooperation Council countries endorsing President Hadi's request.

8. On 25 March 2015 a coalition of nine states led by Saudi Arabia (the other members being Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait, Qatar and Bahrain) responded to a request for assistance by President Hadi and commenced military operations against the Houthis in Yemen ('the Coalition').

9. On 14 April 2015 the UN passed Security Council Resolution 2216 (2015) affirming the legitimacy of President Hadi and condemning the unilateral actions taken by the Houthis.

10. Hostilities have taken place from 2015 to the present day with only occasional cessation, despite numerous ceasefire attempts. Coalition military operations took the form primarily of airstrikes led by Saudi Arabia against the Houthis, together with some ground operations. The Saudis reported numerous cross-border incursions and missile attacks by the Houthis, including the use of SCUD missiles. There were reports of attacks by Houthi forces on Coalition shipping in the Red Sea.

11. Terrorist organisations, such as Al-Qaeda in the Arabian Peninsula and Daesh, have taken advantage of the on-going instability and ungoverned space in Yemen. This has complicated the picture and led to increased anti-terror operations in the region led by US forces.

12. Early in the conflict the Houthis made substantial gains before being pushed back by the Coalition. Since then frontlines have generally been static and the fighting in stalemate. The UAE withdrew the majority of its forces from Yemen in 2019.

13. By June 2021 the Coalition had launched tens of thousands of air delivered weapons, resulting from a far greater number of sorties.

14. A defence intelligence document dated 14 August 2019 records key judgments about Houthi warfighting techniques, including as follows. The civilian population is used to assist Houthi defensive tactics. Houthi fighters do not generally wear military uniform and also avoid the use of military type vehicles, preferring to use civilian vehicles. This is almost certainly a deliberate policy of using civilians as cover from airstrikes. Coalition airstrikes and air superiority over western Yemen have caused the Houthis to use residential areas, hospitals and mosques as cover for military operations and the basing and storage of weapons and ammunition. A significant proportion of Houthi soldiers have been children, possibly as many as 18,000. A sophisticated Iranian inspired info ops campaign, typically promulgating both accurate and inaccurate accounts of Coalition airstrikes, "is a significant force multiplier for the Houthi campaign." Further detail is given in the closed judgment.

15. These fighting and propaganda tactics form important context to the allegations and assessments of IHL breaches, as does the challenging nature of the air campaign, which Mr Lapsley of the Ministry of Defence ('MOD') summarises in this way in his witness statement:

> "The challenging nature of the air campaign should also be acknowledged: airstrikes using multiple different weapons platforms and weapons systems in a multitude of different circumstances; airstrikes against multiple different types of targets, including in some cases strikes against moving vehicles; airstrikes in multiple different types of environment including in or near populated areas, in a civil war where the non-state armed groups are often located deliberately near to or amongst the civilian population; airstrikes often under extreme time pressure such as supporting troops in contact or countering the ballistic missile threat to Yemen and Saudi Arabia; and an air campaign under intense scrutiny by the international community and civil society."

16. It is by any standards a complex and attritional conflict which the evidence from Oxfam illustrates has had devastating humanitarian consequences.

(C) THE LEGAL CONTEXT

(1) The Export Control Act 2002

17. The export of arms and military equipment from the UK to Yemen is regulated by the Export Control Act 2002 ('the 2002 Act'). Section 1(1) of the 2002 Act provides that the Secretary of State may by order make provision for or in connection with the imposition of export controls in relation to goods of any description. Section 9(2) provides that the Secretary of State may give guidance about any matter relating to the exercise of any licensing power or other functions conferred by a control order, and section 9(3) provides that the Secretary of State must give guidance about the general principles to be followed when exercising any such licensing power.

18. Article 32(1) of the Export Control Order 2008 (SI 2008/3231) provides that the Secretary of State may by notice amend, suspend or revoke a licence granted by the Secretary of State.

(2) The Consolidated Criteria

19. On 24 March 2014 the Secretary of State set out in a written statement to Parliament what were described as "Consolidated EU and National Arms Export Licensing Criteria" ("the Consolidated Criteria"). The written statement said that it was guidance given under section 9 of the 2002 Act. It said:

> "As before [these criteria] will not be applied mechanistically but on a case by case basis taking into account all relevant information available at the time the licence application is assessed. While the government recognises that there are situations where transfers must not take place, as set out in the following criteria, we will not refuse a licence on the grounds of a purely theoretical breach of one or more of those criteria."

20. Criterion 2 of the Consolidated Criteria is the relevant criterion for the purpose of these proceedings, providing, so far as material:

> "*The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.*
>
> Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the Government will:
>
> a) …;
>
> b) exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union;
>
> c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law."

21. The Parliamentary written statement also said:

> "In the application of the above criteria, account will be taken of *reliable evidence*, including, for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations." (our emphasis)

(3) The User's Guide

22. Criterion 2 derived from an agreement between the Member States of the European Union contained in the Council Common Position 2008/944/CFSP of 8 December 2008 "defining common rules governing control of exports of military technology and equipment" ('the EU Common Position'). The Consolidated Criteria continue to apply notwithstanding the UK's withdrawal from the European Union.

23. Article 13 of the EU Common Position referred to a "User's Guide" which is to "serve as guidance for the implementation of the Common Position". The most recent version of the User's Guide is dated 16 September 2019. Chapter 2, which has the title "Criteria Guidance", sets out "best practices" for the criteria in the Common Position, including

Criterion 2. The introduction to Chapter 2 describes its purpose as follows, so far as relevant:

> "The purpose of these best practices is to achieve greater consistency among Member States in the application of the criteria set out in Article 2 of [the EU Common Position] by identifying factors to be considered when assessing export licence applications. They are intended to share best practice in the interpretation of the criteria rather than to constitute a set of instructions; individual judgement is still an essential part of the process, and Member States are fully entitled to apply their own interpretations. The best practices are for the use of export licensing officials and other officials in government departments and agencies whose expertise inter alia in regional, legal (e.g. human rights, public international law), technical, development as well as security and military related questions should inform the decision-making process." (our emphasis)

24. Paragraphs 2.1 to 2.15 of Chapter 2 of the User's Guide address Criterion 2. They include the following:

> "2.10. ***The relevant principles established by instruments of international humanitarian law***. International humanitarian law … comprises rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in hostilities (e.g. civilians and wounded, sick and captured combatants), and to regulate the conduct of hostilities (i.e. the means and methods of warfare). It applies to situations of armed conflict and does not regulate when a State may lawfully use force. International humanitarian law imposes obligations on all parties to an armed conflict, including organised armed groups.
>
> The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rule of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection.
>
> The most important instruments of international humanitarian law are the four Geneva Conventions of 1949 and their Additional Protocols of 1977. They are complemented by treaties on particular matters including prohibitions of certain weapons and the protection of certain categories of people and objects, such as children and cultural property …"

> "2.11. ***Serious violations of international humanitarian law*** include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in

international and non- international armed conflict, which it defines as war crimes (Article 8 sub-sections b, c and e…)"

"2.13 ***Clear risk***. A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of a serious violation of international humanitarian law should include an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern."

(4) Principles of International Humanitarian Law

25. The Court of Appeal Judgment identified the relevant principles of IHL at paragraphs 23 to 25, reflecting the Divisional Court's formulation, in the following terms:

"[23] The relevant principles of IHL are codified in the Four Geneva Conventions of 1949 and the Additional Protocols I and II of 1977 and in customary international law. They include the following: (1) the obligation to take all feasible precautions in attack; (2) effective advance warning of attacks which may affect the civilian population; (3) the protection of objects indispensable to civilian populations; (4) the prohibition on indiscriminate attacks; (5) prohibition on disproportionate attacks; (6) the prohibition on attacks directed against civilian objects and/or civilian targets; (7) the obligation to investigate and prosecute; (8) the obligation to make reparation.

[24] The "principle of distinction" prohibits an attack on civilians, as follows:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives": Additional Protocol I to the Geneva Convention, Chapter II "Civilians and Civilian Population", Article 48; and see also Article 8(2)(b)(i) of the Rome Statute of the International Criminal Court.

[25] The "principle of proportionality" prohibits an attack launched on an objective in the knowledge that the incidental civilian injuries would be excessive in relation to the concrete and direct overall military advantage: see

> Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court. The "principle of proportionality" does, however, permit belligerents to carry out proportionate attacks against military objectives, even when it is anticipated that civilian deaths or injuries will inevitably occur as a result."

(D) THE DECISION UNDER CHALLENGE

26. The decision ('the New Decision') was announced in a written statement by the Secretary of State to Parliament of 7 July 2020. The Parliamentary Statement summarised the essence of the Court of Appeal's decision on the ground that succeeded thus: "In the Court's judgment, the question of whether there was an historic pattern of breaches of IHL was a question which required to be faced. Even if it could not be answered with reasonable confidence for every incident, at least the attempt had to be made. It was because we had not reached findings on whether specific incidents constituted breaches of IHL as part of our assessment of clear risk, under Criterion 2c, that the Court of Appeal concluded that our decision-making process was irrational and therefore unlawful."

27. That was an accurate summary. The essence of the Court of Appeal's decision as to the exercise which the Secretary of State should have undertaken prior to the 2015 decision, and should undertake in making subsequent decisions on the application of Criterion 2 to the export of arms to Saudi Arabia, is contained in the following paragraphs of its open judgment:

> "[138] ….The question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced. Even if it could not be answered with reasonable confidence in respect of every incident of concern (which CAAT accepts, and so do we) it is clear to us that it could properly be answered in respect of many such incidents, including most, if not all, of those which have featured prominently in argument. At least the attempt had to be made.
>
> …
>
> [142] We cannot accept the argument from Sir James that it was in some way inappropriate for the Secretary of State to make such an assessment. That is a difficult proposition to make in the face of the Common Position, and represents something of a contradiction with the proposition that the Secretary of State was in a markedly better position to assess events than the NGOs, the UN or others.
>
> …
>
> [144] In addition to the points already made, perhaps the most important reason for making such assessments is that, without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training, support and other inputs by the UK, or the effect of any high-level assurances by the Saudi authorities? If the result of historic assessments was that violations were continuing despite all such efforts, then that would unavoidably become a major consideration in looking at the "real risk" in the future. It would be likely to help determine whether Saudi Arabia had a genuine intent and, importantly, the capacity to live up to the commitments made. We should emphasise that it is not our conclusion that there would only be one answer on future risk, if historic violations were found to have

> taken place, bearing in mind paragraph 2.13 of the User's Guide, and the question whether or not any violations are "isolated incidents", as the Divisional Court put it, in paragraph [208(iii)] of their judgment. That will be for the Secretary of State and his advisers, as Mr Chamberlain rightly conceded.
>
> [145] In reaching this conclusion, we have followed the approach laid down in paragraphs 53-60 above. We emphasise that we have borne fully in mind the complex and difficult nature of the decisions in question, the fact that this is an area particularly far within the responsibility and expertise of the executive branch and that, as a consequence, rationality alone can properly found interference by way of judicial review. We agree with the Divisional Court (judgment paragraph [35]) that in such a case as this, the courts must accord considerable respect to the decision-maker. It is in the application of that test that we have concluded it was irrational and therefore unlawful for the Secretary of State to proceed as he did."

28. The Parliamentary Statement went on to explain that to address the failing, a revised methodology had been adopted in respect of all allegations assessed as likely to have occurred and to have been caused by fixed wing aircraft. Each had been subjected to analysis as to whether it was possible that it involved a breach of IHL or whether that was unlikely; in a number of cases there was insufficient information to reach a view. All "possible" breaches were then treated for the purposes of the Criterion 2c analysis as if they were breaches of IHL. Some incidents had been analysed as possible violations. The analysis had not identified any patterns or systemic weaknesses. It was noted in particular that the incidents which had been determined to be possible violations of IHL occurred at different times, in different circumstances and for different reasons. The conclusion was that these were isolated incidents.

29. The statement went on to emphasise that the IHL analysis was only one part of the Criterion 2 assessment, and that, in retaking the decision, the Secretary of State had taken into account the full range of information available to the Government. In the light of all that information and analysis, she had concluded that, notwithstanding the isolated incidents which had been factored into the analysis as historic possible violations of IHL, Saudi Arabia had a genuine intent to comply with IHL and the capacity to do so. On that basis she had assessed that there was not a clear risk that the export of arms and military equipment to Saudi Arabia might be used in the commission of a serious violation of IHL.

(E) THE GROUNDS IN OUTLINE

30. The challenge was advanced on four grounds:

Ground 1: there was no proper basis for the conclusion that violations were limited to those identified in the IHL analysis;

Ground 2: there was no proper basis for the conclusion that no "pattern" of violations existed;

Ground 3: there was no sustainable basis for the conclusion that Criterion 2c is not met despite the established record of past breaches; and

Ground 4: the Secretary of State misdirected herself as to what amounted to a "serious" violation, and in failing to recognise the need to consider the impunity of Saudi Arabian officials for such violations.

31. Mr Jaffey KC did not shy away from the fact that the first three grounds, which constituted the main thrust of the challenge, could only succeed on the basis that the Secretary of State had in those respects acted irrationally. The essence of the challenge in this case, as he summarised it at the outset of his submissions, was that the Secretary of State had irrationally failed to identify the extent of past breaches of IHL by Saudi Arabia and had irrationally concluded that there was no pattern to past breaches.

32. In this context it is important to keep in mind the relevant principles of domestic public law, which we summarise next.

(F) DOMESTIC PUBLIC LAW PRINCIPLES

33. We agree with the observations of the Divisional Court at paragraphs 27 to 35 of its open judgment, which we here quote in full. No doubt was cast on them by the Court of Appeal's judgment and the concluding paragraph was expressly approved.

> "[27] We agree the nature of the decision in this context, involving as it does risk to life, necessitates a rigorous and intensive standard of review but that does not mean that the Court should stray into areas which are properly the domain of the executive in accordance with the statutory scheme. We have looked carefully at all the evidence to decide whether the decisions in this case were properly open to the Secretary of State.
>
> [28] We also agree …that the test in Criterion 2c sets a legal test against which the Secretary of State must make an evaluation, and it does not import or admit of additional 'political' considerations. The Consolidated Criteria allow political considerations to inform some aspects of decision-making, but not those under Criterion 2. The question that the Secretary of State answers calls for an assessment of what has happened in the past to inform an evaluation of the future. The process is imbued with assessments of how a friendly foreign government will act which is informed by diplomatic and security expertise which the Court does not possess.
>
> [29] We accept the following points made by Mr Eadie QC as conditioning the nature of the review to be carried out by the Court. First, the assessment under Criterion 2c is 'predictive' and involves the evaluation of risk as to future conduct in a dynamic and changing situation. It is, therefore, appropriate for review to be on rationality grounds (see *R (Lord Carlile) v Home Secretary* [2015] AC 945 per Lord Sumption at [32] and Lady Hale at [88]; see also Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at [57]). As stated by Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [29]:
>
> > "Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen."

[30] Secondly, the assessment under Criterion 2c involves the evaluation of risk of extremely complex facts and information drawn from a wide variety of sources (including sensitive sources not publicly available) (c.f. Lord Sumption in *Lord Carlile* at [32] and Lord Reed in *Bank Mellat v HM Treasury* [2014] AC 700 at [93]).

[31] Thirdly, the assessment under Criterion 2c involves the decision-maker drawing on advice from those with considerable specialised knowledge, experience and expertise in the field, including diplomats and military personnel. That expertise means that the Executive's assessments in this area are entitled to great weight (see Lord Hoffmann in *Rehman* at [57] and Lord Sumption and Lady Hale in *Lord Carlile* at [32] and [88] respectively).

[32] Fourthly, the assessment under Criterion 2c is made on the basis of advice from government departments and ministers and officials at the highest level, including the Foreign Secretary.

[33] Fifthly, the role of the Court can properly take into account that there is an expectation, consistent with democratic values, that a person charged with making assessments of this kind should be politically responsible for them (see Lord Hoffmann in *Rehman* at [62] and Lord Sumption in *Lord Carlile* at [32]). In the present case, ministers have appeared before the Parliamentary Committees on Arms Export Controls and the All-Parliamentary Group on Yemen; ministers have also spoken in parliamentary debates on Yemen, made oral and written statements, responded to urgent questions and answered a wide range of parliamentary questions and ministerial correspondence.

[34] Sixthly, the evaluation has parallels with making national security assessments. They are matters of judgement and policy and are recognised as primarily matters for the executive (see *Rehman* at [50] per Lord Hoffman; and c.f. also *Harrow Community Support Limited v. Secretary of State for Defence* [2012] EWHC 1921 (Admin) at [24]).

[35] For these reasons, in our view, the particular context of this case necessitates that considerable respect should be accorded to the decision-maker by a Court."

34. The Court of Appeal said the following at paragraphs 54-57, 94 and 165 of its open judgment:

"[54] The first point which deserves emphasis is that this is a claim for judicial review. As the Divisional Court (comprising Singh LJ and Carr J) put it in *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin), at paragraph [326]:

> "…judicial review is an important mechanism for the maintenance of the rule of law. It serves to correct unlawful conduct on the part of public authorities. However, judicial review is not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts and, in a democratic society, must be a matter for the elected government alone.

> … Judicial review is not, and should not be regarded as, politics by another means."

[55] Secondly, and equally importantly, "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself": see *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at paragraph [42] (Lord Bingham of Cornhill).

[56] In this appeal, therefore, we are not concerned with the merits of the position taken by the Secretary of State in applying criterion 2c. Different people in society may or may not approve of the sale of arms to Saudi Arabia. They may nor may not share the Secretary of State's view about the assessment of risk required by criterion 2c. It is simply not the function of the court to adjudicate on those underlying merits. If, however, the Secretary of State has erred as a matter of law in the approach taken to the assessment of those merits, it is the role of the court to say so.

[57] Thirdly, the principal error of law which it is alleged was committed by the Secretary of State in the present case is that he acted irrationally in the process which he adopted in order to make the assessment required by criterion 2c. We will return to other alleged errors of law when we address Grounds 2 and 4 in the appeal specifically. What is important for present purposes, and in particular in addressing Ground 1 in the appeal, is that the only legal error which is alleged to have been committed is founded on the public law doctrine of irrationality. This sets a deliberately high threshold. The court is not entitled to interfere with the process adopted by the Secretary of State merely because it may consider that a different process would have been preferable. What must be shown by CAAT is that the process which was adopted by the Secretary of State was one which was not reasonably open to him."

"[94] The Secretary of State emphasises a number of points which are not in issue but help to set the context for any review of the actions of the Executive in relation to Criterion 2c. The exercise is predictive and involves the evaluation of risk and as to the future conduct of Saudi Arabia in a fluid and complex situation. The information upon which any assessment had to be made was complex and drawn from a wide variety of sources, including sensitive sources. In making his decision, the Secretary of State had to rely on advice from those with specialist diplomatic and military knowledge. Such evaluations are analogous to national security assessments. For all these reasons, the approach to assessment under Criterion 2c is for the Executive, should command considerable respect in any review and is capable only of rationality challenge. We accept those broad points."

"[165] At the hearing before us Mr Chamberlain invited this court to provide a definition of "serious violations" of IHL in order to assist the Secretary of State in his future assessments in applying Criterion 2c. In particular, he submitted that (depending on the circumstances) even a single incident could amount to a serious violation of IHL and that this Court should give guidance to the Secretary of State to that effect. In our view, it would not be appropriate to seek to give some abstract definition of the concept of "serious violations" of IHL, since so much depends on

> the precise facts. We also remind ourselves that the function of judicial review is generally to assess the lawfulness of past executive action, not to give advice for the future. Judicial review is in this regard highly fact-specific. Furthermore, we have to recall 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."

35. These observations derive further support from the recent Supreme Court decision in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7 [2021] AC 765.

36. We should also refer to what the Court of Appeal said about the *Tameside* duty to make inquiries, which is an aspect of rationality, at paragraph 59:

> "[59] The general principles on the *Tameside* duty were summarised, as we have said earlier, by the Divisional Court. They have recently been approved by the Court of Appeal (Underhill, Hickinbottom and Singh LJJ) in *Balajigari & Ors v Secretary of State for the Home Department* [2019] EWCA Civ 673, at paragraph [70] in the following way:
>
> > "The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

(G) OPEN SOURCE REPORTING

37. There are two important United Nations sources of reporting. UN Security Council Resolution 2140 (2014) established a panel of experts ('UN Panel of Experts') for the purposes of investigating violations of IHL by all sides to the conflict, for purposes of advising the Security Council Sanctions Committee on Yemen. Another panel, the UN Group of Eminent Experts, was established by the UN Office of the High Commissioner for Human Rights following a resolution passed by the Human Rights Council, with a specific mandate to investigate violations of IHL and International Human Rights Law ('UN Group of Experts'). The work of each body is assisted by senior officials with expertise in IHL and military operations.

38. The UN Panel of Experts' conclusions are based on eye-witness testimony, although this is second hand because it does not have representatives on the ground in Yemen. The Court of Appeal open judgment recorded at [91] that the panel did, however, have access to documents provided by member states, satellite imagery from "private providers", and commercial databases recording "maritime and aviation traffic, and social and media traffic", but that in the case of the latter the panel relied on it only where it could be corroborated using multiple independent sources.

39. Reputable non-governmental organisations ('NGOs') including Human Rights Watch, Amnesty International and Mwatana have conducted detailed ground investigations into alleged violations in Yemen. Mwatana is a human rights organisation based in Yemen, founded in 2007, and publishes regular reports on the conflict. Its personnel on the ground interview eye witnesses, save where they are unable to access the territory. Reports from others such as Médecins Sans Frontières ('MSF') and the International Committee of the Red Cross ('ICRC') are sometimes available.

40. The Court of Appeal in its open judgment considered at length the submission on behalf of the Secretary of State that the Government was far better placed than the UN Panels and the NGOs to assess violations; and the rival submissions: see paragraphs [68], [86]-[92], [94], [96], [102], [104], [119]-[121]. Its conclusions on that aspect were expressed in the following paragraphs:

> "[132]. We emphasise that in reaching the following conclusions, we have taken fully into account the closed evidence and submissions, as well as those we have been able to summarise above….
> ...
> [134]. Turning firstly to the Interveners, we accept that the major NGOs, including the Interveners, and the UN Panel of Experts had a major contribution to make in recording and analysing events on the ground in the Yemen conflict. The NGOs did have the capacity to introduce representatives on the ground and to interview eye witnesses, which the Secretary of State could not do. It is the case, however, that the Secretary of State could access a great deal of information which the NGOs and the UN Panel could not see. As we have indicated, the closed evidence makes that clear. In the very crudest terms, the NGO and UN Panel evidence often establishes what happened, but the further information available to the Secretary of State could assist as to why events of concern had happened. Both may of course be highly relevant to whether a violation of IHL had taken place and to the risk of future violations.
>
> [135] Having considered the closed evidence, we do not accept that, broadly speaking, the UK military and other analysts and advisers wrongly discounted the

evidence coming from the NGOs and the UN Panel of experts. We do accept that the evidence was considered, in each case where a concern was raised."

(H) THE DECISION-MAKING PROCESS

(1) The government departments involved

41. Three government departments were involved, in the same way as at the time of the first decision in 2015, namely the Department of International Trade ('DIT'), MOD, and the Foreign Commonwealth and Development Office ('FCDO'). The Export Control Joint Unit ('ECJU'), which has responsibility for processing export licence applications, is a joint unit across all three departments with about 100 officials drawn from them. Those from the MOD are styled ECJU-MOD and those from the FCDO styled ECJU-FCDO (the latter previously being called the Arms Export Policy team). ECJU-FCDO provide advice to the DIT on about 16,000 licence applications each year covering a wide range of equipment and destinations. In relation to the export of military equipment to Saudi Arabia, the FCDO, through the officials in ECJU and the Foreign Secretary, provide advice to the International Trade Secretary, who has the statutory function of making the decision.

(2) IHL Updates

42. 'IHL Updates' are jointly written by MOD's Security, Policy and Operations organisation ('SPO') and FCDO's Middle East and North Africa Directorate ('MENAD'). MENAD has a dedicated Yemen team within it, which provides advice and information on developments in Yemen to the ECJU. MENAD carefully monitors developments in Yemen via receipt of at least biweekly and often daily emails from the UK's diplomatic team covering political and military activity in Yemen. These are based in Riyadh or Amman. MENAD is also in regular contact with NGOs with an interest in the area, through formal meetings and informal communications. Since October 2015 MENAD has produced regular updates which specifically address IHL risks, for regular submission to the Foreign Secretary. The 'IHL Updates' were considered in some detail in the Divisional Court judgment which recorded at [150] and [151]:

> "[150]….The updates include input from a wide variety of sources, including (i) the British Embassies in Riyadh and Washington, (ii) information about ministerial or other high-level contacts between the UK and Saudi Arabia, and (iii) the MoD who send an update on newly reported incidents of alleged International Humanitarian Law violations. A draft "update" is sent to Foreign Office legal advisors, who provide input following the Arms Exports Policy Team's initial assessment of whether there is a "clear risk" of a "serious violation" of International Humanitarian Law.
>
> [151] The [IHL Updates] are detailed documents which include (i) a summary of alleged incidents of International Humanitarian Law violations, including any specific incidents of concern; (ii) an overview of what has changed since the last update; (iii) a summary of UK efforts to support Saudi Arabia's International Humanitarian Law compliance; (iv) a report on the US position; and (v) an overall analysis of Saudi Arabia's attitude towards the principles of International Humanitarian Law. The International Humanitarian Law updates also include as

annexes the MoD's summary and table of alleged incidents and a list of the 'Extant' and 'Pending' export licences. In addition, ad hoc updates are also sent to the Foreign Secretary on occasion."

43. The process for producing IHL Updates, the information which feeds into them, and their role in the decision-making process is essentially the same as it was at the time of the Divisional Court judgment, save that the IHL Updates have since become considerably more detailed and have been produced on a quarterly rather than monthly basis. The IHL Updates are the main vehicles by which information is fed into ECJU-FCDO. On receipt of each Update, ECJU-FCDO completes an overarching assessment of Saudi Arabia's record, attitude and capability in relation to compliance with the key principles of IHL. It is subsequently submitted to the Foreign Secretary in the form of a recommendation as to the advice he or she should give to the International Trade Secretary on the question whether the threshold for refusing licences under Criterion 2c has been met. These submissions are cleared at senior civil servant level within the FCDO. In addition to the regular IHL Updates, ad hoc updates are provided to the Foreign Secretary or relevant Ministers when it is necessary to inform them of specific matters between reporting periods.

(3) The 'Tracker' and the IHL Analysis

44. In his evidence to the Divisional Court in relation to the first challenge, Mr Watkins of the MOD explained that the MOD monitors media and NGO reports for allegations of breaches of IHL. These are recorded by officials in a central database known as 'the Tracker'.

45. Since the Court of Appeal judgment, the Tracker has been expanded and developed so as to be the main tool used in carrying out an analysis of whether and to what extent Saudi Arabia has been in breach of IHL. This analysis is what has been referred to, both in the contemporaneous documents and in submissions, as "the IHL Analysis". The Tracker records all alleged incidents which the MOD considers might require monitoring or investigation, including any which have been identified as potentially involving a breach of IHL by UN bodies, NGOs or the Saudi Arabian Joint Incident Assessment Team ('JIAT'). JIAT is a Coalition-staffed investigatory body, which issues press releases. We consider its effectiveness and independence further below and in our closed judgment. With one exception, to which we refer in the closed judgment, all the incidents upon which CAAT, Mwatana, and the Special Advocates sought to place reliance were included on the Tracker and subjected to the IHL analysis. In October 2019, when the main IHL analysis for the New Decision was complete, there were 486 incidents on the Tracker.

46. The Tracker assigns a serial number to each incident and has a column showing the date it was added to the Tracker. The IHL analysis conducted by the MOD involves each of the incidents being examined by a panel comprising an MOD lawyer with experience of operational decision-making, an airman with operational experience of air-delivered weapons, and a third member with an understanding of the operational context in Yemen. These are personnel with experience gained from involvement or advice in relation to the compliance with IHL of the UK's own military and targeting activities in real time.

47. The Tracker has columns arranged under four broad headings (1) "What allegedly happened?" (2) "What do we know?" (3) "Did the alleged events take place and who was

responsible?" and (4) "Was IHL breached?" The detail of the Tracker is considered further in the closed judgment.

48. The MOD analysis filters out cases in which there is no credible allegation of the incident occurring or insufficient information to be able to make that evaluation.

49. In the analysis of whether there was a breach of IHL, there are identified cases where there is insufficient information to make an evaluation. For the others, an evaluation is then made, using four principles of IHL, namely proportionality, feasible precautions, necessity and distinction identified in the column headings, "as to whether it is possible that the incident constituted a breach of IHL; or whether it is unlikely that it represents a breach." This language is taken from the Decision Paper and discussed further below. All remaining "possible" breaches are then considered as part of the information feeding in to the Criterion 2c assessment, and are for this purpose treated as established breaches.

(4) Other information which informs the Criterion 2 assessment

50. In addressing the question whether there is a clear risk of a serious violation of IHL, the MOD, the ECJU, the Foreign Secretary and the International Trade Secretary focus on the three key factors identified in paragraph 2.13 of the User's Guide, namely (i) Saudi Arabia's past and present record of respect for IHL, (ii) Saudi Arabia's intentions as expressed through formal commitments and (iii) Saudi Arabia's capacity to ensure that equipment or technology is used in a manner consistent with IHL.

51. The analysis is informed by the following particular strands of information and analysis:

(i) MOD analysis of incidents recorded in the Tracker and whether there was any pattern to any incidents identified as "possible" breaches of IHL;

(ii) an understanding of Saudi Arabian military processes and systems, obtained in particular through the Defence Attachés at the British Embassy in Riyadh, UK Liaison Officers ('LOs') located within the Saudi Arabian Air Operations Centre ('SAOC') in Riyadh; and further informed by logistical and technical support and training provided to Saudi Arabia, which the details in the closed evidence suggest is considerable;

(iii) access to Saudi mission reports in the great majority of cases;

(iv) engagement with Saudi Arabia at the highest political, diplomatic and military levels;

(v) post-incident dialogue, including with respect to investigations;

(vi) public and private commitments made by Saudi Arabian officials regarding compliance with IHL; and

(vii) broader analysis of developments in Yemen relevant to IHL compliance.

52. We consider these strands in more detail below.

(5) The Decision Paper

53. In December 2019, a paper was prepared addressing the IHL analysis and broader issues in order to provide advice to enable the New Decision to be taken, concluding with an overall assessment against the Criterion 2c test carried out by ECJU-FCDO ('the Decision Paper'). It ran to 47 pages plus voluminous Annexes and is an important document in the case.

54. The structure of the Decision Paper was that Section I contained a summary; Section II explained the methodology employed by the MOD in carrying out the IHL Analysis for the incidents on the Tracker; Section III recorded and assessed the outcome of the IHL Analysis, including detailed consideration of the allegations which had been assessed as "possible" breaches of IHL; Section IV contained a "thematic analysis" of other relevant information regarding Saudi Arabia's attitude to compliance; and section V contained ECJU-FCDO's analysis of risk for the purposes of the Criterion 2c assessment.

55. In Section I, "the IHL Analysis" was the defined term given to the analysis of incidents on the Tracker by MOD in an attempt to determine the possibility that any such incidents constituted breaches of IHL and/or whether there were patterns of possible violations. Paragraph 7 emphasised that the IHL Analysis applied to past events was just one aspect of the risk assessment, and cited paragraph 2.13 of the User Guide. In doing so it added its own emphasis to the word "include" before reference to the three factors of past record, intentions and capacity, indicating that although those were the focus they were not exhaustive as to what ultimately informs the assessment of risk required by Criterion 2c. Paragraph 10 said that the final section, ECJU-FCDO's Criterion 2c analysis, was informed by (a) the IHL Analysis; (b) the analysis of thematic trends drawn from the IHL Updates, including analysis of the training provided to Saudi Arabia and broader issues, positive and negative; (c) the UK's knowledge of the development of Saudi Arabian systems, including reflection on the impact they had on reported credible allegations; and (d) an overall "stand back" analysis.

56. Section II identified the relevant principles of IHL from paragraph 2.10 of the User's Guide and the paragraphs from the Divisional Court and Court of Appeal judgments. Paragraph 18 observed that there was little jurisprudence available, or evidence of state practice, on breaches of IHL as a matter of state responsibility; and there remained difficult substantive and evidential questions as to the circumstances in which the state is responsible, as a matter of IHL, for mistakes which cause civilian casualties.

57. Paragraph 19 of the Paper went on to observe that although the UK had a close relationship with Saudi Arabia and an unusual level of access to information as a result, it was nevertheless very difficult to reach any confident conclusions as to whether specific incidents constituted breaches of IHL because the UK does not have, and would not expect to have, full insight into airstrikes undertaken by the Coalition (of which it is not a member). It cited paragraph 181(ii) of the Divisional Court's open judgment summarising the difficulties, where it was said:

> "The close relationship between the UK Government and Saudi Arabia places them in a position to garner more direct information about Saudi decision making than outside observers. Nonetheless, there would be inherent difficulties for a non-party to a conflict to reach a reliable view on breaches of International Humanitarian Law by another sovereign state. A non-party would not be likely to have access to all the necessary operational information (in particular, knowledge of information available at the time to the targeting decision-maker forming the basis of the

> targeting decision). An International Humanitarian Law analysis is necessarily a sophisticated exercise involving a myriad of issues, for instance: (a) whether there was a military necessity to strike the target; (b) whether there was a distinction drawn between military objectives and civilians and civilian objects; (c) whether the intended target was perceived to be a 'military' objective; (d) whether any expected incidental civilian loss of life, injury or damage was 'proportionate' to the expected military gain; and (e) whether all feasible precautions were taken to avoid and minimise incidental civilian loss of life, injury or damage."

58. The Decision Paper went on at paragraph 21 to say that the experience of the MOD in attempting the exercise had borne out the concerns expressed by the Divisional Court in the passage quoted. In practice, it said, it had been difficult if not impossible to make any reliable assessment in the absence of a JIAT investigation giving further details of (i) the intended target; (ii) the specific intelligence which led to that targeting; (iii) the surveillance and reconnaissance carried out ahead of a strike; (iv) the weapon used; and (v) other steps taken to identify and minimise potential civilian casualties or damage to civilian infrastructure. Even in those cases where there had been a JIAT investigation, the summaries provided to the UK did not contain sufficient information for the UK to reach a definitive conclusion.

59. Paragraphs 22 and 23 have given rise to a particular dispute as to the methodology applied and merit quotation in full:

> [22] Nevertheless, in compliance with the Court of Appeal's Judgment, the individual incidents have been revisited with the specific aim of evaluating the possibility of a breach of IHL. The IHL Analysis has adopted the following approach:
>
> a. The IHL Analysis has been applied to incidents which the MOD assesses are credible – that is, the information and intelligence available indicates that the alleged events are likely to have happened;
>
> b. An evaluation is made, applying the IHL principles identified above, as to whether it is possible that the incident constituted a breach of IHL; or whether it is unlikely;
>
> c. In a number of incidents, as envisaged by the Court of Appeal, it is simply not possible to make such an assessment due to insufficient information being available. This has also been recorded on the Tracker.
>
> [23] By setting the threshold as "possible", the IHL Analysis has captured the widest range of potential IHL breaches, so as to provide a base from which to assess the prospective risk for Criterion 2(c). "Possible" breaches of IHL are then treated, for the purpose of the overall C2C Analysis as though they were established breaches. However this does not prevent consideration that individual 'possible' incidents: (i) may be anywhere on a spectrum of likelihood from "just possible" to "probable"; (ii) may be more or less serious in terms of consequences; (iii) may be more or less of a concern under any of the core IHL heads of analysis; and (iv) may raise greater or lesser incentive to engage with KSA for instance about whether adequate systems are in place to prevent recurrence."

(all emphasis in original)

60. The Decision Paper went on to explain at paragraph 24 some aspects of the methodology to which we have already alluded, and revealed that the IHL Analysis had been focussed initially on the credible incidents likely to have been caused by Saudi Arabia, and extended to those where the airstrikes were attributable to other Coalition members or where it had not been possible to attribute it to any particular state. The Tracker also recorded trends, not only in relation to cases treated as possible breaches of IHL but in respect of all cases of credible incidents, including those where other Coalition partners were identified as responsible.

61. The final paragraph of Section II said that the IHL Analysis was informed by:

(a) the intelligence and information obtained as a result of HMG's privileged access to Saudi Arabia and its various other sources of imagery etc, including of particular importance its knowledge of and involvement in the development of Saudi systems;

(b) the broader contextual knowledge and intelligence;

(c) information obtained from JIAT investigations. Material relating to JIAT which was relied on was contained in Annex 2 which we consider in our closed judgment; and

(d) other direct engagement with high level military and political contacts in Saudi Arabia. In relation to some incidents, HMG had initiated immediate, intensive and high-level engagement across the Saudi Arabian government and military, adding that "[i]t is a matter of political and diplomatic judgment as to when it is necessary or appropriate to engage in this way."

62. Section III started with an overview of the number of allegations. It observed that in broad terms the number of credible allegations - that is, allegations for which the MOD assessed that the alleged event is likely to have happened - had decreased significantly since the conflict started in 2015, although there had been "spikes" in December 2017 and February and April 2018. The trend was supported by bar charts annexed, representing the monthly figures. Three particular points were evident from this analysis of credible allegations, which it was emphasised related not merely to the possible breaches of IHL but covered all the incidents where it was found to be credible that they had occurred:

(1) The number of credible allegations was relatively low given the high intensity of the air campaign in Yemen. As at 31 October 2019 tens of thousands of targets had been struck, against which the total number of credible allegations was 331. Whilst it was difficult to provide comparisons with different conflicts, reference was made to the January 2016 IHL Update which identified that in relation to the air wars in Iraq/Syria, 310 allegations had been recorded against the coalition forces for a similar number of air strikes as had been carried out in Yemen.

(2) The considerable fall in the number of allegations was consistent with an overall picture of an air force which had shown rapid and consistent improvement in its capability.

(3) There did not appear to be any evidence of a pattern of targeting particular categories of infrastructure, but rather the allegations related to a wide variety of different types of objects.

63. The results of the MOD's IHL Analysis were summarised at paragraph 31 of the Decision Paper.

(1) Of the credible allegations attributed to Saudi Arabia, for about half of them there was insufficient information to assess whether they involved possible breaches of IHL; of the remainder a small number were assessed as involving possible breaches of IHL, with over four times that number being assessed as unlikely to involve breaches of IHL.

(2) The equivalent figures for the credible allegations where it was not known to which Coalition force they were attributable, were insufficient information for about 60% of them, a very small number of possible breaches and over 15 times as many assessed as unlikely to involve breaches of IHL.

64. In addition to the small number of incidents thus assessed by the MOD as involving "possible" breaches of IHL, a further cross check was conducted on all incidents: (a) which were highlighted by the UK to Saudi Arabia; (b) which were noted in the narrative sections of the IHL Updates as being of particular concern; (c) which were highlighted by the UN Panel of Experts in its (then) three reports; or (d) for which JIAT had recommended prosecution of individuals or the payment of compensation. These were identified in Annex 5. Of these:

(a) around 20% were assessed as not being credible. About ¾ of these were incidents which had been highlighted by the UN Panel of Experts;

(b) around a third had insufficient information for the MOD to assess whether they did or did not involve a possible breach of IHL;

(c) around 35% were assessed by the MOD as being unlikely to involve a breach of IHL; and

(d) less than 10% were assessed as involving a possible breach of IHL. These were identified in the Paper and had all been captured in the small number of possible breaches identified on the Tracker. The exercise did not therefore result in the identification of any further possible breaches.

65. In the following 42 paragraphs the Decision Paper addressed in detail each of the small number of possible breaches by Saudi Arabia and the very small number where attribution was unknown and so might be attributable to Saudi Arabia. The detail of each of them is discussed in our closed judgment.

66. Section III concluded with five paragraphs under the heading "Conclusions on IHL Analysis." The first, paragraph 77, emphasised that a relatively low threshold of "possible" had been applied and the small number of incidents captured by it therefore covered a wide range of degrees of likelihood and gravity. Paragraph 78 said that the possible breaches of IHL identified did not indicate a pattern of violations which would give rise to serious concerns regarding Saudi Arabia's capacity or commitment to comply with IHL. Rather, the detail set out was consistent with a limited number of errors, well

within the margin that would be expected in a conflict of this nature. Paragraph 79 said that it was concerning that half of the possible incidents had occurred more recently, but that it was assessed that they were a disparate group of incidents, raising their own particular issues, rather than a grouping of a kind that might lead to a concern about systems generally. Paragraph 80 said that it was also concerning that some of the incidents raised serious concerns. However, the context of each of these incidents was different and it was not assessed that these incidents gave rise to wider concerns.

67. Paragraph 81 said that the broader review of the flagged incidents of concern in Annex 5 did not suggest that there was any trend in the explanation for these incidents which gave rise to concerns about Saudi Arabia's attitude or capability in respect of compliance with IHL.

68. Section IV of the Decision Paper was a "Thematic analysis", that is to say a discussion of considerations other than the IHL Analysis for past breaches, which fed into the ultimate decision of whether there was a clear risk of a serious breach of IHL in the future. In summary, it included the following, and the further matters included in our closed judgment:

(1) The analysis of trends over time set out in Annex 4 indicated that the Royal Saudi Air Force ('RSAF') made rapid improvements in its understanding of, and ability to comply with, IHL. That data was consistent with the UK's observations that it was an air force which was committed to compliance, and which had continuously and significantly developed its capacity to comply. The high-level picture was therefore positive. However, the UK had not accepted this at face value but had continuously taken a more granular approach, identifying particular concerns as they had arisen and engaging with Saudi Arabia to address and resolve those concerns. The Great Hall Strike raised very serious concerns about targeting. The UK immediately engaged with Saudi Arabia. Systemic improvements were rapidly observed.

(2) Saudi Arabia had been very receptive to training and support from the UK, which had been provided to senior airmen/officers and legal advisers, the detail of which was set out.

(3) Indications were that improvements and assurances were producing results at an operational level.

(4) On 25-26 February 2018 the Chief of the Defence Staff ('CDS'), Sir Stuart Peach, visited the SAOC in Riyadh, the outcome of which we indicate in our closed judgment.

(5) In relation to the No Strike List, there was regular communication between MSF and other NGOs in relation to additions and deletions to the list but there was still more work to be done to seek to ensure that it was comprehensive and accurate.

(6) Regular visits by UK personnel to SAOC had continued to take place in 2019. The Air Component Commander, an RAF officer ('ACC'), had made visits to SAOC and Joint Forces Command ('JFC') in April and July 2019. In the April visit he conducted a workshop for mostly senior officers.

(7) The murder of the journalist Jamal Khashoggi by Saudi nationals inside the Saudi embassy in Istanbul on 2 October 2018 was considered at some length as relevant to

the UK government's analysis of the Saudi decision makers' attitudes to international law, and specifically IHL, and to the value of Saudi high-level assurances in respect of IHL compliance. The incident and subsequent Saudi Arabian actions in relation to it raised serious concerns. On balance, however, the Government's view was that the Khashoggi incident did not speak directly to there being an increased risk, let alone clear risk, that UK supplied arms and equipment might be used in a serious violation of IHL in Yemen because the prosecution of the conflict was separate from the Saudi treatment of political dissidents. Based on the full range of evidence available, it was clear that the Saudi intent to comply with IHL in the conduct of the Yemen campaign was genuine.

(8) Consideration was given to Saudi assurances. The Decision Paper identified further examples of exchanges between the UK and Saudi authorities since the Divisional Court's judgment. They included the following. There was a visit by the Chief of Defence Staff in March 2017. The Prime Minister visited Saudi Arabia in April 2017 and met Mohammed bin Salman. A meeting took place between the UK Ambassador in Riyadh and Prince Faud bin Turki and the Chairman of JIAT in September 2018.

(9) The attitude of the United States of America and information from them about their activities and assessments was considered. Since August 2018 the US Secretary of State has been obliged to provide a relevant certification to Congress specifically in relation to air-to-air refuelling support to Saudi Arabia which includes an arms sales element. The certifications required, and given, were that "The Government of Saudi Arabia…. are undertaking demonstrable actions to reduce the risk of harm to civilians and civilian infrastructure resulting from military operations in…Yemen, including by…taking appropriate steps to avoid disproportionate harm to civilians and civilian infrastructure." As the US continued to engage at that very senior level and provide such senior assurances or certifications, that would remain an important factor in the government's analysis of the Criterion 2(c) threshold.

69. The concluding paragraphs to the Thematic Analysis said that Saudi Arabia had given frequent and consistent assurances to the UK of its commitment to ensure compliance with IHL. Those assurances were given at the highest political and military levels. Significantly, this commitment was also evident at a tactical and operational level, through the attitude of participants in the many training courses which had been provided by the UK and US and through other matters identified in our closed judgment. Saudi Arabia had shown that it was able to identify problems and weaknesses and to ask for and be receptive to assistance. It had reacted positively and swiftly to engagement from the UK and US in relation to the two incidents of greatest concern (the Great Hall strike and the Dhayan bus incident). The UK had monitored Saudi Arabia closely and no further cause for concern had been observed.

70. The final section of the Paper was ECJU-FCDO's assessment applying the Criterion 2c test. It recorded that the IHL Analysis of the "possible" breach incidents and the Thematic Analysis had been used to inform an assessment of Saudi Arabia's record, attitude and capability in relation to compliance with the key principles of IHL, and briefly summarised the conclusions in relation to each and aspects of what was in the Paper which supported them. It is sufficient for present purposes to give only a brief summary, although the section runs to 33 detailed paragraphs. The long-term trends and statistics were encouraging. There was a tiny proportion of "possible breaches" by

comparison with the number of air strikes and sorties, and a comparable picture for the number of credible allegations to those of the coalition forces in Iraq/Syria. As to the IHL Analysis of the possible breaches, those which revealed failings which could be addressed by changes in practices had resulted in such changes being put in place. There was no pattern to them which could in itself indicate a clear risk of future IHL violations: where a problem had been highlighted the Saudis had taken action to remedy the situation, thereby mitigating the risk. As to attitude, this approach itself demonstrated a determination to avoid IHL breaches, which was also apparent from the extent of engagement at all levels, receptiveness to assistance, advice and training from the UK and the US, the creation and development of JIAT, development of rules of engagement, and other matters we refer to in our closed judgment. As to capability, Saudi Arabia had demonstrated improvements in their targeting processes in the many ways identified in the Decision Paper and had growing expertise in areas of critical importance to IHL compliance, such as targeting. The conclusion was that there was not a clear risk that the proposed exports would be used in a serious violation of IHL.

71. Annex 5 to the Decision Paper contained a summary of incidents. These were all those which at the time had fallen into one or more of four categories, namely those raised by the Panel of Experts, those noted in the IHL Updates, those for which JIAT had recommended prosecution or payment of compensation, and incidents which had been specifically raised by the UK with Saudi Arabia (together, 'the Annex 5 incidents'). Annex 5 revealed for each incident whether it had been categorised as insufficient information, not credible, unlikely violation or possible violation.

(6) JIAT

72. Annex 2 to the Decision Paper contained information in relation to JIAT. At the time of the Divisional Court's judgment only some 14 incidents had been the subject of JIAT reports. Since then, there have been something like 187 reports and they have become more detailed. The MOD has supported the development of JIAT and delivered training sessions in Saudi Arabia on the process of investigating alleged violations of IHL. We give further detail of Annex 2 in our closed judgment.

(7) The process from Decision Paper to New Decision

73. The Decision Paper was annexed to a submission sent by ECJU-FCDO to the Foreign Secretary on 23 January 2020, which formally recommended that the Foreign Secretary agree with the methodology used and conclusions reached, and with a recommendation to seek certain further legal advice. The submission recorded the view of ECJU-FCDO that the wealth of analysis undertaken and the evidence in the round pointed to a conclusion, that there was no clear risk of the equipment being used in a serious violation of IHL, which was "less finely balanced than before". This was a reference to the first decision in 2015 having been described at that time as finely balanced.

74. On 13 February 2020 the Foreign Secretary agreed that the methodology was in line with what was required by the Court of Appeal's judgment.

75. On 20 April 2020 a joint submission was made by ECJU-FCDO and MENAD to the Foreign Secretary, which took account of the latest quarterly IHL Update covering the period to January 2020, and recommended that the Foreign Secretary agree that there

remained no clear risk of a serious IHL violation. On 27 April 2020 the Foreign Secretary gave such agreement.

76. On 7 May 2020, a further joint submission was made to the Foreign Secretary, dealing with a MENAD ad hoc interim note addressing matters arising in the period from February to May 2020, concluding that there was no change to the assessment of risk and recommending that the Foreign Secretary advise the International Trade Secretary accordingly: which he did in a letter dated 12 May 2020.

77. For various reasons, including Parliament being in recess and the COVID 19 restrictions, the International Trade Secretary was not able to announce the New Decision until 7 July 2020. In the meantime, the usual process of monitoring and review continued. An ad hoc update was provided to the Foreign Secretary on 17 June 2020 to deal with an incident which had occurred on 15 June 2020, but this did not alter the assessment of the Criterion 2c risk. On 24 June 2020 ECJU-DIT was told by ECJU-FCDO that the latest quarterly IHL Update covering the reporting period to 30 April 2020 was available, but that unless there was anything in it which changed their advice on the Criterion 2c assessment of risk, they did not intend to submit further advice or information to the Foreign Secretary. There was nothing in that Update or subsequent information which changed ECJU-FCDO's risk assessment at any time before the New Decision was taken.

(8) The "pattern" emails

78. On 26 and 27 April 2021 the MOD IHL panel, comprising legal, targeting and policy experts, met to consider the incidents treated in the IHL Analysis as possible breaches, now slightly more than those identified at the time of the Decision Paper, to consider whether there might be patterns to them. In an email sent by the MOD's Security, Policy and Operations organisation (SPO) to the head of ECJU-FCDO on 4 May 2021, their conclusion was that no meaningful patterns could be identified because the "possibles" covered a very wide variety of mission types, weapons, platforms and circumstances; and a number concerned some of the most challenging mission types and circumstances. Further detail is included in the closed judgment.

79. The SPO responded in an email of 25 May 2021 explaining, as we interpret it, that the point they were making was that if the putative "pattern" was expressed at the level of generality of two of the four pillars of IHL being applied, namely proportionality and feasible precautions, then it would be wholly unsurprising if most or all of the possible violations fell into such a category, because these were the categories likely to be engaged in air strikes in the circumstances of the Yemen conflict. It was, however, too much of a leap to say that such commonality must be a concerning pattern. When examining the possibles, the MOD panel had had very much in mind consideration of whether the actual nature of any commonality might evidence a problematical pattern.

(9) Reassessment of risk after the New Decision

80. One incident which was flagged in the 7 May 2020 submission involved three airstrikes targeting Houthi militia in the vicinity of a downed Saudi fighter jet in the Al Masloub District in Al Jawf Governorate, which had occurred on 20 February 2020. In the 7 May submission, the ECJU-FCDO noted that they would await the JIAT report and examine any other information which came to light, although the apparently unique circumstances

did not seem to be part of any pattern and the incident did not therefore indicate any increased risk of a violation of IHL.

81. After the New Decision had been taken, in due course further information came to light in relation to the incident in the form of a JIAT report released at the end of November 2020, and further subsequent communications with Saudi officials. We consider this incident in more detail in our closed judgment. It is sufficient here to record that further consideration led to ECJU-FCDO providing an update of their assessment to the Foreign Secretary on 5 February 2021, in which they concluded that the incident did not change their assessment of the Criterion 2c risk.

(I) THE RIVAL SUBMISSIONS

82. The head of ECJU-FCDO responded in an email the same day suggesting that what was said about some of the possibles was a bit circular, "paraphrased as it's not a pattern because it's what we would expect".

83. Mr Jaffey made a number of submissions by way of background to his criticisms of the IHL Analysis. The principal ones were these:

a. Criterion 2b required special caution and vigilance to be exercised where, as here, there had been prior breaches of IHL. Such caution was reinforced by the erroneous assessments of risk made by the Secretary of State in the past. It follows from the fact that the New Decision has concluded that there have been breaches of IHL since the previous decision, that the previous decision was over-optimistic in its assessment of future risk.

b. The Criterion 2c threshold which the Government had set for itself was a low one. All that was required was a clear risk, which is to be contrasted with a theoretical one. The risk was of a single serious violation: there did not need to be a risk of repeated or widespread serious violations. As to what was meant by serious, paragraphs 2.10 and 2.11 of the User Guide indicated that for serious violations one was looking for grave breaches of the Geneva Convention or serious breaches of the Rome Statute for the International Criminal Court. A state could be guilty of such a serious breach notwithstanding that no single individual intended a breach or was reckless. A serious breach by the state might result from the combination of a series of errors made by individuals leading to a breach of the principles which no one of them intended. A single incident could amount to a serious violation.

84. Against this background, the criticisms which he advanced on the basis of the open material can be summarised as follows.

Ground 1 (improper limitation to violations identified in IHL analysis)

a. The IHL analysis was flawed in only testing against four of the relevant principles of IHL, namely proportionality, feasible precautions, distinction and necessity; in doing so it failed to apply three principles where, as he submitted, IHL imposed absolute prohibitions, namely (a) attacks on those who were hors de combat, (b) attacks on civilian hospitals and medical facilities and (c) attacks on targets indispensable to human life, in particular water treatment facilities.

b. The IHL analysis wrongly excluded a whole category of incidents by restricting itself to fixed wing aircraft strikes. It should have included incidents involving rotary wing aircraft, i.e. helicopters, which the open source documents suggested had been involved in some incidents of concern.

c. The large category of incidents which were filtered out as involving insufficient evidence to make an IHL assessment were those where there was no JIAT report. That is the inference to be drawn from the Decision Paper. That is not a sufficient reason for declining any attempt at assessment. The proper course would be to make specific further inquiries of Saudi Arabia for the missing information; and an absence of satisfactory response would itself give rise to an inference that there had been a possible violation.

d. JIAT assessments that Saudi Arabia had not been responsible for incidents were often flawed. Mr Jaffey left Mr McClelland KC to develop this point, which he did by way of three examples in which JIAT had found no Saudi responsibility for an attack but where, it was said, the clear evidence of the attack on the ground included fragments of Western weaponry which could only have been fired by Saudi Arabian aircraft.

e. There were a lot more cases which should have been categorised as possible IHL violations. Mr Jaffey recognised that this would be a matter for consideration with the benefit of the closed material, but in open written and/or oral argument pointed to 8 examples of incidents which he suggested required to be treated as possible IHL violations on the open material alone, and which themselves also established a pattern for the purposes of Ground 2. The 8 were, in chronological order:

1. the Abs hospital strike of August 2016;
2. the Great Hall incident of 8 October 2016;
3. a strike on a wedding in Bani Qais 22 April 2018;
4. the Dhayan bus strike of 9 August 2018;
5. the death of Mr Khashoggi in October 2018;
6. a strike on a hospital in Kitaf, Sa'ada 26 March 2019;
7. the attack in Al Jawf on 14 February 2020; and
8. the attack in Al Haq on 6 August 2020.

85. This last incident post-dated the New Decision, but Mr Jaffey contended that it was legitimate to consider incidents after that date because the judicial review challenge was expressed to be to the ongoing failure of the Secretary of State to suspend licences; and the Court of Appeal had accepted in the previous challenge that that justified taking into account material relating to incidents after the date of the decision which was then under review. Sir James Eadie KC, for the Defendant, emphasised that in contrast to the position in the first challenge, where the Secretary of State had undertaken an updated exercise to the date of the Divisional Court hearing, she had made clear that she would not do so for this challenge; in this challenge, post decision assessments had been put in evidence only pursuant to the duty of candour. It was therefore a case in which, strictly speaking, the general rule applied that the question was confined to the lawfulness of the

decision under challenge on the basis of the material which was or ought to have been available to the decision maker on that date. However, Sir James was content for later material which was before the court to be taken into account and suggested that it would make no difference to the outcome. We agree with that last submission and have taken such material into account.

Ground 2 (pattern)

86. Mr Jaffey submitted that the Secretary of State made two errors in relation to pattern. The first was an error as to what amounted to a pattern, and the second her conclusion that there was no pattern. Mr Jaffey recognised that the second would require consideration of the closed material. In relation to the first he submitted that what we have described as "the pattern emails" demonstrated that the reasoning in relation to patterns was circular and logically flawed. He defined the relevant pattern or patterns in various different ways during his submissions, including attacking targets which ought to be immune from attack, targeting impermissible targets, breaches of rules of engagement, failure to check whether the targets were permissible or whether civilians were present, failure to consider proportionality, and failure to check against no strike lists. These were, he said, manifestations of what must be an underlying root cause, namely the unwillingness or inability to implement IHL by Saudi Arabia (Saudi Arabia meaning, in this submission, personnel at any level, from aircrew upwards). He described this as a "general approach" and a problem which was "systemic in nature". He said that his 8 illustrative examples demonstrated systemic failings by those responsible for targeting. He placed particular emphasis in his submission on a pattern of unwillingness or inability to follow rules of engagement. In his reply he accepted that a relevant pattern would be one which was indicative of a systemic weakness.

Ground 3 (no sustainable basis for finding Criterion 2c not met despite past breaches)

87. Again, Mr Jaffey recognised that this would have to take into account the closed material, but emphasised that all that was required was a risk of a single serious violation, and that the open material suggested numerous violations and the absence of any pattern or trend of improvement. In those circumstances a risk of a further serious violation was the only rational conclusion to reach from the analysis of past breaches.

Ground 4 (misdirection as to meaning of serious violation)

88. Mr Jaffey said that he would not press this ground if Sir James Eadie confirmed his understanding that the Government accepted that a single incident could constitute a serious violation of IHL, and that such a violation might occur without intentional wrongdoing by any individual. Sir James confirmed both those points, whilst emphasising that a single past serious violation did not equate to a real risk of a future serious violation, and that many of the criteria upon which Mr Jaffey relied did specifically require intent or something like it (which we took to mean recklessness). Sir James also submitted that, as Mr Jaffey accepted, the mere fact of civilian casualties did not mean that there was a breach of IHL, nor was it sufficient of itself to make any breach a serious one.

89. As to "impunity", Mr Jaffey's point was that although the Court of Appeal in the previous challenge had rejected any criticism of the Secretary of State in relation to considering

steps taken, or to be taken, to discipline or punish those responsible for incidents, the landscape had changed as a result of the IHL Analysis. Previously, there had been no conclusion of any past violations, whereas in the new process there had been found to be a number of past violations. That required the Secretary of State to reconsider the issue of impunity, and her failure to do so was a public law error.

90. Mr McClelland for the Mwatana supported all Mr Jaffey's arguments and added his own emphasis to some of them. He submitted that the agnostic conclusion that there was "insufficient information" in about half the cases could not be justified where the Mwatana evidence raised a prima facie case of breach: in the absence of countervailing information, these should have been included as "possible breaches". Moreover, in these cases it was incumbent for a rational decision maker to seek further information rather than exclude them from further consideration. In addition, he developed submissions in respect of 3 examples said to show JIAT's demonstrable unreliability. We have addressed these with the benefit of the closed evidence in our closed judgment, where we refer to them as 'the 3 Mwatana cases'.

91. Mr McClelland submitted that the 149 incidents identified in his summary table indicated that the IHL analysis by the Secretary of State must be wrong, both about incidents which it excluded on the grounds of insufficient information and those excluded as unlikely to involve violations. In its evidence, Mwatana identified a list of 32 incidents in which it was said there was prima facie a breach of IHL. Mr McClelland accepted that these would need to be assessed with the benefit of the closed material, and we have done so. All bar 7 were already on the Tracker. When raised, the other 7 were added to the Tracker save for one involving a helicopter, and have been subjected to the IHL Analysis. Our conclusions on Grounds 1 to 3 below have taken into account all the incidents upon which Mwatana rely. Insofar as the incidents were taken up by the Special Advocates in closed argument, they are addressed in our closed judgment. Insofar as they were not, they are addressed in the closed narrative annexes to the witness statements of Mr Lapsley and Mr Wilson, of the SPO at the MOD, which themselves reflect the greater detail in the Tracker, and we see no proper basis for treating the IHL Analysis of any of them as erroneous, still less irrational. It is not necessary to refer to the detail of the Tracker analysis for those other incidents in the closed judgment.

92. Mr McClelland also argued that there was an error in paragraph 78 of the Decision Paper in treating as relevant the suggestion that the number of possible breaches was within the margin to be expected in a conflict of this nature. If so, all it evidenced was that such violations were likely to continue, and so it would be irrational to conclude that there was no clear risk of future violations.

93. In the written arguments it appeared that, in relation to the "insufficient information" category, CAAT and Mwatana might be challenging not just the application of the IHL Analysis but its design, on the basis that where there was insufficient information to form a view it necessarily followed that it was possible that there was a violation of IHL. This was not how the argument was developed orally and Mr McClelland, at least, disavowed it. It is in our view fallacious, as we explain when considering Ground 3. What is required is a real risk of a future serious violation, that is to say a concrete risk for which there is evidential support (albeit that it is a nuanced value judgment); it is plainly not irrational for the Secretary of State to take the view that insofar as that future risk is informed by past incidents, it can only usefully be informed by incidents where the

available information makes it possible to form some meaningful view of the IHL position.

94. The submissions of Sir James Eadie in open were summarised in the following points:

a. There could be no doubt that there had been a very careful, thorough and detailed analysis of all the incidents which had raised concerns, in an attempt faithfully to deal with the issue identified by the Court of Appeal. Much of the detail of that would have to be dealt with in closed session by reference to closed material.

b. Ultimately it is for the Secretary of State to determine how that analysis should be performed; it is not for the court to substitute its own view of how to go about it. If an attack is to be made on the design of the process, it can only be on rationality grounds, i.e. that no one could properly think that it was a suitable exercise. That applies equally, with as much if not greater force, to the conclusions drawn from the analysis.

c. This is not a formulaic exercise. It is shot through with evaluative judgments, and they are judgments which it is particularly apt should be made not by the court but by those who did so in this case, with experience and expertise both in the military activity under scrutiny and in the diplomatic field involving an assessment of the mindset of an international partner. Moreover, there will be limits to the ability to make judgments where the conduct in question is that of a foreign state.

d. The attempt which the Court of Appeal called for has plainly been made by the Secretary of State. What is left, therefore, is a challenge which, as the Court of Appeal recorded at [144] of its judgment, Mr Chamberlain QC then accepted on behalf of CAAT was a matter for the Secretary of State and her advisers.

e. The challenge is directed to saying that there is no proper basis for the evaluative conclusions reached; but once it is accepted that the exercise has been done, the rest is all a matter for evaluation by those with relevant experience and expertise.

f. There was no irrationality in the way the analysis was designed or carried out. It was rational to apply exclusions to those incidents where Saudi Arabia was not involved, those where there was insufficient evidence to form a view about IHL violation, and those where the information showed that it was unlikely that there had been an IHL violation. There was also an element of cross-checking, for example in looking for patterns in those incidents which fell within the 'insufficient information' category.

g. There was nothing irrational about the conclusion reached in the New Decision, which was addressed to future risk and took account of factors other than merely past possible breaches of IHL.

h. Sir James took issue with Mr Jaffey's characterisation of additional principles of IHL, and his formulation of them as involving certain absolute prohibitions by reference to the targets or casualties. He pointed out that this was not set out in the Amended Statement of Facts and Grounds as a separate ground of challenge, and that he was not in a position to state the Government's considered position on the scope of the parts of the Fourth Geneva Convention and the two Additional Protocols upon which Mr Jaffey relied.

95. Sir James Eadie supplemented these arguments by reference to the closed material, to which we refer in our closed judgment.

(J) DISCUSSION AND ANALYSIS

96. We find it convenient to consider Ground 4 first, and then Ground 3, before addressing Grounds 1 and 2.

(K) GROUND 4

97. Ground 4 asserts two separate errors of law, namely that the Secretary of State misdirected herself in respect of (1) what amounted to a "serious" violation and (2) in failing to recognise the need to consider the impunity of Saudi Arabian officials for such violations.

(1) Seriousness

98. The fatal difficulty in the way of this ground is that Mr Jaffey did not seek to point to anything which was said about seriousness by the Secretary of State or her advisers at any stage of the decision-making process as being erroneous in law. Nor did he suggest that such an error of law must have taken place as the inevitable inference from the decision itself. Instead he sought in oral argument to identify aspects which he contended were part of the definition of seriousness, and challenged Sir James Eadie to respond in an attempt to identify a difference which he might rely on. This is not a permissible basis on which to mount a challenge.

99. In CAAT's written submissions, reliance was placed on submissions made on behalf of the Secretary of State before the Divisional Court on the previous challenge, and correspondence (in the context of a mooted appeal to the Supreme Court) in which the Secretary of State had declined to confirm that she had, when making her New Decision, adopted a particular formulation of the meaning of "serious violation". However, the Secretary of State did make clear, in her letter of 27 August 2020, that the IHL analysis did not consider the seriousness of the possible breaches by reference to any separate, specific criteria; that each potential breach had been factored into the overall Criterion 2c assessment on the basis that it was inherently serious; and that the Secretary of State accepted that any one incident, depending on its facts and wider context as understood by the Secretary of State on the basis of all the material available to her, might lead to an overall assessment that there is a "clear risk" for the purpose of Criterion 2c. This answer provides no basis for a suggestion that the Secretary of State has misdirected herself.

100. We also remind ourselves of what the Court of Appeal said at paragraph 165 of its open judgment, quoted above, and in particular this passage:

> "165. …In our view, it would not be appropriate to seek to give some abstract definition of the concept of "serious violations" of IHL, since so much depends on the precise facts. We also remind ourselves that the function of judicial review is generally to assess the lawfulness of past executive action, not to give advice for the future. Judicial review is in this regard highly fact-specific. Furthermore, we have to recall 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."

101. We find ourselves in a similar position, and for similar reasons decline to follow the path which Mr Jaffey invited us to go down.

102. We should record, however, that we do not accept Mr Jaffey's submission that seriousness necessarily bears the same interpretation for the purposes of Criterion 2c as that which was given to it for a different purpose by the Appeals Chamber of The Yugoslavia Tribunal (The International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991) in *Prosecutor v Dusko Tadic aka "Dule"* (IT-94-1). That was a decision which involved, amongst other things, interpreting Article 3 of the Statute under which the Yugoslavia Tribunal was set up, which gave an inclusive definition of violations over which it had jurisdiction. Article 3 did not use the word "serious", referring only to violations, but the tribunal in its decision drew attention to the fact that the expression "serious violations" was used elsewhere in the statute and was inherent in Article 3. At paragraph 94(iii) the tribunal said that "the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."

103. We would have thought that, for the purposes of Criterion 2c, an assessment of culpability would also play a part. Paragraph 2.11 of the User Guide suggests that guidance on what is meant by serious breaches is to be found in what are defined as grave breaches in the four 1949 Geneva Conventions and two 1977 Additional Protocols, and those referred to as other serious violations in the Statute of Rome setting up the International Criminal Court. The general flavour of these is a category defined by reference to wilful or intentional conduct (see, e.g., Article 147 of the Fourth Geneva Convention, Article 11(4) and 85(3) of the 1977 Additional Protocol relating to the protection of victims of international armed conflicts and Article 8.2(b), (c) and (e) of the Statute of Rome), though we would be inclined to accept that reckless conduct might well fall within the category of serious violations. This does not rule out the possibility that negligent failings may give rise to a serious breach, but we would have thought that the nature and quality of the negligence would be a relevant factor. However, we heard only limited argument on the point and it does not arise for decision in this case. Accordingly, it is neither necessary nor appropriate for us to express any concluded view on the point.

(2) Impunity

104. This is an attempt to reargue a point raised in the earlier challenge and rejected by the Court of Appeal. The point was Ground 2 of the original challenge and was recorded in the Court of Appeal judgment at paragraphs 147 to 148 as follows:

> "147…..This ground focuses in particular on three questions, said to be essential to the assessment required by Criterion 2c and to be found among the 21 bullet points in the User's Guide (at pp.55-56): (1) whether the receiving state has legislation in place prohibiting violations of IHL; (2) whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; and (3) whether there is an independent and functioning judiciary in the receiving state capable of punishing members of the armed forces who violate IHL.

> 148. CAAT's case is that the Secretary of State did not and still does not know the answers to those questions in relation to the Kingdom of Saudi Arabia. Further, it is submitted that, as a consequence, the Secretary of State breached his duty to ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly, as required by *Tameside*."

105. The Court of Appeal's conclusions were as follows at paragraphs 153 to 154:

> "153. We are unable to accept the submission that in respect of the matters raised in Ground 2 the Secretary of State adopted a process which was irrational. As Sir James Eadie submitted before us, the essential focus of the present case has not been on individual responsibilities for war crimes, to which the three questions identified above would be particularly relevant. The focus has been on whether the Kingdom of Saudi Arabia *as a state* has a record of compliance with IHL, for example in relation to the principles of distinction and proportionality (emphasis in original). …We can see no additional requirement founded in rationality that the Secretary of State had to ask the three specific questions which are the focus of Ground 2. In the context of this particular case, it was reasonably open to the Secretary of State to focus on other matters. That is essentially what the Divisional Court held. As that court said, at paragraph [128]:
>
> > "it was clear from the evidence that, far from being immune to international criticism and concern as to civilian casualties alleged to have been caused by the Coalition in the Yemen conflict, Saudi Arabia has been mindful of the concerns expressed, in particular by the UK. It is also clear from the evidence that Saudi Arabia has sought positively to address these concerns, in particular by conducting investigations into incidents and setting up a permanent investigatory body."
>
> 154. The Secretary of State enjoyed a broad area of judgment in assessing how to go about his task in addressing Criterion 2c. He was not required, in our judgment, as a matter of rationality to pose the three specific questions upon which CAAT has now focused under Ground 2 in this appeal. This conclusion is also supported by what we say in our CLOSED judgment."

106. Mr Jaffey's submission was that we were not bound by this finding because now that the Secretary of State has found possible breaches of IHL, it is incumbent on her to address the three questions again, and she has failed to do so. We are unable to accept this argument. The Court of Appeal rejected the submission that the three questions were ones which were required to be asked, being contained in the non-prescriptive User Guide in a section addressing itself to war crimes by individuals. That reasoning applies equally to the New Decision, irrespective of the outcome of the new IHL Analysis. In any event it is clear from the contents of the Decision Paper to which we have referred and to which we refer in our closed judgment, that the Divisional Court's summary of the stance adopted by Saudi Arabia, endorsed by the Court of Appeal, remains the stance which it has continued to adopt on all the evidence which we have seen.

(L) GROUND 3

107. Ground 3 raises the issue which is determinative of the challenge: was the Secretary of State's evaluation of the Criterion 2c risk irrational? The submissions advanced on behalf

of CAAT and Mwatana have focussed on Grounds 1 and 2 which criticise aspects of the IHL Analysis of past incidents. That analysis is not, however, determinative of the Criterion 2c question, which involves an assessment of future risk. It is an analysis which can inform the assessment of future risk but ultimately the question for this court is whether the risk evaluation was irrational, not whether one or more of the categorisations of individual incidents, or of pattern, was erroneous. We think it is important to keep the following considerations in mind as to (a) the part the IHL Analysis can play in the ultimate Criterion 2c evaluation and (b) the nature of the IHL Analysis.

108. First, as the Decision Paper correctly recognises, the main factors which govern a proper assessment of the Criterion 2c risk are the willingness and ability of Saudi Arabia to comply with IHL. The core evaluation which the Secretary of State and her advisers focussed on was whether Saudi Arabia had the intention and capacity to comply with IHL. In our view they were correct to do so, reflecting the approach in paragraph 2.13 of the User Guide. Indeed no issue was taken with this approach by CAAT or Mwatana. That was the core assessment.

109. There are many aspects which informed that evaluation by the Secretary of State and her advisers, which are discussed in considerable detail in the Decision Paper in the section headed Thematic Analysis, and to which we have referred above and in our closed judgment. The detailed considerations, reasoning and conclusions in the Thematic Analysis section of the Decision Paper have not been criticised, let alone challenged, as irrational, either in open where the material is gisted, or in closed where the material is unredacted. The New Decision was also informed by the exhaustive thematic analysis contained in three IHL Updates covering the periods February to October 2019, November 2019 to January 2020 and February to May 2020. Again, no criticism is advanced of those Updates.

110. The points arising from those analyses include the following:

(1) A series of assurances were given at the highest level; they could be taken as being genuine because the Saudi Government was acutely aware of international scrutiny of its conduct of the war in Yemen, and for the further reasons set out in this paragraph.
(2) The US assessment supported the UK assessment. We say more about this in our closed judgment.
(3) The intense level of training and support given both in relation to air operations and IHL, which has been welcomed by Saudi Arabia and accepted and integrated into its procedures in a desire constantly to improve, was testament to both a willingness and an ability to comply.
(4) This commitment and ability are reflected in the development of JIAT, one of whose purposes is to learn lessons.
(5) The Saudi response to the particular incidents which the UK raised as of most concern, for example the Great Hall incident and the Dhayan bus incident, was to meet the UK's requests for changes and further information with immediate acceptance and to implement the new procedures being suggested.

111. Secondly, the Secretary of State's evaluation was supported by evidence of trends and overall numbers. Annex 4 to the Decision Paper shows that the trend of credible allegations has fallen considerably over the course of the war. The figure we give in closed for the number in the year prior to preparation of the Decision Paper is strikingly small. None of these were assessed as possible violations of IHL. Mwatana's table of

incidents of concern, which include many which were assessed as not credible, nevertheless also shows the same trend. It has 75 incidents for 2015, 25 incidents for 2016, 13 incidents for 2017, 14 incidents for 2018, and 9 incidents for 2019.

112. These fall to be judged against the very large number of sorties and airstrikes, and in the context of numbers in other conflicts. As at October 2019, the Tracker contained a total number of 486 allegations of which 331 were assessed to be credible. Whilst care must be taken in drawing comparisons across different conflicts (as the Decision Paper said), it is to be noted that in the Syria/Iraq conflict in which a similar number of airstrikes were carried out, a similar number of allegations were recorded against the coalition forces.

113. Thirdly, in making those Thematic Analysis assessments, the UK Government had access to information which is not available to NGOs and others from open sources, which is of considerable value in assessing the willingness and ability of Saudi Arabia to comply with IHL in addition to the factors we have summarised in paragraph 110 above. The privileged access to Saudi Arabia which the UK enjoys was summarised at paragraphs 121 to 125 of the Divisional Court judgment as follows:

> "121……..The UK provides personnel who give practical support in four ways: the UK has (i) a considerable number of military personnel and officials working at the British Embassy in Riyadh who are in regular contact with their Saudi counterparts; (ii) the UK has liaison officers located at Saudi operational HQ; (iii) the UK has British service personnel providing logistical and technical support to projects for the Royal Saudi Armed Forces; and (iv) the UK has trainers and training to improve the general capability of the Saudi Arabian Armed Forces.
>
> 122. In particular, as regards (i), the Defence Attaché at the British Embassy Riyadh (a brigadier or equivalent) holds regular meetings with senior Saudi Military leaders and Her Majesty's Ambassador to Saudi Arabia, who enjoys privileged access to Saudi leadership. Both can raise concerns over International Humanitarian Law allegations at senior levels in the Saudi Arabian government.
>
> 123. As regards (ii), UK Liaison Officers located in the Saudi Arabian military HQ have a significant degree of insight into Saudi Arabia's targeting procedures and processes and access to sensitive post-strike Coalition mission reporting. The RAF Chief of Air Staff Liaison Officer in Riyadh has unparalleled access to the decision-makers in the Saudi Air Force HQ. The MoD has knowledge of Saudi Arabian targeting guidance to reduce civilian casualties, including time sensitive Special Instructions and Air Operational information. Coalition operational lawyers are present in the Saudi Ministry of Defence and at Saudi Air Operations Centre and provide reviews of specific targets and investigations into civilian casualties. The Attaché and liaison officers have noted examples of Saudi concern to minimise civilian casualties in preplanned targeting processes.
>
> 124. As regards (iii), the UK provides significant logistical and technical support to the Saudi military. In particular, the MoD Saudi Armed Forces Projects team comprising over 200 UK armed forces and MoD civilian personnel, provide significant advice to the Saudi military on the military equipment supplied by BAE Systems.

> 125. As regards (iv), the MoD provides significant training to the Saudi armed forces in relation to targeting and compliance with International Humanitarian Law, including (a) International Targeting Courses in 2015 and 2016, (b) individual training in relation to precision-guided munitions (such as Paveway IV and Storm Shadow), and (c) Qualified Weapons Instructors Courses for Saudi Typhoon pilots. In addition, the MOD has supported the development of the Coalition Joint Incident Assessment Team ("JIAT") and delivered training sessions in Saudi Arabia on the process of investigating alleged violations of International Humanitarian Law in May and September 2016."

114. Fourthly, it is in our view significant that not only have the Secretary of State and her advisers had much greater access to sources of information than that available to CAAT and Mwatana, but that the access has been to much greater information than is before the court, even in closed. The Secretary of State's assessment was based on a vast volume of information and material considered by her advisers, of which it was only practical to put a small proportion before the court, and often by way of summary only.

115. Fifthly, this is true not only in relation to the Thematic Analysis evaluations, but also in relation to the IHL Analysis. For example, the Tracker refers to imagery which we have not seen. It refers to Defence Intelligence assessments which we have not seen. It contains summaries of material, where all we have is the summary, not the material for our own assessment. It contains reasoning in a brief and summary form, without setting out all the detail. This is not a criticism. But it makes the task of CAAT and Mwatana all the harder in seeking to persuade the court that a decision based in part on material it has not had access to is irrational.

116. Sixthly, those involved in the IHL Analysis and Thematic Analysis have far greater experience and expertise in evaluating the information than do CAAT, Mwatana, or the court. Those involved in the exercise were experts in (i) interpreting imagery, (ii) evaluating intelligence, (iii) understanding the military challenges and context in targeting, especially in a dynamic situation and against the background of Houthi tactics to use civilian cover and disinformation to advance their war aims, (iv) applying IHL in that context, (v) understanding the Saudi culture and the procedures it adopts and (vi) assessing the weight and significance to be attached to assurances and to Saudi responses to concerns when raised. The principles of IHL in play, in particular those of proportionality and feasible precautions, involve a fact sensitive and evaluative judgment by those seeking to determine whether there has been a breach or possible breach. The MOD panel when considering each individual incident had their own expertise and experience of addressing such questions in real time for UK forces, and were rationally entitled to adopt and apply the same approach to the evaluations of Saudi conduct. That was pre-eminently a matter for their expertise and judgement, not that of the court.

117. Against that background, the high hurdle faced by CAAT and Mwatana in seeking to persuade a court that the Secretary of State has behaved irrationally becomes a very high one. Not only is it inappropriate for the court to substitute its own assessment of the characterisation of individual incidents for that of the experts advising the Secretary of State, as a matter of law, but it is positively dangerous for it to do so where it lacks both

the full range of information and the expertise and experience which informed those assessments.

118. Seventhly, much of the argument on Ground 1 relied on the open source documents or reports by the UN Panels or the NGOs. These were considered as part of the IHL Analysis, but the greater information and expertise available to the UK Government means that it was not bound to accept their content or views.

119. The Court of Appeal said at [134] of their judgment:

> "We accept that the major NGOs, including the Interveners, and the UN Panel of Experts had a major contribution to make in recording and analysing events on the ground in the Yemen conflict. The NGOs did have the capacity to introduce representatives on the ground and to interview eye witnesses, which the Secretary of State could not do. It is the case, however, that the Secretary of State could access a great deal of information which the NGOs and the UN Panel could not see. As we have indicated, the CLOSED evidence makes that clear. In the very crudest terms, the NGO and UN Panel evidence often establishes what happened, but the further information available to the Secretary of State could assist as to why events of concern had happened. Both may of course be highly relevant to whether a violation of IHL had taken place and to the risk of future violations."

120. The evidence before us justifies the view that even in relation to the 'what' question, as distinct from the 'why' question, the UK Government had access to information which could rationally justify rejection of open source reports as not credible. The 3 Mwatana cases and other cases which we address individually in our closed judgment include a number where material to which the open sources did not have access justifies a different conclusion to the 'what' question in treating them as not being credible allegations.

121. The Government was rationally entitled to treat the public source documents with caution. It had its own knowledge of Houthi tactical attributes and capabilities, including the Houthi propaganda agenda. It had its own expertise and experience, military, political and diplomatic, which it could rationally consider was considerably greater than that available to the UN Panels and NGOs. It often had access to greater information both as to what had happened (for example in the form of access to imagery) and sometimes to why it had happened (for example through access to intelligence).

122. The need for caution about the open source reports is borne out by the results of the exercise. Of the Annex 5 incidents, about 20% of the allegations were assessed as 'not credible', the majority of which had been raised by the UN Panel of Experts. We have considered those which CAAT or Mwatana criticise as having been erroneously so categorised, with the benefit of the closed material, and concluded that there is no proper basis for treating their evaluation as 'not credible' to be an irrational one.

123. It was suggested by CAAT that the UN Panel of Experts had before its dissolution found violations of IHL in 33 of the approximately 34 investigations completed, and, in its 2016 Report, 119 incidents in which the Coalition had violated IHL. This is misleading. A similar submission was rejected in these terms in the Divisional Court judgment at paragraph 208:

> "208.

…
(4) …The reports were often directed at broader considerations than International Humanitarian Law violations;
(5) for example, in the *United Nations Panel of Experts Report* the following considerations are evident:

> (a) The mandate for the report was wide: it was to monitor the implementation of sanctions measures.
>
> (b) The Report refers to 119 allegations of International Humanitarian Law violations by the Coalition but does not contain a detailed or comprehensive explanation or analysis of them.
>
> (c) The allegations of International Humanitarian Law violations are, in many instances, very general (see e.g. paragraph 123 "all parties to the conflict in Yemen have violated the principles of distinction, proportionality and precaution…"; paragraph 137 "The Panel documented 119 Coalition sorties related to violations of [International Humanitarian Law]"; Annex 47 "Attacks on farms and agricultural areas – 3" and "Attacks on mosques – 3").
>
> (d) Many of the alleged violations included in the report are not set out in any detail and, as Mr Watkins explains, consequently could not be recorded by the MoD on the Tracker (see e.g. Annex 54 which refers to "3 cases of attacks on fishing vessels and dhows, and 2 cases of attacks upon fishing markets and their communities", but only goes on to provide information about two of these attacks).
>
> (e) The sources used to compile the report were necessarily limited and are not qualitatively as sophisticated as the sources available to the MoD. Section V of the Report covers "Acts that violate international humanitarian law and human rights law and cross-cutting issues". Paragraph 121 describes the methodology of this section, noting that the Panel conducted interviews with refugees, humanitarian organisations, journalists and local activists, and that it obtained commercial satellite imagery to assist in substantiating certain "widespread" or "systematic" attacks. By contrast, the MoD is able to base its analysis on a wide range of information including sensitive MoD sourced imagery which secures a more comprehensive and immediate picture than that provided by third party commercial imagery.

(6) It is clear the Secretary of State and his advisers treated the allegations drawn to their attention in the third party reports seriously and as a matter of concern. When MENAD received an advance copy of United Nations Panel of Experts Report, they immediately forwarded it to the MoD. The MoD then carried out a preliminary assessment of the 119 allegations. Some 39 allegations were eventually added on the MoD tracker as a result of the Report. The UN Panel of Experts Report was carefully considered in the January 2016 update. It was concluded that the additional allegations were concerning but they did not warrant a change in the overall analysis of the risk of future non-compliance with International Humanitarian Law by the Saudi authorities. It was decided that further work was required by MoD to identify whether the alleged attacks had been

> carried out by the Royal Saudi Air Force, rather than one of its coalition partners. MENAD also requested further information from the United Nations Panel of Experts with regards to seven of these incidents but no further detail has been forthcoming to date;
>
> …
>
> (8) it is clear why the Secretary of State took the view that he did that Criterion 2c was not triggered, notwithstanding the various third-party reports that came to his, and his advisers', attention. His assessment of all the material in the light of the advice tendered by officials and fellow ministers was that the necessary risk was not established. We should add that it was not legally necessary for him to engage directly with everything that has been said by others on the topic."

124. Eighthly, the IHL Analysis of past IHL breaches, when placed with the other factors identified in the Thematic Analysis which support the view of the Secretary of State and her advisers that Saudi Arabia has the willingness and ability to comply with IHL, is relevant only to the extent that it undermines that evaluation. In that context:

(1) The test requires a *clear* risk of a serious violation of IHL. In our view *clear* does not simply mean something which is not theoretical, as Mr Jaffey submitted, despite the use of the word theoretical in the introductory paragraph of the Consolidated Criteria. That introduction applies to all the following criteria, not just Criterion 2c. "Clear" connotes a concrete risk for which there is evidential support (albeit that it is a nuanced value judgment). It means that the risk must be clear from evidence which forms a meaningful basis for making an assessment of whether a violation might occur in the future. Insofar as that assessment is based on past breaches or possible breaches, that means that there must be sufficient information available to make a meaningful judgment on that question. The mere fact of civilian casualties or that strikes hit a humanitarian or civilian installation does not equate, in this context, to a 'possible' breach of IHL if there is insufficient information to form a view on the 'why' question. That applies equally to whether there is sufficient information to determine that an allegation is credible, i.e. the 'what' question. Mr McCullough KC's submission that, in any case where there was insufficient information to determine whether an allegation was credible, it should be characterised as a possible breach, ignores the purpose of the exercise. If there is not enough information to form any meaningful judgment, it can serve no useful purpose to include it as a possible breach for the purposes of informing an assessment of whether there is a *clear* risk of a future breach.

(2) This is supported by the final paragraph of the Consolidated Criteria which emphasises that in applying them, account will be taken of "reliable evidence".

(3) This is further supported by the terms of paragraph 138 of the Court of Appeal judgment, which recorded and endorsed the acceptance on behalf of CAAT that the question could not be answered "with reasonable confidence" in respect of some incidents; but that as the question *could* properly be answered in respect of many other such incidents, the attempt had to be made.

(4) As the User Guide, and the Divisional and Court of Appeal judgments recognise, the mere fact of prior breaches does not equate to a risk of future breaches, still less a clear risk of a serious breach. It is important to remain focussed on how the nature and timing of such past breaches affects the assessment of a willingness and ability to comply in the future. That depends not just on the breaches themselves but (a) the reaction of Saudi Arabia if and when they have been raised as matters of concern and (b) an

assessment of whether they are indicative of an underlying systemic weakness which casts doubt on an ability to comply with IHL. It is to this latter aspect that an assessment of "pattern" goes. The historic IHL Analysis is therefore only a useful part of the holistic Criterion 2c future risk assessment to the extent that it reveals a pattern suggestive of unaddressed systemic weaknesses which might undermine the other material before the Secretary of State, which pointed to a willingness and ability on the part of Saudi Arabia to comply with IHL. It plays that limited part in the overall assessment.

(5) Although the methodology of the IHL Analysis treated "possible" breaches as if they were established breaches, which is obviously sensible for the purposes of considering the pattern question, the Decision Paper was correct to observe that that did not preclude an evaluation of how likely it was that the "possible" breaches did in fact involve violation of IHL. We have said more about this in our closed judgment.

125. It follows that the IHL Analysis, although undertaken with anxious scrutiny, does not play a hard-edged part in the Criterion 2c assessment. It was a tool which itself inevitably gave rise to evaluative assessments which involved standing back. It was not intended as an examination to reach a judicial or quasi-judicial decision on every incident (as the Court of Appeal said at paragraph 165 of its judgment), with rigid applications of standards of proof or the pursuit of additional information down all conceivable avenues to try and undertake such a task; but rather an exercise in common sense in the light of the particular expertise and experience of the IHL panel.

126. We have borne these considerations in mind when considering the allegations of miscategorisation of individual incidents, which forms the basis for Ground 1, and the pattern question which forms the basis for Ground 2.

127. In the way the challenge has been mounted, Ground 3, which is determinative, is wholly dependent on the success of Grounds 1 and 2. If the IHL Analysis was not irrational, there is no other basis on which the Criterion 2c risk assessment is said to have been irrational. For the reasons set out below, we reject Grounds 1 and 2, which means that Ground 3 fails.

(M) GROUND 1

128. The arguments can be put into two categories, namely those which apply to the IHL Analysis generally and those which apply to the categorisation of particular incidents. We take them in that order, dealing in sections (1) to (6) below with the general arguments and in sections (7) to (9) below with particular incidents.

(1) Criterion 2b special caution and vigilance

129. The Claimants submitted that criterion 2b required special caution and vigilance to be exercised where, as here, there had been prior breaches of IHL. The Secretary of State did not accept that this approach altered the Criterion 2c threshold. But even assuming that it does, the short answer is that the Secretary of State and her advisers followed it in any event. The thoroughness and diligence which the Government applied to the whole process, including but not limited to the IHL Analysis, is striking. What the Divisional Court said at paragraph 120 of its judgment about the analysis up to the date of that hearing in 2017 was this:

> "120. We should emphasise the volume of material generated each month by the MoD and Foreign Office was considerable and demonstrates the genuine concern and scrutiny that the MoD and Foreign Office were determined to give to the report of incidents of International Humanitarian Law violations in Yemen and the question of Saudi compliance with International Humanitarian Law in the conflict. This was no superficial exercise. It has all the hallmarks of a rigorous and robust, multi-layered process of analysis carried out by numerous expert Government and military personnel, upon which the Secretary of State could properly rely."

130. That remains so on the evidence before us as to what has happened since. Indeed the material before us, in the Tracker, IHL Updates and elsewhere, shows that the exercise by the Government in reaching the New Decision, and in continuing its Criterion 2c evaluation since, has been assiduous, extensive, rigorous, balanced, and multi-layered. It has not been suggested that the exercise or conclusions were conducted other than in good faith, or that there was some agenda influencing it. There can be no doubt that the process of decision making has been approached with genuine and anxious scrutiny.

131. The Decision Paper addressed with care and balance the past incidents found to be possible breaches of IHL and the way they fed into the assessment of future risk. Reliance on Criterion 2b adds nothing of substance to the arguments in this challenge.

132. We should add, however, that we reject Mr Jaffey's submission that it follows from the fact that the New Decision has concluded that there have been breaches of IHL since the previous decision, that the previous decision was wrong in its assessment of future risk. To conclude from that fact that the previous assessment of future risk must have been flawed, making special caution and vigilance essential this time round, is in our view an inappropriate application of hindsight. The question was then, as now, whether the evidence indicated a clear risk of a future serious violation of IHL. We comment further on this point in our closed judgment.

(2) Limitation to fixed wing aircraft

133. The Claimant submits that the IHL Analysis wrongly applied only to incidents involving fixed wing aircraft. This is not, in our view, a valid criticism. The IHL Updates do not limit themselves to fixed wing aircraft, and they were taken into account as part of the holistic Criterion 2c risk assessment. The Tracker includes some incidents involving helicopters which were considered and evaluated for possible IHL violation.

134. Nevertheless, it would not be irrational for the Secretary of State to focus on fixed wing aircraft which, with their associated ammunition, form the primary military export to Saudi Arabia that might be deployed in Yemen. The evidence in the earlier proceedings from Mr Watkins of the MOD was that the UK had no insight into incidents caused by artillery attacks or attack helicopters. Neither the Divisional Court nor the Court of Appeal made any criticism of the Secretary of State in this respect, and they made no finding that the Secretary of State had acted unlawfully in focussing the assessment on the Tracker to fixed wing aircraft. In the course of argument Mr Jaffey pointed to only three incidents involving a helicopter identified in a UN Panel of Experts report. Of these, two were merely recorded as reports and were not verified by the Panel as having taken place; nor were they put forward by the Panel as violations of IHL. The other was an allegation of an attack on a migrant boat on 16 March 2017 involving civilian

casualties. The case study was said to be in Appendix A to the Report but was not put in evidence before us. Given the lack of information available to the UK in relation to helicopter attacks, it seems to us inevitable that, if it had been included on the Tracker, it would have been assessed as one for which there was insufficient information to form a view as to whether it involved a possible violation of IHL.

(3) Limitation to proportionality, feasible precautions, distinction and necessity principles

135. The Claimants contended that it was incorrect for the IHL Analysis to have been confined to the four identified IHL principles of proportionality, feasible precautions, distinction and necessity: it should have extended to certain "absolute" IHL requirements relating to such matters as soldiers hors de combat (e.g. wounded) and protection of specific buildings such as hospitals and water installations.

136. Mr Jaffey sought to advance this contention for the first time in oral argument, by reference to the terms of the Geneva Conventions and the 1977 Additional Protocols, to some of which he took us. The point is not squarely identified as a ground raised in the Amended Statement of Facts and Grounds, and is only obliquely alluded to in paragraph 38.4 of the skeleton argument where it is said that because of the limitation to the 4 principles "in some instances, the analysis may miss other forms of IHL violation such as the obligation to safeguard an enemy hors de combat (Article 41 AP1) or the obligation to safeguard relief consignments and personnel (Article 70 AP1)". There was no suggestion there that these were absolute obligations. This was not the proper way to seek a ruling on the scope of applicable IHL principles, and we are sympathetic to Sir James Eadie's submission that he should not be expected to put forward the Government's position on such an important matter on the hoof and without adequate warning and consideration. The principles relevant to the Criterion 2c exercise in the circumstances of this particular case were identified in the Divisional Court and Court of Appeal judgments, and those were the ones which the Secretary of State applied.

137. We should add that we were far from convinced that the material we were shown justified the conclusion that there were "absolute" prohibitions. Mr Jaffey's paradigm example was a soldier hors de combat. If such a person were deliberately targeted, that would be a breach of the principle of distinction. The mere fact that such a person was hit would not, however, necessarily involve an IHL violation. He might be a proportionate collateral casualty of another legitimate military target. Mr Jaffey treated the Abs Hospital incident as the impermissible targeting of a military person in a vehicle which had entered the hospital compound to seek assistance for an injury, rendering him a prohibited target. But what if there were believed to be other military personnel in the vehicle? Then the principles of proportionality and feasible precautions would come into play, but we doubt whether the mere fact that one occupant of the vehicle was injured would involve an absolute prohibition on a strike under IHL.

138. In any event Mr Jaffey's argument on this point is not of any practical significance in this case. It became apparent in the course of debate with Mr Jaffey during the hearing that the practical examples he gave which might be of relevance to the current challenge would in any event engage one or more of the four principles which the Secretary of State did take into account, whether it be the principle of distinction for intentional targeting, or lack of reasonable precautions or proportionality for collateral effects. Our consideration below and in our closed judgment of the individual cases specifically relied

on as examples of miscategorisation would not have resulted in a different conclusion had we accepted Mr Jaffey's arguments on this point.

(4) "Insufficient evidence" cases with no JIAT report

139. We reject the submission that there was any irrationality in the approach that resulted in a rough correlation between cases which concluded that there was insufficient information to form a view on breach of IHL, and the absence of a JIAT report in such cases. JIAT was the main source for what was regarded as a competent and independent assessment of the material which could answer the 'why' question. In the absence of such material, it is not surprising, and certainly not irrational, for the assessment to be that there was insufficient evidence to form a meaningful judgment of whether there was a possible breach of IHL. We do not see any stark paradox or contradiction between this point and the Secretary of State's reliance on privileged access to Saudi Arabia. The privileged access is what makes the Secretary of State and her advisers particularly well-placed to answer the ultimate Criterion 2c question as to future risk, as an evaluation of Saudi Arabia's willingness and ability to comply with IHL, based on the thematic analysis considerations which they applied. It does not follow that such access has the same effect in relation to an IHL Analysis of past events later brought to their attention where the main evaluative tool for the why question, namely a JIAT investigation, is not available.

140. We have already quoted the views expressed in the Divisional Court judgment at paragraph 181(ii) about the difficulties facing the UK government in this respect, with which we agree.

141. It is fair to point out, in any event, that the Government did not rely only on the existence or absence of JIAT reports. There were individual incidents of concern in which the Government sought further information and assurances, or to which it responded with further training. It was a matter for diplomatic and political judgment as to when to do so and in what terms, and under ordinary *Tameside* principles that judgment could not be impugned unless no reasonable decision-maker could have taken the same approach (see paragraph 36 above). A blanket approach seeking further information in respect of every incident raised as a matter of concern by a NGO, for which there was no JIAT Report, or in which the JIAT report lacked some necessary detail to form an assessment with reasonable confidence, could rationally have been regarded as diplomatically problematic and counterproductive. It was for the Secretary of State and her advisers to exercise the political and diplomatic judgement as to when to engage and to use diplomatic capital. Mr Jaffey's submission that if there were no answer to the why question in respect of a credible allegation then it was irrational for the Secretary of State not to seek specific further information was, in our view, unrealistic. It would logically apply to every such case. It can be seen from the numbers involved that it would be a huge undertaking, which the Secretary of State and her advisers could rationally consider would have had adverse foreign relations consequences in return for which there would have been no significant benefit in the analysis of what is ultimately a predictive evaluation of future risk, and in which the IHL analysis plays a part only to the extent indicated in paragraph 124(4) above.

142. Moreover, all those incidents which were treated as insufficient information cases were nevertheless looked at for the purposes of seeing whether there was a pattern to them.

Accordingly, even if some were wrongly put in that category, it would not invalidate the evaluative assessment which was relevant to future risk.

(5) Number of possible breaches to be expected in a conflict of this nature

143. Criticism was made to the effect that paragraph 78 of the Decision Paper wrongly treated as relevant the suggestion that the number of possible breaches was within the margin to be expected in a conflict of this nature. Mr McClelland's argument was that if so, all it evidenced was that such violations were likely to continue, and so it would be irrational to conclude that there was no clear risk of future violations. We disagree.

144. The passage in question is in a section of the Decision Paper addressing whether the possible breaches constituted a pattern which gave reason to doubt the willingness and capability of Saudi Arabia to comply with IHL. Paragraph 78 stated that the detail which had been set out in the Paper "is consistent with a limited number of errors, well within the margin that would be expected in a conflict of this nature". The evaluative question facing the Secretary of State had to look not merely at individual errors in the past, but to consider whether they evidenced some systemic weakness which had not been identified or addressed and which gave rise to a clear risk of IHL violations in the future. The fact that the number of possible breaches was so small compared with the number of airstrikes and sorties could rationally be relied on as a source of comfort that there were not such systemic weaknesses.

(6) Methodology: the meanings of "possible" and "unlikely"

145. It was common ground that the IHL Analysis methodology was intended to filter out incidents in which a breach of IHL was "unlikely" but retain those where it was "possible". The language of paragraphs 22(b) and 23 of the Decision Paper, and in particular the reference to "possible" as including "just possible", might be problematic if viewed through a lawyerly approach to construction. "Unlikely" is not the antithesis of "possible" as a matter of normal language, and certainly not if "possible" extends all the way down the scale of likelihood to "just possible" as seems to be suggested by paragraph 23. It was submitted on behalf of CAAT and Mwatana, and vigorously argued by Mr McCullough, that "unlikely" occupied only that territory on the scale of likelihood below what was just possible.

146. We regard that submission as unrealistic for a number of reasons. First, the Decision Paper is not a statute and is not to be construed in an over lawyerly way as if it were. It identifies a methodology devised in order to conduct the exercise required by the Court of Appeal judgment; it must be interpreted by reference to the purpose of the exercise and its practical application. If unlikely meant something less possible than "just possible", it would exclude even the remotely possible and in substance mean impossible, or something vanishingly close to it. To treat such an incident as an established breach for the purpose of the Criterion 2c exercise would be positively misleading and unhelpful. It would require inclusion of all or almost all incidents, including those where there was only the very remotest possibility of an IHL breach. That could not sensibly inform an assessment of whether there was, prospectively, a *clear* risk of a *serious* breach. Secondly, such an approach would deprive the word unlikely of its natural meaning, and indeed of any relevant meaning. Thirdly, paragraph 77 of the Decision Paper, at the start of the part headed "Conclusions on IHL Analysis", emphasised that the MOD had applied a "relatively low threshold" of "possible". If what was excluded was only the impossible

or virtually impossible, this would not be characterised as only a relatively low threshold but as an extremely low one. Similar considerations apply to the expression "low bar" in paragraph 145. Fourthly, it is clear that in the way the IHL Analysis was applied, incidents were filtered out on the basis that they were unlikely in the normal meaning of the word. It was the word used in the Tracker and it can be seen from detailed information in the Tracker itself, in the closed material we have examined, that "unlikely" was being given its ordinary meaning. Fifthly, the methodology included an assessment of those incidents that had been put in the "unlikely" category, for the purposes of identifying any trends. That would have been a meaningless and unhelpful exercise if that category were populated only by incidents where it was impossible or virtually impossible that there had been a breach of IHL.

147. We therefore interpret the methodology described in the Decision Paper as being that cases were filtered out where it was assessed that it was unlikely that there was a breach of IHL, using that word in its normal sense. We should add that if the methodology intended to be applied was that suggested by Mr McCullough, but what was done was to apply the methodology as we have understood it, the latter could not in our view have formed an irrational approach so as to infect the ultimate Criterion 2c decision with irrationality. Indeed, in our view it would have been irrational to apply a methodology in the way Mr McCullough sought to interpret it.

(7) Mr Jaffey's 8 incidents

148. These were, in chronological order:

(1) the Abs hospital strike of August 2016;

(2) the Great Hall incident of 8 October 2016;

(3) a strike on a wedding in Bani Qais on 22 April 2018;

(4) the Dhayan bus strike of 9 August 2018;

(5) the death of Mr Khashoggi in October 2018;

(6) a strike on a hospital in Kitaf, Sa'ada on 26 March 2019;

(7) the attack in Al Jawf on 14 February 2020; and

(8) an attack in Al Haq on 6 August 2020.

(a) Abs hospital 15 August 2016

149. This attack hit Abs Hospital, Hajjah, one of the hospitals supported by MSF, on 15 August 2016, as a result of which it was reported that 19 people were killed and 24 injured. Details of the open source material in relation to this attack appear from the Court of Appeal judgment at paragraphs 108 to 111. A JIAT press statement released in December 2016 concluded that "damages inflicted on the building were because a targeted vehicle (which was a legitimate military target) next to the building which were unintentional." (sic) The Panel of Experts did not accept this and said that its investigations suggested that the vehicle was a civilian car transporting wounded individual(s) (wounded, possibly from a previous airstrike elsewhere) to the hospital.

150. We say more about this in our closed judgment. The categorisation of this incident in the IHL Analysis cannot be said to be irrational and cannot support an argument that the decision of the Secretary of State was irrational.

(b) The Great Hall strike 8 October 2016

151. The open source material surrounding this incident was summarised in paragraph 113 of the Court of Appeal's judgment. The episode was addressed in detail by the second UN Panel of Experts report. In brief, two guided bombs were dropped on 8 October 2016 in the mid afternoon, when around a thousand people were attending the funeral. The funeral was of the father of an acting Minister of the Interior and, as the UN Panel put it, "a significant number of Houthi-Saleh-affiliated military and political leaders were expected to attend". It was an incident which was immediately identified by the UK Government at the time as of great concern. JIAT published its initial report on 15 October 2016, concluding that there had not been compliance with the Coalition rules of engagement and that appropriate action should be taken against individuals and compensation paid to the families of victims.

152. We say more about this in our closed judgment. The categorisation of this incident in the IHL Analysis cannot be said to be irrational and cannot support an argument that the decision of the Secretary of State was irrational.

(c) Strike on a wedding in Bani Qais 22 April 2018

153. The open source documents reported that this air strike hit guests at a wedding resulting in 21 being killed, including 11 children, and 90 injured. The UN Panel of Experts suggested that it breached the principles of proportionality and taking feasible precautions. JIAT found "a number of errors indicating non-compliance with some of the rules of engagement procedures to minimise damage."

154. We say more about this in our closed judgment. The categorisation of this incident in the IHL Analysis cannot be said to be irrational and cannot support an argument that the decision of the Secretary of State was irrational.

(d) Dhayan bus strike 9 August 2018

155. This was an airstrike on a bus in a busy civilian market in Dhayan, Sa'ada, in which the open sources reported approximately 43 killed and 63 wounded. The UN Panel of Experts stated that it breached IHL. JIAT concluded that the Coalition believed the bus to be carrying Houthi personnel; that orders to attack the bus were given without following rules of engagement to minimise civilian casualties; and that when the bus moved, an order to abort was given but that this did not reach the pilot in time.

156. We say more about this in our closed judgment. The categorisation of this incident in the IHL Analysis cannot be said to be irrational and cannot support an argument that the decision of the Secretary of State was irrational.

(e) Death of Mr Khashoggi in October 2018

157. As explained above, the murder of the journalist Jamal Khashoggi by Saudi nationals inside the Saudi embassy in Istanbul on 2 October 2018 was considered at some length

in the Decision Paper as relevant to the UK Government's analysis of the Saudi decision-makers' attitude to international law, and specifically IHL; and to the value of Saudi high-level assurances in respect of IHL compliance. The incident, and subsequent Saudi Arabian actions in relation to it, raised serious concerns. On balance, however, the Government's view was that the Khashoggi incident did not speak directly to there being an increased risk, let alone clear risk, that UK-supplied arms and equipment might be used in a serious violation of IHL in Yemen, because the prosecution of the conflict was separate from the Saudi treatment of political dissidents. The assessment was that, based on the full range of evidence available, it was clear that the Saudi intent to comply with IHL in the conduct of the Yemen campaign was genuine. We have said a little more about this in our closed judgment.

158. The assessment was careful and balanced, and made by those with particular expertise. It cannot meet the high threshold of being characterised as irrational or supporting an argument that the decision of the Secretary of State was irrational.

(f) Strike on a hospital in Kitaf, Sa'ada 26 March 2019

159. This was an airstrike in which the open source documents reported that 7 were killed, including 4 children, and 6 injured. The UN Panel of Experts concluded that it was a violation of IHL. The JIAT report concluded that "the military commander hastened the work procedure to ensure that military advantage is not lost, which resulted in inaccuracies in the assessment of the possibility of civilians entering the targeting area."

160. We have said more about this in our closed judgment. The categorisation of this incident in the IHL Analysis cannot be said to be irrational and cannot support an argument that the decision of the Secretary of State was irrational.

(g) Attack in Al Jawf on 14 February 2020

161. We have said more about this in our closed judgment. The categorisation of this incident in the IHL Analysis cannot be said to be irrational. We are satisfied that it cannot support an argument that the decision of the Secretary of State was irrational.

(h) Attack in Al Haq on 6 August 2020

162. We have said more about this in our closed judgment. The categorisation of this incident in the IHL Analysis cannot be said to be irrational. We are satisfied that it cannot support an argument that the decision of the Secretary of State was irrational.

(8) The 3 Mwatana cases

163. These 3 cases were addressed in argument by Mr McCullough by reference to the open and closed evidence. They were as follows:

a. An allegation of an airstrike on 24 September 2016 airstrike hitting a residential complex at Jiblah Fork in Al-Dhihar District, Ibb Governorate. The open source reporting identified ammunition fragments indicative of a Saudi strike nearby.

b. An allegation that an airstrike on 21 September 2016 hit a residential building in the Souq Al-Honood area in Hodeida city, killing at least 26 civilians and wounding 60 others. The JIAT report said JIAT had vetted the incident, and reviewed all documents, including the Air Tasking Order, mission execution procedures, daily mission schedule,

after-mission reports, satellite images of the targeted site and Souq Al-Honood neighbourhood location, video recordings of the mission, video of the Battle Damage Assessment (BDA), and weapons technical documents amongst other things. It concluded that Coalition forces received credible intelligence information that a number of prominent leaders of Houthi armed militia held a meeting in the Presidential Palace, which was considered to be a military target with high value involving time sensitive targets. The technical capabilities of the guided weapons made it unlikely that they would have accidentally hit the residential complex, which was about 500 meters away and beyond the target from the aircraft's direction of approach (which was significant because if the guidance to the weapon failed, it would be expected, based on the available technical information, to fall short of the target rather than overshooting it). JIAT also evaluated the news, reports and photographs that coincided with the air strike on the Palace, which indicated that the Souq was hit by a missile attack by Houthi armed militia, one hour after the Coalition targeted the Presidential Palace. The JIAT imagery of the Souq damage suggested multiple locations of damage, indicating multiple attacks by projectiles which were inconsistent with aerial attack, and no sign of debris from a Saudi air strike. It concluded that the Coalition forces were not responsible for the damage caused to the Souq.

c. A report of an airstrike on 28 August 2015 hitting a residential building. The JIAT report claims that there was no airstrike at the alleged location In any event, the open source reporting on the debris found in this incident suggests that it did not come from a Saudi aircraft but from that of a different member of the Coalition.

164. We consider each of them in our closed judgment. We conclude that none supports the submission that the Secretary of State's categorisation of them or her decision on the Criterion 2c risk was irrational.

(9) The SA Annex cases

165. We have also considered in our closed judgment individual cases which Mr McCullough submitted, with the benefit of the closed material, had been miscategorised or otherwise undermined the IHL Analysis. For the reasons given in our closed judgment, we have concluded that it cannot be said that the categorisation of any of them was irrational or that, singly or cumulatively, they undermined the rationality of the Secretary of State's decision.

166. Having considered all the material, in closed as well as open, we therefore reject Ground 1.

(N) GROUND 2

167. We have rejected the submission that the categorisation of any of the incidents in the IHL Analysis was irrational. The pattern analysis therefore fell to be performed in respect of the possible breaches which the IHL Analysis revealed.

(1) The possibles

168. These are considered further in our closed judgment.

(2) The Secretary of State's pattern assessment

169. As we have explained, past breaches could not render irrational the Secretary of State's assessment of the Criterion 2c future risk unless they suggested some underlying systemic weakness which was unaddressed so as to undermine the conclusion derived from the other material considered, including the thematic analysis considerations, which pointed to Saudi Arabia having the intention and capability to comply with IHL. That is the nature of the pattern analysis which fell to be undertaken.

170. The open arguments advanced on behalf of CAAT and Mwatana depended in large part upon there being many more incidents which should have been characterised as possible IHL violations, a proposition we have rejected. They also depended upon applying such a high level of generality to the categorisation for pattern purposes (such as breach of rules of engagement) as to divorce the analysis from the purpose it serves as part of the overall Criterion 2c risk assessment. Moreover, regard must be had to the dates of the few possibles in the light of the evidence about constant improvement by the Saudis of the kind we have described above and in our closed judgment.

171. To be fair to Mr Jaffey and Mr McClelland, the arguments advanced in open were without sight of the closed material which identified the incidents treated as possible IHL violations and included the full text of the part of the decision Paper which discussed the pattern question. It is notable, however, that Mr McCullough, who had the benefit of having seen the closed material, did not subject that part of the Decision Paper to any criticism.

172. The approach to the pattern question in the Decision Paper and the conclusions reached seem to us to be sound and well-reasoned. The identification of the possible breaches by the IHL Analysis was, we have held, not irrational. There were very few by comparison with the very large number of sorties and airstrikes. We have described them in some detail in our closed judgment. It is apparent from the detail of the cases that they were disparate in nature and not suggestive of any systemic weakness which had not been addressed. That, at the very lowest, was a rational view. Moreover, the review of the Annex 5 incidents, which included also "unlikely" and "insufficient information" cases, did not give rise to concerns about Saudi Arabia's attitude or capability.

173. With the benefit of seeing the closed material, we have concluded, with little hesitation, that there is no basis for treating the Secretary of State's approach or answer to the pattern question as irrational.

(3) Events since the date of the Decision Paper

174. For reasons we discuss more fully in our closed judgment, there is nothing in events since the New Decision was taken which changes our view of the continuing rationality of the Secretary of State's Criterion 2c risk assessment.

(4) Paragraph 78 of the Decision Paper

175. We reject Mr McClelland's argument that there is anything in paragraph 78 of the Decision paper to undermine this conclusion. His submission was that there was an error in paragraph 78 of the Decision Paper in treating as relevant the suggestion that the

number of possible breaches was within the margin to be expected in a conflict of this nature; and that, if so, all it evidenced was that such violations were likely to continue, making it irrational to conclude that there was no clear risk of future violations. We disagree. The passage in question was addressing whether the "possible" breaches constituted a pattern. The number involved was plainly relevant to that question, and the number which might be expected, as well as their nature, was relevant to the question whether they were suggestive of a systemic weakness.

(5) The pattern emails

176. We have set out the "pattern emails" which Mr Jaffey submitted demonstrated circular and invalid reasoning. We disagree that they do so. The SPO response in their email of 25 May 2021 explained that the point they were making was that if the putative "pattern" was expressed at the level of generality of two of the four pillars of IHL being applied, namely proportionality and feasible precautions, it would be wholly unsurprising if most or all of the possible violations fell into such a category because these were the ones likely to be engaged in air strikes in the circumstances of the Yemen conflict. It was, however, too much of a leap to say that such commonality must be a concerning pattern. When examining the possibles the MOD panel had had very much in mind consideration of whether the actual nature of any commonality might evidence a problematical pattern. That is a rational and coherent explanation and betrays no circularity.

177. We therefore reject Ground 2.

(O) CONCLUSIONS

178. We have rejected all four grounds of challenge. The claim will therefore be dismissed.