AC-2023-LON-003634

In the High Court of Justice
King's Bench Division
Administrative Court

In the matter of an application for judicial review

THE KING

on the application of

Al HAQ

Claimant

-and-

SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendant

-and-

BAE SYSTEMS PLC

Interested Party

Notification of the Judge's decision on the application for permission to apply for judicial review (CPR 54.11, 54.12)

Following consideration of the documents lodged by the Claimant and the Acknowledgement of Service filed by the Defendant

ORDER by the Honourable Mr Justice Eyre

1. The Claimant is granted permission to rely on the Reply.
2. The application for permission to apply for judicial review is refused.
3. The costs of preparing the Acknowledgement of Service are to be paid by the Claimant to the Defendant, summarily assessed in the sum of £28,230.38.
4. Paragraph 3 above is a final costs order unless within 14 days of the date of this Order the Claimant files with the Court and serves on the Defendant a notice of objection setting out the reasons why he should not be required to pay costs (either in the amount required by the costs order, or at all). The submissions shall not exceed 3 pages. If the Claimant files and serves notice of objection, the Defendant may, within 14 days of the date it is served, file and serve submissions in response (not to exceed 3 pages). The Claimant may, within 7 days of the date on which the Defendant's response is served, file and serve submissions in reply (not to exceed 2 pages).
5. The directions at paragraph 4 apply whether or not the Claimant seeks reconsideration of the decision to refuse permission to apply for judicial review.

   (a) If an application for reconsideration is made, the Judge who hears that application will consider the written representations

filed pursuant to paragraph 4 above together with such further oral submissions as may be permitted, and decide what costs order if any, should be made.

(b) If no application for reconsideration is made or if an application is made but withdrawn, the written representations filed pursuant to paragraph 4 above will be referred to a Judge and what order for costs if any, should be made will be decided without further hearing.

Reasons

1. Although a Reply is normally neither necessary nor encouraged it is appropriate for the Claimant to be given permission for the Reply in the circumstances here having regard to the developing situation and in particular to the information provided in Summary Grounds of Defence (to which it is right that the Claimant should have an opportunity to respond).

The Decision of 18th December 2023 and the Defendant's continuing Approach.

Ground 1:

2. The Claimant's case is that the circumstances in Gaza and the actions of Israel are such that the only rational approach having regard to the SELC was and is to suspend the relevant licences for exports to Israel. For the following reasons that contention is not arguable with a realistic prospect of success.

3. The course of keeping the question of the suspension of the licences under review is well within the range of conclusions open to the Defendant when having regard to the SELC subject potentially to the quality and intensity of such review. The explanation given by the Defendant shows a level and intensity of review which cannot arguably be said to be at a level such that it is not rationally open to the Defendant to rely upon it.

4. It cannot be said that it was not rationally open to the Defendant to regard criterion 2(c) as the primary criterion to be addressed. I will consider below the alleged errors of law in the Defendant's approach. It is relevant in the consideration of the rationality of the Defendant's approach to criterion 2(c) that the Claimant at paragraphs 24 and 123 of the Statement of Facts and Grounds contemplates an approach of undertaking a review (albeit in the latter case against the background of a suspension having been made).

5. Criterion 2(c) requires the Defendant to consider whether there is a risk that the items might be used in a relevant violation of international humanitarian law. However, there has to be a clear risk and it has to be of a serious violation. There is a high hurdle to be surmounted to establish that the Defendant's conclusion as to those matters was irrational and there is no realistic prospect of that hurdle being surmounted here. In that regard I revert to the point that it cannot realistically be said that it was not rationally open to the Defendant in light of a changing situation with different views being expressed as to

events on the ground to conclude that a continuing review was appropriate provided that the review was of a quality such that the Defendant could rationally regard it as being adequate to enable a decision on the criterion. It cannot be said with a real prospect of success that the review being undertaken here was not of that quality. To the extent that the minimum requirements set out at paragraph 24 of the Statement of Facts and Grounds differ from the review being undertaken those are matters of degree and/or within the scope of the Defendant's rational judgement.

6. The Defendant was entitled to regard her conclusion as to criterion 2(c) as governing the approach to criteria 1(b) and 7(g).

Ground 2.

7. The Claimant has identified two alleged errors of law. To the extent that it continues to say that the conclusion reached by the Defendant must necessarily have involved other unidentified errors of law then a ground with a real prospect of success has not been shown in light of the conclusion I have reached above in respect of ground 1.

8. It is said that the Defendant erred in construing international humanitarian law to mean Israel's understanding of that law. Such an approach would involve an error of law but I am satisfied that this ground is not arguable because it arises from a misreading of the Defendant's approach as follows.

9. It is apparent from the Summary Grounds of Defence that the Defendant is not regarding Israel as the conclusive interpreter of the requirements of that law. Instead she is having regard to Israel's understanding of its obligations as an element in determining whether there is an intention on the part of Israel to comply with its obligations. She took account in that regard of the fact that Israel was contending that it was complying with its obligations as it understood them as part of her assessment of whether there was a clear risk of a serious violation of those requirements. That was an approach which was rational and lawful. A state saying that it is intending to comply with its obligations might be evincing an intention not to comply if its understanding of its obligations is so entirely misconceived as to render those obligations nugatory. That is, however, a matter of degree and there is no arguable error of law in saying that Israel's intention to comply was a relevant consideration. It was not determinative but it is apparent that the Defendant did not regard it as determinative.

10. As to the contention that there was an error of law as to the ATT and the Genocide Convention the difference between the parties' positions turns not on the interpretation of the legal provisions but on the view as to whether there is a risk of genocide. It cannot realistically be said that in circumstances where the Defendant is keeping the position under review that the conclusion in that regard was not rationally open to her.

Ground 3.

11. This now amounts to a contention as to the information which the Defendant should have obtained and the weight which she should have given to the information she had. The test is one of rationality as explained in *Balajigari.* In that regard the approach taken was rationally open to the Defendant and the contrary is not realistically arguable in light of the intensity of the review being undertaken and the continuation of that review.

The earlier Decisions.

12. The Claimant advances a challenge to the earlier decisions which it says were inherent in the fact of the earlier assessments and the failure to suspend the licences during the period before 18th December 2023. There are two reasons why permission is to be refused in respect of this somewhat unparticularised challenge. The first is that the challenge to those decisions is academic in light of the decision of 18th December 2023 and the approach of a continuing review. The second is that in the context of the developing situation it cannot be said that a lawful and rational application of the criteria necessarily compelled a suspension at those times.

Costs.

13. In light of the refusal of permission it is not open to me to make a costs capping order. I am satisfied that the amount of the Defendant's schedule of costs is reasonable and proportionate.

Stephen Eyre
Signed

The date of service of this order is calculated from the date in the section below

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For completion by the Administrative Court Office

Sent / Handed to

either the Claimant, and the Defendant [and the Interested Party]
or the Claimant's, and the Defendant's [and the Interested Party's] solicitors

Date: 19/02/2024

Solicitors: BINDMANS LLP
Ref No.

Notes for the Claimant

If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed Form 86B within 7 days of the service of this order.

A fee is payable on submission of Form 86B. ***For details of the current fee please refer to the Administrative Court fees table at*** https://www.gov.uk/court-fees-what-they-are.

Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out.

The form to make an application for remission of a court fee can be obtained from the gov.uk website at https://www.gov.uk/get-help-with-court-fees