6. THE ARGUMENT AGAINST A JUDICIAL REVIEW

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Skeleton Argument of Philip Sales & Jemima Stratford for the Treasury Solicitor, 5 December 2002

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR PERMISSION

TO APPLY FOR JUDICIAL REVIEW

Ref. No. CO/542912002

BETWEEN THE QUEEN

On the Application of the Campaign for Nuclear Disarmament

Proposed Claimant

and -

THE PRIME MINISTER

Proposed First Defendant

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Proposed Second Defendant

THE SECRETARY OF STATE FOR DEFENCE

Proposed Third Defendant

SKELETON ARGUMENT OF THE PROPOSED DEFENDANTS

Time Estimate: 1 - 1 1/2days

Pre-Reading: skeleton arguments; witness statement of Peter Ricketts; Detailed Statement of Grounds

Pre-Reading Time Estimate: 3 hours

INTRODUCTION

1. This is an application by the Proposed Claimant, the Campaign for Nuclear Disarmament ("CND") for permission under CPR Part 54 to bring a claim for judicial review. The application relates to UN Security Council Resolution 1441 on Iraq, adopted on 8 November 2002 ("SCR 1441").

2. Following a directions hearing before Mr Justice Maurice Kay on 29 November 2002, the, Court has ordered that the hearing on permission

on 9 December 2002 may (if permission is granted) proceed directly to a substantive hearing, but limited to the preliminary issues raised by the proposed claim. Accordingly, the substantive issue which this application seeks to raise before the Court (addressed at paras 13-16 and 51-88 of the Detailed Statement of Grounds) is not addressed in this skeleton argument. As was made clear to the Court, the Government submits that it has no obligation in law to engage in a debate with CND about the substantive issues of international law referred to in the claim, and considers that it would be detrimental to the national interest for it to engage in a substantive debate on those issues at the present time.

3. CND seeks:

"A declaration that UN Security Council Resolution 1441 does not authorise the use of force in the event of its breach and that a further UN Security Council Resolution would be needed to authorise such force." (Section 6 of the Claim Form).

Section 3 of the Claim Form does not identify any particular decision to be re-viewed. Instead it alleges that the challenge is to "a misdirection of law as to the effect of [SCR 1441]". In fact, as CND is forced to acknowledge in its Detailed Statement of Grounds (e.g. paras 44 and 50 (2)), the United Kingdom Government has deliberately, and after careful consideration, refrained from making a definitive statement of its legal position under international law in relation to these highly sensitive issues concerning the international relations of the United Kingdom [Ricketts 1, in particular paras 3 and 8]. Accordingly, the suggestion of "a misdirection of law" is purely speculative. The true target and purpose of this application is to require the Government to make such a definitive statement.

4. For the reasons which are developed below, the Proposed Defendants[1] respectfully submit that this claim is misconceived, and that in view of insuperable legal obstacles facing CND no permission should be granted.

In the alternative, if permission is granted, the claim should be dismissed for the reasons set out below.

NON-JUSTICIABLE

5. CND present the preliminary issue as being whether it is "inappropriate as a matter of principle" for the Court to rule on the legal merits of the substantive issue (Detailed Statement of Grounds, para 4(1)). In fact, as the Court of Appeal has recently emphasised in *R (Abbasi) v Sec. of State for Foreign and Commonwealth Affairs and anor.* [2002] EWCA Civ. 1598 (6.11.02), the issue of justiciability depends, not on general principle, but on subject matter and suitability in the particular

case" (para 85). Accordingly, it is necessary to consider the particular context of this case, its subject matter and the suitability of the Court being asked to make the declaration which is sought.

6. The claim is founded on an assertion that the United Kingdom Government has misdirected itself as to international law. There is no such misdirection, and CND are unable to point to one. The furthest that the United Kingdom has gone is to reserve its position [Ricketts 1, para 7]. This potential challenge is therefore in fact to the decision of the Government to date not to make a definitive statement of its legal position under international law. Any decision by the Government to issue a definitive statement of its views on a matter of international law involves sensitive judgments as to the effect of such a statement on this country's international relations [Ricketts 1, paras. 3-4 and 6-8]. That is particularly true in the position adopted by this country in relation to a difficult international to situation such as that addressed by SCR 1441. Thus the proposed claim is in substance an attempt by CND to dictate the conduct of foreign policy.

7. As a matter of domestic law, decisions as to the conduct of the United Kingdom's foreign policy and international relations with other states are entrusted to the executive, who are subject to democratic accountability in Parliament. The executive Government is best placed to assess all the multifarious ramifications for this country of decisions in the conduct of foreign relations. As Lord Hoffmann recently identified in the parallel (and, in this case, closely related) field of national security, the principle of the separation of the powers requires the courts to respect the executive's responsibility in this area: *Secretary of State for the Home Department v. Rehman* [2001] 3 WLR 877 at paras. 50-54, 57 and 62. See also *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, paras. 80-87 (Laws LJ: in the minority in the result, but here stating general propositions with which the majority expressed no disagreement. In the COMBAR lecture 2001, "Separation of Powers" [2002] *Judicial Review* 137, Lord Hoffmann says that the conduct of foreign relations and the security of the State are matters which "are wholly within the competence of the executive" and thus "obviously not justiciable" (para. 11).

8. It is well recognised by the English courts that decisions on the conduct of the UK's international relations with foreign states are not justiciable by the courts: see e.g. *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 411C-F (Lord Diplock), 418A-D (Lord Roskill); *R v Secretary of State for Foreign & Commonwealth Affairs, ex p. Everett* [1989] 1 QB 811 esp. at 816F-817B per O'Connor LJ and 820B-G per Taylor LJ; *R v Secretary of State for Foreign and*

Commonwealth Affairs ex parte Ferhud Butt [1999] 116 International Law Rep. 608 (esp. 615 per Lightman J; and p. 622 in the Court of Appeal per Henry LJ); *R v Secretary of State for Foreign & Commonwealth Affairs, ex p. Pirbhai* (1985) 107 International Law Rep. 462 (CA), esp. at p. 479 per Sir John Donaldson MR ("... in the context of a situation with serious implications for the conduct. of international relations, the courts should act with a high degree of circumspection in the interests of all concerned. It can rarely, if ever, be for judge to intervene where diplomats fear to tread."); *In the Matter of Foday Saybana Sankoh,* CA, unrep., 27 Sept. 2000, para. 9 per Laws LJ ("... that involves the proposition that the court should dictate to the executive government steps that it should take in the course of executing Government foreign policy: a hopeless proposition").

9. Those cases were referred to as "powerful" authority by the Court of Appeal in *Abbasi* (paras. 37-38 and 80). The limited circumstances in which the Court was there prepared to envisage that there might be scope for judicial review of a refusal to render diplomatic assistance to a British subject who is suffering violation of a fundamental human right as the result of the conduct of the authorities of a foreign state have no application or relevance to the present claim. Thus the Court of Appeal confirmed in *Abbasi* that the Government "must be free to give full weight to foreign policy considerations, which are not justiciable" (para 99).

10. CND seek to argue that it is appropriate for the Court to review "any misdirection in law" (there is none identified, see above) on which the Government "in making its decision to go to war" (Detailed Statement of Grounds, para 28). No such decision has in fact been made. However, quite apart from this flaw in the claim, this submission of CND does reveal the extent to which this claim is intimately connected with questions of military and defence policy. These are matters of high policy relating to a decision as to whether and when the United Kingdom would engage in military action against another state. Such matters are pre-eminently non-justiciable, as stated, eg, in *De Smith, Woolf & Jowell, Judicial Review of Administrative Action* (5th ed.) at para 6-045:

    "There will be some questions of 'high policy' such as the making of treaties, the defence of the realm, the dissolution of Parliament and the appointment of Ministers where the courts as a matter of discretion do not intervene, because the matters are simply not justiciable." (footnote omitted)

11. Having cited this passage in *Marchiori v Environment Agency and ors.* [2002] EWCA Civ 03 (25.2.02), Laws LJ went on to summarise the effect of the case law as follows:

> "38. Taking all these materials together, it seems to me, first, to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy... The court is unequipped to judge such merits or demerits... The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown's first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions....."

Lord Justice Laws' caveat to this statement of principle, on which CND seek to rely (Detailed Statement of Grounds, para 26 and 36) was in relevant part:

> "40 .... Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy."

CND have not sought to suggest, nor could they, that the present case discloses any actual bad faith on the part of ministers in making decisions of high policy.

12. It is firmly established that international instruments such as SCR 1441 do not form part of English law, and that the courts do not have jurisdiction to rule upon the true meaning and effect of such obligations which apply only at the level of international law: see, most recently, *R v Lyons* [2002] 3 WLR 1562, in particular per Lord Hoffmann at para 27, citing *J H Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418.

13. Moreover, it is well established that the English courts do not have jurisdiction to rule upon the obligations of foreign states under international instruments: see, e.g., *British Airways v. Laker Airways* [1985] AC 58 at 85-86 (per Lord Diplock). SCR 1441 directly affects the rights and obligations in international law of a range of other states, apart from the United Kingdom. To do so would also involve a breach of comity, which the courts are astute to avoid: see *Buck v. AG* [1965] 1 Ch 745 at 770-771 (per Lord Diplock) and *R. v. Secretary of State*, ex parte *British Council of Turkish Cypriot Associations* 112 ILR 735 at 740 (per Sedley J).

14. None of these clear principles is affected, contrary to the contentions of CND (e.g. Detailed Statement of Grounds, para 31), by wholly unexceptional statements made to the effect that the Government will

always act in accordance with international law [e.g. p.110 of the Bundle]. The substantive issue on which CND seeks a ruling plainly concerns the interpretation of an international instrument, SCR 1441. Accordingly, the Court should for this additional reason hold that this application is not properly justiciable.

15. Indeed, even at the level of international law, the question whether military action will be justified against Iraq must depend upon the particular circumstances applicable at the time when any decision to take such action may be made. Therefore CND is wrong to state that if the issue came before an international court, there would be no doubt that it would be capable of judicial determination (Detailed Statement of Grounds, para 27). Any judgment, both by the United Kingdom Government and by any international court, would have to be made against the actual circumstances that arose: see Ricketts 1 para 10, citing a statement by the Foreign Secretary in the House of Commons on 25 November.

16. A decision by the United Kingdom Government, or by its courts, to issue a definitive and reasoned statement or judgment concerning the true meaning and effect of SCR 1441 would affect not only the United Kingdom, but also other states. This would itself be a matter bearing upon the substantive conduct of the international affairs of the United Kingdom and would affect its relations with other countries. It would be the fact of a decision being made to issue such a statement which would be a matter of high policy (c.f. Detailed Statement of Grounds, para 35). The Court of Appeal in *Abbasi* was mindful of such considerations in refusing any relief. Two of the four reasons noted at para 107 for refusing relief were:

> "i)... if the Foreign and Commonwealth Office were to make any statement as to its view of the legality of the detention of the British prisoners, or any statement as to the nature of discussions held with United States officials, this might well undermine those discussions.
>
> ii) On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time." (emphasis added)

17. The witness statement of Peter Ricketts, Director General for Political Affairs at the Foreign and Commonwealth Office, explains both the similar and the additional concerns held in relation to SCR 1441. In summary, he highlights the following principal points:

(a) The assertion of arguments of international law by one state is in practice regarded by other states as a political act, which may arouse upset or, depending on the state, even enmity (para 3).

(b) This is especially true in a situation which is sensitive and where tension is high on all sides, where the issue of international law affects many states, and where the successful conduct of international affairs may dictate that matters should be left open for diplomatic negotiation (para 4);

(c) To disclose the Government's understanding of the legal position under international law relevant to an international negotiation could be prejudicial to the success of the Government in that negotiation, and could be of immense value to any potential adversary (para 5);

(d) Accordingly, the greatest care should be exercised and sensitive diplomatic judgment be brought to bear before the Government commits itself to supporting arguments in international law, which may prove controversial for friends and/or opponents and which may compromise the Government's own negotiating position as a tense international situation develops (para 6).

18. For all of these reasons, the subject matter of CND's claim is non-justiciable and is wholly unsuited to a claim for judicial review.

NO DUTY TO GIVE REASONS

19. Further and in any event, the essence of CND's proposed claim is to require the Government to give reasons for its understanding of the legal position on the interpretation of SCR 1441. That is part of what was sought by CND in its letter before action [Bundle, e.g. p. 359E], and it would be the practical effect if permission were granted and these proceedings were to result in any declaration.

20. The conditions under which a public authority may come under a duty at law to give reasons are not satisfied in this case. It is well established that there is no general obligation to give reasons, and the particular factors which may in a particular case give rise to such an obligation are not present in the circumstances of this case: see, especially, *Stefan v GMC* [1999] 1 WLR 1293 (PC), 1300 and 1301G-1303H. This is in part because a universal requirement for reasons may "impose an undesirable legalism into areas where a high degree of informality is appropriate" (1300F). Unlike hearings before the Health Committee of the GMC which were at issue in *Stefan*, there are numerous and weighty grounds of “policy” and “public interest” (1303H) justifying no requirement to give reasons for the United Kingdom's view on the interpretation of SCR 1441 [Ricketts 1, paras 3 -6 and 8 - 10].

PREMATURE

21. Further and again in any event, there is at the present time no decision in relation to which reasons could be given. No decision has in fact been taken as to whether and when the armed forces of the United Kingdom might be deployed against Iraq. This is acknowledged by CND in the Detailed Statement of Grounds, albeit with equivocation (especially para 44). For that reason alone, this application for permission should be refused.

22. The furthest that the Secretary of State for Foreign and Commonwealth Affairs has judged it appropriate to go at this time is to state that the position of the United Kingdom Government must be reserved [House of Commons, 25 November, quoted at Ricketts 1, para 7]. No definitive view, either one way or the other, of the legal position under international law has been expressed. That reflects a considered position, which is judged to be in the national interest and in the interests of the conduct of the United Kingdom's international relations [Ricketts 1, para 8].

23. CND are therefore constrained to point to the wholly unexceptional and unsurprising statements made by the Government that the United Kingdom Government will act within international law [e.g. Detailed Statement of Grounds, para 28]. This is no more solid a foundation for the claim than would be a statement that the Government will act in accordance with domestic law. It cannot enable CND to overcome such a fundamental obstacle to its challenge as the absence of any decision (let alone any justiciable decision). The present case is quite different to any of the cases on which CND seek to rely (in particular, Detailed Statement of Grounds, para 29), which concerned decisions which had actually been taken, in the past, and in relation to which the decision maker stated that he had relied on particular legal advice. Here, no such decision has been taken, or indeed may ever need to be taken.

24. The courts will not grant declaratory relief in relation to a matter which is abstract and theoretical. The fact that the timetable for future decisions may prove to be a tight one does not render this application, at the present time, any less hypothetical, abstract or theoretical. The courts can, in appropriate cases, hear applications with great expedition (see, e.g. *R v Portsmoutb Hospital, ex p. Glass* [1999] 2 FLR 905 where a declaration about how a patient should be treated if an emergency arose was refused, since it was not possible to know what would be the most appropriate treatment until the emergency occurred).

25. These proceedings do not concern specific facts which are already in existence. Rather they are premised upon conjecture and speculation by CND. See, for example, the unsupported (and contested) assertion at

Detailed Statement of Grounds, para 50(2) "although the government statements on the legality of attacking Iraq without a further UN Security Council Resolution are equivocal, they give a **strong indication** that the government is **minded** to attack without a further resolution" (emphasis added). Accordingly, CND cannot properly claim a declaration in relation to specific facts which are already in existence, and the basis upon which it seeks to found these proceedings is hypothetical, turning on facts and circumstances which have not yet occurred and may never occur at all (see *Zamir & Woolf, The Declaratory Judgment* (3rd ed.), 4.070, p.153). The formulation of a legal position with regard to a future Security Council resolution must be dependent upon the facts and circumstances prevailing at the time (for example, taking account of the nature of any material breach of SCR 1441 which may occur) [Ricketts 1, para 10].

26. Furthermore, there would be no public interest in the Court giving an advisory opinion on this hypothetical issue. For the reasons set out in the witness statement of Peter Ricketts, the public interest is entirely against the giving of any such opinion.

STANDING

27. A claimant for Judicial review must be able to satisfy the test of a "sufficient interest" in the subject matter of the proposed claim: section 31(3) of the Supreme Court Act 1981. This is a jurisdictional condition for the bringing of any application, and standing cannot be conferred by consent: *R v Secretary of State for Social Services, ex p. CPAG* [1990] 2 QB 540, 556E-F. Accordingly, the Court needs to address this jurisdictional condition, which is not purely a question of discretion, but rather a mixed decision of fact and law which the Court must decide on legal principles: *R v Secretary of State for the Environment, ex p. Rose Theatre Trust Co* [1990] 1 QB 504, 520C per Schiemann J. This is not a case in which it is not possible for the issue of standing to be addressed and determined at the permission stage; the Court has detailed submissions on all relevant factual and legal matters pertaining to standing.

28. Although the courts have in recent years taken a more generous approach to the test of sufficient interest, it does remain a hurdle which every claimant must surmount having regard to the particular circumstances and context of the challenge. The proposed Defendants do not doubt that CND has strongly held political views which it is of course entitled to ventilate to the public by all appropriate means. However, as is apparent from the witness statement of Carol Naughton, those political concerns focus upon the United Kingdom's nuclear weapons system, and more generally upon the peaceful resolution of

conflict [Naughton 1, para 1, Bundle p.360]. CND's concern is to prevent any use of force against Iraq, in particular involving Trident [Naughton 1, para 7, Bundle p.363]. Those are political concerns about the use of force, and in particular the use of nuclear weapons, and are self-evidently not a concern about whether, as a matter of international law, there would be a need for a second Security Council Resolution in the event of a material breach of SCR 1441. Merely to assert an interest, whether as an individual or a company, does not satisfy the sufficient interest test (see *Rose Theatre Trust Co* p.520E). Nor can such an interest be manufactured by entering into correspondence with a Secretary of State: *Rose Theatre Trust Co* p. 521H [c.f. Naughton 1, paras 3-6, Bundle p.361-363]. Accordingly, the proposed Defendants. submit that the Government is under no obligation to make a definitive statement of its legal position under international law to a private organisation such as CND, and that CND therefore lacks standing to bring this claim.

CONCLUSION

29. For all the reasons set out above, it is submitted that permission should be refused, alternatively the claim should be dismissed.

PHILIP SALES

JEMIMA STRATFORD

6th December 2002

[1] The Proposed First Defendant is not properly named as a Defendant. The Prime Minister is not an authorised Government Department within section 17 of the Crown Proceedings Act 1947