
7. THE CND CASE PRESENTED TO THE HIGH COURT

**Skeleton Argument of Rabinder Singh QC, Charlotte
Kilroy, and Michael Fordham, 6 December 2002**

IN THE ADMINISTRATIVE COURT

CO/5429/2002

R (CND) v Prime Minister and Secretaries of State

CLAIMANT'S SKELETON ARGUMENT

*judicial review: permission/preliminary issue**Monday 9 December 2002***SUGGESTED PRE-READING** (t/e: 2 hours)

- (1) The skeleton arguments
- (2) The grounds and statement of facts (**bundle tabs 1-3**)
- (3) Security Council Press Release SC/7564 (**pp.71-75, 78-82**)
- (4) Witness statement: Naughton (**pp. 360-412**); Ricketts (lodged separately.)

THIS PRELIMINARY HEARING

1. There are before the Court: (1) the claimant's application for permission to seek judicial review; and (2) the invitation, made by the defendants, that the Court should dismiss the claim by a ruling, as a preliminary issue and without consideration of international law, that the subject-matter is necessarily non-justiciable.
2. The claimant submits that: (1) the Court should grant permission for judicial review, there being no clean knock-out blow; and (2) the Court should decline the invitation to dismiss the case. Matters should proceed, as the defendants indicated to Maurice Kay J at the directions hearing (29.11.02) that they otherwise would, namely with a further 7 days to consider the position and put together whatever case on international law they wish to put before the Court.

WHAT THE CLAIM IS ABOUT

3. The claimant has filed detailed grounds for judicial review (**tabs 1-2**), to which attention is invited, whose contents are not repeated here. In essence:
 - (1) This claim for judicial review arises out of the prospect of military action by the United Kingdom against Iraq to enforce

United Nations Security Council Resolution 1441 (8.11.02) in the event of non-compliance by Iraq with its terms.

- (2) The substantive question raised in the proceedings is this: whether Resolution 1441 authorises States to take military action in the event of non-compliance by Iraq with its terms. The consequence, if not, is that international law would require a further mandate from the Security Council, for military action for such non-compliance with the terms of the Resolution.
4. The claimant submits that:
 - (3) The question on which the Court would be ruling is an issue of law. Indeed, it is in essence a question of interpretation (of the Resolution). The argument would be legal argument.
 - (4) It is moreover a relevant question of law.
 - (5) As a relevant question of law, the case should not be dismissed without consideration of its legal merits, on grounds of a suggested justiciability bar.
 - (6) The identification of the requirements of international law are not a matter within the exclusive province of the Executive.
 5. The claimant's argument on the substantive issue of international law is straightforward. It is set out in the grounds (**tab 1 para 13-16, tab 2 paras 51-88**). The nature of the argument can be seen from these main points:
 - 1) An aggressive war is an act contrary to the law of nations, and prohibited by peremptory norms of customary international law (*Nicaragua v United States*, [1986] ICJ Reports 14, at para 190) and by Article 2(4) of the UN Charter.
 - 2) A war is an aggressive war unless it is conducted with lawful justification. Unless a war is authorized by the Security Council under Chapter VII of the UN Charter, or justified under Article 51 of the Charter it is unlawful.
 - 3) Military action against Iraq is not authorized by Resolution 1441. Resolution 1441 sets out the obligations upon Iraq. It expressly deals with the question of enforcement (paragraph 11). It does not authorise States to use force. On the contrary, it provides that to the extent of any breach the matter would revert to the Security Council (paragraphs 4, 12).¹
 - 4) Resolution 1441 constitutes action under Chapter VII of the Charter of the United Nations. Chapter VII does not contain any authority for States to take military action for enforcement

of Security Council Resolutions. On the contrary: Article 2(4) contains a clear prohibition on use of force by States (which moreover reflects part of the jus cogens); Article 24 makes clear that force is a matter for the Security Council itself; and Article 51 shows that there is an exception, not for enforcement of Security Council Resolutions, but in special circumstances of self-defence.

Those points engage not foreign policy "debate", restricted to the political forum, but legal interpretation apt for consideration by a Court of law.

WHAT THE CLAIM IS NOT ABOUT

6. This claim for judicial review does not seek to raise any question as to whether it would be appropriate to seek a further mandate from the UN Security Council as a matter of (a) political judgment, (b) diplomatic function, or (c) foreign policy. Nor does this claim raise any question in which the Court is being asked to scrutinise an Executive decision, dealing directly with a matter of defence, on a ground relating to (i) its factual merits or (ii) its rationality. Nor does the claimant ask the Court for any remedy which would constrain the Executive in relation to any decision which it may take, whether as a matter of political judgment, diplomatic function or foreign affairs or at all, as to whether to take military action; or whether or how to deploy troops.

WHAT THE GOVERNMENT HAS SAID

7. The Government has made clear that it is contemplating military action against Iraq, in the event of Iraq's non-compliance with UN Security Council Resolutions, now Resolution 1441:

the action that we need to take is to ensure that the UN resolutions are properly implemented - that is the clear purpose.²

we are not at the stage of taking decisions about military action. However, it is important to recognise that in the event of the UN's will not being complied with, we must be prepared to take that action.³

As the UN process moves forward, so should our preparedness for military action in the event that the process fails.⁴

NATO Allies stand united in their commitment to take effective action to assist and support the efforts of the UN to ensure full and immediate compliance by Iraq, without conditions or restrictions, with UNSCR 1441.⁵

8. The Government has said that it regards as essential that any such action be taken having regard to and in accordance with international law:

*we will always act in accordance with international law⁶
the issues before us come down to four...*

The fourth question is whether even if Saddam is as great a threat as we say, it is justifiable to use force to deal with the threat. The short answer to that question is yes, provided force is a last resort and its use is consistent with international law.

Law, whether domestic or international, fundamentally depends for its legitimacy on the values it reflects. Law without values is no law at all. But while the moral legitimacy of any law will strengthen the natural consent for that law, there will always be some who reject or despise the values on which the law is based. Against them, the law has to be enforced, ultimately, by the force of arms. But the force which is used has itself to be consistent with the moral and legal framework it seeks to defend. Laws without force is no law. Force without law is no law.⁷

If there is military action, any participation in it by Her Majesty's Government would be strictly in accordance with our obligations in international law...⁸

I repeat, any decisions that we make in respect of military action will be made within the context of the body of international law...⁹

If force becomes necessary, any decisions made by Her Majesty's Government will be careful, proportionate and consistent with our obligations in international law.¹⁰

I can assure you any action we do take... in the context of Iraq... will continue to be justified under International law.¹¹

It is to be noted that international law has featured in Government observations about Iraq¹² and in cross-party support¹³.

9. The Government has recognised that there is an important question¹⁴ of whether Resolution 1441 authorises the use of force by States in the event of non-compliance by Iraq with its terms, there being a legal interrelationship between the absence of a Security Council mandate and international law:

we have always made it clear that within international law we have to reserve our right to take military action, if that is required, within the existing charter and the existing body of

UN Security Council resolutions, if, for example, a subsequent resolution were to be vetoed.¹⁵

We have always made it clear that any action that we take will be taken within the context of each of our obligations in international law and the same applies to the United Nations. That remains our position... [T]he Security Council resolutions form part of international law but not the total corpus, and whether military action is justified in International law, with or without a second resolution, depends on the circumstances.¹⁶

[Asked:] If Iraq fails to comply and military action - the most serious of consequences - ensues, would that require a mandate from the UN ? Would this country support a coalition of nations undertaking that military action if such a mandate were not forthcoming ? Under what legal verification would that be possible ?

[Answer:] we must reserve the right, within our obligations under international law, to take military action if we deem that necessary, outwith a specific Security Council resolution being passed in the future.

I repeat that the UN charter, Security Council resolutions and customary international law are the basis of international law. They have to come together. Judgments about whether military action is necessary and justified in international law must be made on that totality.¹⁷

I want to... answer four key questions...

Thirdly, would there have to be a second Security Council resolution if military action proved necessary ?...

Resolution 1441 does not stipulate that there has to be a second Security Council resolution to authorise military action in the event of a further material breach by Iraq... [T]he preference of the Government in the event of any material breach is that there should be a second Security Council resolution authorising military action. However, the faith now being placed in the Security Council by all members of the United Nations, including the United States, requires the Council to show a corresponding level of responsibility. So far, it has done so and I believe that it will do so in the future, but we must reserve our position in the event that it does not.¹⁸

[asked:] many people think America hasn't got authorisation for war on Saddam Hussein without a new fresh mandate from the Security Council, is that your view ?

[answer:] I don't think that's necessarily the case no.¹⁹

[The Foreign Secretary] said that the Government did not regard it as necessary for a second resolution to be brought before the UN security council.²⁰

JUSTICIABILITY

10. The question of justiciability is dealt with in the grounds at tab 1 para 7-9, tab 2 paras 19-37. Justiciability goes to the separation of powers between the Executive and the Courts. In the present case, the question of justiciability will come to this: is the substantive issue in this claim for judicial review one which is within the exclusive province of the Executive (as say the defendants), or is it (as says the claimant) a relevant question of law proper for a ruling by the Court in the exercise of its supervisory jurisdiction to ensure that the Executive does not take political decisions on the basis of an erroneous understanding of the law?
11. There is a more immediate question, on this initial hearing: is it appropriate to compartmentalise the questions of (i) justiciability and (ii) international law, so as to deal with the former on a blanket basis and isolated from an analysis of the issue of substance. As to this:
 - (1) The claimant submits that compartmentalisation is inappropriate. The response of the Court is linked to the particular context²¹, and will involve an analysis of the nature of the issue, as to whether it has legal relevance and merit. Justiciability cannot be approached in a vacuum. The law on justiciability has now reached a similar position to that which the law on standing reached long ago, it being undesirable to isolate standing from legality.²²
 - (2) Given that the defendants seek to have the claim dismissed without consideration of international law, it would be appropriate for the Court to test the position by assuming in the claimant's favour that the claimant is right (a) that the international law question is relevant, and (b) as to the answer to the international law question. The defendants' suggested knock-out blow is not said to be: (a) that international law (justiciable where legally relevant) is irrelevant in this case; nor (b) that the claimant is plainly and obviously wrong about international law.
12. The claimant advances the following propositions, in support of its contention that this case ought not to be dismissed as non-justiciable, and certainly not without addressing and analysing the argument on international law:

International law

- 1) The domestic Court has jurisdiction to rule on a relevant question as to what international law requires, that not being per se a matter within the exclusive province of the Executive. The question of international law must be one which is relevant to the position of the Executive in the particular case, over which the Court is exercising its supervisory jurisdiction.

See eg. *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.
- 2) The prohibition on the use of force has the character of *jus cogens*, a peremptory norm of customary international law. It is a well established rule of English law that all rules of customary international law are part of the law of the land; and that among those rules of customary international law *jus cogens* enjoys a higher status as one of the fundamental standards of the international community. Violations of *jus cogens* therefore come under the court's supervisory jurisdiction.

(see *Abbasi* at [28], [68]-[69]; *Oppenheim* at 56-57; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529; *Reg. v. Bow Street Magistrate, Ex p. Pinochet* (No. 3) [2000] 1 AC 147 at 198)
- 3) International law is relevant to the Court's supervisory jurisdiction where the Executive has a stated intention to act by having regard to international law. The Court can appropriately assume the judicial function of ensuring that the Executive directs itself correctly as to what international law requires.

See *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839, 867C-F (Lord Hope); *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, 367E-H (Lord Steyn) 341 (Lord Bingham).
- 4) The Court can properly express a view on international law, without there needing to be a statutory context under consideration; though, if there is, international law cannot assist if inconsistent with a clear domestic statutory provision

See *Abbasi* at [57]; *R v Lyons* [2002] 3 WLR 1562 at [14] (Lord Bingham CJ), [28] (Lord Hoffman), [67] (Lord Hutton), [81] (Lord Hobhouse), [109] (Lord Millett).

Justiciability

- 1) Justiciability depends not on any general principle but on subject matter and suitability in the particular case.

See *Abbasi* at [85].

- 2) A case is not to be treated as non-justiciable simply because it relates to a sensitive 'field of activity'. Thus, even Executive decisions dealing directly with matters of defence are not immune from judicial review, since that would be repugnant to the rule of law.

See *R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department* [2002] EWCA Civ 158 [2002] 3 WLR 344 at [85] (Laws LJ).

- 3) What matters is whether the particular issue is or is not one which lies within the exclusive province of the Executive.

See *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 [2001] 3 WLR 877 at [54] (Lord Hoffmann).

- 4) Illustrative of a particular complaint not susceptible of judicial determination is the scrutiny of a defence-related decision on grounds relating to its factual merits.

See *Roth* at [85] (Laws LJ).

13. The Court is invited to reject the suggestion that there is in this case a justiciability bar which precludes the Court from analysing, and excuses the defendants from answering, the substantive question of law.

NATIONAL INTEREST

14. The defendants have now²³ suggested that the very act of speaking about what international law requires might involve disclosing material which would threaten the security of the State. That, however, betrays a misapprehension of what the issue is (and what it is not: paragraph 6 above). The issue is and remains whether Resolution 1441 authorises States to take military action in the event of non-compliance by Iraq with its terms or whether a further Security Council Resolution is needed. That is a question of interpretation of the Resolution within its legal context (Chapter VII of the Charter and customary international law).
15. In his witness statement of 5 December 2002, Peter Ricketts states that the disclosure of a definitive statement of the Government's legal position would be prejudicial to the national interest and to the conduct of the Government's foreign policy. He states that in international

relations issues of law, politics and diplomacy are closely bound up together, and that the assertion of arguments of international law by one state is in practice regarded by other states as a political act. The UK's international alliances could be damaged by the incautious assertion of arguments under international law which affect the position of those other states, and its success in negotiations prejudiced. Furthermore an adversary could plan on the basis of the legal 'bottom line'.

16. This is not a debate about international relations, it is a judicial adjudication on a question of legal interpretation. Moreover;
 - (1) The UK has an obligation both internationally and domestically to act in accordance with customary international law. There is no doubt that this obligation is justiciable in the international courts (see the *Nicaragua* case). In the ***Expenses case (1962) ICJ reports, 151*** the ICJ firmly rejected the suggestion that it could not interpret a provision of the UN Charter because the question put to it was intertwined with political questions. It stated: "*The court...cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.*"
 - (2) If international courts will consider a concrete legal question which nonetheless has political significance, there is no reason why a domestic court should be precluded from doing so on that ground alone (see *R v Home Secretary ex parte Adan [2001] 2 AC 477*).
 - (3) It is clear that the Government regularly states what its understanding of international law and Resolution 1441 is (see Ambassador Greenstock's statements to the Press (**p63**), the Prime Minister's statements to the press (**p70B**), Mr Straw in Parliament (**pp259A-F**) and that it will comply with international law.
 - (4) If the Government is giving assurances to the British public that it will act in accordance with international law the British public is entitled to know what that means. The Government is effectively saying that it wants the option of acting unlawfully without the opprobrium of being seen to do so. This is not a valid ground on which a Court should judge an issue to be non-justiciable.
 - (5) The Government's argument is essentially one of timing. Once it takes action upon a breach of SCR 1441 then the question will be whether the action it took was compatible

with international law, and all the arguments about prejudice in Mr Rickett's witness statement would fall away. Is the Court to reject a claim on the grounds of non-justiciability on the basis that it is prejudicial for a Government to discover that its proposed action is unlawful before the event has taken place, when that Government stated publicly that it would only act in accordance with international law?

17. The Claimant's application for a declaratory judgment does not in any way involve forecasting the future (Mr Ricketts paragraph 10 of his witness statement). The Claimant is not seeking to pre-empt any future decisions on whether the UK would be entitled to take action on the basis of Article 51 of the UN Charter, or for humanitarian reasons. The Claimant's application relates to Resolution 1441 and whether a further UN Security Council Resolution would be required to enforce against any breach of that resolution. That is a pure question of interpretation of the Resolution itself against the background of the UN Charter and customary international law. The meaning of the Resolution will not change even if the circumstances do.

PREMATURITY AND STANDING

18. If the defendants seek to take a point (and at this permission stage) in relation to the prospective nature of the claim or the question of sufficient interest, each is dealt within in detail in the grounds for judicial review: **tab 1 paras 10-11; tab 2 paras 38-50**. The claimant submits that, if and to the extent that the claim is "non-justiciable" then it will fail for that reason. Similarly, if the claimant is wrong as to the nature of the international law question and/or the answer to that question, the claim would for that reason be dismissed. If, however, the matter is justiciable and the claimant is right that there is a relevant question of international law on which it is correct, it would not be right for the claim to fail on some other ground relating to its timing or the identity of the claimant.
19. The case raises issues of very great importance, brought in the public interest. Although it is "prospective" in the sense that the defendants have said that no decision has been taken as to military action (**pp.98, 115, 270**):
 - (1) The prospect of military action is and remains a real one: paragraph 7 above.
 - (2) The issue of international law, whether ruled on by the Court or even if left to the exclusive province of the Executive, would necessarily need to inform prospectively the decision whether to proceed with military action.

- (3) It cannot seriously be suggested that, if justiciable, it would be better for the issue to be resolved after military action has been taken.
20. In fact, this would be a very good example of the Court appropriately using its "advisory" jurisdiction (*R v Secretary of State for the Home Department, ex p Mehari* [1994] QB 474, 491G-H (Laws LJ); *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, 18A (Sir Thomas Bingham MR)).
- (1) The issue is of public importance, serving a useful purpose in the public interest, is in sufficiently precise terms and the appropriate parties are before the Court: see *London Borough of Islington v Camp* 20th July 1999 unrep.; also *The Woolf Report, Access to Justice* (1996) at p.252.
- (2) An advisory declaration would mean that whatever political choices are made by Government, they would be made on an informed basis as to the law (favourable or adverse) and facing up to the legal implications: cf. (by way of analogy) *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131E-F (Lord Hoffmann).

CONCLUSION

21. The Court is invited to decline the Government's invitation to dismiss this important case without consideration of the issue of international law, and to make directions for the further conduct of these proceedings.

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6.12.02

IN THE ADMINISTRATIVE COURT
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CLAIMANT'S SKELETON ARGUMENT

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FOOTNOTES

- ¹. The travaux préparatoires include an unadopted draft which did provide (**p.401**) that "breach authorises member states to use all necessary means to restore international peace and security in the area".
2. The Prime Minister to Parliament (24.9.02) (**p.113**).
3. The Prime Minister to Parliament (24.9.02) (**p.115**).
4. The Foreign Secretary to Parliament (25.11.02) (**p. 270**).

5. NATO Prague Summit Statement on Iraq (21.11.02) **(P. 349)**.
6. The Prime Minister to Parliament (24.9.02) **(p.110)**.
7. The Foreign Secretary to Parliament (24.9.02) **(pp. 125, 131)**.
8. The Foreign Secretary to Parliament (24.9.02) **(p.133)**.
9. The Foreign Secretary to Parliament (7.11.02) **(p.246)**.
10. The Foreign Secretary to Parliament (25.11.02) **(p.270)**.
11. Letter from Ministry of Defence to claimant's solicitor (24.5.02) **(p.374)**.
12. The Prime Minister to Parliament (24.9.02): 'Iraq deserves to be led by someone who can abide by international law' **(P.106)**.
13. Mr Ancram to Parliament (24.9.02) (p.135): "We must act legally - the Conservative Party puts great store by the rule of law and will want to be assured throughout this process that international law is being pursued"; Mr Moore (25.11.02) (p.294): "the framework of international law must govern the whole debate, and the actions of our Government... "
14. See also: (24.9.02) Mr Duncan Smith and the Prime Minister **(pp.109-110)**, Mr Jenkin **(p.236)**; (7.11.02) Mr Ancram **(p.244)**, the Foreign Secretary **(pp.249-250)**; (on 25.11.02) the Foreign Secretary **(pp.273-275)**, Mr Ancram and the Foreign Secretary **(pp.281-282)**, Mr Llwyd (25.11.02) **(p.315)**.
15. The Foreign Secretary to Parliament (7.11.02) **(p.246)**.
16. The Foreign Secretary to Parliament (7.11.02) **(p.250)**.
17. The Foreign Secretary to Parliament (7.11.02) **(p.251)**.
18. The Foreign Secretary to Parliament (25.11.02) **(pp.263, 267)**.
19. Defence Secretary (Mr Hoon) on BBC's *On The Record* (10.11.02) **(p.352)**.
20. Press report (20.11.02) **(p.99)**.
21. *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2AC 532 at [28] (Lord Steyn: "In law context is everything").
22. *R v IRC, ex p National Federation of Self-Employed* [1982] AC 617.
23. Cf. paragraph 9 above.