8. THE HIGH COURT JUDGEMENT

Judgment of Lord Justice Simon Brown, Mr Justice Maurice Kay and Mr Justice Richards, 17 December 2002

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Neutral Citation No: [2002] EWHC 2777 (Admin) Case No: CO/5429/2002

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17th December 2002

Before:

THE RIGHT HONOURABLE LORD JUSTICE SIMON BROWN

THE HONOURABLE MR JUSTICE MAURICE KAY

and

THE HONOURABLE MR JUSTICE RICHARDS

……

Between

THE CAMPAIGN FOR NUCLEAR DISARMAMENT Applicant

- and -

(1) THE PRIME MINISTER OF THE UNITED KINGDOM Respondents

and

(2) THE SECRETARY OF STATE FOR FOREIGN & COMMONWEALTH AFFAIRS

and

(3) THE SECRETARY OF STATE FOR DEFENCE

- -

Rabinder Singh Esq, QC, Michael Fordham Esq & Ms Charlotte Kilroy
(instructed by **Public Interest Lawyers**) for the Applicant
Philip Sales Esq & Ms Jemima Stratford
(instructed by **The Treasury Solicitor**) for the Respondents
Hearing dates : 10th/11th December 2002

- -

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN

(SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Simon Brown:

1. This application is nothing if not topical. Resolution 1441 was unanimously adopted by the United Nations Security Council on 8 November 2002. It affords Iraq "a final opportunity to comply with its disarmament obligations" (paragraph 2) and recalls that the Council "has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations" (paragraph 13). Just ten days ago, pursuant to paragraph 3, Iraq provided the United Nations' Monitoring Verification & Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) with a twelve thousand page dossier by way of a "declaration of all aspects of its programmes to develop chemical, biological and nuclear weapons". UNMOVIC and IAEA are presently engaged in their inspection activities. All this is well known, front-page and television news on a daily basis. It is a time of great international tension.

2. What the applicants, Campaign for Nuclear Disarmament (CND), seek by this judicial review application is solely declaratory relief, an advisory declaration as to the true meaning of Resolution 1441 and more particularly as to whether it authorises States to take military action in the event of non-compliance by Iraq with its terms. CND submit it does not. In short, the court is being invited to declare that the UK Government would be acting in breach of international law were it to take military action against Iraq without a further Resolution. It is, to say the least, a novel and ambitious claim.

3. Before coming to examine it let me first set it in the context of certain public statements made by the defendants upon which the applicants seek to rely. Although many such are to be found in the documents before us, I shall quote just three, each made by the Foreign Secretary, the second defendant:

   i. **7 November 2002 (the day before Resolution 1441 was adopted), in the House of Commons**:

      "I do not want to anticipate what will happen if there is a breach, except to say that although we would much prefer decisions to be taken within the Security Council, 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. However, I do not believe it will come to that."

ii. **10 November 2002, when interviewed on BBC Radio 4**:

"Well, I think it's pretty obvious what 'serious consequences' means. Of course there were some negotiations over the text, but the United States and the United Kingdom would not have voted for this text, indeed sponsored the text, had we not been satisfied that it spelt out a very clear set of ultimata to Saddam Hussein, gave the inspectors the best possible powers and also spelt out at the end of the resolution what would happen if Saddam Hussein did not cooperate. It's all there. It's very clear and, yes, military action is bound to follow if Saddam Hussein does not cooperate fully with the terms of this resolution."

iii. **25 November 2002, in the House of Commons**:

"I should make it clear to the House, as I did on 7 November, that the preference of the British Government, in the event of a material breach, is that there should be a second Resolution authorising military action. The faith now being placed in the Security Council by all members of the United Nations, including the US, requires the Council to show a corresponding level of responsibility. So far it has more than done so. I believe it will do so in the future. But we must reserve our position in the event that it does not."

4. As was indicated in the first of those statements and as, indeed, has repeatedly been stated by the ministers throughout the whole course of events, the government intends only to take action which is justified by international law. As the first defendant said in Parliament on 24 September 2002:

"We will always act in accordance with international law."

5. There is no reason to doubt the government's good faith in this commitment and I do not understand the applicants to question it. On the contrary, it forms the first plank of their argument for the declaration sought. What Mr Rabinder Singh QC submits is that, the government having clearly stated that it would not wish to take military action save in accordance with international law, "there is a great public interest in ensuring that the government is adequately informed on this key question of law; the government should have the benefit of judicial guidance as to what the law is". I take this from the applicant's written reply. In the same passage "CND makes it clear that it does not invite the court to seek to influence the policy decisions of the government in this area".

6. The applicant's argument would appear to suggest that government's need of the court's assistance in understanding the true position in

international law is evident from two things: first, CND's contention that without a second Security Council resolution military action against Iraq would be unlawful; secondly, the government's apparent belief to the contrary evidenced by the second of the Foreign Secretary's statements set out above (the evidential high-water mark of the applicant's case that the defendants have misdirected themselves in law on the question), and perhaps also by the third of those statements in which, by "reserv[ing]" the government's position in the event that no second resolution is adopted, Mr Straw is said to have implied that the UK government would regard itself nevertheless as able to take military action. At the very least, it appears to contemplate that possibility.

7. Essentially, therefore, it is CND's case that they are bringing this application solely to ensure that government do not at some future date embark upon military action against Iraq in the mistaken belief that it is lawful to do so when in fact it is not. Given CND's avowed purpose, which is to campaign against war and in favour of the peaceful resolution of conflict, some might think this disingenuous. Such suspicions might be sharpened by seeing it asserted in CND's skeleton argument that "the Government is effectively saying that it wants the option of acting unlawfully without the opprobrium of being seen to do so". For present purposes, however, I propose to accept it at face value. The critical question nevertheless remains whether, even assuming this to be so, the claim is one which the court should properly entertain and determine. That is the issue presently before us. Pursuant to an order made by Maurice Kay J on 29 November 2002, the application has been confined initially to the determination of preliminary issues in the way of justiciability, prematurity and standing - everything, in short, save for the substantive point of international law upon which the applicants ultimately seek the court's ruling.

8. Before, however, coming to these preliminary issues, it is I think necessary to sketch in at least the framework of the argument which CND wish to advance on the substantive question. For this purpose I must set out three further paragraphs of Resolution 1441. By these paragraphs the Security Council:

> "4. Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below;
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> …11. Directs the Executive Chairman of UNMOVIC and the

> Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution;
>
> 12. Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."

9. Following the adoption of Resolution 1441, public statements were made by a number of the ambassadors to the United Nations from the Member States of the Security Council. The UK's ambassador stated:

> "There is no 'automaticity' in this Resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in operational paragraph 12."

10. CND point out that an earlier draft of the resolution had provided not merely that non-compliance with its terms should constitute a further material breach of Iraq's obligations but also "that such breach authorises Member States to use all necessary means to restore international peace and security in the area". The phrase "all necessary means" is widely recognised to encompass the use of force and indeed this form of words is to be found in Resolution 678 of 29 November 1990 by which Member States were authorised to act following Iraq's invasion of Kuwait. The omission of that clause from Resolution 1441 as adopted is, suggest CND, striking and significant. That consideration, they submit, coupled with ambassadorial statements exemplified by that made by the UK ambassador and, most importantly of all, the express text of the resolution by which any breaches must be reported back to the Council for it to deal with as it may then think appropriate, makes good their contention that breach of the resolution would not of itself authorise the taking of military action. Their case on the true construction of the resolution, they submit, is not merely arguable but strong. They further submit that it raises a sharp-edged question of law involving no considerations of policy, no disputed areas of fact, no consideration of the developing international situation. It is thus an issue upon which the court can and should decide. Such, in a nutshell, is the applicant's contention.

11. The defendants assert to the contrary that there are compelling reasons for the court not to embark upon such an exercise, prominent amongst them considerations of the national interest. It is in this connection that

there is before the court a statement dated 5 December 2002 made by Mr Ricketts, Director General for Political Affairs at the Foreign and Commonwealth Office, who draws upon 28 years' experience closely involved in the United Kingdom's conduct of its international relations and diplomatic negotiations with foreign States. I must set out the bulk of this statement in full:

> "3. The claimants have asked that the Government explain its understanding of the legal position with regard to the interpretation of Security Council Resolution 1441 (2002). In the judgment of the Secretary of State and the Foreign & Commonwealth Office, and in my own opinion, however, it would be prejudicial to the national interest and to the conduct of the Government's foreign policy if the Government were to be constrained to make a definitive statement of its legal position under international law in relation to issues concerning the international relations of the United Kingdom. The short point is that it is an unavoidable feature of the conduct of international relations that issues of law, politics and diplomacy are usually closely bound up together. The assertion of arguments of international law by one state is in practice regarded by other states as a political act, and they react accordingly. 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.
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> 4. This is especially true in a situation which (like the present situation covered by resolution 1441) is sensitive and where tension is high on all sides: the assertion of arguments of international law by one state which are unpalatable to other states may have the effect of increasing tension and diminishing the possibilities for a diplomatic (and, it is hoped, peaceful) solution. It is also especially true where the issue of international law to be considered is an issue which (like the interpretation of resolution 1441) affects not just the United Kingdom, but many other states as well, who will have their own strongly held views about the matter. It is frequently important for the successful conduct of international affairs that matters should not be reduced to simple black and white, but should be left as shades of grey and open for diplomatic negotiation. Questions of international law often remain at large and may form part of the wider debate between and within states.

> 5. Further, there are many and obvious examples of situations where the disclosure of a legal position on the part of the Government would be prejudicial to the national interest, as tending to indicate to other states the practical constraints affecting the Government. To disclose the Government's understanding of the legal position under international law of an international negotiation (eg of an amendment to a treaty, or of a resolution) could plainly be prejudicial to the success of the Government in that negotiation – as a practical indication of the constraints under which the Government may understand itself to be operating, and its legal "bottom line". Where an international issue involves the possible use of force by the Government, the advance discussion of legal advice as to the legality or otherwise of the use of force in a variety of possible circumstances could be of immense value to the potential adversary, allowing it to plan and adopt positions contrary to the interests of this country with greater assurance than would otherwise be the case.
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> 6. The practical experience of the Foreign & Commonwealth Office shows, therefore, that 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."

12. Having then set out the Foreign Secretary's statement in the House of Commons on 25 November 2002 (see paragraph 3(iii) above), Mr Ricketts continues:

> 8. That statement is a considered position. The judgment of the Secretary of State and of the Foreign & Commonwealth Office is that, in this sensitive area and at this time, it would be detrimental to the national interest and the conduct of this country's international relations for the Government to go further or to commit itself to any more definitive view. The question whether the Government's views on the legal position on this issue should be further disclosed is a political issue, a decision on which would have consequences for our international relations. Any indication of the constraints (including legal constraints) which may affect decisions by an international coalition to use force to secure Iraqi compliance with its obligations regarding weapons of mass destruction could well be detrimental to achieving that objective.

9. Further, to make public the Government's detailed understanding of the legal position on the interpretation of SCR 1441(2002) in advance of any future negotiation in the Security Council of a further resolution could well be detrimental to the success of that negotiation.

10. It is also clear that the formulation of a legal position with regard to a future Security Council resolution must be dependent upon the facts and the circumstances prevailing at the time. To indicate now whether it is the Government's view that a resolution is or is not necessary, other than in abstract terms, would not be possible in view of the impracticability of forecasting the developing situation in detail, and would not be helpful in terms of arriving at a resolution of the situation in the interests of the United Kingdom. Thus, in the House of Commons on 25 November, the Foreign Secretary stated:

> 'Paragraph 4 [of Security Council resolution 1441] therefore defines in general terms what a material breach will consist of. As with any definition of that type, it is never possible to give an exhaustive list of all conceivable behaviours that it covers. That judgement has to be made against the real circumstances that arise'"

13. I shall have to return later to the main thrust of that statement, Mr Ricketts's strongly expressed view that "it would be prejudicial to the national interest and the conduct of the government's foreign policy if the government were to be constrained to make a definitive statement of its legal position under international law", for the various reasons which he then explains. For the moment I pause only to note the contention in paragraph 10 of the statement that the substantive issue sought to be raised here is not the clear-cut question of construction suggested by CND but rather is fact-sensitive and dependent upon the developing international situation. Mr Sales argues that the developing facts could become relevant in two main ways. First, the nature and extent of any non-compliance could affect the question whether article 51 of the United Nations Charter (the self-defence provision) provided an alternative basis of authorisation for military action. Secondly, the reaction of states to the developing situation hereafter - how in future they act and what they say with regard to the necessity or otherwise for a second resolution - may well, by virtue of article 31.3(b) of the Vienna Convention on the Interpretation of Treaties, of itself affect the true interpretation under international law of Resolution 1441.

14. Persuasive though for my part I find Mr Sales' arguments on these points, I am content for present purposes to assume in CND's favour that the point of international law upon which they wish this court to pronounce is indeed capable of resolution without reference to the developing situation, without indeed there being any need for factual judgment at all. Furthermore, given the nature of this preliminary hearing, I shall naturally assume CND's case on the true construction of Resolution 1441 to be at the very least a properly arguable one.

15. I come, therefore, to the preliminary issues now before us: justiciability, prematurity and standing. The principal of these, of course, is justiciability although the present question might perhaps best be formulated simply thus: should the court in its discretion entertain this substantive application? It is not, of course, a challenge: no decision is impugned, neither an existing decision nor even a prospective decision. (CND must inevitably recognise that any future decision to take military action would plainly be beyond the court's purview). It is nakedly an application for an advisory declaration. The court's jurisdiction to grant relief in this form, rarely though it is exercised, cannot be doubted. Should it, however, be exercised here? That is the crucial question for determination on this preliminary hearing.

16. I have already indicated the essential basis upon which Mr Singh invites us to hear and determine this issue of international law. It involves, he says, a pure question of interpretation and it is, he submits, of the first importance that the court should resolve it lest the UK government, contrary to its stated intentions, embark upon unlawful military action through an erroneous understanding of the true legal position. Let me now set out the argument in a little more detail.

17. Its starting point, as I understand it, is that the prohibition on the unlawful use of force is a peremptory norm of customary international law and as such part of the common law of England in the absence of any contrary statutory duty. The use of force is unlawful unless authorised. Non-compliance with Resolution 1441 would not of itself provide such authorisation. An application, therefore, which is designed to avert a possible breach of a peremptory norm of customary international law - more, a norm with the character of *jus cogens*, thereby enjoying a higher status as one of the fundamental standards of the international community - falls within the court's common law supervisory jurisdiction.

18. Mr Singh next submits that the court's jurisdiction is not to be regarded as ousted by the nature of the context within which this

issue of law arises for decision, that of threatened military action. A case is not to be treated as non-justiciable simply because it relates to a sensitive field of executive action. There are no longer any no-go areas for the courts whether on the ground that the source of the power being exercised is the prerogative or because it is being exercised in relation to a particularly sensitive part of public administration, here the defence of the realm. Lord Roskill's list of "excluded categories" - certain areas of decision making under prerogative power, namely "those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers", all said to be beyond the reach of judicial review - see *CCSU -v- Minister for Civil Service* [1985] AC 374, 418 - now lies in tatters. One by one the barriers have fallen: the immunity from review of the exercise of prerogative power in *CCSU* itself; the refusal of a passport in *R -v- Secretary of State for Foreign & Commonwealth Affairs, ex parte Everett* [1989] QB 811; the prerogative of mercy in *R -v- Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349.

19. In short, the class of case of itself provides no bar. What matters, submits Mr Singh, is whether the particular issue sought to be litigated is or is not one lying within the exclusive province of the Executive. In this regard he points to Lord Hoffmann's speech in *Home Secretary -v- Rehman* [2001] 3 WLR 877, 895:

> "It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive. The precise boundaries were analysed by Lord Scarman, by reference to *Chandler -v- DPP* in [1964] AC 763 in his speech in *CCSU -v- Minister for the Civil Service* [1985] AC 734, 406. His analysis shows that the Commission [SIAC] serves at least three important functions which were shown to be necessary by the decision in *Chahal*. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the Commission's ability to differ from the Home Secretary's evaluation may be limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the Commission from saying that although the Home Secretary's opinion that Mr

> Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security. Secondly, the Commission may reject the Home Secretary's opinion on the ground that it was 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held'. Thirdly, an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question, which arose in *Chahal* itself, as to whether deporting someone would infringe his rights under Article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether the deportation is in the interests of national security is irrelevant to rights under Article 3. If there is a danger of torture, the government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative." (paragraph 54)

20. There, submits Mr Singh, in the third of SIAC's functions, is an illustration of where the courts can legitimately overturn an executive decision even in the field of national security.

21. Mr Singh further relies upon passages in Laws LJ's judgment in *Marchiori -v- The Environment Agency & Others* [2002] EWCA Civ 03, notably the following:

> "38. [I]t 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 on matters of national defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. 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. Of course they may or may not be

> satisfied, and their satisfaction or otherwise will sound in the ballot-box. There is, and cannot be, any expectation that the unelected judiciary will play any role in such questions, remotely comparable to that of government. …
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> 39. I recognise that the notion of so grave a matter of State lacks sharp edges. But it is now a commonplace that the intensity of judicial review depends on the context (see for example *Daly* [2001] 2 WLR 1622 per Lord Steyn at paragraph 28). One context will shade into another; there is for instance a distinction between a deportation decision affecting a specific individual (as in *Rehman*) and a decision of defence policy (such as *Trident*), though both involve matters of national security.
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> 40. Secondly, however, this primacy which the common law accords to elected government in matters of defence is by no means the whole story. Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. …"

22. It is the applicants' argument, founded on these and similar dicta in other recent judgments - most notably in *Abbasi -v- Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598 - that no longer are there any forbidden areas of executive action into which the courts simply cannot look; there are only aspects of decision making which the court must necessarily accept lie properly and solely with the executive, for example questions of policy and the substantive merits of factual decisions in sensitive fields like those of national security, defence and foreign relations. These are fields in which "the court is unequipped to judge such merits or demerits" and where in any event respect is properly due to the democratically elected government which is answerable politically for its actions. This case, however, runs the applicants' argument, raises no such considerations. There are no issues which CND seek to have decided here which touch on policy or the merits of any decision. Rather they seek a ruling on a pure point of law in the field of customary international law which is itself part of English common law. The courts should not refuse this invitation. They cannot justifiably accord to the executive the exclusive right to determine this

question; on the contrary, it is a question altogether more appropriate for decision by the court in the exercise of its conventional supervisory jurisdiction: to ensure that those exercising public power have not erred in law in the classic sense of misunderstanding their legal powers.

23. Skilfully and resourcefully though this argument was advanced it is clearly not without its difficulties. The first is its invocation of the principle that the common law encompasses also customary international law. Correct although this undoubtedly is, I have difficulty in understanding how it avails the applicants here. To engage in war without lawful justification is certainly contrary to the law of nations. The issue which the applicants seek to have determined here, however, is whether in the circumstances postulated war *would* be unlawful and that, of course, involves the interpretation of Resolution 1441 itself, a specific international treaty which clearly is *not* part of our domestic law. Ordinarily speaking, English courts will not rule upon the true meaning and effect of international instruments which apply only at the level of international law - see, most recently, *R -v- Lyons* [2002] 3 WLR 1562.

24. Recognising this difficulty, as many of Mr Singh's submissions appear to do, the applicants seek to distinguish *Lyons* and point to other recent case law illustrating the court's preparedness at least in certain circumstances to rule upon the State's obligations under international law. Pressed as to which authorities come closest to supporting the applicants' submission that the court should assume the right to rule upon this issue of international law, Mr Singh relies most heavily on two: *R -v- Home Secretary, ex parte Adan* [2001] 2 AC 477 and *Abbasi*. Let me consider in turn each of these undoubtedly important cases.

25. A central issue raised in *Adan* was whether the courts of this country should entertain a contention that the courts of France and Germany are misapplying the Refugee Convention. The United Kingdom takes the view that the Convention extends protection to asylum seekers in fear of non-State persecution if for any reason the State cannot protect them against it. France and Germany interpret the Convention differently, more narrowly. The House of Lords held that the Convention has one autonomous meaning, namely that adopted by the United Kingdom. In so ruling, their Lordships rejected an argument for the Secretary of State based on the principle of comity, the contention that Parliament could not have intended either the Secretary of State or the courts of this country to have to make a decision that an action by a foreign government or a ruling by a foreign court was wrong in law. Their Lordships were concerned, as they explained, with the United Kingdom's obligation under the Convention as interpreted by the

United Kingdom and with the Secretary of State's obligation under the Asylum and Immigration Act 1996 pursuant to which he issued the relevant certificates. As Lord Steyn put it at p518:

> "[C]ounsel for the Secretary of State raised a matter which did cause me concern at one stage, namely whether the view I have adopted contains an implicit criticism of the judicial departments of Germany and France. I certainly intend no criticism of the interpretations adopted in good faith in Germany and France. Unanimity on all perplexing problems created by multilateral treaties is unachievable. National courts can only do their best to minimise their disagreements. But ultimately they have no choice but to apply what they consider to be the autonomous meaning. Here the difference is fundamental and cannot be overcome by a form of words. The House is bound to take into account the obligations of the United Kingdom government and to apply the terms of … the 1996 Act."

26. Lord Phillips MR was later to say in *Abbasi* at paragraph 57:

> "Although the statutory context in which *Adan* was decided was highly material, the passage from Lord Cross's speech in *Cattermole* supports the view that, albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."

27. *Oppenheim -v- Cattermole* [1976] AC 249 (the other case to which Lord Phillips was there referring) raised the issue whether a decree passed in Germany in 1941, depriving Jews who had emigrated from Germany of their citizenship, should be recognised by the English court. The House of Lords concluded not, Lord Cross saying:

> "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise this as a law at all."

28. *Abbasi* itself concerned a challenge by a British citizen captured by United States forces in Afghanistan and held in Guantanamo Bay with regard to the exercise of the Foreign Secretary's powers of intervention on behalf of British citizens abroad. Two central issues were identified: first, whether the English court will examine the legitimacy of action taken by a foreign sovereign state; secondly, whether the English court will adjudicate upon actions taken by the executive in the conduct of foreign affairs. There is much that is illuminating of both those issues to

be found in the court's judgment. By way of citation, however, I shall confine myself to the court's summary in paragraph 106 of its views as to what the authorities establish and its main reasons expressed in paragraph 107 for rejecting the application:

"106. …

(i) It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.

(ii) Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen. The ECHR does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this court.

(iii) However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectations. But the court cannot enter the forbidden areas, including decisions affecting foreign policy.

(iv) It is highly likely that any decision of the Foreign & Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

(v) The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case. …

107. We have made clear our deep concerns that, in apparent contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention in territory in which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. However, there are a number of reasons why we consider that the applicant's claim for relief must be rejected:

(i) It is quite clear from Mr Fry's evidence that the Foreign & Commonwealth Office have considered Mr Abbasi's request for assistance. He has also disclosed that the British detainees are the subject of discussions between this country and the United States both at Secretary of State and lower official levels. We do not consider that Mr Abbasi could reasonably expect more than this. In particular, if the Foreign & 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."

29. The "apparent contravention of fundamental principles of law" (paragraph 107) and "clear breach of a fundamental human right" (paragraph 107(ii)) are a reference to the undisputed fact that Mr Abbasi was being denied access to a court to challenge the legality of his detention. The Court of Appeal carefully refrained from investigating, let alone expressing a view on, the legality of the detention itself; that is clearly apparent from the judgment as a whole, not least the final sentence of paragraph 107(i). That notwithstanding, it is Mr Singh's submission that the Court of Appeal can there be seen to have been prepared to state its view on an issue of international law in a plainly sensitive area, namely the US administration's denial to detainees of any right akin to *habeas corpus*.

30. Before coming to consider the extent to which these authorities on analysis truly assist the applicants, it is convenient first to note the main passages in Lord Hoffmann's speech in *Lyons* on which Mr Sales relies in response to this part of CND's argument and the way in which Mr Singh for his part suggests that *Lyons* can be distinguished.

31. The appellants in *Lyons*, it will be remembered, were seeking to overturn their convictions, secured before the Human Rights Act 1998 came into force, in reliance on a ruling by the ECHR that the admission of certain statements against them had infringed their right to a fair trial under article 6. The following passages in Lord Hoffmann's speech are those most relevant to the present application:

> "27. … [T]he Convention is an international treaty and the ECHR is an international court with jurisdiction under

> international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *J H Rayner (Mincing Lane) Limited -v- Department of Trade and Industry* [1990] 2 AC 418 (the *International Tin Council* case). Parliament may pass a law which mirrors the terms of the treaty and in this sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. …
>
> 40. The argument that the courts are an organ of state and therefore obliged to give effect to the state's international obligations is in my opinion a fallacy. If the proposition were true, it would completely undermine the principle that the courts apply domestic law and not international treaties. There would be no reason to confine it to secondary obligations arising from breaches of the treaty. The truth of the matter is that, in the present context, to describe the courts as an organ of the state is significant only in international law. International law does not normally take account of the internal distribution of powers within a state. It is the duty of the state to comply with international law, whatever may be the organs which have the power to do so. And likewise, a treaty may be infringed by the actions of the Crown, Parliament or the courts. From the point of view of international law, it ordinarily does not matter. In domestic law, however, the position is very different. The domestic constitution is based upon the separation of powers. In domestic law the courts are obliged to give effect to the law as enacted by Parliament. This obligation is entirely unaffected by international law."

32. The applicants seek to distinguish that authority on two bases: first, they submit that the appellants there had nothing but the treaty to rely upon, the Convention at the relevant time not having been incorporated into English law; here by contrast the applicants assert that their claim for a declaration is under customary international law and therefore justiciable at common law. Secondly, it is suggested that the appellants

in *Lyons* were in any event confronted by an English statute precluding their success unless the convictions were found to be unsafe as a matter of English law, whereas here no such statute stands in the applicants' path.

33. Before concluding this summary of the applicants' case there are just two further authorities to which I should briefly refer, *R -v- Home Secretary ex parte Launder*[1997] 1 WLR 839 and *R -v- Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326. Each involved a challenge to an executive decision taken under English law - in *Launder* a decision to extradite, in *Kebilene* a decision to prosecute - at a time prior to the incorporation of ECHR. The decision in each case had been taken by reference to an understanding of the UK's international law obligations under the Convention. A single citation from Lord Steyn's speech in *Kebilene* (itself referring to Lord Hope's speech in *Launder*) sufficiently encapsulates the principle for which Mr Singh cited these authorities and on which he seeks to rely:

> "Lord Bingham of Cornhill CJ [in the Divisional Court below] pointed out that in the present case the Director wished to know where he stood on the issue of compatibility of the legislation. The Director sought and relied on legal advice on that issue. Lord Bingham said that if the advice was wrong, the Director should have the opportunity to reconsider the confirmation of his advice on a sound legal basis. As Lord Bingham observed '… this approach is consistent with the judgment of Lord Hope [in *Launder* at p867]:
>
> 'If the applicant is to have an effective remedy against a decision [on extradition] which is flawed because the decision-maker has misdirected himself on the Convention which he himself took into account, it must surely be right to examine the substance of the argument'
>
> I respectfully agree. There was no infringement of the principle of Parliamentary sovereignty."

34. In both those cases, submits Mr Singh, one finds the court investigating and reaching a conclusion on the position under international law so as to ensure that the executive decision maker has not misunderstood it and thereby misdirected himself in law - or, it is perhaps more accurate to say, taken account of an immaterial consideration. So too, he contends, should the court in the present case assume and exercise jurisdiction to guard against a comparable misunderstanding by government as to the legal effect of Resolution 1441.

35. I have, I hope, in the preceding pages fairly summarised the applicants' arguments and the principal authorities upon which they rely. The

defendants' arguments I propose to deal with substantially more shortly. This is not because they lacked anything in the way of thoroughness, but rather because to my mind there are really only two of them which need to be considered, each, as I believe, destructive of central aspects of the applicants' case and in combination fatal to its success. The first goes to the court's jurisdiction to rule on matters of international law unless in some way they are properly related to the court's determination of some domestic law right or interest. The second focuses on Mr Ricketts's statement and the sound reasons of national interest which he gives as to why the court should not require the government publicly to declare its definitive view of the position in international law and, by the same token, why the court for its part should not embark upon the same exercise. Both arguments I find compelling. Let me take them in turn.

36. Should the court declare the meaning of an international instrument operating purely on the plane of international law? In my judgment the answer is plainly no. All of the cases relied upon by the applicants in which the court has pronounced upon some issue of international law are cases where it has been necessary to do so in order to determine rights and obligations under domestic law. In *Adan*, as has been seen, the English courts felt bound to consider the position under the Convention to determine whether the Secretary of State had acted properly in issuing certificates under the relevant statute. They had, indeed, "no choice but to apply what they considered to be [the Convention's] autonomous meaning" (per Lord Steyn - see paragraph 25 above). In *Oppenheim -v- Cattermole* a view had to be taken upon the legality of the Nazi decree to decide whether or not "to recognise this as a law at all" (per Lord Cross - see paragraph 27 above). True it is that in *Abbasi* the court recognised the breach of fundamental human rights constituted by the denial to all detainees of access to a court to challenge the legality of their detention. But as already pointed out the court carefully refrained from considering the legality of the detention itself and throughout it was concerned solely with Mr Abbasi's rights under domestic law, namely his right to have the Foreign Secretary properly exercise his discretion whether, and if so how, to assist the applicant as a British citizen. *Abbasi*, indeed, so far from affording support to the applicants' argument, in my judgment tends rather to undermine it. *Launder* and *Kebilene* likewise were cases in which the courts were prepared to examine the position under an international convention but only in the context of reviewing the legality of a decision under domestic law. As Mr Sales points out, there is in the present case no point of reference in domestic law to which the international law issue can be said to go; there is nothing here

susceptible of challenge in the way of the determination of rights, interests or duties under domestic law to draw the court into the field of international law. Laws LJ's dictum in paragraph 40 of his judgment in *Marchiori* (see paragraph 21 above) that "democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety", contrary to Mr Singh's submission, is not in point here: the domestic courts are the surety for the lawful exercise of public power only with regard to domestic law; they are not charged with policing the United Kingdom's conduct on the international plane. That is for the International Court of Justice. Mr Singh was quite unable to point to any case in which the domestic courts have ruled on a matter of international law in no way bearing on to the application of domestic law.

37. *Lyons*, again contrary to Mr Singh's submission, is in my judgment indistinguishable in principle from the present case. The courts there refused to take account of the State's duty in international law since it did not properly sound in domestic law. No more does it here. The absence of any relevant statutory provision here is nothing to the point. Nor, as I sought to explain in paragraph 23 above, can the applicants escape the rule which *Lyons* exemplifies by seeking to invoke the principle of customary international law. What is sought here is a ruling on the interpretation of an international instrument, no more and no less. It is one thing, as in cases like *Kebilene* and *Launder*, for our courts to consider the application of an international treaty by reference to the facts of an individual case. (That, indeed, would have been the position in *Lyons* itself had the courts been prepared to undertake the exercise.) It is quite another thing to pronounce generally upon a treaty's true interpretation and effect. There is no distinction between the position of the United Kingdom and that of all other States to whom Resolution 1441 applies. Why should the English courts presume to give an authoritative ruling on its meaning? Plainly such a ruling would not bind other States. How could our assumption of jurisdiction here be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?

38. The general rule is that, in the interests of comity, domestic courts do not rule on questions of international law which affect foreign sovereign states. As Diplock LJ said in *Buck -v- Attorney-General* [1965] Chancery 745, 770:

> "For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the *res* of the *res judicata* in the suit, would be to assert jurisdiction over the internal affairs of

that state. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do."

39. Twenty years later, Lord Diplock (as he had by then become) returned to the theme in *British Airways -v- Laker Airways* [1985] AC 58, 85: "The interpretation of treaties to which the United Kingdom is a party but the terms of which have not either expressly or by reference been incorporated in English domestic law by legislation is not a matter which falls within the interpretative jurisdiction of an English court of law."

40. I would notice too in this connection the reference in paragraph 57 of the court's judgment in *Abbasi* to the court exercising caution when faced with an allegation that a foreign state is in breach of international law - see paragraph 26 above. Whilst the statutory context within which *Adan* was decided necessarily defeated the Crown's case on comity there, plainly that is not so here. Here there is simply no foothold in domestic law for any ruling to be given on international law. There would need to be compelling reason for the court to take the unprecedented step of assuming jurisdiction here and no good reason not to. In fact, however, the opposite is the case. I turn to the second of Mr Sales's main arguments.

41. Mr Ricketts's statement attests to two specific reasons why it would be damaging to the national interest for the government to commit itself publicly to a definitive view of the legal effect of Resolution 1441 and to parade its arguments in support. First, it would adversely affect the conduct of our international relations with regard to the Iraq situation. Secondly, it would tie the United Kingdom's hands if and when it has to re-enter the negotiating chamber. I have already set out the statement in paragraphs 11 and 12 above and shall not attempt a paraphrase. Mr Ricketts's assertions, I have to say, appear to me not merely persuasive but in large part self-evident. Much the same thinking plainly informs the Court of Appeal's observation in the last sentence of paragraph 107 (i) of the judgment in *Abbasi* as to the risk of discussions between States being undermined. Whatever particular position the government were to adopt, how could it fail to antagonise some at least of our international colleagues? Were the government, for example, to accept and assert publicly the interpretation of the resolution contended for by CND, how could that not (a) damage our relations with, say, the USA who may well take a different view of its effect, and (b) give comfort to the Iraqis? If, at some future date, following a report under paragraphs 4 and/or 11 of the resolution, the Security Council were to consider the matter afresh under paragraph 12, how could the United Kingdom, assuming it were to negotiate for a second resolution, not be

disadvantaged in that negotiation if it admitted that States would otherwise be powerless to act?

42. All this surely is obvious. It is hardly surprising that the Foreign Secretary expressed himself as he did on 25 November 2002 (see paragraph 3(iii) above), carefully avoiding committing the government to a view, that statement being, as Mr Ricketts observes, "a considered position". Even, however, were all this not obvious, we would at the very least be bound to recognise Mr Ricketts's experience and expertise in these matters and that the executive is better placed than the court to make these assessments of the national interest with regard to the conduct of foreign relations in the field of national security and defence. We could not properly reject Mr Ricketts's views unless we thought them plainly wrong. Lord Steyn in *Rehman*, albeit finding it "well established in the case law that issues of national security do not fall beyond the competence of the courts", then added:

> "It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security."

43. Mr Ricketts's statement, of course, is directed rather to the reasons why the government for its part should not be required to state its position on the meaning of Resolution 1441 than to why the court should not grant an advisory declaration on the point. Clearly, however, the one follows from the other. The logic is inescapable. On the international plane, as a matter of practical international politics, other States do not make nice distinctions between legal assertions by government and declarations of law by national courts. But, that aside, any declaration by the court would as a matter of practical reality embarrass the government no less than were it to state a definitive view itself. By constitutional convention the government will always comply with decisions of the court. Whatever the court were to declare the instrument to mean, the government could not ignore that ruling or assert some different meaning in its dealings with other States. And, indeed, the objections go further still. Were the court even to embark upon a hearing of the substantive issue the government would be placed in an impossible position. In practice it would be forced to adopt and argue its position before the court, the very thing that Mr Ricketts indicates would damage the conduct of our international relations. The objection, in short, is not merely to the court ever granting an advisory declaration, but in addition to the court even embarking on the argument.

44. If follows from all this that in my judgment strong reasons exist for the court to reject CND's application at this preliminary stage without ever proceeding to the hearing of the substantive issue. As already indicated,

even assuming we had jurisdiction to decide the question of international law upon which our ruling is sought, there would need to be compelling reason to do so. The reason advanced by CND is, as stated, to guard against the United Kingdom going to war under a mistake of law. How real a risk is that, however? I am bound to say that for my part I think it no more than fanciful. Plainly the government has access to the best advice not only from law officers but also from a number of distinguished specialists in the field. Why should it be thought that the advice obtained is likely to be wrong? CND's answer to that is that various statements made by ministers most notably the Foreign Secretary's statement on 10 November 2002 that "military action is bound to follow" if the terms of Resolution 1441 are breached (see paragraph 3(ii) above) suggest that the government believes no second resolution to be necessary and that this is wrong. I find this argument unconvincing. Quite apart from the fact that it begs the question as to the true interpretation of Resolution 1441, I can find in the ministerial statements nothing to indicate the government's actual view. We simply do not know it.

45. How, then, does Mr Singh seek to meet the argument that any declaration here could be damaging to the national interest. What he submits is that the only proper course for government to take is to conduct its international relations openly in accordance with whatever advice it has received. Government should not, he submits, dissemble or bluff in its negotiations with other States. This appears to me to represent a singularly utopian view of international affairs. For my part I cannot accept it. The plain fact is that even to argue the substantive issue here, let alone to decide it, would be contrary to the national interest.

46. I should say just a word or two at this stage about advisory declarations. These, valuable tools though they can be in the exercise of the court's supervisory jurisdiction, should be sparingly used. Their essential purposes are, first, to reduce the danger of administrative activities being declared illegal retrospectively, and, secondly, to assist public authorities by giving advice on legal questions which is then binding on all see *Zamir & Woolf: The Declaratory Judgment*, 3rd Edition, 2002 at p143. To make such a declaration here, however, would risk giving them a bad name. The jurisdiction is being invoked for wholly impermissible reasons.

47. I would state my conclusions in summary form as follows:

    i. The court has no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to

interpret for the purposes of determining a person's rights or duties under domestic law. That is the position here.

ii. The court will in any event decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence. That too is the position here. Whether as a matter of juridical theory such judicial abstinence is properly to be regarded as a matter of discretion or a matter of jurisdiction seems to me for present purposes immaterial. Either way I regard the substantive question raised by this application to be non-justiciable.

iii. Even were this claim not barred by either of the above considerations, I would still reject it on the ground that advisory declarations should not be made save for demonstrably good reason. Here there is none. There is no sound basis for believing the government to have been wrongly advised as to the true position in international law. Nor, in any event, could there be any question here of declaring illegal whatever decision or action may hereafter be taken in the light of the United Kingdom's understanding of its position in international law.

iv. Although in the ordinary way such fundamental objections to the very nature of the claim would strongly militate against permission being granted to advance it, because of the obvious importance of the issues before us and the skill and cogency of Mr Singh's arguments, I myself would propose that we grant permission and then, for the reasons given, dismiss the substantive claim. This, one notes, was the course adopted by the Court of Appeal in *Abbasi*. Frankly, it matters little which of the two routes is taken; these days the possibilities of appeal are the same in either case. Of one thing, however, I am sure: this application must fail and be dismissed at this preliminary stage.

48. By way of footnote I add just these brief comments on prematurity and standing, the other two issues separated out for consideration at this preliminary stage. Were the applicants' claim for an advisory declaration, contrary to my clear conclusions, a sound one, it could not sensibly be regarded as premature. On the contrary to postpone it would be to defeat its very purpose. As for standing, again, were the court to regard it an appropriate exercise of its jurisdiction to advise government as it is here invited to do, it would hardly be right to withhold that advice by reference to some suggested deficiency in CND's interest in the matter.

Mr Justice Maurice Kay :

49. I agree. The procedural position in this case is a little obscure but, although there is no challenge to an existing decision and the only remedy sought is a declaration of an advisory nature, the proceedings are wholly public law based and were properly commenced under Part 54. In these circumstances, they can only proceed with permission. The initial hurdle is in the preliminary issues which we have considered. Although the case for CND has been formulated and presented with coherence and intelligence it is, for the reasons given by Simon Brown LJ, fatally flawed. Nevertheless, because it is an unusual case relating to matters of great public importance I take the view that the appropriate course, and the expedient one in the light of the directions that were given on 29 November, is to grant permission but to dismiss the application.

50. I propose to add a few observations about the conceptual basis of this decision. In the course of submissions there was some debate over whether any obstacle in the way of CND's application is properly categorised as one of jurisdiction, justiciability or discretion. It is clear from *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 that the controlling factor in considering whether a particular exercise or, for present purposes, prospective exercise of prerogative power is susceptible to judicial review is "not its source but its subject matter" (Lord Scarman, at p 407). It is also clear from that milestone authority that there are subject matters which are, in the language of Lord Phillips of Worth Matravers MR in *Abbasi*, "forbidden areas" (para 106(iii)). The first reason why the present application must fail is that its subject matter is one of those forbidden areas. In my judgment this is not because of an exercise of judicial discretion. It is a matter of principle. If it were purely a matter of discretion there would be circumstances in which the discretion could only be exercised after full consideration of the substantive case. It is because it is a matter of principle that I feel able to dismiss the present application on a preliminary issue without full consideration of the substantive case. In the *CCSU* case (at p 398) Lord Fraser spoke of "many of the most important prerogative powers concerned with control of the armed forces and with foreign policy and with matters which are unsuitable for discussion or review in the Law Court."

    In my judgment, this is most appropriately characterised as justiciability. If authority were required for this proposition it is to be found in the *CCSU* case, *R v. Foreign Secretary, ex parte Everett* [1989] 1 QB 811 (per Taylor LJ at p. 820) and *R v. Criminal Injuries Compensation Board, ex parte P* [1995] 1 All ER 870, at pp 879882,

per Neil LJ, who explained the difference between jurisdiction and justiciability in this context. I readily accept that the ambit of the "forbidden areas" is not immutable and that cases such as *Everett* and *Bentley* [2001] 1 Cr App 307 CA illustrate how the areas identified by Lord Roskill in the *CCSU* case have been reduced. However, the authorities provide no hint of retreat in relation to the subject matter of the present case. This is hardly surprising. Foreign policy and the deployment of the armed forces remain non-justiciable. That is the first basis upon which I would refuse the present application. I would also refuse it on the other grounds to which Simon Brown LJ has referred and for the same reasons given by him. I agree that the "international law" ground is more appropriately categorised as going to jurisdiction rather than justiciability.

Notwithstanding the erudition with which it was advanced, this is an unsustainable challenge.

Mr Justice Richards:

51. I agree with both judgments. Although I accept that permission should be granted because of the importance of the matters raised, in my view the claim should not be allowed to proceed beyond the preliminary issues since it would be wholly inappropriate to entertain the substantive issues and the court would not countenance the grant of the declaration sought. I would summarise my reasons as follows.

52. CND seeks an "advisory" declaration, before any decision is taken on the use of armed force against Iraq and with a view to "informing" the Government on the correct interpretation of Resolution 1441 as an input into any decision that may be taken. There are undoubtedly cases where it may be appropriate for the court to entertain a claim for a declaration in advance of a decision or even where there is no decision in prospect. In *London Borough of Islington v. Camp* (20 July 1999, unreported), on which CND relies, I examined some of the relevant authorities and principles and agreed to entertain a claim for purely declaratory relief, though expressly avoiding the expression "advisory opinion". As the judgment made clear, however, the circumstances of the case were highly unusual and it was in the public interest to entertain the claim. The jurisdiction remains one to be exercised only in exceptional circumstances. The circumstances of the present case, far from justifying that exceptional course, tell very strongly against doing so.

53. The issue on which CND seeks a ruling is one on which the Government has deliberately refrained from expressing any concluded or definitive view. Its considered position, as set out in the Foreign Secretary’s statement to Parliament on 25 November 2002, is to reserve its position in the event that there is a material breach of Resolution

1441 and the Security Council does not adopt a further resolution authorising military action. I do not accept that, merely because the Government has not ruled out the use of force without a further resolution, there is an inconsistency between its considered position and what CND contends to be the correct interpretation of Resolution 1441. The considered position simply avoids any direction of law one way or the other. Thus no misdirection in law would be established even if CND's interpretation of Resolution 1441 were upheld. Nor does the Foreign Secretary's radio interview on 10 November 2002, described as the evidential high watermark of CND's case, involve any direction in law as to the interpretation of Resolution 1441. Again it leaves the matter open.

54. The very fact that the Government has refrained from committing itself to a position on the interpretation of Resolution 1441 militates against entertaining the present claim. No doubt the Government has access to expert legal advice and is able to form a reasoned judgment on the legal issue. It does not seek or need advice from the court. There is no obvious reason why the court should "inform" it or force a ruling upon it.

55. The case against intervention becomes overwhelmingly strong once account is taken of the actual reasons for the Government's stance, as set out in the witness statement of Mr Ricketts. I refer in particular to the Government's judgment that "in this sensitive area and at this time, it would be detrimental to the national interest and the conduct of this country's international relations for the Government to go further or to commit itself to any more definitive view". The court must plainly respect and give weight to that judgment (cf. *Home Secretary v. Rehman* [2001] 3 WLR 877 at paras 26, 31, 5354). It follows, in my view, that to entertain the present claim would inevitably be to act contrary to the national interest. If the Government played an active part in the substantive proceedings, it would necessarily be drawn beyond its considered position. If it played no such part, its position would nonetheless be compromised by any judgment of the court. It could not ignore that judgment without giving rise to an unprecedented situation and risking strain to the established constitutional relationship between courts and executive. In any event I think it obvious that a judgment of the court would be liable to cause damage of the same kind as, on the evidence before the court, would be liable to be caused by a definitive statement of the legal position by the Government itself. I accept that other states are not likely to draw a clear distinction between the Government and a national court and that it would be very difficult for the Government in practice to dissociate its own position from the judgment of the court.

56. In marked contrast, therefore, with the case of *London Borough of Islington v. Camp*, there are strong public interest grounds why the court should not exercise its discretion to entertain the present claim or consider the grant of declaratory relief.

57. I have dealt with the matter so far solely in terms of discretionary considerations. I can add a number of other points also going to the court's discretion. In my view, even if this court were otherwise free to do so, it would be undesirable for it to rule on the interpretation of Resolution 1441 as an abstract legal question in advance of any decision and in circumstances where any difference of view over the correct interpretation of that instrument might not be of any relevance at the end of the day. In practice the point may not arise at all. If it does arise, it will arise against a particular factual background and in circumstances where the position adopted by other states may also be relevant and other rules of international law may also be in play. I recognise the force of CND's point that if one waits for a decision it will be too late to raise the issue in the national court; but even leaving aside the inappropriateness of entertaining such a claim when any ultimate decision would be unreviewable (see below), I consider there to be real objections to examining a question of this kind in isolation and on a contingent basis.

58. For those reasons I am satisfied that the claim should be rejected on discretionary grounds. Far from justifying the exceptional exercise of the court's jurisdiction to grant an advisory declaration, the circumstances make such a course inappropriate and contrary to the public interest.

59. I am also satisfied, however, that the objections to the claim go deeper than that. First, the claim would take the court into areas of foreign affairs and defence which are the exclusive responsibility of the executive Government areas that the court in *R (on the application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 described at paragraph 106(iii) as "forbidden areas". Of course, the field of activity alone does not determine whether something falls within a forbidden area: "justiciability depends, not on general principle, but on subject matter and suitability in the particular case" (*Abbasi*, paragraph 85). In the course of his excellent submissions, Mr Rabinder Singh QC took us through the case law of the last 20 years to show the evolution of the courts' approach to that question and how far the courts have gone in identifying matters that can properly be the subject of judicial determination even though they fall within fields of activity once thought to be immune from review. He submitted that the subject matter of the present claim was one plainly suitable for judicial

determination, namely a clinical point of law, and that to leave it within the exclusive province of the executive would be contrary to the rule of law. But that neat attempt to isolate a purely judicial issue ignores two important features of the present case:

i. According to Mr Ricketts's evidence, the assertion of arguments of international law is part and parcel of the conduct of international relations; it is frequently important for the successful conduct of international affairs that matters should not be reduced to simple black and white, but should be left as shades of grey and open for diplomatic negotiation; and in relation specifically to Resolution 1441 it would be detrimental to the conduct of this country's international relations for the Government to go further than its considered position. In the face of that evidence, it seems to me clear that the legal issue cannot in practice be divorced from the conduct of international relations and that by entertaining the present claim and ruling on the interpretation of Resolution 1441 the court would be interfering with, indeed damaging, the Government's conduct of international relations. That would be to enter a forbidden area. The situation is closely analogous to that considered in Abbasi at paragraph 107(i), where the court evidently thought it impermissible to require the FCO to make statements that might undermine discussions held with US officials.

ii. A plain purpose of the present claim is to discourage or inhibit the Government from using armed force against Iraq without a further Security Council resolution. Thus the claim is an attempt to limit the Government's freedom of movement in relation to the actual use of military force as well as in relation to the exercise of diplomatic pressure in advance. That takes it squarely into the fields of foreign affairs and defence. In my view it is unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision. I reject Mr Singh's submission that it would be permissible in principle to isolate and rule upon legal issues e.g. as to whether the decision was taken in breach of international law. The nature and subject matter of such a decision require it to be treated as an indivisible whole rather than breaking it down into legal, political, military and other components and viewing those components in isolation for the purpose of determining whether they are suited to judicial determination. The same

objections of principle apply to an attempt to isolate in advance a potential legal component of a possible future decision with a view to limiting the Government's freedom of movement when taking the decision itself.

60. In the course of argument I suggested that justiciability might be an aspect of discretion. The contrast drawn was with the court's jurisdiction. Whilst I adhere to the view that justiciability is not a jurisdictional concept, it seems to me on reflection that it engages rules of law rather than purely discretionary considerations. They are rules that, in this context at least, the courts have imposed upon themselves in recognition of the limits of judicial expertise and of the proper demarcation between the role of the courts and the responsibilities of the executive under our constitutional settlement. The objections on grounds of non-justiciability therefore provide a separate and additional reason for declining to entertain the claim.

61. A further objection to the claim is that it asks the national court to declare the meaning and effect of an instrument of international law. The objection can be analysed in this way:

i. The basic rule is that international treaties do not form part of domestic law and that the national courts have no jurisdiction to interpret or apply them (see e.g. *R v. Lyons* [2002] 3 WLR 1562 at paras 27 and 39). The same basic rule must in my view apply to an instrument such as Resolution 1441 which has been made under an international treaty and has been negotiated in the same way as a treaty.

ii. Mr Singh sought to avoid the application of that rule by contending first that this case involves a principle of customary international law (indeed, a principle having the status of "jus cogens") prohibiting the unauthorised use of force and that customary international law forms part of domestic law. It seems to me, however, that recourse to customary international law cannot assist the claimant since what is directly in issue is not a principle of customary international law but the meaning and effect of Resolution 1441, an international instrument not forming part of customary international law.

iii. By way of exception to the basic rule, situations arise where the national courts have to adjudicate upon the interpretation of international treaties e.g. in determining private rights and obligations under domestic law and/or where statute requires decisions to be taken in accordance with an international treaty; and in human rights cases there may be a wider exception. Those examples feature in the discussion in *Abbasi* at paras 5157. None of them applies here.

iv. A further exception can arise where a decision maker has expressly taken into account an international treaty and the court thinks it appropriate to examine the correctness of the self direction or advice on which the decision is based: see *R v. Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839, 867CF and *R v. Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 341 and 367EH, both of them cases where the court was willing to have regard to the European Convention on Human Rights prior to the Human Rights Act 1998 coming into force. Again, however, that is not this case. General statements by the Government that it will act in accordance with international law do not amount to a direction in law and the Government has in practice studiously avoided any direction on the interpretation of Resolution 1441.

v. There may be other exceptional cases where the court can properly rule on the interpretation of an international instrument, but none has been shown to be applicable here.

vi. Thus the case falls foul of the basic rule against the interpretation of international treaties by the national court.

62. I am less certain about the strength of the objections advanced by reference to the implications of a ruling for other states:

i. A declaration as to the meaning and effect of Resolution 1441 would certainly be of general application, in the sense that it would purport to interpret the resolution as a matter of international law. Mr Sales submitted that the court would thereby be ruling on the obligations of foreign states under an international instrument, which it does not have jurisdiction to do. He cited *British Airways v. Laker Airways* [1985] AC 58 at 8586, where, in the context of a dispute between the UK and US Governments about the latter's compliance with its treaty obligations, Diplock LJ observed that "[t]he interpretation of treaties to which the United Kingdom is a party but the terms of which have not either expressly or by reference been incorporated in English domestic law by legislation is not a matter that falls within the interpretative jurisdiction of an English court of law". On the face of it, this is simply an expression of the basic rule concerning the court's jurisdiction to interpret international treaties, which I have covered already. I doubt whether it supports the additional objection advanced by Mr Sales or whether a declaration on the meaning and effect of Resolution 1441 would amount to a ruling on the obligations of foreign states.

ii. This leads into the related subject of comity upon which Mr Sales also relied. As to that, I doubt whether a ruling by the national court on Resolution 1441 would itself involve any express or implied criticism of other states. On the other hand, it might cause other states the same kind of problem as it would cause the UK Government in terms of international negotiating position. It might also be used in support of criticism of a state which took action on a basis inconsistent with the ruling. Thus I do not think that one can dismiss the argument on comity, though the weight properly to be given to it is hard to assess.

iii. The simple point, as it seems to me, is that the court should steer away from these areas of potential difficulty in relation to other states unless there are compelling reasons to confront them. There are no such reasons in this case.

63. In the light of my conclusions on the main issues I do not think it necessary to deal with standing.

64. For those reasons I would grant permission but dismiss the claim on the basis of the preliminary issues.