IN THE HIGH COURT OF JUSTICE **AC-2023-LON-003634**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N :

THE KING
(on the application of
Al-Haq)

Claimant

-v-

SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendant

Claimant's Second Skeleton Argument for hearing listed on 23 April 2024

References are in the following format: Statement of Facts and Grounds "SFG/paragraph"; Summary Grounds of Defence "SGD/paragraph"; Reply "Reply/paragraph"; Renewal Grounds "RG/paragraph".
Abbreviations are the same as defined in SFG unless otherwise indicated

INTRODUCTION

1. The Defendant, in her Skeleton Argument filed on 18 April 2024, has at a late stage fundamentally changed her position. She now seeks a rolled-up hearing on the basis that documents "*underpinning recent and current decision-making*" should be disclosed, such that she is no longer "*inviting the Court at this hearing to dismiss the claim as unarguable*" (D Skeleton Argument at §5). In effect, she recognises that the Court cannot safely dismiss the claim as unarguable, since there are documents relevant to the permission decision to which neither the Court nor the Claimant are currently privy.

2. The Defendant further proposes draft directions, which make provisions for the protection of sensitive material, with a hearing by 20 December 2024.

3. Whilst the Claimant welcomes the Defendant's acceptance that the Court cannot be invited to refuse permission at the present stage:

    3.1. the proposal of a rolled-up hearing raises an issue of critical importance to the Claimant, namely its costs protection; and

    3.2. the proposed directions entirely fail to reflect the terrible urgency of the issues raised by these proceedings. For the avoidance of doubt, contrary to what is said in §7 of the Defendant's skeleton, and as set out further in §10 below, the Claimant has repeatedly made applications for expedition, to which the Defendant has indicated its consent in principle. The Claimant proposes alternative directions, as per the attached draft directions.

COSTS PROTECTION AND PERMISSION

4. Following receipt of the Defendant's skeleton argument, the Claimant wrote to the Defendant (letter of 19 April 2024, attached), noting that:

    4.1. The Court's power to grant a CCO is conditional on the grant of permission.[1] Accordingly, if the Court orders a rolled-up hearing, then it will be unable to grant a CCO.

    4.2. The Claimant has very limited financial resources, such that it will be forced to withdraw from proceedings if it does not receive costs protection. Indeed, the Claimant has filed evidence to the Court that it is unable to continue the claim without a CCO,[2] and has since repeated that undertaking.[3]

    4.3. That means that the effect of a rolled-up hearing would be to force the Claimant to withdraw, thus shutting it out from court. That is obviously unacceptable.

    4.4. Although the Court has no power to order a CCO without permission being granted, the parties are of course free to come to a costs agreement. The Claimant therefore

1 Criminal Justice and Courts Act 2015, s88(3).
2 Witness statement of Susan Power at §9 [CB/15/152].
3 Reply §27 [CB/9/117]; witness statement of Rochelle Ferguson at §7 [CB/32/527].

invited the Defendant to agree to a costs cap of £25,000 (together with a reciprocal costs cap of £87,500), which would allow for a rolled-up hearing to be ordered. A response was requested by 10am on Monday 22 April 2024.

5. By way of email at 9:47 am on 22 April 2024, the Claimant was informed that the GLD was taking instructions but no response was likely before 10am. Because of the impending nature of the hearing, the Claimant hopes that it is most helpful to file this skeleton now, in order that the Judge be apprised of the current position when reading-in.

6. If the Defendant is unwilling to agree costs protection with the Claimant, then the Claimant has no option but to ask the Court to reject the Defendant's proposal for a rolled up hearing, and to determine permission.

7. In that regard, the Claimant will say, in support of the grant of permission, that:

    7.1. The Defendant's position is that the Court cannot be invited to refuse permission, since it does not have before it all documents material to that decision. In itself, this means that (if a rolled-up hearing is impossible) permission should be granted.

    7.2. This is supported by the approach taken in other cases in which there has not been disclosure of all necessary material: (*R (Sky Blue Sports & Leisure Ltd) v Coventry City Council* [2013] EWHC 3366 (Admin) at §§26 and 29;[4] see further the Claimant's first skeleton argument at §§7 and 16).

    7.3. Permission in the present case is further supported by the considerable public importance of the issues raised.[5]

    7.4. Further and in any event, the Claimant relies on the reasons for the grant of permission set out in its first skeleton argument.

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[4] See also *R (Police Superintendents' Association) v The Police Remuneration Review Body* [2023] EWHC 1838 (Admin) at §15(9).

[5] Which is itself a compelling reason for the grant of permission: *R (Gentle) v Prime Minister* [2006] EWCA Civ 1078 at §§4-5, 22-23.

8. Should permission be granted, the Claimant asks that the Court make a CCO of £25,000 subject to a reciprocal cap of £87,500.[6] The submissions in support are to be found at [CB/6/66-72]; the witness statement of Dr Power is at [CB/15/pp.150-155]; and the updated application, together with the witness statement of Rochelle Ferguson, is at [CB/32/pp.519-530]. By way of further update, and as set out in the letter to the Defendant dated 19 April, the Claimant has now raised £36,000 through its crowdfunding campaign.

9. So far as the Defendant is concerned, her position is:

    9.1. She initially agreed to both the making of a CCO and to the proposed amounts (as recorded in paras 2 and 3 of the Claimant's costs application [CB/6/66]), namely – at the time - £20,000 and £70,000.

    9.2. She then, in §68 of the SGD [CB/8/102], said that "on reflection" her position was that this was not an appropriate case for a CCO. The reasons given were as follows:

        9.2.1. the claim is not properly arguable and (for Grounds 2 and 3) insufficiently particularised. In the Claimant's submission, it would follow from the grant of permission that these are not good points.

        9.2.2. the case does not raise an issue of general public importance, in essence because the legal principles have been established in the CAAT cases. In the Claimant's submission, (i) the issues raised are of the highest public importance, namely the prospect that the UK may be exporting arms unlawfully, in the context of a humanitarian catastrophe, and (ii) if this is relevant, the CAAT litigation did indeed clarify some of the legal framework, but there remain important and new legal questions which arise in the present case (not least Criterion 1(b), the proper interpretation of the ATT and the Genocide Convention, the proper interpretation of the SELC so far as Israel's interpretation of IHL is concerned, the interpretation and application of aspects of IHL that were not in issue in the

[6] [CB/32/519].

CAAT cases (see §§135-139, CAAT 2), the rationality of the procedure adopted in the present case, etc).

9.3. In the SGDs, the SST nevertheless accepted that, if a CCO is appropriate, then she agreed to a reciprocal cap of £70,000.

9.4. In response to the Claimant's revised application for a CCO at the amounts of £25,000 and £87,500 [CB/32/519], she replied on 12 April 2024 [CB/43/647] that she maintained that a CCO was inappropriate. She did not address the Claimant's liability for adverse costs, but responded that an increase from £70,000 to £87,500 was inappropriate, since the figure of £70,000 was based on a calculation of the likely full costs of the litigation (Power, §17).

9.5. As to that latter point, the Claimant has, in the course of preparing this skeleton argument, revisited the likely costs of the litigation (better informed as it now is, in that regard), and can confirm that the likely costs of the litigation (on reduced rates) far exceed £70,000 and currently are likely to be at least £100,000.

EXPEDITION AND DIRECTIONS

10. Firstly, the Defendant is wrong to assert (in D Skeleton Argument at §7) that "*at no stage has an application for expedition been made.*"

10.1. The Claimant put the Defendant on notice during pre-action correspondence that it would be seeking expedited proceedings [SB/11/84].

10.2. At the time of issuing the claim, the Claimant wrote a cover letter to the Administrative Court to seek expedition. Section 9 of the Claim Form states that it is "*imperative that the claim be decided as quickly as possible.*" [CB/2/18] and seeks case management directions, paragraph 1 of which states "*This case shall proceed according to an expedited timetable*" [CB/5/64].

10.3. The Renewal Grounds at §13 provide that "*the Claimant renews its application for an expedited timetable and relies on its previous application and correspondence*" [CB/11/129].

10.4. In its application for the expedition of the renewal hearing, the Claimant also restated that it had "*requested expedition*" with its application for permission [CB/14/138].

11. Before the claim was issued, the Defendant confirmed that she "*would not object in principle to the Court dealing with any claim that might be issued expeditiously*".[7] Subsequently:

11.1. Her position in the Summary Grounds was: "*If permission is granted, the Secretary of State agrees that this case is suitable for a degree of expedition, but the timetable be sufficient and realistic*" (§67 [CB/8/p.102]).

11.2. Her position in correspondence with the Court on 31 January 2024 [CB/48/666] was that "*we do not object to the Claimant's application*", subject to the removal of a proposed hear-by date of 7th June 2024. The order [p.670] includes the first paragraph "*this case shall proceed according to an expedited timetable*". It also includes provision that the Defendant file their Detailed Grounds of Resistance within 21 days of the grant of permission [p.671].

12. For the avoidance of doubt, it remains the Claimant's case that urgent and expeditious determination of its claim is of paramount importance. As set out in §36 of the first skeleton argument, the scale of civilian harm is overwhelming, with at least 34,097 Palestinians killed (over 9,500 women and 14,500 children), and 76,980injured.[8] The situation in relation to famine is worsening day by day, with 1.1million people now facing catastrophic food insecurity. Israel continues to indicate plans to launch a ground offensive in Rafah, where over

[7] Letter dated 17 November 2023 [SB/15/91].

[8] https://www.timesofisrael.com/liveblog_entry/hamas-run-health-ministry-raises-gaza-death-toll-to-34097/

a million Palestinians are currently sheltering,[9] despite the EU and US warning of a humanitarian catastrophe if it does so.[10]

13. Secondly, it appears from the Defendant's skeleton that consideration of the need for PII or for CMP has not yet been undertaken, or completed. The impression is that she will now begin to review documents from a standing start.[11] This is not understood. From at least 23 February 2024, when the Claimant filed its renewed application for permission ([CB/11/124]), the Defendant has known that she is under a duty of candour to present all relevant materials to the Court. Given the assertions that the procedure is conspicuously careful and thorough (D skeleton, §2.1), it is to be expected that all of the relevant materials will already be known to the Defendant, and thus both easily retrieved and familiar to her (or her advisers). Further, it is to be expected that the security classification of many documents will be relatively apparent, at least for the purposes of deciding whether to make a s.6 application.

14. Accordingly, the Claimant seeks a timetable in the form attached. In particular:

    14.1. The Claimant proposes that the Defendant shall file Detailed Grounds of Resistance by 14 May 2024 (21 days after the permission hearing), together with any evidence on which it seeks to rely (if not the subject of a closed material proceedings application). This period – of 21 days – reflects the previously agreed position, and the familiarity of the Defendant with the materials;

    14.2. As per the Defendant's proposal, the Claimant suggests that by that same date (on the Claimant's proposal, 14 May) the Defendant shall inform the Claimant and the Court:

        14.2.1. Whether it proposes to apply for Public Interest Immunity in respect of any evidence on which it proposes to rely.

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9 In airstrikes over the course of the weekend of 20-21 April 2024 in Rafah, Israel killed 22 people, including 17 children: https://news.sky.com/story/baby-saved-from-womb-of-mother-killed-in-israeli-strike-13120661

10 Politico, "Israel steps up preparation for Rafah invasion despite Western warnings" https://www.politico.eu/article/israel-troops-prepare-rafah-invasion-gaza/

11 See eg D Skeleton Argument at §6.1: "*There will need to be a careful process of considering the sensitivity of all the material in those documents*".

14.2.2. Whether it proposes to apply for a Closed Material Procedure ("**CMP**") under Section 6(2) of the Justice and Security Act 2013.

14.3. If the Defendant proposes to make such an application for PII and/or a CMP, any such application must be made by 28 May 2024. Although the Defendant allowed herself 28 days between notice and application, it is not understood why this would be necessary. Instead, the Claimant's proposal reflects the period of 14 days set out in CPR 82.21(1)(a).[12]

14.4. As to what follows, whilst the Claimant appreciates that the present Court may not be in a position to direct precise dates for the determination of such applications, or of subsequent applications in relation to CMP or PII, the Claimant would respectfully ask that it be ordered (i) that the CMP or PII process be expedited, and (ii) that there is an end-date to the process, of three weeks after the application was made, namely 18 June 2024.

14.5. The Claimant may file an OPEN Reply by 2 July 2024 (namely two weeks after the final opening up decisions, under the previous paragraph) and the Claimant's special advocates a CLOSED Reply by the same date.

14.6. The hearing, time estimate of 3 days, to be listed on the first available date after 16 July 2024, with a heard by date of 31 July 2024 (in the alternative, if 31 July 2024 is considered impossible, with a heard by date of 16 September 2024. In that regard, the Court is respectfully asked to find that this case is appropriate for listing as vacation business.)

15. Should the Defendant decide not to apply for PII or CMP, then the Claimant would wish to file a Reply by 4 June 2024 (giving the Claimant three weeks from receipt of the DGRs, which is longer than the two weeks in §45.2 of the first skeleton, but it appears now to be the case

[12] This notice period is imposed by the CPR and not by statute, which requires only that some provision for notice is made: see section 6(10) of the Justice and Security Act 2013. Accordingly, it is open to the court to reduce the notice period to 7 days under CPR 3.1(2)(a). The Claimant is however concerned to allow sufficient time for the appointment of a special advocate.

that there may be significant new material to consider), with a hearing to be listed by 31 July 2024.

CONCLUSION

16. For the reasons set out above, the Claimant respectfully submits that, if necessary, permission should be granted and a CCO made in the amounts sought; and that an order for expedition be made, with an appropriate timetable as set out above.

VICTORIA WAKEFIELD KC

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Brick Court Chambers

LUKE TATTERSALL

Essex Court Chambers

22 April 2024