

**UK Working Group on Arms<sup>i</sup> Submission to the  
Independent Review of Administrative Law, led by Lord Edward Faulks QC.**

1. The UK Working Group on Arms (UKWG), a coalition of civil society organisations working in the field of conventional arms, makes the following submission to the Independent Review of Administrative Law (IRAL) chaired by Lord Faulks QC. We agree with the government where it says, in introducing the Panel, that the courts and the way they operate are a key part of our constitution. However, we have serious concerns about the Terms of Reference ('ToR') and the framing of the Call for Evidence ('CoE') of this review.
2. In particular, the ToR, and CoE seem to be premised upon some deeply problematic assumptions. The first and most obvious of these relates to the so-called 'balance' between the ability to challenge unlawful executive action, and effective executive governance, where the Government says that the Panel: *'should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law.'*<sup>ii</sup>
3. We do not consider there to be a 'balance' to be struck. Executive conduct and policy is properly limited by what is lawful, and the ability to enforce that through the courts is fundamental to the functioning of the UK's democratic constitution. The lawfulness of government action is prior to and distinct from any considerations of 'effectiveness'. The notion of seeking to strike a 'balance' between the ability to enforce lawfulness and the 'effectiveness' of government conduct leads to the possibility of effectiveness being prioritised over lawfulness, or lawfulness being seen as in some way an impediment to effectiveness; something that we note with concern appears to be suggested in parts of the IRAL's 'Questionnaire to Government Departments'.<sup>iii</sup> There is simply no proper evidence that judicial review – whether its theoretical availability or actual operation – improperly impedes the normal and appropriate working of government.
4. Further, the questions set out to government departments in the CoE, and others, seem to be premised upon an assumption that judicial review is a burden on government. While that is problematic in and of itself, and the framing of such leading questions as *"do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions?"* and *"Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?"* reflects that, it is troubling that there is no similar direction to the Panel to consider any burden, harm or obstruction experienced by individual members of the public or those acting in the public interest who may need to use judicial review. There does not appear to be any corresponding ambition (demonstrated through any similarly specific questions) to secure or improve the capacity of such individuals and public interest actors to protect themselves or others from unlawful executive action and ensure that it is held to account for any failure to respect the limits of what is permitted to it by the law.
5. The work of the UKWG is concerned with the reduction of human suffering, human rights abuses and civilian casualties caused in situations of conflict and armed violence, linked to issues of humanitarian response to crisis and socio-economic development.
6. Legal challenges have been an important tool with respect to the objectives of the UKWG over many years in clarifying matters of law and as part of a process for setting the standards that government is obliged to follow in implementing the law. Such challenges have also helped clarify the extent the limits of the law, and thus the extent to which the government is free to implement policy. This has improved standards of governance in important areas of government activity

including development aid, and the scrutiny of arms sales. Legal challenges have also been important in attempting to ensure that the UK's arms transfer policy and practice do not result in the supply of arms which breach national and international law. Judicial review should be available as a measure of last resort for cases of grave concern.

7. The Lord Chancellor, Robert Buckland QC MP, said on launching this Panel that "Judicial Review will always be an essential part of our democratic constitution – protecting citizens from an overbearing state." We agree absolutely and the most notable cases of interest to our Working Group in the field of arms transfers bear out the need for such a process to be accessible, and that the bar is already set at an appropriate level, with the reservation that the cost and time involved in seeking Judicial Review are excessive for small organisations and individuals who lack substantial private means.
8. The community of organisations working on arms export controls does not take the process of Judicial Review lightly. We accept that governments of all political persuasions will take decisions and implement policies with which we disagree, and that this is not a matter for immediate recourse to the Courts. Indeed, such actions are only ever taken on an exceptional basis – Oxfam for example had never before the Campaign Against Arms Trade (CAAT) vs DIT case participated in a legal action of this kind, while most of the parties to this submission have never sought a UK Judicial Review.
9. In 2014 and 2015, for example, we are aware that CAAT engaged in two rounds of correspondence with the Secretary of State for Foreign and Commonwealth Affairs regarding arms supplies to Israel during the major conflict that erupted in 2014. The government announced that it had reviewed all extant licences, and would suspend transfers to Israel if major combat operations continued beyond the Summer of 2014. A detailed explanation by the government of its process led to the conclusion by lawyers that, while there was a disagreement about the nature of the conflict and the decision to continue exporting to Israel, the government had followed an appropriate process and that a Judicial Review was not warranted.
10. There are, however, a small number of notable cases which have been important in framing and improving arms export policy and practice over the past twenty-five years.

**The Pergau Dam: The 1995 decision against the government reinforced the principle that development aid finance must be effectively spent.**

11. In 1988, then Secretary of State for Defence George Younger concluded an agreement with Malaysia for the UK to provide aid in the amount of 20% the value of arms sales from Britain to Malaysia. This aid would come in the form of a dam project, despite a subsequent assessment from economists and engineers of the Overseas Development Administration who found that the dam would not be a cost-efficient way to increase the production of electricity. Despite this, in 1991, then Foreign Secretary, Douglas Hurd, authorised the expenditure of £234 million from the aid budget for the project. The World Development Movement called for a judicial review of the funding of Pergau Dam on the grounds of a law which states that aid can only be used for "promoting the development or maintaining the economy of a country ... or the welfare of its people". The High Court ruled in 1995 that the Foreign Secretary had acted *ultra vires* in that the project was not of economic benefit to the Malaysian people. As a result, the law was changed in 2002 to prevent the tying of aid to other considerations, including arms sales; development officials gained a voice in assessing arms licensing decisions, now embodied in Criterion 8 of the

Consolidated Criteria used to assess risk before licensing; and UK aid is now consistently seen to be among the most effectively spent globally.

#### **Death Penalty Drugs:**

12. In 2010 Reprieve launched a judicial review of the Government's refusal to ban the export of the anesthetic sodium thiopental from the UK despite credible evidence of its use to carry out execution by lethal injection in the USA. Reprieve believed that the State of Tennessee was looking to source the drug from the UK to carry out a scheduled execution. Their initial request to halt exports of the drug was refused on the grounds that the ban would impact on the legitimate trade of the sodium thiopental and, as the drug was traded globally, a ban on export from the UK would not prevent an execution from taking place in the USA.
13. Reprieve questioned this decision and took the Government to the High Court. They argued that as the UK Export Control Act 2002 permits the control of the export of goods which might be used for, or to facilitate, a breach of human rights, the export of the drug should be controlled. They also supplied evidence that a UK company had previously supplied sodium thiopental to the USA which had then been used to conduct an execution.<sup>iv</sup>

During the Judicial Review, Vince Cable, the then Secretary of State for Business Innovation and Skills, announced that, due to new information, the UK would introduce controls on the export of sodium thiopental.<sup>v</sup> Subsequently, sodium thiopental, along with other drugs used to carry out execution by lethal injection, was added to the EU Anti-Torture Regulation and the export is controlled across the EU.<sup>vi</sup> This indicates that Judicial Review can be an effective tool in leading the government to properly apply its legal obligations when no other course of action has been successful.

#### **Arms sales to Saudi Arabia in the context of the war in Yemen:**

14. In 2017, CAAT filed a claim for Judicial Review over the failure of the Secretary of State for International Trade to suspend extant arms export licences for transfer of arms, equipment and related services to Saudi Arabia, and of the Secretary of State's decision to continue to grant such licences, in light of the ongoing serious violations of International Humanitarian Law (IHL) and attacks on civilians and civilian objects in particular by the Saudi-led Coalition operating in Yemen. UKWG members Amnesty International UK and Oxfam GB were among those who joined the CAAT case as intervenors.
15. CAAT argued that in these circumstances the continuing transfer of arms, ammunition and support services to the Royal Saudi Air Force was illegal. Initially unsuccessful in the Divisional Court, the Court of Appeal found in CAAT's favour in 2019, finding that the process for assessing risk in the arms licensing procedure was irrational and unlawful, and that therefore licences issued to Saudi Arabia for use in Yemen were unlawful. This case continues, with permission to appeal to the Supreme Court granted to both parties, although the government has now decided not to proceed.
16. The case has already led to a new risk assessment process for licensing arms sales, which the government says takes account of the failings identified by the Court of Appeal. This remains to be independently assessed, and important questions of interpretation of IHL remain to be decided. It has also been of significant interest to humanitarian organisations working in Yemen, and by extension in other war zones. Aid workers and medics have been subject to air attack from the

early days of the war, and a judgment insisting on a robust definition of a serious violation of IHL would strengthen protection for such workers, by cutting off supplies of arms to those carrying out such attacks. This is an important matter of public policy.

17. The Head of the Export Control Organisation (ECO) at the Department of International Trade (DIT) revealed in a 2017 witness statement to the Divisional Court that in his opinion it would be more prudent to suspend issuing of licences because of breaches of IHL and IHRL, however Ministers took the view that licensing should continue.<sup>vii</sup>
18. In identifying a clear gap in the government's export licensing process, the Court has played an important role in providing for this gap to be addressed and assisting the government in meeting its legal obligations.
19. This is a straightforward instance of a political decision which is properly the subject of Judicial Review. A Supreme Court ruling on the scope of IHL and the nature of "serious violations" of it will have important implications for UK arms licensing policy and practice, reducing the scope for Ministers to make arms licensing decisions that fall foul of their legal obligations, while maintaining their freedom to decide policy overall.

## Conclusion

20. The UKWG has chosen to engage with the IRAL notwithstanding our significant concerns, set out above, because the questions the IRAL is discussing will ultimately affect the defence and promotion of human rights in the UK. Rights must be able to be vindicated and enforced or they risk becoming illusory. The ability to seek Judicial Review of government actions is a vital mechanism for good governance, and has been vital to proper and effective control of arms exports and issues surrounding them. It should not be made harder to access than is currently the case.

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<sup>i</sup> For the purposes of this submission the membership of the UK Working Group on Arms is Action on Armed Violence, the Omega Foundation, Oxfam and Saferworld.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/915624/independent-review-admin-law-terms-of-reference.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf)

<sup>iii</sup> See eg Question 2, '2. In relation to your decision making, does the prospect of being judicially reviewed ...result in compromises which reduce the effectiveness of decisions?'

<sup>iv</sup> Documents relevant to this case can be found on Reprieves website:

[https://reprieve.org.uk/press/2010\\_11\\_22\\_high\\_court\\_hearing/](https://reprieve.org.uk/press/2010_11_22_high_court_hearing/).

<sup>v</sup> The Guardian, *Vince Cable restricts export of drug used in US executions*, 29 November 2010,

<https://www.theguardian.com/science/2010/nov/29/sodium-thiopental-export-restrictions>.

<sup>vi</sup> European Commission, Commission Implementing Regulation (EU) No: 1352/2011 of 20 December 2011, amending Council Regulation (EC) No 1236/2005 concerning the trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, Official Journal of the European Union, 21st December 2011, L338/31, (Annex III (4)).

<sup>vii</sup> Witness Statement of Edward Bell, available at <https://caat.org.uk/wp-content/uploads/2020/09/bell-statement-1.pdf>