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CO/582/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Administrative Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/09/2015

Before: The Hon Mr Justice Simon

Between:

The Queen (on the application of Ali Mohamed Agab Mohamed Nour)	**Claimant**
and	
Secretary of State for Defence	**Defendant**
and	
Secretary of State for Foreign and Commonwealth Affairs	**Interested Party**

Mr Dan Squires and **Ms Tamara Jaber** (instructed by **Deighton Pierce Glynn**) for the Claimant
Mr Ben Watson (instructed by **Government Legal Department**) for the Defendant and Interested Party

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Hearing date: 15 July 2015

Approved Judgment

Mr Justice Simon:

Introduction

1. This case raises the question of the ambit of the Court's powers of review of an assessment made by the Defendant under HM Government's 'Overseas Security and Justice Assistance Human Rights Guidance', ('the OSJA Guidance'). The Claimant challenges assessments made under the OSJA Guidance in relation to the provision of assistance and training offered to the Sudanese Armed Forces ('the SAF') under the 'Defence Engagement Sudan' ('DES') programme.

2. As part of the process of assessment under the OSJA Guidance, the Defendant was required to decide whether assistance and training might directly or significantly contribute to the risk of violation of human rights or international humanitarian law ('IHL').

3. The Claimant is a Sudanese national who, before coming to this country, was a lawyer working in the field of human rights in Sudan. In 2009 he had to leave Sudan and came to this country, where he claimed asylum and was granted refugee status. His interest in this claim is clear and there is no issue about the sufficiency of his interest in these proceedings.

4. In summary, his case is that the Defendant has failed to carry out proper assessments in relation to assistance and training provided, and to be provided, to the SAF; and he seeks a declaration to that effect, as well as an order requiring the Defendant to cease providing any assistance or training to the SAF (other than English Language training and training in human rights and IHL) until a lawful assessment has been made.

5. In answer the Defendant submits that there are no proper grounds for either the challenge or for the relief which is sought, for a number of reasons, which either overlap or reinforce each other. First, the OSJA Guidance (as its name suggests) is concerned with guidance in making assessments and does not create substantive legal obligations in relation to those assessments. Secondly, the subject matter of the assessments, involving political and reputational judgment in the field of foreign affairs, is inherently unsuitable for judicial determination. Thirdly, the applicable standard of review is a test of irrationality, and the Claimant does not come close to establishing that the OSJA assessments were irrational.

The OSJA assessment process

6. Although there have been a number of OSJA assessments, for practical purposes (and subject to the question of costs) this claim is now primarily concerned with an assessment made on 10 June 2015. There were earlier assessments which related to assistance and training under programmes which have now concluded, but in terms of the discretionary relief sought in these Judicial Review proceedings, their relevance is largely by way of background and history.

7. The OSJA Guidance was first published in December 2011 and was updated in February 2014. In a foreword the Secretary of State for Foreign Affairs (Rt. Hon. William Hague MP) indicated its purpose.

> Better security sector and justice systems overseas have a positive impact not only for the citizens of the country in question but for the interests of the United Kingdom. It is important that we work with a wide range of countries. This includes some countries where we have concerns about human rights. It is of fundamental importance that HMG work on security and justice overseas is based on British values, including human rights and democracy, and this guidance is designed to support that.
>
> We cannot take for granted that assistance provided by HMG will always have a positive impact on the human rights compliance of the institutions with which we work, which is why guidance such as this is important …
>
> This guidance is a practical tool that HMG officials need to make these difficult decisions, to ensure that our security and justice work reflects our commitments to strengthen and uphold the record of the United Kingdom as a defender and promoter of human rights and democracy.

8. The OSJA Guidance itself sets out a 4-stage process of human rights risk management.

> Assess the internal situation in the host country, its stability and its attitude to human rights law and [IHL].
>
> Identify the human rights and [IHL] risks associated with the proposed assistance.
>
> Mitigate. What steps can be taken to mitigate the risk that the assistance might directly or significantly contribute to any of the matters at stage 2?
>
> Strengthen security, justice and human rights. Is there a serious risk that the assistance might directly or significantly contribute to a violation of human rights and/or IHL?

9. How the question posed at stage 4 might be answered was addressed in §12 of the OSJA Guidance.

> Make an overall assessment of whether there is a <u>serious risk</u> that the assistance <u>might directly or significantly contribute</u> to a violation of human rights and/or IHL, and determine whether senior personnel or Ministers need to approve this assessment.
>
> Where possible, the assistance should seek to strengthen compliance with human rights and/or international humanitarian law in the host country. Where no serious risk is identified, you should also consider whether there is a risk to

> HMG's reputation in providing the assistance (*emphasis in the original*).

10. A number of points emerge from this passage: first, the criteria which is to be applied ('a serious risk that the assistance might directly or significantly contribute to violations of human rights and/or IHL'); secondly, the extent to which the judgement of these matters is vested in the person who makes the assessment; thirdly, the ultimate question involves deciding whether the assessment should be approved by a senior Official or a Minister; and finally, consideration may need to be given to a separate question: whether, if no serious risk that the assistance might directly or significantly contribute to a violation of human rights and/or IHL is identified, there may be a reputational risk from providing assistance.

11. Annex A to the OSJA Guidance is a checklist which follows the 4-stage process. Stage 1 is described as the 'Strategic Overview'. If the assessment is that there are no concerns about the internal situation in the relevant country and its attitude towards human rights law and IHL, then the assessment proceeds to Stage 4 and the consideration of reputational risk; otherwise the next step is the identification of risk at Stage 2.

12. Under Stage 2, the assessment requires consideration of whether the assistance might directly or significantly contribute to any of a number of enumerated breaches of human rights or IHL: for example, (iii) the use of torture or cruel, inhuman or degrading treatment, (iv) unlawful killing and/or unlawful use of force (e.g. disproportionate and indiscriminate), and (v) enforced disappearance.

13. Stage 3 addresses the question of steps which may have been taken in the past, are being taken or could be taken in the future, to mitigate any risk that the assistance might directly or significantly contribute to any of the matters set out at Stage 2. Again, a number of relevant potential mitigating factors are enumerated: for example, (2) assurances that may have been received from the relevant Government, (4) whether the proposed assistance includes training related to promoting compliance with international human rights and/or IHL, and (6) monitoring or recording human rights violations and thereby materially reducing the level of risk.

14. At Stage 4 the assessor makes an overall assessment and reaches a conclusion about the approval process.

> 1. Is there a serious risk* that the assistance might directly or significantly contribute to a violation of human rights and/or IHL?
>
> 2. Is there a reputational or political risk to HMG?

An asterisked note provides further guidance:

> What amounts to a serious risk will depend on the facts of each case. But the possibility of a violation should be a real possibility and not just theoretical or fanciful.

> Your should always consider consulting your legal advisors and the relevant FCO department or post when considering the human rights and IHL risks of implementing a programme or project, particularly where there is uncertainty about any of the issues arising under this Checklist or if a submission to Ministers is required.

15. Under the heading, 'Next Steps', the checklist provides for three possible outcomes identified by the colours: green, amber and red.

16. If there is no serious risk of contributing to human rights violation and little or no reputational risk for the Government or if 'Ministerial approval fully considering the human rights risks, has already been given for this type of activity to the institution in question and nothing material has changed', the decision is considered to be 'green', and approval can be given by the 'Programme Manager or Senior Responsible Owner'. If there is a serious risk of contributing to human rights violations but these can be mitigated, or there is some reputational risk to the Government, the case is considered to be 'amber' and there must be consultation with the relevant Head of Department or Head of Mission. If there is a serious risk of contributing to human rights violations which cannot be mitigated, or a 'serious' reputational risk, the case is considered to be 'red', and Ministers must be consulted.

17. Although the checklist is designed to assist in rational decision-making, I am wary of treating it as confining or prescribing the way in which an assessment should be carried out, or treating it as an examination paper to be marked for the rationality of its contents.

The issue in these proceedings

18. The issue in this case is a relatively narrow one. The Claimant accepts that the OSJA Guidance does not require or prohibit any substantive outcome. If Ministers, aware of the human rights and/or IHL risks, decide that security assistance should be provided, Mr Squires (for the Claimant) accepted that there is nothing in the OSJA Guidance which prevents them making that decision: Ministers may decide that the overall interests of the United Kingdom justify providing assistance notwithstanding the human rights and/or IHL risks. However, he submitted that the OSJA Guidance provides a critical role in ensuring that Ministers are consulted and made fully aware of the risks so that the decisions are taken by those who are directly politically accountable.

19. It is common ground that the OSJA assessment of 10 June 2015 ('the third OSJA assessment') correctly concluded that the next step was not 'green'. The main issue is whether the 'amber' decision can be impugned in these proceedings. The Claimant contends that the assessment was defective and that the decision should have been 'red'. Since, on conventional Constitutional law principles, Ministers are responsible for the acts of their officials, the issue between the parties (at least in the result) is closely confined.

The factual basis of the Claim

20. The breaches of human rights and IHL by the SAF over many years are not in issue between the parties. In these circumstances the facts can be conveniently summarised by reference to a passage in the Claimant's skeleton argument at §2.

> The SAF has been, and continues to be, responsible for truly appalling human rights violations. It is well-documented that for more than a decade the SAF has engaged in indiscriminate and deliberate killing of civilians, mass rape and ethnic cleansing. Very recent reports indicate that it is currently continuing to perpetrate such widespread human rights and IHL abuses. Those are crimes for which the SAF's Commander-in-Chief, President Omar al Bashir, and the Minister to whom until June 2015 the SAF was accountable, Abdulrahim Hussein, have been indicted by the International Criminal Court. They face charges of genocide and crimes against humanity for directing a campaign of extermination, mass killing, rape and pillage against civilians. The human rights abuses have continued since the Defendant began the DES programme, indeed if anything the SAF's human rights record has deteriorated over the past few years.
>
> The SAF's human rights abuses are not simply the acts of rogue elements within Sudan's army. They are part of deliberate policies to crush an insurgency and of ethnic cleansing ordered by senior members of the SAF and carried out under the leadership of its officers.

21. A number of incidents set out in the evidence fully justify this general charge; and I shall confine myself to one example described in §11 of the Claimant's skeleton argument, referring to a report in February 2015 by Human Rights Watch ('HRW').

> [This report] entitled 'Mass Rape in North Darfur: Sudanese Army Attacks against Civilians in Tabit,' describes allegations of mass rape of women and girls in October 2014 in the North Darfur Town of Tabit by the SAF. The report describes large-scale rape over a 36 hour period at the end of October 2014 perpetrated by members of the SAF which HRW considers may constitute crimes against humanity. It is reported that the rape was systematic, and, as set out below, part of a deliberate policy 'ordered' by SAF officers. Reports indicate that over 200 women in what was perceived to be a rebel village were raped, including girls under the age of 11, in order to punish those perceived to be sympathetic to rebel groups. After the attack, military commanders and government officials sought to prevent information about the rapes being made public and have 'threatened, intimidated, beaten, detained and tortured residents from Tabit to prevent them from speaking out about what took place'.

22. The evidence indicates that this is only a recent example of a number of very serious violations of human rights committed by members of the SAF with, at the very least, the connivance of its officers.

The DES programme

23. It is clear from the evidence filed by the Defendant that the Ministry of Defence has drawn back very considerably in the extent to which assistance and training has been offered to the SAF.

24. The first OSJA assessment was carried out in October 2013; and it is convenient to note two points about it. First, as noted above, there is no issue that the provision of courses in the English language and on Human Rights and IHL is accepted by the Claimant as unobjectionable. In the terms of the OSJA Guidance such courses would not 'directly or significantly contribute to violation of human rights and/or IHL'. Secondly, although a placement on phase 1 of the 44-week Army Commissioning Course at the Royal Military Academy Sandhurst had been available to the SAF in the period 2012-13 that placement was no longer available by October 2013.

25. A considerable amount of evidence was deployed in relation to the first OSJA assessment and a second OSJA assessment carried out in April 2014. However, these were superseded by the third OSJA assessment and a new DES programme for 2015-16. In these circumstances I propose to focus on this assessment and programme.

26. It is, however, necessary to mention one further matter of history: a report by the Government 'Stabilisation Unit' dated February 2014, an operational unit concerned with instability overseas. The Stabilisation Unit had been asked by the Defence Attaché in Khartoum to conduct an assessment of the DES, the purpose of providing the various courses and what might be achieved by doing so.

27. The headline findings included the following:

> A broad consensus exists that despite the nature of the Sudanese regime and the human rights violations committed by state security forces, there is political value in continued [defence engagement] with the SAF.
>
> …
>
> HMG red lines are in place (which comply with international sanctions) and have been clearly communicated to the SAF, who understand the current constraints. The Defence Section is restricted from providing any training education or assistance that improves, or could be seen to improve [SAF's] combat skills or capability to prosecute offensive operations.
>
> …

28. At paragraph 22 there is a further observation.

> While educational approaches have proven to be a very valuable entry point, alone they are not likely to have any effect

> on SAF behaviour. Instead, broader societal, political and institutional factors determine how security forces behave, so if left unaddressed education and training will have little impact. Tackling such issues usually requires a deep, trusting and long-lasting partnership and work that expands well beyond defence institutions themselves. The Team found no indication that the context in Sudan is ripe for this sort of engagement. Defence education is an entry point and a means to an end – access – and cannot be expected to deliver behavioural change.

The third OSJA assessment

29. This is the current assessment. In relation to Stage 1, 'strategic overview', it sets out what purport to be answers to 4 questions: (1) Are there concerns about the stability of the host country now or in the next 5 years or ongoing conflict in any part of the country? (2) Are there serious human rights and/or IHL concerns about the host country? (3) Does the host country retain the death penalty? If the answer is yes, is there a moratorium in place? (4) Are there any human rights concerns with the institution due to receive assistance?

30. Apart from question (3), which was answered concisely, 'Yes', the discursive essays under the other headings did not specifically answer the question, although the general tone suggests that the questions were to be answered affirmatively.

31. Under Stage 2, which involved consideration of whether the assistance might directly or significantly contribute to any of the enumerated human rights risks, the answers 'No' were given to each of the enumerated risks, with a further comment:

> While we do not judge that the assistance provided under this programme might directly or significantly contribute to any human rights risks, we assess that there are inherent indirect risks associated with engagement with the SAF. It is also recognised that there are reputational risks involved in this assistance (see below).

32. Under Stage 3, mitigation of risks, the assessment dealt with a number of the enumerated factors. These included, (1) 'Project design and exit strategy':

> We will <u>not</u> provide any training, education, or assistance that could directly improve the SAF's combat skills or its capacity to prosecute lethal operations. This has been clearly communicated to SAF.
>
> We will continue to subject defence engagement to regular review (formally and informally) and will commission a second Stabilisation Unit review in FY 15-16 in order to inform future decisions on engagement.

33. Under (2) 'Training on human rights and IHL', there was:

> The key mitigation of this programme is the actual assistance being provided, and the repeated opportunities taken with it to include training on international standards, human rights and [IHL]. The assistance proposed under the programme is in itself a mitigating factor because one of the main objectives of the programme is to promote the observances of IHL by the SAF.

34. There is also reference to the importance of monitoring and reporting on mitigation of risks (4), and, at (6), to 'Operational guidelines/doctrine'.

> Teaching provided through the programme is at all times aimed at the strategic and not the tactical or operational level. Nonetheless, where there is a risk that strategic concepts such as leadership could be misapplied, we judge that this is mitigated by its delivery within the context of broader education on human rights standards and IHL.

35. The conclusion under Stage 3 was:

> We do not assess that the assistance provided under this programme might directly or significantly contribute to any human rights risks (see Stage 2). However the points outlined above are considered sufficient to mitigate the lesser risks which are inherent in this defence engagement activity.

36. The conclusion at Stage 4 was stated as follows:

> We judge that the overall risk of this project is to be Amber. There is some reputational or political risk to HMG but this can be mitigated effectively.

37. An annex set out the proposed programmes for 2015/2016. The Claimant focused on two of these courses.

38. The first was, 'Psychology of Leadership', which was described as:

> A reflection on underlying skills and professional practices in order to consolidate leadership ability. The course mirrors one delivered at the Royal Military Academy Sandhurst and as such is grounded in the British Army's Values and Standards with the aim of inculcating the requirement for leaders to abide by such values.

39. The second course was: 'Managing Defence in a Wider Security Context', which was described as:

> Examines approaches to the governance and management of defence in developed and transitional democracies. It presents the same foundations of rule of law, democratic control [of] armed forces and respect for human rights as underpins training in the UK Armed Forces.

40. The document was signed by two personnel within the Defence Department, whose names have been redacted, but one of whom was of Field Officer rank.

The Law

41. Mr Watson (for the Defendant) submitted on behalf of the Defendant that OSJA assessments made in the context of the OSJA Guidance concerned decisions which were either non-justiciable, see *Shergill v. Khaira* [2015] AC 359, Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Hodge JJSC at [41]-[43]; or decisions in respect of which the Courts should be very slow to intervene. I accept this in so far as it relates to the assessment of political or reputational risk, see also the judgment of the Divisional Court on a renewed application for leave to bring Judicial Review Proceedings in *R (Shah) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 3891 (Admin) at [22]. I do not however accept that an OSJA assessment is otherwise non-justiciable, and the cases Mr Watson relied on did not support this proposition.

42. He was on firmer forensic ground in his submission that, since the process involves assessing a large number of factors and attaching weight to them, the Court should be cautious before substituting its own view of the matter for that of the decision-maker, particularly where the assessments and the decision are based on factors where the court does not have the fuller picture, the experience or institutional legitimacy enabling it to form its own view with confidence, see for example *R (Lord Carlile of Berriew and others) v. Secretary of State for the Home Department* [2015] 1 AC 945, Lord Sumption JSC [32]-[34].

43. In my view this approach means that (subject to one ground), when considering the third OSJA assessment, the Court should not intervene unless it is satisfied that either the assessments or the conclusion or both are irrational in the *Wednesbury* sense, see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

44. In the present case there are further reasons for the Court to adopt a cautious approach. First, the OSJA Guidance makes clear that the ultimate decision may be difficult, and that the OSJA Guidance is intended to be a 'practical tool' in making an assessment. Secondly, the Court is bound to attach considerable weight to the assessment of those charged with making the decision, not least because they can be assumed to have detailed knowledge of the courses being offered which goes beyond the prospectus. Thirdly, the OSJA assessments, involving the application of guidance, consider and give weight to a number of factors, and the Court should not be drawn into a critical analysis of the words used, as if considering a statute.

The grounds of claim

45. The **first ground of claim** is based on the contention that the Defendant failed to gather information about the effects of past training and assistance, and consequently, was not in a position to assess the effect of the provision of such training and assistance in the future. It is said that the only assessment of the effect of training and assistance was in relation to the provision of English language and human rights/IHL training.

46. As set out above, the Stage 3 question under the OSJA Guidance, asks:

> What steps have been taken in the past, are being taken or could be taken to mitigate any risk that the assistance might directly or significantly contribute to any of the matters set out at Stage 2?

47. The first of these enquiries (a consideration of past steps) is not addressed in the third OSJA assessment because it is not posed as a question on the form. However, Mr Squires's objection to the assessment went much further. His case was that, having provided particular courses which (he contended) plainly involved military training, the Defendant was required to assess retrospectively the historic risks which had been posed by this assistance and training.

48. I do not accept this submission. What the Stage 3 question envisaged was a retrospective assessment of the steps which had been taken (as well as the steps currently being taken or which could be taken) to mitigate the identified risks posed by the proposed training and assistance. Plainly, if the past steps were ineffective, this would throw light on the general effectiveness of any proposed mitigation of risk.

49. Although the Stabilisation Unit had recommended that 'increased effort should be directed to measure the impact of the DES programme', the issue of whether SAF officers who had received training or assistance in the past had been later implicated in human rights abuses was recognised as a very difficult question to answer in practice.

> This is almost impossible to monitor given the limited visibility we have on the career progression of the programme's alumni.

50. However, significantly, the third OSJA assessment made no assumption that the assistance provided in the past had significantly mitigated breaches of human rights and/or IHL; and there is reference to a further Stabilisation Unit review to be conducted in the financial year 2015-16 in order to inform future decisions.

51. In terms of the grounds of challenge to the decision, I do not accept that this is the sort of situation where a claimant can rely on a *Tameside* duty, see Secretary of *State for Education v. Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065B. It was for the Defendant to decide the extent of the relevant enquiries that were necessary, and among the relevant considerations was the practicalities of obtaining the information. The test for a successful challenge in these circumstances is whether no reasonable public body could have come to the conclusion that the Defendant did. The Court should not accept an invitation to intervene merely because it can be said that further or different enquiries might have been sensible or desirable.

52. Mr Squires also relied on a passage in the Stage 1 question, as annexed checklist to the OSJA Guidance, which invites consideration of:

> Previous/current dealings HMG has had/is having with the institution or unit … (*emphasis added*).

53. However, this is in the context of the Stage 1 question by reference to the concerns about the internal situation in the relevant country and its attitude towards human rights law and IHL. This reference to historical dealings does not assist the Claimant since the answer to the Stage 1 enquiry did not bypass the Stage 2 and 3 enquiries, but led directly to them.

54. In the **second ground of claim** the Claimant accepted the challenge of showing that the third OSJA assessment was irrational. Mr Squires argued that no reasonable decision-maker in possession of the relevant facts could conclude that the training or assistance might not directly or significantly contribute to violations of human rights or infractions of IHL. He submitted that this was apparent from the nature of the courses.

55. 'Psychology of Leadership' is a 5-day course offered in Sudan to 17 members of the SAF. The course prospectus describes the importance of leaders understanding 'why people think, feel and behave the way they do', and how they are better able to accomplish the leader's 'ability to shape the thoughts and actions of those they lead'.

56. Consideration of the course is necessarily limited to the prospectus and to the points made by Mr Squires; and, as indicated above, the Court is bound to recognise that those who have a detailed knowledge of the courses are better able to form a view about whether there was a real possibility that this short course 'might directly or significantly contribute to human rights risks'. The assessment, based on the facts, was that it would not do so significantly or directly, although the inherent indirect risk was recognised. This view of the matter cannot be properly described as irrational.

57. 'Managing Defence in a Wider Security Context' is a 7-week course given at Cranfield University, offered to a single member of the SAF. The course aim is:

> To enhance the knowledge, professional understanding and analytical skills necessary to improve and/or transform the governance and management of the students' defence and security systems, thereby advancing the defence and security interests of the UK.

58. In his evidence, Andrew Griffiths (Assistant Head (Africa) in the Ministry of Defence's Directorate for International Policy and Planning) identified the course as 'explicitly aimed at improving human rights in the defence context', and quoted from the introduction of the prospectus.

> Governance and management are interdependent: poor governance and lack of accountability open up possibilities for corruption and other abuses of human rights and physical resources.

59. Adopting the same approach as to the 'Psychology of Leadership' course, I do not consider that it was irrational for the decision-maker to conclude that there was no real possibility that this course might 'directly or significantly contribute' to the identified risks of human rights infractions, while accepting that there would be inherent, indirect risks, as well as reputational risks.

60. The Claimant's **third Ground of Claim** focused on the overall conclusion. Mr Squires submitted that, in order to satisfy the Stage 2 test, the Defendant needed to consider whether the assistance to be provided to the SAF 'might' directly or significantly 'contribute' to a human rights risk. It would be enough that there was a possibility of contributing to the risk, provided the possibility was not insignificant. In circumstances of the continuing gross abuses of human rights by the SAF and where the Defendant accepted that he has no knowledge of (1) how the provision of training in operational skills or leadership to SAF officers had affected SAF operations in Sudan, or (2) whether the officers to whom training had been provided have been responsible for the violations of human rights and IHL, no reasonable decision-maker could conclude that there was no serious risk of contributing to the perpetration of human rights/IHL abuses. It was no answer, submitted Mr Squires, that the courses included training in human rights/IHL if the training also provided enhancement of the leadership skills of those to whom the course were offered. The purpose of the courses was to enable those who participated better to deliver the goals they were seeking to pursue. If those goals included ethnic cleansing or other human rights abuses, the risk was not removed simply because individuals were encouraged to use leadership skills for lawful purposes. Again, he emphasised that this was not an argument that the Defendant was precluded by the OSJA process from providing leadership courses to members of an armed force currently involved in serious human rights violations. The argument was that no reasonable decision-maker asking themselves the right question could have concluded that doing so carried no significant risk.

61. Attractively as the argument was articulated, I am unable to accept it. It seems to me that this is a similar point to that made in Ground 2, and the answer is the same: the Court should not intervene unless the decision-maker's conclusion is one which no reasonable decision-maker in possession of the material facts could have reached. In circumstances where the decision-maker (1) has not shied away from the human rights abuses carried out by the SAF, (2) can properly be assumed to have a clearer picture than the Court as to what the courses are intended and likely to achieve and (3) has reached a nuanced overall view about the risk (and mitigation of the risk) that the courses might indirectly contribute to the risk of human rights breaches and breaches of IHL, I am not prepared to find that the overall conclusion was irrational.

62. The **fourth ground of claim** relates to what is said to be a significant difference between the first and second OSJA assessment on the one hand, and the third OSJA assessment on the other. Mr Squires drew a distinction between, the sentence in the stage 3 (mitigation) section in the first and second OSJA assessments:

> We will not provide any training, education, or assistance that improves or could be seen to improve, SAF combat skills or capability to prosecute military operations;

and the different wording in the stage 3 section in the third OSJA assessment:

> We will not provide any training, education, or assistance that could directly improve SAF's combat skills or its capacity to prosecute lethal operations.

63. Mr Squires submitted that the difference represented an unacknowledged change in Government policy, which was unlawful for two reasons. First, because the Defendant was now prepared to provide training which might significantly but indirectly improve the SAF's combat skills and ability to prosecute military operations; and, if so, he had misdirected himself as to the terms of the OSJA Guidance which required an assessment of whether assistance 'might directly or significantly' contribute to identified human rights risks. The question of whether the assistance might indirectly but significantly improve SAF combat skills or capability to prosecute military operations had not been addressed; and had been reframed in terms of lethal operations. Secondly, if the Defendant's change of approach were intended to be one of substance with the intention to provide assistance which would improve the SAF's combat skills or its capability to prosecute military operations (provided it would not do so directly), it would amount to a significant change, and a proper assessment of the risk of human rights violations would need to determine whether such a change of policy altered the prospect of contributing to human rights violations; and there was no indication in the third OSJA assessment that the significance of that change had been either recognised or assessed. It was plainly a relevant factor which should have been considered; and the failure to do so was unlawful.

64. I do not accept that there has been any significant change in policy represented by the different use of the words 'military operations' (first and second OSJAs), 'offensive operations' (Stabilisation Unit report) and 'lethal operations' (third OSJA). The various OSJAs have had the effect of confining the courses which are offered rather than expanding them; and it is plain from the third OSJA, read as a whole, that the decision-maker has given careful consideration to each of the four stages of the assessment and that, as part of that assessment the mitigation within stage 3 has been expressed slightly differently to reflect a realistic assessment in relation to the indirect effects of the proposed training and assistance. This has not involved a changed policy, let alone any illegality in relation to a revised policy. Nor, if material at this stage of the analysis, does it render the conclusion of the third OSJA assessment irrational.

Conclusion

65. In the light of the above, I find that the claim fails and there must be judgment for the Defendant.