Claim No: CO/1294/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N :

THE QUEEN on the application of
GULF CENTER FOR HUMAN RIGHTS

Claimant

and

SECRETARY OF STATE FOR JUSTICE

Defendant

STATEMENT OF GROUNDS

INTRODUCTION AND SUMMARY OF CLAIM

1. The Gulf Center for Human Rights ("*the Claimant*") is a non-governmental organisation which seeks to support human rights defenders in the Gulf region, including in Saudi Arabia and Oman. It is seeking to challenge the Defendant's bid to provide services to the Saudi Arabian prison authorities through a profit-making company which he has established called "*Just Solutions International*" which is known by the abbreviation "*JSi*". The bid was made public on 18 December 2014. Proceedings were issued protectively on 17 March 2015 by another individual, "*AB*". For reasons set out in the witness statement of the Claimant's solicitors, Adam Hundt, AB has withdrawn from the claim because of concerns about the safety of his family and the present Claimant has applied to be substituted. The Claimant also seeks a protective costs order for reasons set out at the end of these Grounds.

2. JSi is described by the Defendant as "*the commercial brand for the National Offender Management Service (NOMS)*", or as NOMS' "*commercial arm*". It competes to win tenders to provide, for profit, "*consultancy and … offender managements products and services to overseas governments.*" The Defendant accepts that he has no statutory or prerogative authority for creating a "*commercial arm*" or for competing for commercial

contracts to provide services in this way. It is the Claimant's case that, in those circumstances, it is unlawful for the Defendant to have created and to continue to operate JSi. The challenge therefore has wider application than the specific Saudi prison project. If the Claimant's submissions are correct there is no lawful basis for JSi to operate in relation to any of the projects in which it is apparently currently engaged in different countries in the world (though given the secrecy with which JSi operates, little is known about them).

3. In addition, the claim raises a point of constitutional law of general importance. As the Claimant understands it, the Defendant's position is that, notwithstanding the absence of a statutory or prerogative source of power which he can identify, he is entitled to act provided there is no legal prohibition on a private party so acting. That is a view of constitutional law reflected in Sir Robert Megarry VC's judgment in *Malone v Metropolitan Police Commissioner* [1979] Ch. 344. The alternative proposition, and one taken in a number of other authorities (for example by Carnwath LJ as he then was, in *R (Shrewsbury and Atcham BC) v Secretary of State and Local Government* [2008] EWCA Civ 148; [2008] 3 All ER 548), is that even if (which Carnwath LJ doubted) Ministers have a power to act without an identifiable statutory or prerogative basis, there are limits to that power which would not apply to private actors.

4. The present case raises the following two issues:

   (i) The first issue is whether there is a residual category of Ministerial power which is derived neither from statute nor the prerogative nor is incidental to the exercise of statutory or prerogative powers. The category has been referred to as "*third source power*" and that wording will be used below. As Carnwath LJ observed in *Shrewsbury*, whether such a source of power exists is a matter of "*continuing academic controversy*" (§44), and Carnwath LJ and other judges have doubted whether Ministers, in fact, enjoy third-source powers. Other cases have held that there is such a source of power. The issue is one which, as far as authority is concerned, would require determination by the Supreme Court (see *Shrewsbury* §49). The Claimant reserves his position on that issue.

(ii) The second issue is whether, if such a third source of power exists, there is any limit to its operation, and in particular, whether it can be exercised only "*for the public benefit, and for identifiably "governmental" purposes within limits set by the law*", as Carnwath LJ held in *Shrewsbury* at §48. Whether there is a limitation on the exercise of third-source power of the kind Carnwath LJ identified is not subject to any binding precedent, and can be determined at first instance. It is an issue of real importance given the wide range of circumstances in which the Government has purported to act on the basis of such third-source powers. Richards LJ expressed different views in *Shrewsbury* and suggested that if a private party would not be prohibited from taking any particular action, nor would a Minister. The Claimant respectfully submits that Carnwath LJ's analysis (supported by Waller LJ) is the correct one. Public bodies enjoy a different constitutional position from private parties. If third-source powers exist, they cannot be used for any purpose the Government chooses but, at a minimum, only for the public benefit, and for identifiably "*governmental*" purposes.

5. Applying Carnwath LJ's analysis to the present case, the creation of JSi and its competing for commercial contracts against private companies to provide consultancy services and products to overseas bodies in order to secure a profit is in no sense an "*identifiably 'governmental' purpose*". It was therefore outside the powers of the Defendant to create and maintain JSi in the absence of statutory authority and its continued operation is unlawful, including in relation to the provision of services to Saudi Arabia.

FACTUAL BACKGROUND

Procedural background

6. Proceedings were initially issued by AB on 17 March 2015 seeking to challenge the arrangement, first published in a Ministry of Justice Mid-Year Report on 18 December 2014, whereby JSi had submitted "*a £5.9m proposal to the Kingdom of Saudi Arabia, Ministry of Finance to conduct a training needs analysis across all the learning and development programmes within the Saudi Arabian Prison Service.*"

7. On 29 June 2015 the present Claimant applied to be substituted for AB. The procedural history, the basis on which the Gulf Center for Human Rights is seeking to be substituted for AB, and its specific concern about the proposal to provide services to prison authorities in Saudi Arabia are set out in the witness statements of Adam Hundt and Melanie Gingell, a member of the Claimant's Advisory Board. They are not repeated in these Grounds save where relevant to Standing (see below).

Just Solutions International ("JSi")

8. JSi is described by the Ministry of Justice ("MOJ") as "*the commercial brand for the National Offender Management Service (NOMS)*", the latter being an executive agency of the MOJ. JSi is also described by the MOJ as a "*commercial vehicle*", a "*social enterprise*", a "*trading arm*" of NOMS, a "*commercial arm*" of NOMS and a "*commercial brand.*"

9. The JSi website states **[p2-164 of the permission bundle (PB)]**:

> *As the trading arm for the National Offender Management Service (NOMS), Just Solutions international provides products, services and consultancy to help improve Justice systems across the world. JSi represents NOMS on all commercial issues.*
>
> *JSi offers tried and tested products and services from one of the largest and most integrated offender management systems in the world. In addition we can source expertise from experts within NOMS, as well as from a wide range of associates and partners.*

The website continues **[2-166 PB]**:

> *JSi provides a range of solutions across the Justice system, from policing through courts to prisons and community sentence delivery. A particular focus is on reducing re-offending and recidivism.*
>
> *JSi has been created as a social enterprise by a team of entrepreneurs within the UK Justice system.*
>
> *We deliver our services to customers in conjunction with NOMS.*
>
> *JSi can offer a range of off the shelf solutions from training programmes for staff working in prisons and community settings to assessment systems and risk management systems. We have a wide catalogue of interventions for specific offender groups. Many are accredited to ensure the highest standards.*
>
> *The Justice system in England and Wales is known for its work on integrated offender management. We are able to share our learning and have systems and processes that will assist others to develop similarly joined up work between prisons and community offender services.*

We have recently adopted commissioning and payment by results models in England and Wales. JSi has experts in both areas and can help you to consider whether bringing private and voluntary sector organisations and new payment mechanisms into delivery of your services makes sense.

10. On 9 October 2013 the then Secretary of State for Justice, Chris Grayling MP, said that JSi was being *"piloted"*, and he described it as a *"social enterprise"* set up to provide criminal justice services to foreign governments *"in a commercial manner"* **[2-118 PB].** As far as the Claimant is aware, JSi was launched in April 2014 and a JSi brochure was first published online on or around 6 March 2014 **[2-155 PB]**. This brochure is similar in form and appearance to a brochure a private company would produce when seeking to market itself. It provides the fullest account of JSi's functions and objectives available in the public domain to date. It refers to JSi as *"the commercial arm of the National Offender Management Service (NOMS) and specialises in Criminal Justice consultancy and the provision of offender management products and services to overseas governments."* The brochure states:

> *JSi builds on the expertise and remit of NOMS, achieving better outcomes for less without compromising the legality of its operations and the safety, security and decency of prisons.*
>
> *JSi is uniquely placed to support other organisations and jurisdictions in tackling criminal justice issues by drawing on NOMS' and the United Kingdom's experience and skills.*
>
> *JSi responds to requests for assistance flexibly and speedily, tailoring its support to local and cultural circumstances. It deploys skilled associates in a number of consultancy and delivery roles in both the UK and abroad; where applicable, in conjunction with other UK government departments and partners.*

The brochure numbers among the *"tools and techniques developed for JSi"*:

- *Consultancy advice*
- *Accredited training and development of prison and probation staff*
- *Design and delivery of internationally recognised intervention programmes for offenders and re-offenders*
- *Designing prison and rehabilitation establishments*
- *IT systems*

11. The Mid Year Report to Parliament published on 18 December 2014 provided further details on JSi. It stated: *"Just Solutions international (JSi), is the commercial brand for the*

National Offender Management Service (NOMS) promoting products and services to international justice markets." It also stated *"JSi generated £551k in revenue for NOMS in 2013–14, and will continue to build on this during 2014–15 financial year."* **[2-74 PB]**

12. Some further information about JSi's activities was revealed in response to a Parliamentary Question submitted by Sadiq Khan MP on 20 January 2015 **[2-187 PB]**. The Justice Minister, Andrew Selous MP, provided a list of countries with which NOMS has worked in the previous two years, including those from which payment was received. The Minister did not distinguish between those provided services under the JSi *"brand"* and those services provided on some other basis by NOMS. The countries that were provided services by NOMS in exchange for payment at that date were said to be Oman, Seychelles, Bermuda, Cayman Islands, China, Kosovo and Turkey.

13. Reference was also made to JSi in an undated online advertisement **[2-189 PB]** published by *"British Expertise International"*, a private sector organisation which seeks to introduce its members to British and international contacts and identify potential partners. The advertisement describes JSi as a *"company based on the social enterprise model"* to provide access to NOMS' experience and which seeks to *"generate income"*. It states that JSi *"are very interested in talking to members [of British Expertise International] who might want to include [JSi] in project consortia."* The advertisement states that JSi have *"already worked"* in *"India, Saudi Arabia, Oman, Bemuda and the Cayman Islands."* It is not clear what work JSi have already done in Saudi Arabia prior to the current bid or why that work, and the work in India, was not referred to in the Ministerial answer of 20 January 2015. It is, as a general matter, very difficult to determine where JSi has operated, what it has done, where it has bid for work, what its contracts have been worth. To this extent it again operates like a commercial enterprise, keeping such information as secret. Requests made by the lawyer and journalist David Allen Green for information regarding JSi's commercial activities have been refused, in whole or in substantial part, by the Defendant on the grounds of commercial sensitivity (see exhibit **[MG/6]** to the witness statement of Ms Gingell **[2-106 PB]**).

14. On 25 February 2015 a letter before claim was sent on behalf of AB to the Defendant **[2-239 PB]**. It raised a number of grounds of challenge to the proposal to provide

assistance to Saudi Arabia. As one ground of challenge, the letter questioned the *vires* of the Defendant operating a commercial enterprise through the JSi. It pointed out that AB could not identify where the power to do so lay as it would not appear to be derived from either statute or the prerogative. The Defendant was requested to "*provide confirmation of the power which he exercised*" when creating and operating JSi.

15. A substantive response to the letter before claim was received from the Defendant on 31 March 2015 **[2-264A-I PB]**. The letter confirmed that "*JSi is the commercial arm of NOMS specialising in the provision of consultancy services and assistance to overseas governments in the areas in which NOMS has particular expertise, i.e. criminal justice and offender management.*" It explained that "*none of the NOMS's budget is spent on [the JSi's] programmes*". JSi makes a profit and "*the work is funded by foreign governments through the contracts JSi enters into, with a net financial benefit to the UK.*" As to the legal basis for NOMS establishing a "*commercial arm*" or "*brand*", the letter did not, as requested, "*provide confirmation of the power … exercised*". The Defendant did not identify any statutory, prerogative or common law power permitting him to set up a profit-making enterprise. Instead he simply stated that there was no "*statutory (nor any other) prohibition*" upon his doing so. As the Claimant understands the Defendant's position it is that, provided there is no express legal prohibition on his acting, he can act as he wishes and is not required to identify any particular source for his power.

GROUNDS OF CLAIM

Legal principles

16. A number of the sources of public authorities' powers to act are uncontroversial:

(i) Public authorities can have authority to act conferred on them by statute.

(ii) Ministers can exercise prerogative powers vested in the Crown. The prerogative is the "*residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown*" (*Attorney General v de Keyser's Royal Hotel* [1920] AC 508, 526 per Lord Dunedin). Whether or not a Prerogative power exists, and if so its scope, requires a historical analysis. That is because "*The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute… the proper approach is [therefore] a historical one: how was it used in former*

times and how has it been used in modern times?" (Burmah Oil v Lord Advocate [1965] AC 75, 101B-D per Lord Reid 101B-D). The correct point in time for the start of that historical analysis is *"after it had become clear that sovereignty resided in the King in Parliament" such that "any rights thereafter exercised by the King (or the executive) alone must be regarded as a part of sovereignty which Parliament chose to leave in his hands"* (ibid 100B-C).

(iii) Public authorities have *"ancillary powers, necessary for the carrying out of any substantive governmental function"* (Shrewsbury §45). Thus public authorities can enter contracts or own property where that is necessary to their carrying out of some other function which itself derives from statute or the prerogative. This is, therefore, not strictly speaking a separate source of power but is incidental to, and necessary for, the operation of powers derived from one of the two sources set out above.

17. A much more controversial question is whether public authorities have what is sometimes referred to as *"common law"* or *"third source"* powers (see Harris, *"The 'third source' of authority for Government action revisited"* (2007) LQR 225 226 for discussion of the different terminologies used to describe the powers). It is a source of power that is derived neither from statute or the prerogative, nor incidental to the exercise of such powers. As Carnwath LJ observed in Shrewsbury BC at §44 *"The existence of a residual category of Ministerial power, not dependent on either statute or prerogative"* is a matter of controversy both among academics and the courts.

Malone and subsequent authorities

18. Perhaps the starkest position (and the one it would appear is being taken by the Defendant in the present case) is that expressed by Sir Robert Megarry VC in Malone v Metropolitan Police Commissioner [1979] Ch. 344, 357. Sir Robert observed: *"England… is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden."* He held that that applied equally to public bodies. Malone concerned the tapping of telephones by the Post Office at the request of the police. There was no law which expressly forbade such tapping, and, therefore, on Sir Robert Megarry VC's analysis, it required no authority in statute or the prerogative. This aspect of the decision was *obiter* as tapping phones

on the authority of the Home Secretary, in fact, had statutory recognition at the time, but the analysis of public authorities as being able to act, like a private party, in any way not expressly forbidden by law has been influential. It has also been subject to criticism.

19. Lester and Weait, "*The use of ministerial powers without parliamentary authority: the Ram doctrine*" [2003] PL 415, 421 suggest that Sir Robert's analysis "*does not correctly state the present state of the law.*" They continued pp 421-422:

> *The notion that a minister or government department can do anything that a natural person can do, provided it is not forbidden from doing so, fails to have regard … to the modern constitutional position of public authorities, including ministers and their departments. Public authorities have legal obligations by virtue of the public nature of their functions as servants of the public. So much is clear from the principles of public law, including the principle of legality, and from the constitutional scheme contained in the Human Rights Act 1998, and the devolution legislation. These principles preclude arbitrary action by the executive or any other public authority.*

A similar analysis appears in the current edition of *de Smith's Judicial Review* (7th edn, 2013) in which it is written at §5-025:

> *While central government must be able to carry out incidental functions that are not in conflict with its statutory powers, it is wrong to equate the principle pertaining to private individuals – that they may do everything which is not specifically forbidden – with the power of ministers, where the opposite is true. Any action they take must be justified by a law which 'defines its purpose and justifies its existence'. The extension of the Ram doctrine [which provides that a minister of the Crown may exercise any powers that the Crown may exercise except insofar as the minister is precluded from doing so by necessary implication] beyond its modest purpose of achieving incidental powers should be resisted in the interests of the rule of law.*

20. Judicial authority for the approach taken by Lester and Weait and in *de Smith*, and the apparent rejection of the *Malone* approach, can be found in the decision of Laws J, as he then was, in *R v Somerset CC ex p Fewings* [1995] 1 All ER 513 which concerned a purported ban by a local authority of deer hunting on common land. Laws J found the ban to be unlawful and held at 524E-J:

> *Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are*

not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose. I would say that a public body enjoys no rights properly so called; … [I]n every … instance… where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performance of the duties for whose fulfilment it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence. Under our law, this is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.

21. Laws J's decision was upheld by the Court of Appeal (see [1995] 1 WLR 1037). Sir Thomas Bingham MR, as he then was, referred at 1042H to Laws J's judgment and stated that *"the rule for local authorities is that any action to be taken must be justified by positive law"*. Although not stated expressly, that is a subtly different conclusion to Laws J's. The Court of Appeal referred to *"local authorities"* having to establish a basis in positive law for their actions, whereas Laws J had referred, more generally, to any *"public bodies"*. When the Court of Appeal came to reconsider third-source powers in *R v Secretary of State for Health ex p C* [2000] 1 FLR 627, it was the narrower reading of *Fewings* that was applied.

R v Secretary of State for Health ex p C

22. The *ex p C* case concerned a list maintained by the Department of Health of those about whom there were doubts as to their suitability to work with children. There was at the time no statutory authority to maintain the list and no specific prerogative power was relied upon by the Department. Hale LJ, as she then was, gave the leading judgment. She referred to *Fewings* and the passage from Laws J's judgment quoted above, and she observed at §15 that it applied to *"a local authority, which is … a creature of statute."* She continued at §16 *"The Crown is not a creature of statute"*, and held that the Department had a power to maintain the list despite the absence of statutory or prerogative authority (§21).

23. As set out further below, Carnwath LJ in *Shrewsbury* took *ex p C* as authority for the proposition that there is a third source of power enjoyed by public authorities. That is a view that also has support among commentators. For example, Harris *op cit* at pp

249-250 argues that requiring "*mandatory positive authorisation*" for all government action in the form of identifiable statutory or prerogative authority is too "*inflexible*". He continues: "*the unpredictability and infinite variety of human society are such that governments will always have to have the capacity to take legitimate action to further public good in advance of legislation deliberately deciding on the acceptability of the particular action which has had to be taken*". That does not, however, mean that Harris supported the Malone approach that the Government can do anything not prohibited by law. He considered that third-source powers, while necessary, should be carefully circumscribed. He proposed a "*conventional expectation approach*" by which there is a "*clear expectation that government action should normally be anticipated and authorised in advance by the legislature, but maintains the freedom for the government, where justified, to act without pre-action legislative authorisation*" (p 250). That, he anticipated, would leave only a "*relatively small range of potential justified government action to require authority to be found in the third source*" (ibid).

24. It is also clear from *ex p C* that while the Court of Appeal considered that the Government in some cases did have the power to act without positive authority in statute or the prerogative, it did not apply the Malone approach that the Government may do anything which is not positively prohibited of a private person. As Hale LJ held at §22-23:

> *[The fact that maintenance of the list is not, in itself, unlawful] of course does not mean that the Department is free to operate the list in whatever way it likes. Its status as a public authority brings consequences which would not apply to a private citizen. A private citizen would find it difficult to maintain such a list. He would not have access to the necessary information and he would not have the power, as the Department has, to give guidance both to former and prospective employers which will make its operation so much more effective. The appellant may not have a right to be provided with a job, nor is the Department expressly prohibiting his employment. Nevertheless he is placed in a position where he will find it extremely difficult to get a job in child care: indeed it is the declared object of the Index to secure that he does not do so. The impact of a list such as this maintained by a Government Department or public authority is that much more powerful because they are generally so much more powerful.*
>
> *These considerations call to mind some further words of Professor Wade, cited by Laws J in Fewings Case:*
>
> > *'The powers of public authorities are … essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish … This is unfettered discretion. But a*

public authority may do none of those things unless it acts reasonably and in good faith and on lawful and relevant grounds of public interest … The whole conception of an unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.'

R (Shrewsbury and Atcham BC) v Secretary of State and Local Government

25. The question of third-source powers was considered by the Court of Appeal in *Shrewsbury*. The case concerned the promotion of legislation to replace two-tier local government in some parts of the country with unitary authorities. Such a change, it was accepted, would require primary legislation and the challenge was to prior measures taken by the Secretary of State to promote the proposed legislation. The case, in fact, did not ultimately require the Defendant to rely upon third-source powers. As Carnwath LJ observed at §49, the power to promote proposed statutory changes is *"simply a necessary and incidental part of the ordinary business of central government, part of which is the promotion of new policies through legislation"*. All three members of the Court of Appeal did, however, consider the nature and scope of third-source powers, and each made important observations about it.

26. Carnwath LJ referred to *ex p C* and held that it was binding upon the Court and required it to recognise that *"the powers of the Secretary of State are not confined to those conferred by statute or prerogative"* (§44). Carnwath LJ did, however, question that conclusion. At §45 he recorded a submission by the Claimants that *"sought to rewind the clock to a time when the accepted wisdom was that Ministers had only two sources of power: statute or prerogative"*. He expressed *"some sympathy with that approach,"* noting that the authorities said to support the existence of *"'third source' powers"* relied upon in *ex p C* were of *"limited assistance"* as they concerned powers that are *"in the nature of ancillary powers, necessary for the carrying out of any substantive governmental … function"* and thus *"throw… no light on what, if any, non-statutory substantive functions the Crown retains beyond the scope of the "prerogative", as traditionally understood."*

27. Carnwath LJ at §47 suggested, indeed, that other authorities indicated that there was no such third source of power. He referred to passages in a number of cases (*Northumbria Police Authority Case* [1989] QB 26, *A-G v De Keyser's Hotel* [1920] AC 50 and *Laker Airways v DOT* [1977] QB 642) and held *"It is not easy to reconcile such statements of high authority with the existence of a residual category of substantive "third*

source" powers, apart from the prerogative. At the very least, they suggest that any such category is exceptional, and should be strictly confined." Carnwath LJ continued at §48 by observing that *"Reference to the status of a Minister as "corporation sole", or to analogies with the powers of natural persons, seem to me unhelpful."* He held that, but for the authority in ex p C, he would have shared the view of the editors of *de Smith* that recognition of third-source powers *"should be resisted in the interest of the rule of law"* (ibid)

28. In the light of these observations Carnwath LJ held that if third-source powers existed they should be limited. He held at §48:

> *As a matter of capacity, no doubt, [a public authority] has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit, and for identifiably "governmental" purposes within limits set by the law.*

29. Carnwath LJ's observations were considered by both Richards and Waller LLJ in Shrewsbury. Both agreed with Carnwath LJ on the outcome of the appeal, but each expressed different views on third-source powers. Richards LJ stated that he did not share Carnwath LJ's reservations about such powers (§72), and observed that the most *"satisfactory explanation"* for *"the basis on which the ordinary business of government is conducted"* is that it depends heavily on the *"third source of powers"* (§73). He went on to question the proposed *"qualifications"* suggested by Carnwath LJ (that powers can only be exercised *"for the public benefit"* or for *"identifiably 'governmental' purposes"*) on the basis that *"It seems to me that any limiting principle would have to be so wide as to be of no practical utility or would risk imposing an artificial and inappropriate restriction upon the work of government"* (§74). Waller LJ also quoted from the passage of Carnwath LJ's judgment at §48. Unlike Richards LJ, however, he indicated agreement with it. He held at §81: *"I instinctively favour some constraint on the powers by reference to the duty to act only for the public benefit but until one has actual facts by reference to which the matter can be fully tested, it is unwise to say more."*

House of Lords/Supreme Court

30. As Carnwath LJ noted in Shrewsbury at §49, the extent of third-source powers has been considered, but not determined, by the House of Lords and Supreme Court.

31. In R (Hooper) v SSWP [2005] 1 WLR 1681 the issue was expressly left open by Lord Nicholls at §5-6 and Lord Hoffmann at §46-47, though with the latter noting that there was a "*good deal of force*" in the submission that the Government enjoyed third-source powers.

32. In R (New London College Ltd) v SSHD [2013] UKSC 51, [2013] 1 WLR 2358 the Supreme Court considered whether the Secretary of State had the power to create a scheme by which educational institutions were permitted to "*sponsor*" foreign students. The Court held that such powers were incidental to statutory powers conferred by immigration legislation and the existence or scope of third-source powers did not therefore need to be determined. Both Lord Sumption and Lord Carnwath, however, made observations about the issue. Lord Sumption at §28 noted that "*the Crown possesses some general administrative powers to carry on the ordinary business of government which are not exercises of the royal prerogative and do not require statutory authority*". That, however, was restricted to administrative functions incidental to the exercise of the government's powers. Lord Sumption queried whether it was right to equate the capacities and powers of the Crown with those of a natural person outside of such managerial acts, noting "*it is open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like.*" Lord Carnwath also addressed the issue. At §34 he noted that the Secretary of State had not sought to rely on the "*third source*" as the basis of her power to promulgate guidance by reference to "*controversial*" cases such as ex p C and Shrewsbury. He stated that she was "*wise not to do so*" and referred to the reasoning in his judgment in Shrewsbury §44-49 in which he had doubted whether third source powers existed as a permissible basis for government action.

Summary of principles

33. It is submitted that the following principles can be ascertained from the above authorities:

    (i) There is no doubt that the Crown possesses general administrative powers, which can be exercised by Ministers, where such powers are a necessary and

incidental part of the ordinary business of government conducted on some statutory or prerogative basis.

(ii) Whether the Crown, in addition, possesses powers which are not necessary and incidental to its performance of other functions, and which do not find their source in statute or the prerogative, is controversial. Doubts were expressed in *Shrewsbury* as to whether such powers should be recognised, but as Carnwath LJ held, following *ex p C* that is an issue that requires determination by the Supreme Court. *Ex p C* is authority, binding on the High Court and Court of Appeal, for the proposition that the Government does possess third-source powers and that it is not necessary in every case to identify a statutory or prerogative source of its power to act.

(iii) Whether there is any limit to the scope of third-source powers, or whether the Crown can do anything that would not be unlawful if done by a private party, is, however, not subject to binding authority. The Court of Appeal in *ex p C* considered whether a private party would be acting unlawfully in maintaining a list of those who could not safely work with children and concluded that it would not. It is clear, however, that was not regarded as sufficient, in itself, to render the list lawful. As Hale LJ indicated, the powers of public authorities are essentially different to those of a private citizen, and that, unlike a private citizen, there are limits to the purposes for which the Secretary of State can act on the basis of third-source powers (§22-24).

(iv) The nature of the limit to third-source powers was considered further in *Shrewsbury*. The majority, Carnwath and Waller LLJ, held that such powers could only be exercised "*for the public benefit, and for identifiably "governmental" purposes*" (§48 and 81) while Richards LJ considered there was no such limitation (§74).

34. The central issue in the present case is whether the analysis of Carnwath and Waller LLJ in *Shrewsbury* or that of Richards LJ is the correct one. The Claimant respectfully submits that it is the former. It cannot be the case that public authorities can do anything that is not prohibited, whether or not they are acting for a "*governmental*"

purpose or for the public benefit, simply because a private person could do it. The issues that arise in the present case in which Ministers have created a commercial enterprise are a good example of why that must be so. If the Defendant could do anything which was not prohibited of a private person, he could, for example, decide that he wished in his capacity as Secretary of State to open a string of casinos as a way of generating revenue for the prison service. Or he could decide that the MOJ should own race horses. All of those are things that a private person could do. They are not, however, "*governmental purposes*" or necessarily for the "*public benefit,*" and, the Claimant submits, the Secretary of State would require statutory authority to do them.

35. The alternative, that no constraint of the kind identified by Carnwath and Waller LLJ is required, is inconsistent with the rule of law and the constitutional position of the Executive as exercising powers conferred on it by Parliament (see further the observations cited above from Lester and Weait *op cit*, de Smith *op cit*, and Laws J in *Fewings*). If public authorities are not restricted to acting for "*governmental*" or any other identifiable purposes, and like a private party can act for any reason or for any purpose they choose, their actions cannot be meaningfully reviewed by the courts. It cannot be said that a public authority has taken into account irrelevant factors, was motivated by improper purposes or is acting irrationally where there is no requirement that it seeks to achieve any particular ends. If public authorities are entitled to run casinos or own race horses simply because a private person can do so, and need not act in pursuit of any identifiable governmental objective, it is impossible to see how a court could review their decisions. That is to accord an unfettered discretion enjoyed by the Executive and is inconsistent with the rule of law.

36. Instead, the Claimant submits, if some form of third-source power exist, and there is no need for a Minister to identify a statutory or prerogative basis for acting, it must be, as Harris has written, an exceptional category and one that is tightly circumscribed given its anomalous constitutional position. At the very least Ministers must be acting for identifiably governmental purposes and for the public benefit so that there is some limit to the exercise of the power and the possibility of some meaningful review of their actions by the courts.

Application of legal principles to present case

37. As set out above, the Claimant accepts that the High Court and Court of Appeal is bound by *ex p C* to hold that the Defendant is not necessarily acting unlawfully simply because he is purporting to exercise powers that are not derived from statute or the prerogative nor incidental to the exercise of such powers. The Claimant does, however, reserve its position should the matter be considered by the Supreme Court, and will argue that there is no such source of power, respectfully endorsing the doubts expressed in this regard by Carnwath LJ in *Shrewsbury*.

38. For the reasons set out above, however, the Claimant submits that, if third-source powers do exist, they are not unlimited in the way that the freedom of a private party is unlimited, and their scope should be narrowly construed. At a minimum that means they can only be exercised *"for the public benefit, and for identifiably "governmental" purposes within limits set by the law"*. If that is correct, the creation and operation of JSi as a *"commercial"* profit-making vehicle is unlawful. JSi operates as a *"commercial brand"* selling its services *"in a commercial manner"*. It advertises its products, services and consultancy to foreign governments and seeks to make a profit. It operates in essentially the same way as companies such as G4S and Serco do in bidding for contracts outside the UK to deliver services on a commercial basis. It cannot conceivably be said that JSi is performing *"governmental purposes"* any more than does any other commercial operator. It is therefore not lawful for the Government to create and operate a body such as JSi without statutory authority.

39. It is not surprising, it is submitted, that creating and operating a profit-making commercial company should require some statutory basis. It raises a range of difficult questions. Whether this is something that NOMS should be doing at all, and if so, what should the limits be to the services it can provide. Should what is, in essence, a commercial company be able to take advantage of its connection to the Government to obtain contracts when competing with private operators? What considerations are relevant in deciding to bid for work? What is the relationship between the company's profit-making aim and the ends that NOMS otherwise seeks to pursue? It is for the legislature to determine these matters, and, if it wishes, to accord the appropriate powers, properly circumscribed, to the Executive to establish a commercial arm. It is

not for the Executive to take such decisions without any positive and identifiable lawful authority.

40. The requirement for such statutory authority, and the role that it would play, is apparent from other analogous contexts. For example, the National Health Service Act 2006 ss 43 states that the *"principal purpose"* of an NHS Foundation Trust is *"the provision of goods and services for the purposes of the health service in England"*, but that, as long as services are not *"provided to individuals for or in connection with the prevention, diagnosis or treatment of illness"* or for the *"promotion and protection of public health"*, a Trust can carry out activities *"for the purpose of making additional income available in order better to carry on its principal purpose."* In addition at least 50% of a Trust's total income must come from the provision of goods and services for the purposes of the health service in England and it cannot derive more than 50% of its income from its commercial activities (s 43(2A)). That reflects the choice Parliament has made to allow NHS Trusts, for limited purposes and in limited circumstances, to make services available for profit provided that is in order to support the Trust's statutory function. That, however, is a matter for the legislature to determine and Ministers cannot lawfully set up profit-making companies selling the expertise gained by their Department without such authority. That has occurred in the present case and it is unlawful.

TIMING OF CHALLENGE

41. The Defendant responded on 31 March 2015 to the Claimant's letter before claim of 25 February 2015. The Defendant noted that the claim was issued exactly three months less one day after the relevant decision was announced. Although it was therefore in time pursuant to CPR 54.5(1)(b), the Defendant asserted that it was not sufficiently *"prompt"*. The Defendant stated that there would be prejudice to himself and the UK's interests more generally if the Claimant was granted a remedy which prevented it from proceeding with the bid made to the Saudi authorities.

42. The argument, if it is being made, that even if the Claimant has an arguable case that JSi has been unlawfully created and is being unlawfully operated by the Defendant, permission should refused because of delay, is not a good one.

43. Firstly, the claim is brought in time and there is good reason why it was not issued earlier. The operation of the JSi has been shrouded in secrecy. As set out above, the existence of the Saudi Arabian bid was only made public on 18 December 2014 in a Ministry of Justice Mid-Year Report. The Defendant refused to provide further information about the bid, and it appears, furthermore, from the British Expertise International advertisement that it may have been providing services to Saudi Arabia previously, and to other countries, which have never been revealed. The Saudi bid itself only came to wider public attention when a journalist wrote about it on 16 January 2015. The original Claimant, AB, contacted solicitors on 4 February 2015. They gathered evidence and analysed the claim and sent a detailed letter before claim on 25 February 2015 to which it took the Defendant more than a month to respond. The reason that there has then been further delay after proceedings were issued is set out in the witness statement of Adam Hundt at §7 and §9-14 **[2-228-230 PB]**. None of those are the fault of AB or the current Claimant, both of whom acted promptly at all stages both before proceedings were issued and subsequently.

44. Had the Defendant been open about the activities of JSi, proceedings might have been issued earlier. As it is, however, there is no fault of AB or the current Claimant in the timing of these proceedings, which were issued within 3 months of the impugned decision being published. There is therefore no delay and the timing of the issuing of proceedings provides no basis for refusing permission.

45. Secondly, and in any event, the submission on delay could at most be relevant to any specific remedy seeking the quashing the Saudi Arabian bid. It does not apply to declaratory relief related to the legal status of JSi. If JSi was unlawfully created and is being unlawfully operated, that is an ongoing illegality and a matter of obvious public importance to rectify. It is understood that JSi is continuing to bid for and undertake commercial contracts in other countries. If the Defendant had no power to create or operate JSi, that should be determined and a declaration made to that effect. If the Claimant succeeds, submissions as to any specific remedy and the effects it will have on the Saudi Arabia bid can be made. That does not, however, mean that the claim should not proceed. If the Claimant has an arguable claim as to the general and

continuing illegality of JSi, it is plainly a matter of public interest that that should be determined.

STANDING

46. In the Defendant's response of 31 March 2015 to AB's letter before claim, it was asserted by the Defendant that AB lacked standing to challenge the decision to provide services to the Saudi prison authorities. That was not a good argument in relation to AB, but in any event it does not apply to GCHR which is a non-governmental organisation with a legitimate interest in the case. It plainly has standing to pursue the present claim.

47. GCHR is an independent, non-profit and non-governmental organisation founded in 2011 to protect human rights defenders in the Gulf region. It provides support and protection for human rights defenders (including journalists, lawyers and bloggers) in a number of countries, including support and protection for those who are imprisoned because of their activities. The countries within GCHR's mandate include Saudi Arabia and Oman, two of the countries to which JSi has provided, or is seeking to provide, services.

48. GCHR is very concerned about the treatment of human rights defenders, and those incarcerated more generally in prisons in Saudi Arabia. In the witness statement of Ms Gingell at §20-28 **[2-11-13 PB]** she describes the treatment of a number of prominent human rights lawyers and activists who received lengthy prison sentences, as well as the use of the death penalty (inflicted in Saudi Arabia by beheading), corporal punishment and torture in the Saudi prison system. Excerpts from Saudi Arabia's Country Chapter in Human Rights Watch's World Report 2015 **[2-193A-G PB]**, serve to summarise the situation:

> *Saudi Arabia continued in 2014 to try, convict, and imprison political dissidents and human rights activists solely on account of their peaceful activities … As in past years, authorities subjected hundreds of people to unfair trials and arbitrary detention. New anti-terrorism regulations that took effect in 2014 can be used to criminalize almost any form of peaceful criticism of the authorities as terrorism … In May, a Jeddah court convicted activist Raif Badawi and sentenced him to 10 years in prison and 1,000 lashes for "insulting Islam" by founding a critical liberal website, and for his comments during television interviews. An appeals court upheld the*

sentence in September … Detainees, including children, commonly face systematic violations of due process and fair trial rights, including arbitrary arrest and torture and ill-treatment in detention. Saudi judges routinely sentence defendants to floggings of hundreds of lashes … Judges can order arrest and detention, including of children, at their discretion. Children can be tried for capital crimes and sentenced as adults if physical signs of puberty exist … In June, the Ministry of Justice announced that prosecutors had filed 191 cases of alleged sorcery – a crime punishable by death – between November 2013 and May 2014, including some against foreign domestic workers …

According to media reports, Saudi Arabia executed at least 68 persons between January and mid-November 2014, mostly for murder, drug offenses, and armed robbery, including 31 between August 4 and September 4. Thirty-one of those executed were convicted for non-violent crimes, including one man sentenced for sorcery.

49. GCHR is concerned that the UK's provision of assistance to the Saudi prison system, in particular where it is occurring in a "*commercial manner*" and without apparently requiring Saudi Arabia to cease its human rights violations, will exacerbate those violations (see Ms Gingell's statement at §35-37 **[2-15-16 PB]**). GCHR is concerned that by engaging in commercial activities with the Saudi prison authorities, notwithstanding the serious human rights violations they are perpetrating, the UK gives legitimacy to the authorities' activities and suggests that the UK, notwithstanding its public condemnation of human rights abuses, is, in fact, prepared to turn a "*blind eye*" to them. GCHR is also concerned that if JSi succeeds in improving the organisational and managerial skills of the Saudi prison authorities, that will make it more effective generally, thus improving its capacity to commit human rights violations.

50. As Ms Gingell explains in her statement at §32 **[2-14 PB]**, she is not surprised that AB, having a family member living in Saudi Arabia, was not willing to proceed with the claim given the risk in which that would place them. She also notes at §33 that she is unaware of any human rights organisation based in Saudi Arabia which could bring the case given that such organisations are not able to operate safely or effectively. If GCHR does not have standing to bring the case, it is difficult to see which individual or organisation would do so, and the important public interest and constitutional issues raised by the claim would not be determined by the courts.

51. The test for standing in cases involved a public interest was considered by the Supreme Court in *AXA General Insurance Ltd and others v HM Advocate and others* [2011] UKSC 46; [2012] 1 AC 868 and *Walton v The Scottish Ministers* [2012] UKSC 44. If the Claimant is correct, the Defendant has purported to create and operate a commercial enterprise, bidding for or engaging in work in a number of countries, where he had no power to do so. The present case is therefore one which engages what Lord Reed described in *Walton* at §90 as not merely the "*redress [of] individual grievances*" but the court's "*constitutional function of maintaining the rule of law.*" In bringing the claim GCHR is "*acting in the public interest and can genuinely say that the issue [in the claim] directly affects the section of the public that [GCHR] seeks to represent*" (*AXA* at §63). In no sense could GCHR be said to be a mere "*busybody … who interferes in something with which he has no legitimate concern*" (*Walton* §92). The claim therefore satisfies the test for standing in public interest cases identified in *AXA* and *Walton*.

PROTECTIVE COSTS ORDER

52. The Court is further respectfully invited to grant the Claimant a protective costs order covering this application for judicial review, limiting its liability to costs to the sum of £2,000 (to be increased to £5,000 if the Claimant is able to raise more money as it is currently seeking to do).

53. The case meets the guidelines set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 for the grant of a protective costs order:

    (i) The case is arguable and raises important points of general legal and public importance that should be resolved by the Court, i.e. whether the Defendant has the power to create and operate JSi. That raises a series of important and undetermined questions of constitutional law, namely whether Ministers have powers that are neither conferred by statute or the prerogative and if so whether the analysis of the scope of those powers of Carnwath and Waller LLJ in *Shrewsbury* was correct. In addition the case raises specific issues as to whether, if the Crown enjoys third-source powers, they can be used to create commercial profit-making enterprises generally and JSi in particular. If the Claimant is

correct, and the Defendant has no such powers, that is a matter that has wide-reaching implications and should be determined by the courts.

(ii) The Claimant has no private interest in the outcome of this litigation. It is an NGO acting in the public interest.

(iii) The Claimant is not seeking a full protective costs order. While its finances are limited, this is an issue of sufficient importance that it is able to offer a cost-cap of £2,000. This is a substantial sum for the Claimant, and, crucially, it is all they can afford. Further details of the financial circumstances of the Claimant can be found in the witness statement of Ms Gingell on behalf of the Claimant.

(iv) If the Claimant is not granted a protective costs order it will be forced to withdraw its claim and the important issues raised by the case will go unresolved.

CONCLUSION

54. For the reasons above, the Claimant seeks permission to bring judicial review proceedings and at a substantive hearing seek the relief set out in the Claim Form. It also seeks a protective costs order.

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29 June 2015