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

Claim No. CO/2650/2007

BETWEEN

THE QUEEN
on the application of

NUCLEAR INFORMATION SERVICE

Claimant

-and-

(1) SECRETARY OF STATE FOR DEFENCE
(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendants

DEFENDANTS' SKELETON ARGUMENT
[for Renewed Application for Permission, 10.6.08]

Introduction

A: the claim

1. The Claimant seeks to challenge 2 decisions contained in the White Paper 'The Future of the United Kingdom's Nuclear Deterrent', published on 4th December 2006. The relevant decisions were:

   (i) to build a new class of submarines; and

   (ii) to participate in the 'life extension programme' for the Trident D5 missile.

   (Together, these decisions are referred to as 'the White Paper decisions".) The Claimant's proceedings were issued on 30th March 2007 – i.e. neither promptly, nor within the 3 month long-stop period permitted by CPR 54.5.

2. The Claimant's challenge falls into 2 parts. The *first* part comprises various contentions that the White Paper decisions are inconsistent with various international law standards:

   (i) the requirements of the Treaty on the Non-Proliferation of Nuclear Weapons ("the NPT"), specifically Article VI of the NPT;

   (ii) "secondary" obligations arising as a result of the 2000 Review Conference of the Parties to the NPT;

   (iii) international law concerning the use of force because the use of the Trident missile system "envisaged" in the White Paper is contrary to the provisions of Article 2(4) of the UN Charter (which prohibit the use of force or the threat of use of force), and outside a state's right to act in self-defence, as recognised in Article 51. The basis of this claim is that the White Paper does not state in terms that the use of nuclear weapons would only occur "in extreme circumstances of self-defence, in which the very survival of a State would be at stake"; and

   (iv) requirements of international humanitarian law because the White Paper fails to identify how the "envisaged" use of the Trident missile system could be compatible: (a) with the prohibition on indiscriminate weapons (i.e. those that do not distinguish between military and civilian targets); (b) the prohibition on the use of weapons that cause unnecessary suffering to combatants; and (c)

the principle of neutrality (i.e. that the territory of neutral powers is inviolable).

The *second* part of the Claimant's challenge contends that following the publication of the White Paper (and presumably prior to the date of the Parliamentary debate) there was an unlawful failure to consult on the policy decisions contained within the White Paper.

B: permission refused by Collins J

3. Permission to apply for judicial review was refused by Collins J on 4th May 2007. In refusing permission he observed as follows:

> "Whatever one's views on the decision to replace Trident, the issue is one for Parliament and the argument that there should be consultation on it is misconceived. The responsibility for the defence of the realm is that of the government and not for the courts to consider. Further, the summary grounds produce reasons which in my view are correct in demonstrating that there is no arguable case. The NPT does not render the United Kingdom's retention of its nuclear capability unlawful. ..."[1]

Thus as to the first part of the Claimant's claim, Collins J concluded both that the points raised were not justiciable *and* that they were in any event unarguable. As to the second (consultation) part of the claim, Collins J clearly considered that that lacked any legal or factual basis at all.

C: the renewed application

4. The application for permission to apply for judicial review was renewed by notice dated 9th May 2007[2] on the following grounds

> "1. Permission to apply for judicial review was and remains appropriate because (a) the claim raises important issues, (b) the claim should not be characterised as unarguable and (c) there is no clean knock-out blow.
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> 2. The claim is not 'non-justiciable'. It does not involve the Court second-guessing the policy merits of replacement of Trident. Rather it raises questions of law, concerning both (a) compatibility with

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1 See Supplementary Bundle at p. 23. Collins J also concluded that the Claimant's should pay the Defendants' costs of preparing the Acknowledgment of Service.

2 Supplementary Bundle at p. 24.

international law; and (b) duty to consult. Each is arguable and important, as is the question of justiciability.

3. Compatibility with international law raises, inter alia, an important question as to the scope and application of the *Launder* principle.

4. The Defendants seek narrowly to confine that principle, the content of relevant international law, and the separate question of the duty to consult. Whether they are right or wrong to do so, in each respect, should be the subject of argument and determination at a substantive hearing."

The Claimant then also requested that the hearing of the renewed application for permission be postponed until after the judgment of the House of Lords in *R(Gentle) v Prime Minister*. The House of Lords gave judgment in that case on 9th April 2008 (now reported at [2008] 2 WLR 879).

5. Although the grounds of renewal are set out at some length, in sum they amount to the following:

(i) the first part of the claim is justiciable. In this regard, the Claimant continues to rely on the so-called '*Launder* principle' that if

"... a public body has expressly stated that it has taken an unincorporated treaty obligation into consideration ... a Court has a duty to ensure that the public body has properly understood the scope of that obligation ..."[3]

(ii) that the first part of the claim is in fact arguable on it merits[4]; and

(iii) that the consultation part of the claim is arguable[5].

The Grounds of Renewal also include the contention that the claim 'raises important issues'. However, this cannot provide any principled, free-standing basis for a grant of permission. The question for the Court is

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3 See Claimant's Grounds at §§13 – 16, Claimant's Bundle pp. 12 – 14. This is the substance of Renewal Grounds 2, 3 and 4.

4 Grounds of Renewal §2.

5 Also Grounds of Renewal at §2. This part of the Grounds of Renewal also appears to contend that the consultation part of the claim 'is justiciable'. In fact, it has never been suggested by the Defendants that this part of the claim is not justiciable. The Defendants' case is simply that there is no legal basis for the contention that any obligation to consult arose, and even if any such obligation did exist, the claim made was hopeless on the facts. This is the basis on which Collins J refused permission on this part of the claim.

whether or not it is arguable that the White Paper decisions are unlawful. If the Claimant cannot identify any arguable legal point permission should not be granted on grounds of 'importance' alone. In this regard the whole cannot be greater than the sum of the parts: the Court's proper function is to consider issues of legality, not to undertake general inquiries on matters simply because it is claimed that the decision taken was 'important'.

6. Although the House of Lords judgment in *R(Gentle) v Prime Minister* was handed down on 9th April 2008, the Claimant has not to date indicated the way in which it assists its claim in the present case. In fact, the judgment of the House of Lords in *Gentle* serves only to undermine the Claimant's position on the first part of its claim: see

   (i) per Lord Bingham at [8], p. 885E – F; per Lord Hope at [24] and Baroness Hale at [58] (as to the general point concerning justiciability of matters that are one of political judgment); and in particular,

   (ii) per Lord Hope at [26] as to the scope of the '*Launder* principle' relied on by the Claimants in this case. The statement as to the scope of this principle is entirely consistent with the Defendants' position as set out at paragraphs 11 – 15 of the Summary Grounds[6].

Submissions

A: General

7. The Defendants continue to rely on the points set out in their Summary Grounds. Those Grounds are at pp. 4 – 22 of the Supplementary Bundle. The authorities referred to in those Grounds (insofar as they are not in the Claimant's Bundle) are in the authorities bundle lodged with this Skeleton Argument.

8. The matters set out in the Summary Grounds are not repeated verbatim in this Skeleton Argument. The Defendants will refer to them as necessary at the hearing of this application.

9. In summary, the Defendants' position is:

   the White Paper decisions

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6 See Supplementary Bundle at pp. 8 – 11.

(i) the Claimant's challenge to the White Paper decisions has been commenced out of time. The Claimant does not dispute this fact, but contends that the claim should proceed because it raises "issues of general public importance". If it does indeed involve issues of such public importance, that is a compelling reason why the claim should have been commenced promptly and in any event within 3 months, not a reason that excuses delay. In relation to the White Paper decisions the witness statement of Diane McDonald (at §33, CB/38) does not suggest that these matters have been pursued with any sense of urgency at all;

(ii) the challenges to the White Paper decisions are not justiciable (see Grounds at paragraphs 11 to 21). This point is underlined by the decision of the House of Lords in *Gentle*;

(iii) in any event the challenges to the White Paper decisions are unarguable on the facts (see Grounds at paragraphs 22 to 31);

the consultation challenge

(iv) the challenge alleging an unlawful failure to consult is unarguable both as a matter of law, and on the facts (see Grounds at paragraphs 32 to 42). Again, cases decided since the decision of Collins J re-affirm this conclusion: see *R(Niazi and others) v Secretary of State for the Home Department*[7] (Divisional Court); *R(C) v Secretary of State for Justice*[8] (Divisional Court); and *BAPIO v Secretary of State for the Home Department*[9] (Court of Appeal).

10. For these reasons, this renewed application for permission to apply for judicial review should be refused.

B: the challenge to the White Paper decisions

(i) Justiciability

11. The Defendants' case is stated in the Summary Grounds at paragraphs 11 – 21[10]. The Claimant's case rests entirely on the '*Launder* principle' – i.e. a statement by Lord Hope in *R v Secretary of State for the Home*

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7 [2007] EWCA Civ 1495

8 [2008] EWHC 171 (Admin)

9 [2007] EWCA Civ 1139

10 Supplementary Bundle at pp. 8 – 14.

Department ex parte Launder [1997] 1 WLR 839 at 867[11]. In truth, it is not a principle at all, at least not in any overriding sense. It is not an approach of general application, and not an approach that is applicable in the circumstances of this case. *First*, it is not applicable simply because general statements have been made to the effect that the government will act in accordance with international law: see *R(CND) v Prime Minister* [2002] EWHC 2777 (Admin) at [61][12], and compare the statement in the Executive Summary of the White Paper at CB/190:

> "Renewing our minimum nuclear deterrent capability is fully consistent with all our international obligations."

12. *Secondly*, Lord Hope's statement in *Launder* is not a matter that overrides the principle of restraint that the courts will not rule on the exercise of discretionary powers in relation to defence of the realm: see *Marchiori v The Environment Agency* [2002] EWCA Civ 3 per Laws LJ at [38] – [40]; *R(Gentle) v Prime Minister* [2007] 2 WLR 295 per Lord Phillips MR at [26] – [34]; and *International Transport Roth v. Home Secretary* [2003] QB 728, per Laws LJ at [85].

13. In the present case, and despite the Claimant's contention to the contrary no "clean" issue of law arises. Rather, consideration of the claim the Claimant pursues leads directly and inevitably to examination of judgments and assessments that are outwith the scope of judicial determination. For example, any exploration of whether the White Paper decisions were consistent with the obligation under Article VI of the NPT (which concerns multilateral disarmament) will inevitably require the Court to evaluate for itself a range of interlocking and overlapping considerations. Questions such as how to initiate or progress negotiations towards the goal set out in Article VI; what would constitute sufficient international controls to give States the security necessary to enable them to part with a nuclear deterrent; and whether the achievement of those goals would be better served by the United Kingdom retaining an effective nuclear deterrent pending the conclusion of those negotiations, are not questions capable of being the subject of a judicial decision: see more specifically, Summary Grounds at paragraphs 17 – 21[13].

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11 *Launder* is at CB/666 – 696, the relevant passage in Lord Hope's speech is at CB/694.

12 At CB/766.

13 Compare also on these points, as to the fine political/diplomatic judgements to be made, the statement made by Ambassador John Duncan, Head of the UK Delegation to the First Preparatory Committee for the Eighth Review Conference of the Nuclear Non-Proliferation Treaty, at §5, and in relation to the White Paper decisions at §§14 – 19. Supplementary Bundle at pp. 32 – 35.

14. *Thirdly*, Lord Hope's conclusions in *Launder* are not applicable to the very different circumstances of the present case. This is clear from Lord Hope's own speech in *Gentle*. At [26] he stated

> "26. Mr. Singh sought to overcome these difficulties by comparing this case with *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839. In that case the Secretary of State said that he had taken account of the applicant's representations that his extradition to Hong Kong would be a breach of the (then unincorporated) European Convention for the Protection of Human Rights and Fundamental Freedoms in reaching his decision that the applicant should be extradited. At p 867e-f I said that, if the applicant was to have an effective remedy against a decision which was flawed because the decision-maker had misdirected himself on the Convention which he himself said he took into account, the House should examine the substance of the argument. But the context in which I made that observation was a case where the Secretary of State was dealing with the applicant's rights under domestic extradition law. He chose to do this by reference, among other things, to the Convention. If he misunderstood its provisions he was, according to the ordinary principles of domestic law, reviewable. Here the Attorney General was not dealing with rights or obligations in domestic law when he was considering what international law had to say about the legality of the invasion. The only question he was concerned with was whether the invasion was lawful in international law. That question as such is not, as Mr Singh accepts, reviewable in the domestic courts. Nor can it be linked to the state's obligations under article 2(1). The Attorney General did not say, when he was considering the issue of legality, that he was addressing his mind to the Convention rights of the troops for whom the Chief of the Defence Staff was responsible.
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> [emphasis added]

15. *Overall*:

(i) the Claimant's reliance on *Launder* does not assist in the circumstances of this case. For the reasons summarised above, the approach taken in *Launder* is inapplicable in this case, and therefore does not provide the Claimant with the 'foothold in domestic law' (Claimant's Grounds at §12, CB/11) that the Claimant contends is the essential precondition for its claim;

(ii) the Court is being asked to undertake a task which is not capable of judicial determination. This is particularly evident in respect of the challenges resting on (a) international law concerning the use of force; and (b) international humanitarian law. In each instance specific language in the White Paper as to the circumstances in which the use of nuclear weapons would be

considered is picked over[14]. The Court would no doubt be invited by the Claimant to determine what specific language should have appeared in the White Paper. However, this is precisely the sort of exercise identified in *Gentle* (per Baroness Hale at [58]) as beyond the competence of the Court.

(ii) Merits

16. The Defendants' case is at paragraphs 22 – 31 of the Summary Grounds[15].

17. *First*, the obligation under Article VI of the NPT is for negotiated, multilateral nuclear disarmament under strict and effective international control. Once this is understood, the decision in the White Paper to maintain Trident (now, the only nuclear weapons system retained by the United Kingdom) cannot be characterised as contrary to that obligation. Nor can the decision to maintain Trident be regarded as a breach of the obligation to perform such treaty obligations "in good faith": see Summary Grounds, paragraph 17. The fact that the position adopted in the White Paper is entirely consistent with the United Kingdom's acceptance of its obligations under Article VI of the NPT is underscored by the statements made in April 2008 to the Preparatory Committee for the Eighth Review Conference of the Nuclear Non-Proliferation Treaty[16].

18. *Secondly*, the conclusions stated by the 2000 Review Conference neither alter nor supplement the scope of Article VI of the NPT. They comprise only political statements of practical guidance made in the context of the obligation contained within Article VI of the NPT. Thus, if the Claimant's case in relation to the NPT is unarguable (which it is), it is not improved by reference to this practical guidance. See further on this point, Summary Grounds at paragraph 26[17].

19. *Thirdly*, as to the Claimant's reliance on (a) international law concerning the use of force; and (b) international humanitarian law, no sensible distinction can be drawn between the statements contained in the White Paper, and the propositions identified by the Claimant as the relevant

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14 For the specific points made, and the Defendants' response to them, see Summary Grounds at paragraphs 27 – 31, Supplementary Bundle pp. 16 – 17.

15 Supplementary Bundle at pp. 14 – 17.

16 See Supplementary Bundle at pp. 25 – 27; and pp. 28 – 31.

17 Supplementary Bundle at pp. 15 – 16.

international law standards: see generally, Summary Grounds at paragraphs 27 – 31[18].

C: the consultation claim

20. The Claimant's case is at §§24 – 29 of the Grounds in Support of the Claim[19]. The Defendants' response is at paragraphs 32 – 42 of the Summary Grounds[20]. The Claimant accepts that there was no express obligation to conduct any formal written consultation process. The Claimant faintly contends that a representation was made that some form of formal consultation process would take place[21], but that contention is hopeless on its facts: see Defendants' Grounds at paragraphs 38 – 39[22].

21. The thrust of the Claimant's case rests on the contention that some form of general obligation to consult arises at common law by reason of the 'magnitude' of the decision taken[23]. There is no legal basis for this contention. Moreover, it is a contention that has been specifically rejected by the Court of Appeal in *R(BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 per Sedley LJ at [41] – [47], in particular at [43] – [45], and by the Divisional Court in *R(C) v Secretary of State for Justice* [2008] EWHC 171 (Admin) per Maurice Kay LJ at [24] (where a submission comparable to that made by the Claimant in this case was described as containing "the seeds of its own destruction").

22. Further, to the extent that the Claimant seeks to rely on the Cabinet Office Code of Practice as founding an obligation to consult, that submission is inconsistent with the decision of the Divisional Court in *R(Niazi) v Secretary of State for the Home Department* [2007] EWCA Civ 1495 per May LJ at [24]. Finally, the Claimant makes mention of the Aarhus Convention (and presumably, Article 7 of that Convention[24]). The provisions of that Convention have been given effect to in the United Kingdom through a number of specific provisions[25], but the Convention itself gives rise to no free-standing right of consultation at common law.

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18 Supplementary Bundle at pp. 16 – 17.

19 See, CB/18 – 21.

20 Supplementary Bundle at 18 – 21.

21 See Grounds in Support of the Claim at §28, second and fourth sentences.

22 See Supplementary Bundle at pp. 19 – 20.

23 Grounds in Support of the Claim at §26

24 The Aarhus Convention is at CB/512 – 536, Article 7 is at CB/522.

25 See, for example, the legislation presently in place concerning environmental impact assessments and strategic environmental assessments

23. In any event, the Claimant's claim as to consultation ignores the fact that the White Paper expressly stated (at CB/188)

> "The Government's decision followed a careful review of all the issues and options, which are set out in full in the White Paper. We now look forward to a substantial period of public and parliamentary debate in which the issues can be aired freely. ..."

There was nothing unlawful in the conclusion that the White Paper decisions should be the subject of 'public and parliamentary debate'. That process took place, included the Parliamentary debate and vote on 14th March 2007, and taken as a whole was an entirely appropriate means of facilitating public consideration of and response to the contents of the White Paper. Even Ms. McDonald (who makes the witness statement in support of the Claimant's claim) does not contend that she was unable to take part in this process – in fact quite the contrary: see w/s at §29, CB/36. Thus, even if the points made above as to the legal merits of this part of the claim are ignored, the claim as to consultation lacks any sufficient factual merit.

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