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Your ref: REC/REC/00121071/1
Our ref: Z1523941/JEP/N1

23 October 2015

Dear Sirs

Re: Proposed application for judicial review by Caroline Lucas MP and Baroness Jones of Moulescoomb

We are in receipt of your Letters Before Claim, sent pursuant to the Pre-action Protocol for Judicial Review, dated 23 September 2015.

1. **The Claimants:**

Caroline Lucas MP and Baroness Jones of Moulescoomb

2. **From:**

The Secretary of State for Defence

3. **Reference details:**

Your reference: REC/REC/00121071/1

Our reference: Z1317681/JEP/N1

The matter is being handled on behalf of the Secretary of State by [redacted], Senior Lawyer, Government Legal Department.

4. **The details of the matter being challenged:**

You allege that the Secretary of State is under a duty to formulate and publish a "Targeted Killing Policy" governing the circumstances in which it will authorise military operations abroad which have the objective of killing identified individuals "*outside an armed conflict or war in which the UK is participating*".

You also seek the Government's confirmation that no such military operations will be authorised until such a policy has been published and its lawfulness "tested".

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You argue your case by reference to events surrounding the targeted strike by the Royal Air force in Raqqa on 21 August 2015.

5. Response to the proposed claim:

Summary

1. The proposed claim is not justiciable and your clients do not have standing to bring it.

2. The lawfulness of the action taken in Raqqa on 21 August 2015, and the lawfulness of any future air strike, does not depend upon the formulation and publication of a "policy" on targeted killing.

3. The action taken in Raqqa on 21 August 2015 was a precision air strike against an ISIL vehicle, which contained three ISIL fighters. The target of the air strike, Mr Reyaad Khan, was an ISIL fighter assessed to be actively engaged in planning and directing imminent armed attacks against the United Kingdom. The airstrike was a lawful act of both individual and collective self-defence and consistent with principles of international humanitarian law.

   3.1 It was a lawful act of self-defence of the United Kingdom because it was a necessary and proportionate response to an imminent armed attack against the United Kingdom.

   3.2 It was also lawful as an act in the collective self-defence of Iraq in that it was directed at persons who were members of a group engaged in planning and perpetrating attacks against Iraq.

4. The attack was lawful on both (and each independently) of these bases. It was also consistent with principles of the law of armed conflict in that the airstrike was directed at Reyaad Khan in the ongoing armed conflict within and against Iraq who was actively engaged in attack planning and perpetration, and the strike was fully in accordance with principles of military necessity, proportionality and related law of armed conflict principles.

5. There is therefore no basis upon which your clients' proposed application for judicial review can succeed.

Justiciability and standing

6. Your clients' attempt to restrain the Government from using military force on the territory of a foreign State, when it considers it necessary to do so, and in line with the Government's paramount responsibility to protect the people of the United Kingdom, is wholly inappropriate. So, too, is your proposal that the courts should advise the Government as to the scope of military action abroad that it may take in the future.

7. The proposed claim would invite the Court into territory of extreme sensitivity concerning, as it does, allegations about military operations conducted by the United Kingdom in Syria on 21 August 2015, any future military action in Syria, and the activities of the intelligence and security services of the United Kingdom. It would be wholly inappropriate for the courts to entertain such a challenge, whether in the context of ongoing armed conflict or the wider complex and challenging military, diplomatic and national security situation.

8. In *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872 the Divisional Court and the Court of Appeal rejected, as non-justiciable, a claim that by passing locational intelligence to the United States, enabling the US to use lethal force to kill an individual in Pakistan (by means of a drone strike), UK officials were or would be acting in breach of the criminal law. Whilst in *Noor Khan* the alleged acts of passing locational intelligence were secondary to the alleged acts of the US in undertaking drone strikes – whereas here the allegation concerns use of force by UK armed forces – a similar principle of non-justiciability applies.

9. As Lord Bingham observed in *R v Jones (Margaret)* [2007] 1 AC 136 at §30:

   "...there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed

services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law "

10. Similarly, in the same case, Lord Hoffmann said at §65:

> *"...there is the practical difficulty that the making of war and peace and the disposition of the armed forces has always been regarded as a discretionary power of the Crown in the exercise of which the courts will not inquire. ...the reason why the courts will not inquire ... is because of the discretionary nature of the power itself."*

11. See, further, the well known passages in *R (CND) v Prime Minister [2002] EWHC 2777 (Admin) at §59 (ii); and R (Al-Haq) v SSFCA [2009] EWHC 1910 (Admin).*

12. This is a paradigm example of a case to which these well-established rules of non-justiciability apply.

13. Moreover, your letter is replete with criticisms of the alleged lack of clarity of statements made in Parliament. As Parliamentarians, your clients will be well aware that it would be contrary to Article 9 of the Bill of Rights 1688 for the courts to entertain any challenge to anything said by a member of the legislature within Parliament itself, and they will not do so. The forum in which your clients may, and indeed have, raised and debated such issues is Parliament. They do not have standing to bring the proposed claim before the courts.

The claimed need for a "published policy"

14. You claim that the Government is under a duty in law to have a written "policy" as to when it will act in the self-defence of the United Kingdom, or, presumably (on your logic) the collective self-defence of any other country; further, you say, that "policy" must be published.

15. The true position is that in deciding whether to initiate a strike when faced with a threat such as that posed by the Islamic State in Iraq and the Levant (ISIL), in Iraq and Syria, the Government will consider the applicable law (including international law), and then consider whether on the facts a strike is justified in law. The present context involves a factual assessment as to whether or not military action should be taken and is justified, applying the relevant legal framework. The principles of law on which your alleged duty is based have no application in the context of the planning of military operations in an armed conflict abroad or to the authorisation of the sort of action undertaken against Reyaad Khan. That is not properly to be described as a "policy".

16. Even if it is properly to be characterised as a "policy", it is not a policy attracting the legal consequences, including the need to publish, dealt with in cases such as *R (Lumba) v SSHD [2012] 1 AC 245*, on which you heavily rely. There is no requirement to publish the Government's conception of the applicable legal framework in any particular context, still less in a context such as the present. Indeed, such information is privileged and the courts have consistently recognised the importance to be attached to the concept of legal professional privilege: *R v Derby Magistrates ex parte B* [1996] AC 487, *R v Special Commissioner for Income Tax ex parte Morgan Grenfell* [2003] 1 AC 563 and *Three Rivers District Council v Bank of England* [2005] 1 AC 610.

17. The position is not comparable to that considered in *Lumba*, which was concerned with the requirement for a published policy as to the circumstances in which foreign national prisoners liable to deportation would be released on immigration bail, so that the power to detain would not be exercised arbitrarily as between cases and so that an individual is aware of the criteria that are being applied, is able to make informed and meaningful representations to the decision-maker before a decision is made, and is able to challenge an adverse decision. Those matters simply have no traction in the present circumstances, which are not concerned with the administration of a statutory scheme conferring a discretion on the Secretary of State, and where (given the national security concerns engaged) there is no possibility of any intended target of such action being invited to make representations to a decision-maker, or being able to challenge an adverse decision. Similar considerations apply with respect to the benefits case to which you refer, *B v SSWP [2005] 1 WLR 3796*, or in the context of the adoption of measures designed to ensure the fairness of the procedure for assessing fast-track asylum claims, as in *R (Refugee Legal Centre) v SSHD [2005] 1WLR 2219.*

18. Similarly, your reliance on *R (Purdy) v DPP [2010] AC 345* is wholly inappropriate. It is absurd to suggest that a terrorist planning an imminent armed attack against the United Kingdom must be given guidance as to the precise circumstances in which the United Kingdom's government may decide that it is necessary and proportionate to prevent him from doing so by using military force. It is equally misconceived to suggest that, having satisfied itself that such action would be lawful, the government is in need of a further policy to indicate whether the State's right of self-defence is being operated "consistently", as if it were a matter of the exercise of a discretion under a statutory scheme.

19. Further, you incorrectly suggest that the Secretary of State stated that the test of the legality of such action is the same as that which applies as to the use of lethal force by armed police. He did not do so. The circumstances are plainly very different; the UN "*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*", which you cite, are of no application or assistance in the present circumstances.

The armed conflict

20. In any event, your letter proceeds from the premise that the action taken in Raqqa occurred outside the context of an armed conflict. That premise is fundamentally mistaken.

21. An armed conflict is taking place in Iraq, and crossing over into Syria, at present. The United Kingdom is not currently participating in coalition air strikes within Syria (but is doing so in Iraq). The military action taken in Syria by the RAF on 21 August 2015 was aimed at a specific ISIL target that presented a clear, credible and specific threat of armed attack on the United Kingdom in the context of an active armed conflict in which the three ISIL fighters killed in the attack were participants. The fact that the United Kingdom had not up to that point conducted any air strikes on Syrian territory provides no basis for the assertion that this action took place outside the context of an armed conflict. The Raqqa strike was a military operation which was consistent with international humanitarian law.

The right of self-defence

22. The chronological starting point is that on 25 November 2014 the United Kingdom's Permanent Representative to the United Nations wrote to the President of the Security Council, pursuant to Article 51 of the United Nations Charter, informing the Security Council that the United Kingdom was taking measures in support of the collective self-defence of Iraq as part of international efforts led by the United States. Those measures were in response to the request of the Government of Iraq for assistance in confronting the attack by ISIL on Iraq. The letter stated:

> "*The United Kingdom fully supports these international efforts whose purpose is to end the continuing attack on Iraq, to protect Iraqi citizens and to enable Iraqi forces to regain control of the borders of Iraq by striking ISIL sites and military* strongholds *in Syria, as necessary and proportionate measures.*"

23. That remains the position. In his letter of 7 September 2015 to the President of the Security Council, which was also sent pursuant to Article 51 of the UN Charter, the United Kingdom's Permanent Representative referred back to his letter of 25 November 2014 and explained, "*ISIL is engaged in an ongoing armed attack against Iraq, and therefore action against ISIL in Syria is lawful in the collective self-defence of Iraq.*" We further note that the United States, France and Australia are participating in military operations in Syria in collective self-defence of Iraq, and have so informed the Security Council in accordance with Article 51. That is the legal position. The airstrike against ISIL in Raqqa was lawful as an act of collective self-defence.

24. However, the Government has chosen to limit its involvement in coalition air strikes against ISIL to the territory of Iraq, subject to exceptions, including the Government's right to act in Syria (without first consulting Parliament) if there is a critical British national interest at stake. Such was the case on this occasion: a critical British national interest was at stake.

25. The airstrike in Raqqa was also lawful as an act of individual self-defence of the United Kingdom. The Permanent Representative's letter of 7 September 2015 to the President of the Security Council made

clear that self-defence of the United Kingdom was one of the legal bases justifying the United Kingdom's action:

> *"On 21 August 2015 armed forces of the United Kingdom of Great Britain and Northern Ireland carried out a precision airstrike against an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling. This airstrike was a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom."*

26. Action in self-defence is lawful where it is necessary and proportionate to avert an imminent armed attack against the United Kingdom whether the threat emanates from a State or a non-State actor. That was the position in relation to the targeting of Reyaad Khan, who was actively working to direct and orchestrate specific terrorist attacks in the United Kingdom (such as plots to attack high profile public commemorations, including those taking place in the summer of 2015). The manifest intention was to murder British citizens and others in the United Kingdom. The strike was essential to prevent such attacks. There was no effective alternative means of doing so. Reyaad Khan and his associates were operating from territory controlled by ISIL. There are no police or military on the ground in Syria who could have apprehended him. The planned attacks could only be forestalled by the action taken. It was therefore necessary and proportionate to take targeted military action against him. The strike was conducted in accordance with International Humanitarian Law targeting rules and principles. There were no civilian casualties.

27. Article 51 of the UN Charter provides:

> *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."*

28. It is well established that the inherent right of self-defence encompasses not only a State's right to defend itself against *actual* armed attack but also a right of anticipatory self-defence in the case of *imminent* armed attack. An armed attack may not be solely from another state and, as such, states are also not precluded from defending their populations on the ground of the non-state nature of the attackers.

29. Two further conditions apply where force is to be used in self-defence in anticipation of an imminent armed attack. First, military action should be used only as a last resort. It must be *necessary* to use force to deal with the particular threat that is faced. Secondly, the force used must be *proportionate* to the threat faced and must be limited to what is necessary to deal with the threat.

30. The intended scale and effects of the threatened attacks against the United Kingdom by Reyaad Khan and those of ISIL with whom he was conspiring were judged to reach the level of a threatened armed attack capable of justifying a response under Article 51 of the UN Charter. There was clear evidence of Reyaad Khan's planning and directing a series of attacks against the UK and the UK's allies, including a number which were foiled. The evidence showed that the threat was genuine, demonstrating Mr Khan's intent, and capability of delivering the attack. The threat of attack was current and could have become a reality at any moment and without warning. The airstrike that killed him was the only feasible means of effectively disrupting the attacks planned and directed by him. There was no realistic prospect that he would travel outside Syria so that other means of disruption could be attempted. The significantly disruptive impact of the strike outweighed any potential effects increasing the threat to the UK. The Government accordingly decided to act in self-defence of the UK against an imminent armed attack, as it was entitled to do.

Your clients' proposed judicial review claim

31. For all the reasons set out above, we strongly urge your clients to refrain from lodging the threatened judicial review claim. In the event that they persist in bringing it, it will be vigorously defended, and our client will seek his costs of doing so.

6. Details of any other interested Parties

None.

7. ADR proposals

You have not set out any ADR proposals in your letter before claim. The Secretary of State agrees that ADR is not appropriate for this claim.

8. Response to requests for information and documents

See above.

9. Address for further correspondence and service of court documents

[redacted], Senior Lawyer, N1 National Security and Counter Terrorism Litigation Team, Government Legal Department, One Kemble Street, LONDON, WC2B 4TS; Tel: [redacted]; Email: [redacted]

Yours faithfully,

[redacted]
For the Treasury Solicitor

D [redacted]
F [redacted]
E [redacted]