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HIGH COURT, LONDON

27th JANUARY 2009

APPEAL REFUSED ON TRIDENT

JUDICIAL REVIEW OF THE GOVERNMENT'S DECISION TO RENEW THE TRIDENT NUCLEAR WEAPONS SYSTEM

In the High Court on 26th January, Lord Justice Scott Baker refused NIS permission to appeal Mr. Justice Simon's decision of 10th June 2008 not to grant permission to claim Judicial Review of the Government's 2006 Defence White Paper and its decision to renew the Trident nuclear weapons system. The question of Consultation was not pursued.

Michael Fordham QC, who appeared with Naina Patel, also of Blackstone Chambers, both instructed by Phil Shiner and Fouzia Javaid of Public Interest Lawyers, argued that the issue of nuclear weapons is not forbidden territory for the courts simply because it involves international law in the area of defence policy. The fact that the White Paper relies on the Nuclear Non-Proliferation Treaty (NPT) and the 1996 Advisory Opinion of the International Court of Justice on The Legality of the Threat and Use of Nuclear Weapons creates a foothold in domestic law for the court to consider the legal question of whether the Government has properly understood its obligations under those two instruments.

Mr Fordham QC explained:

The Government is incorrect in law in considering that "*the UK's retention of a nuclear deterrent is fully consistent with our international legal obligations*" (paragraph 2-9 of the 2006 White Paper), because whilst acknowledging its obligation under the Nuclear Non-Proliferation Treaty (NPT) to negotiate *multilateral disarmament*, it omits its obligation to engage in *unilateral disarmament*. This duty, by all State parties, to reduce nuclear weapons unilaterally, is a legal obligation.

The Vienna Convention on the Interpretation of Treaties says that a treaty must be interpreted in context and in light of its object and purpose. Context includes '*any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*' (Article 31(3)(a)), in this case the 2000 NPT Review Conference. It is the Review Conference which makes clear that states are obliged, unilaterally, to reduce their nuclear arsenals and to narrow the basis for envisaged use of any weapons which remain. Although the White Paper refers to the NPT, it omits any reference to either the Convention or the Review Conference

The White Paper also refers to the 1996 Advisory Opinion of the International Court of Justice on The Legality of the Threat and Use of Nuclear Weapons (paragraph 2-11). While relying on the possible exception to the illegality of the weapons by a State '*in an extreme circumstance of self-defence*' (paragraph 97 of the White Paper), it omits the qualification '*in which its very survival would be at stake.*'

Moreover, the Advisory Opinion does no more than apply principles of international humanitarian law, and customary international law to the threat and use of nuclear weapons. These principles have been received into domestic law and must apply to the Government's decisions regardless of the Government's self-direction in the White Paper.

NIS's arguments raise matters of law not policy, and the place for those arguments is a substantive hearing for judicial review. However, permission to appeal was not granted, nor was leave to appeal to the House of Lords, thus the case is closed. But NIS and its lawyers are satisfied that the government has not proved that its policy is legal and we will remain vigilant to any further opportunity to challenge the renewal of Trident. The many people who have enabled this case to be heard by donating £9000 have participated in a valuable attempt to bring the government to justice. Together with the pro bono contributions of our lawyers and the persistence of the NIS Board in taking difficult decisions, we have been a formidable team. We will be back!