Neutral Citation Number: [2017] EWHC 1969 (Admin)

Case No: CO/1025/2017

**IN THE HIGH COURT OF JUSTICE**
**DIVISIONAL COURT OF THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2017

**Before:**

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**
and
**MR JUSTICE OUSELEY**

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**Between:**

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| **Regina (on the application of General Abdulwaheed Shannan Al Rabbat)** | **Claimant** |
| **- and -** | |
| **Westminster Magistrates' Court** | **Defendant** |
| **-and-** | |
| **(1) The Rt Hon Tony Blair**<br>**(2)The Rt Hon Jack Straw**<br>**(3) The Rt Hon The Lord Goldsmith** | **Interested Parties** |
| **-and-** | |
| **HM Attorney General** | **Intervener** |

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**Michael Mansfield QC, Antonia Benfield,** and **Abdul-Haq Al-Ani** (instructed by **Imran Khan** and **Kate Ellis** of **Imran Khan and Partners**) for the **Claimant**

**James Eadie QC** and **Melanie Cumberland** for the **Intervener**

Hearing date: 5 July 2017

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# Approved Judgment

**Lord Thomas of Cwmgiedd, CJ:**

1. This is the judgment of the court.

*The issue*

2. The application before us made by Mr Mansfield QC on behalf of the claimant, General Abdulwaheed Shannan Al Rabbat, is an application for permission to bring proceedings for judicial review of the decision of District Judge Snow at the City of Westminster Magistrates' Court on 24 November 2016. His decision was a refusal to issue a summons for a private prosecution of the Interested Parties in respect of what is contended to be the crime of aggression under the law of England and Wales. That crime is said to have been committed by the Interested Parties through their participation in the decision made in 2003 to invade Iraq and overthrow the regime of President Saddam Hussein.

3. On 29 March 2006 the House of Lords unanimously decided in *R v Jones (Margaret)* [2007] 1 AC 136, in the context of the invasion of Iraq, that although there was a crime of aggression under customary international law, there was no such crime as the crime of aggression under the law of England and Wales. The leading judgments were given by Lord Bingham and Lord Hoffmann. This court is bound by that decision.

4. It is contended on behalf of the claimant that the House of Lords was in error and that there is a crime of aggression under the law of England and Wales. Although it is accepted that we are bound by that decision, it is contended we should grant permission so that the Supreme Court, under the Practice Statement of 26 July 1966 [1966] 1 WLR 1234, can review the decision in *Jones* in the circumstances that now pertain and depart from it.

5. If we were to grant permission, when, as is inevitable, the claim failed in this court, it is contended we should certify a general point of law of public importance as to the correctness of the decision in *Jones.*

6. HM Attorney General, whom we allowed to intervene, contended we should refuse permission as the claim was "hopeless"; the crime of aggression was unknown to the law of England and Wales; there was no arguable basis for supposing that the Supreme Court would depart from the decision in *Jones*.

7. The Interested Parties have taken no part in this application so far. They may seek to take part in the event permission were granted.

*The submissions of the claimant*

8. The submissions of the claimant advanced by Mr Mansfield QC had six principal limbs:

   i) Article 6 (a) of the Charter for the International Military Tribunal at Nuremberg had given that Tribunal jurisdiction over:

      > "CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;"

As the then Attorney General, Sir Hartley Shawcross QC, had made clear in his address to the Tribunal, that Article was merely declaratory of an existing principle of international law. From that time it was clearly established that the crime of aggression was a crime under international law and of sufficient certainty that prosecutions before an international tribunal could be brought.

ii) The report of the inquiry into the invasion of Iraq conducted under the chairmanship of Sir John Chilcot published on 6 July 2016 showed that there was a case for the Interested Parties to answer for the crime of aggression. Saddam Hussein had not posed an immediate threat to the interests of the UK, the intelligence regarding weapons of mass destruction was presented with unwarranted certainty, the invasion was not necessary and the invasion had been undertaken without the authority of the UN Security Council.

iii) As there was that case for the Interested Parties to answer in respect of the crime of aggression under international law, the Interested Parties should be tried before a court so that they could be held to account for their criminal breach of the law.

iv) It was not possible for a prosecution to be brought under the Rome Statute or before any other international court. The courts of England and Wales therefore had to try the Interested Parties as otherwise they would not be held to account and there would have been a failure to uphold the rule of law.

v) It was therefore necessary to reconsider the decision in *Jones* so that those who had been responsible for the war in Iraq could be held properly to account in a court of law in England Wales. The international community had held those responsible for the Second World War to account by prosecuting those who were thought responsible for aggression at the trials at Nuremberg. It was the duty of the UK courts to follow that example. Without such a prosecution there would be no accountability for the breach of the law.

vi) Apart from the issue of policy, the decision in *Jones* was on analysis in any event wrongly decided.

*Our starting point: the crime of aggression under international law.*

9. It is not disputed by the Attorney General that it is well established that there is a crime of aggression under international law of sufficient certainty for a prosecution to be brought against those who commit such a crime. However, the issue before us is whether there is such a crime under the law of England and Wales so that a prosecution can be brought before the courts of England and Wales.

10. We therefore turn to examine that question for, if there is no such crime, it would be unfair to the Interested Parties and inapposite for us to examine the contention that there was a case to answer.

*Events on the international plane since 1998*

11. We turn first to examine Mr Mansfield QC's contention that there has been a failure to implement on the international plane the provision for jurisdiction and process necessary to prosecute those who commit the crime of aggression.

12. The Rome Statute (as adopted on 17 July 1998) established the International Criminal Court and came into force on 1 July 2002. It gave the Court under Article 5.1 (d) jurisdiction over the crime of aggression. Article 5.2, however, provided that the jurisdiction over that crime should be postponed until that crime had been defined in accordance with the provisions of Article 121 (for amendments) and 123 (for a review of the Statute).

13. In accordance with Article 123 a review conference was held in Kampala in 2010. On 11 June 2010, Resolution RC/Res.6 was adopted at Kampala setting out a definition of the crime of aggression (to be inserted into the Rome Statute as Article 8 bis), a provision for the exercise of jurisdiction over that crime (to be inserted into the Rome Statute as Article 15 bis) and a provision creating jurisdiction by referral of the Security Council (to be inserted into the Rome Statute as Article 15 ter).

14. Each of those provisions requires ratification or acceptance. Paragraph 2 of Article 15 bis and Article 15 ter provide:

> "The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties."

15. 34 States Parties have ratified the amendments; the 30th State Party ratified on 26 June 2016. Before any jurisdiction can be exercised, a decision has to be made by the same majority as is required for an amendment to the Rome Statute. A working group had been set up, but no such decision had yet been made. It would therefore appear that at the present time no prosecution can take place before the International Criminal Court for the crime of aggression committed before 26 June 2017.

16. Although we are therefore prepared to accept the submission that at the present time there can be no prosecution before the International Criminal Court for a crime of aggression committed before 26 June 2017, the question whether the courts of England and Wales can try the crime of aggression as a crime under the law of England and Wales depends on the reasoning of the decision in *Jones* (which decided there was no such crime under the law of England and Wales) and whether there is any prospect that the Supreme Court would decide that the reasoning was wrong or no longer applicable.

*The decision in Jones*

17. The appellants in *Jones* had been charged with various offences relating to direct action they had taken at an operational military airbase in the UK. They contended that they had a defence to those offences on the ground that the activities being carried on at the military bases were unlawful as they were carried out in pursuit of a crime - the war of aggression in invading Iraq. In holding that there was no crime of aggression under the domestic law of England and Wales, Lord Bingham, giving the principal judgment, held:

i) Although the crime of aggression was a crime under international law, it had not been incorporated or assimilated into domestic criminal law; such a crime was not automatically incorporated as it required a statute to incorporate it.

ii) It was clear from the decision in *R v Knuller* [1973] AC 435 that a new criminal offence could only be created by Act of Parliament; no new offence could be created by the common law. Parliament had since 1945 legislated to create several criminal offences reflective of international law. However, when giving effect to the Rome Statute by the International Criminal Court Act 2001, Parliament had not included the crime of aggression in the offences created under the act. Lord Bingham said at paragraph 28:

> "It would be anomalous if the crime of aggression, excluded (obviously deliberately) from the 2001 Act, were to be treated as a domestic crime, since it would not be the subject of the constraints (as to the need for the Attorney General's consent, the mode of trial, the requisite *mens rea*, the liability of secondary parties and maximum penalties) applicable to the crimes which were included."

iii) There were good reasons for not departing from that principle and creating the crime of aggression. In the first place a charge of aggression made against a leader would presuppose commission of the crime by his own state or foreign state. A decision on the charge would involve a decision in the courts on the culpability in going to war, but there were well established rules that courts would be slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of armed forces.

iv) Lord Hoffmann reached the same conclusion for two reasons. First was his reliance on the democratic principle that it was for Parliament alone to decide whether conduct not previously regarded as criminal should be made a criminal offence. Second, in the absence of statutory authority, prosecution of the crime of aggression in a domestic court would be inconsistent with a fundamental principle of the constitution – see paragraphs 63 to 67 of his judgment.

*The prospects of the Supreme Court departing from the decision in Jones*

18. In our opinion there is no prospect of the Supreme Court holding that the decision in *Jones* was wrong or the reasoning no longer applicable.

19. First, we can see no basis for contending that the House of Lords erred in its conclusion (as set out at paragraph 22 of the judgment of Lord Bingham) that the crime of aggression under customary international law was not assimilated into domestic law. We accept, as we have set out, that the crime of aggression is a crime under international law, but the reasons given by Lord Bingham for the decision that such a crime is not automatically assimilated into the domestic law of England and Wales are unassailable.

20. The Practice Statement of 26 July 1966 in which the House of Lords set out the circumstances in which it might depart from a previous decision where it appeared right to do so made clear:

> "In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."

The fundamental importance of certainty in the criminal law was underlined in *Knuller* by Lord Reid at 455C and by Lord Simon at 488H to 489. In *R v G* [2004] 1 AC 1034 the House of Lords departed from their previous decision on recklessness because of the compelling reasons set out at paragraphs 32-39 of the judgment of Lord Bingham. It would not otherwise have done so. There is no reason, let alone a compelling reason, for departing from the decision in *Jones.* Indeed, the fact that the invasion of Iraq was held not to be a crime in domestic law in 2006 provides a compelling reason why *Jones* should not be departed from.

21. We have also considered the degree of academic criticism of the decision in *Jones*. On occasions academic criticism has been seen as providing a basis for departing from a previous decision (as was the case in *R v G* at paragraph 34). Our attention has been drawn to (1) a passage in the chapter in The Iraq War and International Law (2008) by Rabinder Singh QC (as he then was) *Justiciability in the Areas of Foreign Relations* (at pages 255-257), (2) a passage in Professor Cryer's *Oxford Companion to International Criminal Justice (*at p 881), (3) an article in Global Research (7 November 2015) by Professor Nick Grief entitled *Why can't Tony Blair be Prosecuted for the Crime of Aggression?* and (4) a paper by Pal Wrange *The Crime of Aggression and Complementarity in International Criminal Justice from the Rome Statute to its Review* (2010). These commentaries either contain no or no persuasive criticism of the decision in *Jones.* We have also noted that *Jones* was discussed in *R (Keyu) v Foreign Secretary* [2016] AC 1355 at paragraphs 144-151 without any suggestion that it did not represent clearly and correctly decided law on the incorporation of customary international law into domestic law.

22. Finally we have considered whether the effect of the decision presents any practical problems (as discussed in *Horton v Sadler* [2007] 1 AC 307) or whether there has been a change in the legal landscape (a term used in *Knauer v Ministry of Justice* [2016] AC 908 at paragraph 23) justifying a departure from *Jones*. We see the force of Mr Mansfield's contention that if there is a crime of aggression under international law, there should be a means of prosecuting it, as otherwise the rule of law is undermined.

23. However, it is evident from the events that have occurred on the international plane (to which we have briefly referred at paragraphs 12-16 above) that the prosecution of the crime of aggression before an international court presents significant practical difficulties. The existence of such difficulties cannot in any way justify the domestic courts of England and Wales departing from the clear principle that it is for Parliament to make such conduct criminal under domestic law. Parliament deliberately chose not to do so. The courts cannot usurp that function. It is for Parliament and Parliament alone to make the decision. Furthermore, there is no

answer to the practical and constitutional difficulties identified by Lord Bingham and Lord Hoffman that would arise if a prosecution was brought without clear statutory provision. The issues that have arisen on the international plane make no difference to the bases of the decision in *Jones.*

24. For all these reasons therefore we have concluded that there is no prospect of the Supreme Court departing from the decision in *Jones.*

*The position in a Judicial Review*

25. It is argued, however, that as a Divisional Court of the Administrative Court it is not our function to act as a gatekeeper by making the decision on what the prospects are of the Supreme Court departing from a previous decision. That it is said can only be a matter for the Supreme Court and we should therefore grant permission so that it can make that decision itself.

26. No one was able to refer us to any authority where this court has had to decide on the approach the Divisional Court of the Administrative Court should adopt in determining whether it should grant permission to bring judicial review proceedings in a case seeking to overturn a previous decision of the House of Lords or Supreme Court.

27. In contrast to proceedings before the civil courts where there is no restriction on the bringing of proceedings, permission is required to bring proceedings for judicial review and the court has a duty to determine the issue of permission. In our opinion, the requirement of permission obliges us to form a view on the prospects of success of any claim, even where, as in the present case, the legal question is one of substantial general public importance.

28. We are not simply required to leave the matter as an issue for decision by the Supreme Court. Having formed the view that there is no prospect of the Supreme Court overturning the decision in *Jones*, it is our duty to refuse permission to bring the proceedings for judicial review.