



IN THE WESTMINSTER MAGISTRATES' COURT

MARYLEBONE ROAD
London
NW1 5BR

11 November 2022
(delivered 23 November 2022)

Between

REX

Prosecution

and

MIKAYLA HAYES

Defendant

Ms Scott appeared on behalf of the Prosecution

Mr Cogan appeared on behalf of the Defendant

REASONS

JUDGE IKRAM: The Defendant has raised a preliminary argument in that she argues that the domestic criminal courts of England & Wales (strictly, the UK) have no jurisdiction to try her for the offence she has been charged with. She argues that the USA authorities must try her.

At the conclusion of the initial hearing, I gave the opportunity to the United States Air Force to address me as an 'amicus' of the court and indicated the sorts of evidence/material that might be useful in resolving this issue. They have chosen not to attend, nor make any submissions. I draw no conclusions from them taking that position.

To be clear, I make no findings as to whether the criminal allegation is proved or, in fact, her conduct, unlawful. I do, however, assume for the purposes of this application only, that her conduct was unlawful.

Agreed Background

1. The Defendant has been charged with an offence of causing death by careless driving on the 26th of August 2022.
2. She was, at the relevant time, a serving airman with the United States Air Force ('USAF') based at RAF Lakenheath.
3. She was driving in her vehicle after a PT instruction session at the base to her home address located some 30 minutes (22 miles) away from the RAF base.
4. En route, her vehicle was involved in a collision with a motor bike.

Relevant Law

5. The NATO-SOFA agreement (para VII 3(a)), states primary right to jurisdiction as regards offences 'arising out of any act or omission done in the performance of official duty' lies with the sending state.

The UK is a signatory so the position of visiting forces is now incorporated in the 1952 Act.

6. Visiting Forces Act 1952

s.3(1)(a)

Restriction, as respects certain offences, of trial by United Kingdom courts of offenders connected with visiting force.

(1) Subject to the provisions of this section, **a person charged** with an offence against United Kingdom law **shall not be liable to be tried for that offence by a United Kingdom court** if at the time when the offence is alleged to have been committed he was a member of a visiting force or a member of a civilian component of such a force **and –**

(a) the alleged offence, if committed by him, arose out of and in the course of his duty as a member of that force or component, as the case may be; or

s.11(4)

Evidence for purposes of Part I.

Where a person is charged with an offence against United Kingdom law and at the time when the offence is alleged to have been committed he was a member of a visiting force or a member of a civilian component of such a force, **a certificate issued by or on behalf of the appropriate authority of the sending country, stating that the alleged offence, if committed by him, arose out of and in the course of his duty as a member of that force or component, as the case may be, shall in any such proceedings as aforesaid be sufficient evidence of that fact unless the contrary is proved.**

The lack of precise definition as to the scope of official duty is dealt with by the issuing of a certificate by the US relevant authority. It provides a rebuttable presumption on whether an accused was acting in the performance of official duty.

In this case, there is such a certificate, issued by the Department of Air Force as per s.11(4) above.

7. It is accepted that she was 'a member of a visiting force or a member of a civilian component of such a force' and so s.3(1)(a)(1) is satisfied.
8. I have been provided various authorities. *Smith v Stages* is referred to and deals with a road traffic accident and the issue of whether the employer was vicariously liable for the accident of their employee. In that case, the employee was paid wages for the journey. Lord Goff stated in that case:

'We can begin with the simple proposition that, in ordinary circumstances, when a man is travelling to or from his place of work he is not acting in the course of his employment Likewise, of course, he

is not acting in the course of his employment when he is travelling home after his day's work is over..... These are the normal cases. '

The case discusses exceptions. The travelling salesman or repairman and the person travelling on an emergency call out are cited.

Lord Goff posed the question 'But how do we distinguish the cases in this category in which a man is acting in the course of his employment from those in which he is not? The answer is, I fear, that everything depends on the circumstances.'

Whilst not an authority from the criminal courts, the guidance provided is instructive.

The issue in this case

9. It is common ground that the starting point is that the alleged offence did **arise out of and in the course of her duty as member of the USAF** and, therefore, the English courts would not have jurisdiction to try her UNLESS the prosecution can persuade me that it did not.

10. In terms of how much evidence the prosecution need to prove, the High Court suggests that I will be so satisfied if the prosecution persuade me on the balance of probabilities. In other words, the English Courts can deal with her if the prosecution persuade me it is more likely than not that the offence did not so arise.

11. I agree that the issue of standard of proof was not actually argued in the relevant case but as the law stands, I am bound to follow the decision of the High Court (*Percy v Moore* [1996] Lexis Citation 3779)

That said, I have been invited to give my view, also, on the criminal standard. In other words, what would my decision have been if I asked myself 'have the prosecution made me sure that the offence did not arise out of and in the course of duty?' I will in due course, do so.

12. The issue, putting it simplistically on behalf of the prosecution, is whether when she was driving and involved in the collision, the Defendant was now 'off duty'.

Analysis

13. I have heard no live evidence in this case but make my decision on the basis of papers submitted and oral submissions by the advocates.

14. I have been supplied with various decided cases on the core issue but not from the criminal courts.

Defence Argument

15. I do not intend to rehearse every argument put but cite key points. They, of course, do not need to prove anything as the certificate governs my starting position.
16. They go as far as to say that as she was at all times subject to 'service law', citing statute which governs British forces (and suggesting the same must be the case for US personnel), that it cannot be said they are ever 'off duty.' That emergencies meant she might have to come into the base at any time. That was subject to the proviso of when on leave / holiday.
17. The accommodation she was travelling to was found and paid for by the USAF (though the tenancy was in the name of the Defendant and her husband.) The journey was a duty activity.
18. She was at the time, wearing 'physical training gear' ('PTG'). Whilst driving the vehicle, Mr Cogan argued she was in uniform at the time of the collision and subject to regulations / rules as regards the wearing of it. She must, therefore, be in the course of duty at the time.
19. Reference is made to the Constables under the Police (Injury Benefit) Regulations 2006 (SI 2006 932). Section 6 states that an injury suffered will be treated as received in the execution of his duty if the police officer received the injury 'while on duty OR while on a journey necessary to enable him to report for duty or return home after duty, or ...' It is argued the situation here is analogous and that 'it must follow that she was on duty at the time of the collision.'

Prosecution Argument

20. They refer to the Air Force Policy Directive on 'Dress and Personal Appearance' (12 April 2022) :
 - i. It draws a distinction between 'Dress Uniforms' and 'physical training gear' and argue it is, therefore, not uniform at all.
 - ii. The wearing of uniform is not mandatory to / from the base though *may* be worn (1.3.1).
 - iii. It refers to express reference to the wearing of PTG being permitted off-duty (8.1.10). I also note that retired personnel can also wear it (8.1)

21. I do not rehearse all the remaining prosecution arguments; they were within the skeleton argument. They argue that this is a case where the presumption is rebutted.

Findings

22. The exclusion of the jurisdiction of our courts is a significant concession even as regards friendly foreign forces and I must take some care in interpreting the relevant statutes with Parliament's intention at the fore.
23. I consider such factors, as I can find relevant per the approach of Lord Goff in *Smith v Stages* above.
24. In this case, there is no additional payment for the journey home. There is no evidence that her fuel for the journey was paid for by the USAF.
25. The said vehicle was registered in the name of the Defendant. She had insurance for the vehicle in her own name.
26. She was not required on her employer's instructions to make the particular journey at the end of the working day. It is alleged that she said at the scene, she was on her way home and had finished work.
27. Whilst I note that her accommodation was paid for by the USAF, I do not find that a factor which points to a journey there being 'in the course of her duty'
28. She was not on an emergency call out or the like, she was simply travelling home after a day at work.
29. I do not find, as suggested, that simply because an airman is subject to service law 'at all times' that anything done at any time, is, for the purposes of this legislation, whilst 'on duty'. It would give a near universal ouster of jurisdiction and run contrary to the narrow interpretation that I agree must be taken on interpretation.

If that were the case, there would be no need for any consideration of s.11(4) at all and a foreign NATO serviceman would not be subject to UK courts whenever and whatever time any alleged offence was committed. Parliament clearly intended it to be narrower in scope. In implementing the Treaty, I also note that Parliament resolved that a certificate is rebuttable unlike other jurisdictions.

30. I find that PTG is not uniform. Even if it were, the fact she was wearing PTG is NOT indicative at all, of her being on duty at the time of the driving as uniform is not mandatory to/from the base and may be worn

off duty. PTG may also, of course, be worn by retired servicemen. The wearing of PTG cannot be an indication that at the time, a person is on duty as a serviceman.

31. In terms of the Police Regulations argument, I find that it is, with respect, misconceived. Section 6 merely extends the scope of execution of duty. In stating that an injury is covered '**while on duty OR while on a journey**' necessary to enable him to report for duty or return home after duty', it clearly recognises the distinction between the two. Journeys are additionally brought with scope of the term 'execution of duty' because they are not, otherwise '**while on duty.**' The section also suggests that the journey home is 'after duty.' In any event, the Police Regulations have specific purpose in defining when injury benefits might be payable.`

I do not find any merit in the argument.

32. The prosecution have persuaded me that this falls within what Lord Goff described as a 'normal case' as per *Smith v Stages* above. I should state that whilst it is not a criminal case, I found it useful as a guide to approach and taking a holistic approach with consideration of all relevant factors.
33. In all the circumstances, the prosecution have persuaded me that when you consider all the circumstances, that her driving on that particular journey and alleged collision thereafter did not '**arise out of and in the course of his duty.**'

Conclusion

34. The prosecution have proved to me that the alleged offence of causing death by dangerous driving, did not arise out of and in the course of the Defendant's duty as a member of a visiting force.
35. The contents of the USAF certificate is therefore rebutted.
36. I make that finding on the balance of probabilities and would have come to the same conclusion on if I had applied the criminal standard of proof.
37. This court will seek to move to the next stage of proceedings.

Tanweer Ikram CBE
Deputy Senior District Judge

