Neutral Citation Number: [2020] EWHC 1850 (Admin)

Case No: CO/4473/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2020

Before :

MRS JUSTICE CUTTS DBE

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Between :

THE QUEEN on the Application of DEFENDING CHRISTIAN ARABS	**Claimant**
- and –	
GUILDFORD MAGISTRATES' COURT	**Defendant**
-and-	
TONY BLAIR	**Interested Party**

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Abdul-Haq Al-Ani (instructed under the **Public Access Scheme**) for the **Claimant**
The **Defendant** was not represented for this hearing.

Hearing dates: 10 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be listed on 10th July 2020 at 14:00.

Mrs Justice Cutts DBE :

1. This is a renewed application for permission to challenge the decision of a District Judge (Magistrates Court) ("the DJ") who at Guildford Magistrates Court on 1st July 2019 refused an application to issue a summons pursuant to s.1(1)(a) of the Magistrates Courts Act 1980 against the former Prime Minister, Tony Blair, for an offence of administering a noxious substance contrary to s.23 of the Offences Against the Person Act 1861 ("OAPA"). The application for the summons was made by an organisation called Defending Christian Arabs on behalf of an Iraqi citizen named Amer Abdulimam Jasim. The DJ refused to issue the summons on the grounds that the court had no territorial jurisdiction.

2. On 13th March 2020, following an unfortunate delay in the Magistrates Court responding to the applicant, permission was refused on the papers by Garnham J who found that the DJ's reasoning provided a complete answer to the application as the "crime" occurred in Iraq and the Surrey Justices had no jurisdiction.

The facts alleged

3. The allegation is that on 20th March 2003 Mr Blair, then Prime Minister, ordered that the invading UK armed forces should use Depleted Uranium (DU) bullets in the invasion of Iraq. Tons of DU were converted into dust carried by wind over vast areas of Southern Iraq. Mr Jasim has developed lung cancer. It is said that he has every reason to believe that the administration of poisonous and radioactive DU has been the cause if his illness.

4. The argument advanced on Mr Jasim's behalf was that it is not in dispute that Mr Blair, as Prime Minister of the UK, ordered the use of DU penetrators in the invasion of Iraq in 2003. It is not disputed that DU penetrators are radioactive and poisonous. It is not disputed that the use of poison in war has been prohibited since the Strasbourg Agreement of 1675. By s.23 of the OAPA it is an offence to "unlawfully and maliciously administer or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm." The applicant, a citizen of Basra, has reason to believe that his lung cancer has been caused by inhaling DU dust which had showered the city in the 2003 invasion.

Legal framework

5. The right of private prosecution is expressly preserved by s.6 of the Prosecution of Offences Act 1985.

6. S.1(1)(a) of the Magistrates Courts Act 1980 as amended provides:

"On an information being laid before a Justice of the Peace,

> *that a person has, or is suspected of having, committed an offence, the justice may issue-*
>
> *(a) A summons directed to that person requiring him to appear before a magistrates' court to answer the summons."*

Other provisions authorise the issue of such summonses by a District Judge (Magistrates Court).

7. Part 7 of the Criminal Procedure Rules provide the procedure to be followed in requesting such a summons. They provide that an allegation of an offence in an information must contain a statement of the offence that describes the offence in ordinary language, identifies any legislation that creates it and such particulars of the conduct constituting the commission of the offence as to make it clear what the prosecutor alleges against the defendant.

8. A decision whether to issue a summons is a judicial function involving the exercise of a discretion which is subject to control by judicial review. See for example *R v Manchester Stipendiary Magistrate, ex parte Hill [1983] 1 AC 328.*

9. In exercising this function, as set out in *R v West London Metropolitan Stipendiary Magistrate ex parte Klahn [1979] 1 WLR 933*, the DJ should at the very least ascertain: (1) Whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not "out of time"; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute. In addition to these specific matters the DJ should consider whether the application was vexatious. The matter is properly within the DJ's discretion and no exhaustive catalogue has been laid down to which consideration should be given. He should consider the whole of the relevant circumstances.

10. As set out in *R (Kay and another) v Leeds Magistrates Court [2018] 4 WLR 91* when considering whether to issue a summons:

    i) The magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present; that the offence alleged is not time barred; that the court has jurisdiction; and whether the informant has the necessary authority to prosecute.

    ii) If so generally the magistrate ought to issue the summons, unless there are compelling reasons not to do so – most obviously that the application is vexatious (which may involve the presence of an improper ulterior

purpose and/or long delay); or is an abuse of process; or is otherwise improper.

iii) Hence the magistrate should consider the whole of the relevant circumstances to enable him to satisfy himself that it is a proper case to issue the summons and, even if there is evidence of the offence, should consider whether the application is vexatious, an abuse of process, or otherwise improper.

iv) Whether the applicant has previously approached the police may be a relevant circumstance.

v) (…)

vi) (…)

11. In the context of the allegation in this case, in order to establish an offence contrary to s.23 of the OAPA, the prosecutor has to prove:

i) That Tony Blair administered to, caused to be administered to or taken by Amer Jasim any poison or other destructive or noxious thing;

ii) That he thereby caused him grievous bodily harm;

iii) When he did so he was acting unlawfully and maliciously.

The decision of the DJ

12. In refusing to issue the summons the DJ said as follows:

> *"I would refuse this application for summons as I am not persuaded that this court has territorial jurisdiction. The "mischief" complained of happened overseas."*

Having reached this conclusion it does not appear that the DJ directed himself to any of the other factors involved in the exercise of his discretion on whether or not to issue the summons.

The applicant's submissions

13. It is submitted that the DJ was wrong to conclude that the court had no territorial jurisdiction. Such can be found in s.31 of the Criminal Justice Act 1948 which states:

> *"(1) Any British subject employed under His Majesty's Government in the United Kingdom in the service of the*

> *Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, shall be guilty of an offence, and subject to the same punishment, as if the offences had been committed in England."*

It is submitted that Tony Blair fell within this definition by virtue of his position as Prime Minister and therefore the extra territorial acts alleged are justiciable in this country. It is further submitted that the only consideration in the renewal hearing is to consider whether the DJ may have been arguably wrong in his conclusion that the court had no jurisdiction to hear the case.

14. An alternative route to jurisdiction is to be found in Directive 2012/29/EU which came into force on 16th November 2015. It is submitted that this is binding on the Magistrates Court. This Directive establishes minimum standards on the rights, support and protection of victims of crime. Mr Al-Ani submits that this Directive conveys an ability to try extraterritorial offences in the UK. He relies upon a fact sheet on the Directive produced by the European Commission which outlines the main features of it and which contains the following:

> *"The new rules apply as of 16 November 2015, but they are not limited to crimes committed after this date. The Victims' Rights Directive applies if the crime was committed in the European Union. For instance, the Directive will apply in cases related to crimes committed during the Second World War, if the proceedings take place after the 16th November 2016. Likewise, the Directive will apply to international crimes, if the proceedings take place in the European Union after 16 November 2015."*

This, he submits, extends the jurisdiction of the court to try an offence which occurred in Iraq. The court should grant permission for judicial review to allow the claimant to argue that the criminal offence of using poisonous weapons is a crime under Directive 2012/29/EU.

15. Mr Al-Ani submits that the court also has jurisdiction by virtue of the application of Customary International Law (CIL) which is automatically incorporated into UK domestic law. The use of poison and poisonous weapons in war is banned by various Agreements, Declarations and Regulations which are part of CIL which is automatically incorporated into UK domestic law. If the DJ was correct and there is no jurisdiction to try the alleged crime by reason of extra territoriality the claimant states that the crime of using poison under CIL will be substituted. The court would have jurisdiction to try that offence in the instant case. It would be a waste of the court's time and money should the claimant be forced to lodge fresh applications for this crime. The

High Court should allow for this offence to be substituted for that alleged under s.23 OAPA. Permission for judicial review should be granted to enable the claimant to argue that the criminal offence of using poisonous weapons is a crime under CIL.

16. At my request Mr Al-Ani addressed the essential ingredients of an offence under s.23 OAPA. He submitted that there is prima facie evidence that they are made out as follows:

    i) It can be established that Tony Blair administered the noxious substance as when the DU in the bombs exploded they were converted to minute particles of uranium oxide which were carried by winds over large areas surrounding the battlefield. Most of South Iraq was contaminated. The poison was "administered". Releasing the substance from an airplane is no different to spraying CS gas in someone's face.

    ii) Tony Blair was Prime Minister and he therefore caused the substance to be administered. He must have ordered the use of the explosives in question.

    iii) This caused grievous bodily harm to Mr Jasim in the form of lung cancer.

17. Reliance is placed on Article 47 of the European Charter of Fundamental Rights which grants to those whose rights and freedoms guaranteed by the Union are violated the right to an effective remedy before a tribunal. This, Mr Al-Ani submits, entitles Mr Jasim to an effective remedy in the form of legal proceedings and is a reason why permission should be granted.

18. The applicant also seeks a declaration of incompatibility pursuant to s.4 of the Human Rights Act 1998 in relation to s.18(1) of the Senior Courts Act 1981. His ability to request such and the purpose of challenge under the Human Rights Act will be thwarted if permission is not given.

Decision

Jurisdiction

19. The general rule is that English criminal law does not ordinarily extend to things done outside the realm even when done by British citizens. (*R v Harden [1963] 1 QB 8.*) Specific statutory provision is required before any part of English criminal law can apply to conduct abroad. There is no such specific provision for offences committed contrary to OAPA. As was said in *Cox v Army Council [1963] AC 48* apart from those exceptional cases in which specific provision is made in respect of acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.

20. I have considered whether s.31 of the Criminal Justice Act 1948 grants jurisdiction to the Surrey Justices for a crime contrary to s.23 OAPA committed in Iraq. I have concluded that in the circumstances of this case it does not. I do not consider that the Prime Minister of the UK was "employed under Her Majesty's Government in the service of the Crown" who, in the course of armed conflict approved by Parliament was "acting or purporting to act in the course of his employment." There is no definition of these terms within the Act itself. Mr Al-Ani has been unable to provide any authority in support of the proposition that the Prime Minister is employed under Her Majesty's Government. In my judgment, as leader of the Government, he is an office holder rather than an employee. The words of this section, on their face, apply not to the Prime Minister but to civil servants.

21. Nor do I consider that Directive 2012/29/EU provides jurisdiction to the Surrey Justices to try an offence contrary to s.23 OAPA alleged to have been committed in Iraq. Otherwise known as the "Victims' Rights Directive", this Directive establishes minimum standards on the rights, support and protection of victims of crime and ensures that persons who have fallen victim to crime are recognised and treated with respect. The Directive does not grant jurisdiction to try extra-territorial crimes where such does not already exist.

22. Further, according to the DG Guidance Document the aim is "to strengthen the rights of victims of crime so that any victim can rely on the same basic level of rights whatever their nationality and <u>wherever in the EU the crime takes place."</u> The same document makes it clear that the Directive applies in relation to criminal offences committed in the Union and to criminal proceedings that take place within the Union. The alleged offence in this case took place outside the Union and there is no jurisdiction for the alleged offence to be tried within it.

23. Victims of crime under international law are not specifically mentioned in the Directive. The Guidance Document states:

> *"However, most EU Member States have recently taken steps to incorporate international crimes such as genocide, war crimes and torture into their national criminal codes and to establish universal jurisdiction over them, so that these types of crimes may be prosecuted within their national legal systems even if committed abroad. Consequently, the Directive also confers rights on victims of extra-territorial offences who will become involved in criminal proceedings which take place within the Member States."*

This does not apply to this case. It is important to remember that the offence for which the applicant wishes Mr Blair to be summonsed is contrary to s.23 OAPA not for any of the international crimes named above.

24. As Mr Al-Ani conceded in the hearing, the applicant did not seek a summons for any offence under international law. The DJ was concerned with the

application for a summons in relation to the alleged offence under s.23 OAPA. He was correct to confine himself to the question of jurisdiction in relation to that offence alone. The question of jurisdiction under international law did not therefore arise.

25. It follows that I consider the DJ correct in finding that the Surrey Justices did not have jurisdiction to try an offence contrary to s.23 OAPA said to have occurred in Iraq. I do not consider it arguable that he did not.

26. This is an application for a review of the DJ's decision not to grant the summons sought for the specific offence contrary to s.23 of OAPA. I do not consider it appropriate in those circumstances for this court to substitute an application for a summons for a different offence in the absence of any compliance with the Criminal Procedure Rules governing such application.

The ingredients of the offence

27. The DJ, having decided that the Surrey Justices had no jurisdiction in relation to a crime alleged to have occurred in Iraq, did not go on to further consider whether there was prima facie evidence of the ingredients of an offence contrary to s.23 OAPA.

28. As was said in *R (DPP) v Sunderland [2014] EWHC 613*, when deciding whether or not to issue the summons, the Magistrate is required to review whether there was prima facie evidence of the ingredients of the offence alleged. In so doing he must conduct a "rigorous analysis of the legal framework". As *Johnson v Westminster Magistrates Court [2019] EWHC 1709* makes clear, the threshold test for the issuance of a summons is not a low one. The court went on to say that level of analysis is particularly important now that indictable offences are sent direct to the Crown Court. An offence pursuant to s.23 OAPA is indictable only and would, if the summons had been issued, resulted in the sending of the case direct to the Crown Court.

29. In the present case, had the DJ conducted a rigorous analysis of the legal framework it is unarguable that he could reasonably have concluded that there was prima facie evidence of the alleged offence for the following reasons:

   i) The application for a summons baldly states that it is not disputed that Tony Blair, as Prime Minister of the UK, ordered the use of DU penetrators in the invasion of Iraq in 2003. This is how the applicant avers he caused a noxious substance to be administered to the alleged victim. Mr Al-Ani submits that it is "not in dispute" that Tony Blair ordered the use of the noxious substance by reason of his office as Prime Minister. There is however no prima facie evidence that he did so order. The mere fact that he was Prime Minister is insufficient. The prosecutor would have to prove that he was aware of and ordered it to be used.

   ii) Even if Mr Blair did order the use of DU, the prosecutor also has difficulty establishing that he administered it to, caused it to be administered to or caused it to be taken by Mr Jasim. As the House of

Lords said in *R v Kennedy (no 2) 2007 UKHL 38*, s.23 OAPA creates three distinct offences:

a) Such an offence can be committed where the accused administers a noxious thing directly to a victim such as by injecting him with it, holding a glass containing it to the victim's lips or spraying the noxious thing in his face. That is not the allegation in this case. I do not consider that dropping DU into Iraq which is then carried by winds to other parts of the country to be in any way analogous to spraying CS gas directly into another's face.

b) It can be committed where the accused causes an innocent party to administer it to the victim, for example knowing that a syringe is filled with poison he instructs another who believes it to be a therapeutic substance to inject the victim with it. That is not the allegation in this case.

c) It can be committed where the noxious substance is not administered to the victim but it is taken by him, for example there is poison in his food and he eats it. That again is not the allegation in this case.

iii) The biggest obstacle to the prosecutor would be proving that the use of these weapons in 2003 caused Mr Jasim to suffer from lung cancer sixteen years later in 2019. That would be the case even without the intervening act of the wind carrying DU "over vast areas of Southern Iraq", as alleged in the application before the DJ. It may be that Mr Jasim believes that this was the cause of his unfortunate illness but that is not sufficient. There is no prima facie evidence that this ingredient is made out.

Vexatious prosecution

30. Finally, before a DJ grants a summons sought by a private prosecutor, he must consider whether the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is otherwise improper. As held in *Kay*, whether the applicant has previously approached the police may be a relevant circumstance.

31. In the present case, having concluded that the court had no jurisdiction, the DJ did not consider this question. In my judgment, had he done so, he could not have reasonably concluded that the application was other than improper by reason of the long delay and had an improper ulterior purpose. In addition, there is no evidence that the applicant had previously approached the police.

32. In this latter regard I have seen a letter dated 6th May 2003 from DS Richard Miller in which he states that the Attorney General's office had declined to grant consent for criminal proceedings against members of HM Government following consultation with the CPS. I am told by Mr Al-Ani that this was written to a Mr Bradshaw (now deceased) who was a founding member of

"Legal Action against War", which organisation had tried to initiate a prosecution for war crimes concerning the occupation of Iraq. It is not known whether the use of DU or other weapons formed part of that attempt. I consider the origins of this letter too vague to assist in the determination of whether to grant permission for judicial review. There is nothing else to suggest that the applicant has approached the police to prosecute this offence.

33. There is evidence that the motive behind the application for a summons to prosecute Tony Blair for an offence under s.23 OAPA was not because an alleged crime was committed against Mr Jasim but because the applicant wants Mr Blair, as Prime Minister, to face charges relating to the commission of war crimes by the use of chemical weapons. Such would be an improper motive for the application in this case.

    i) In box 4 of the application form for the summons which requires details of the alleged offence the applicant wrote "The statement of offences and the particulars of the conduct constituting the commission of the crime of administering poison **indiscriminately to the people of Iraq** are shown in the attached statement of offences to this application." (Emphasis added). There then follow 92 paragraphs setting out the dangers and effects of DU as well as the accusation that it was unsafe to disperse it through fire and explosion anywhere in the world, including Iraq. A valid question in this regard is said to be why the UK, entrusted with ruling Iraq jointly with the USA, took no measure to charge anyone who breached Regulation 6 of the Ionising Radiation Regulations 1999 which applies to practices involving the production, handling, use, storage, transport or disposal of radioactive substances. Reference is made to the consideration of the use of DU radioactivity under International Law with the conclusion that it was thereby unlawful. Reference is also made to the environmental effects of DU. Paragraphs 58-64 set out international law which bans the use of chemical weapons, including, it is submitted, DU.

    ii) Mr Zuhayr Menjou, the director of the charity "Defending Christian Arabs" has provided a witness statement dated 20th May 2020 in support of the oral application for permission. At paragraph 23 of that statement he says: "Guildford Magistrates Court deliberately breached its legal duty to consider a serious application of great public interest as the application seeks to prosecute a former Prime Minister of the UK **for war crimes.**" (Emphasis added).

    iii) In the summary of grounds for the granting of permission for judicial review the applicant states that permission should be given "to enable the claimant to argue that the criminal offence of using positions [sic] weapons is a crime under customary international law."

34. Further there has been no acceptable reason for the delay of 16 years in the prosecution of this alleged offence. It is said to be because Mr Jasim, as a citizen of Iraq, could not have been expected to report the crime whilst living

in a country under attack. This may account for some delay but not for the length of the delay in this case.

Conclusion

35. For the reasons I have given I do not consider it arguable that the DJ erred in refusing the application to grant the summons in the terms sought.

36. In those circumstances I do not consider it appropriate to grant permission solely to allow the applicant to argue that a failure to do so denies the applicant the right to a hearing under Article 47 of the HRA. The applicant was entitled to apply for judicial review of the DJ's decision and, upon refusal, to make that application orally to the court. It cannot be properly said that he has been denied access to court.

37. Further I do not consider it appropriate to grant permission on an unmeritorious application for judicial review solely to enable the applicant to seek a declaration of incompatibility in relation to s.18(1) of the Senior Courts Act 1981 which prohibits an appeal to the Court of Appeal from any judgment of the High Court in any criminal cause or matter.

38. Accordingly, permission to judicially review the decision of the DJ not to grant the summons sought is refused.

Application for permission to appeal

39. In written submissions dated the 1st July 2020 Mr Al-Ani seeks permission to appeal my refusal of permission to apply for judicial review. He wishes to appeal on the grounds:

    i) That I was wrong to refuse permission in order that the applicant could apply for a declaration of incompatibility of s18(1) of the Senior Courts Act 1981. The applicant lists eight occasions when this court has refused permission for judicial review on applications arising out of the invasion and occupation of Iraq on three occasions declaring the application totally without merit. The denial of a hearing is in breach of the ECHR.

    ii) That I was wrong not to grant permission in order that the applicant could argue that Attorney General was wrong not to initiate criminal proceedings against HM Government for war crimes in relation to Iraq. The applicant argues that the 2003 letter [see paragraph 32 above] was a political decision. He draws attention to five occasions when the AG's department refused to grant consent for the prosecution of war crimes.

    iii) That I was wrong not to grant him permission in order that he could argue that the Legal Aid Sentencing and Punishment of Offenders Act 2012 is incompatible with the Human Rights Act in denying him legal aid for the purposes of judicial review.

Conclusion on application for permission to appeal

40. In my judgment these grounds of appeal show very clearly that the application for a summons was made for an improper purpose in that the applicant wished to prosecute Tony Blair for war crimes rather than for the offence the subject of the summons application.

41. Permission to appeal is refused. This application concerns a criminal cause or matter. The applicant has no right to appeal.

42. In any event, this was an application for permission to judicially review the decision of the DJ not to issue a summons against Tony Blair for administering a noxious substance to Mr Jasim, contrary to s.23 OAPA 1861. Mr Al-Ani told me in terms during the course of the hearing that the 2003 letter could not be shown to have any direct connection to that alleged crime. For the reasons set out above I consider the DJ right not to have done so and the application totally without merit. It would be inappropriate in those circumstances to grant permission solely for the applicant to argue the points he raises in his application for permission to appeal.