

HIGH COURT REJECTS JUDICIAL REVIEW APPLICATION AGAINST REFUSAL TO PROSECUTE THE FORMER PRIME MINISTER

R (Al-Rabbat) v Westminster Magistrates' Court [2017] EWHC 1969 (Admin)

Introduction

By a decision handed down on 31 July 2017, the Divisional Court in *R (Al-Rabbat) v Westminster Magistrates' Court* [2017] EWHC 1969 (Admin) refused an application for judicial review of a magistrates' court's refusal to issue a summons for private prosecutions to be brought against the former UK Prime Minister Tony Blair, and others, for the international crime of aggression in respect of their involvement in the 2003 Iraq War.

Background

In 2003, the United Kingdom, and others, carried out a military invasion of Iraq. Between 2009 and 2011, an inquiry led by Sir John Chilcot ("the Chilcot Inquiry") investigated the UK's role in the build up to the Iraq War and, on 6 July 2016, published the results of its investigations. The Chilcot Inquiry, which received advice on international law throughout its proceedings from a former President of the International Court of Justice, was broadly critical of the actions that had been taken by the British government and found that the legal basis for the war was "far from satisfactory".

On 24 November 2016, District Judge Snow at Westminster Magistrates' Court decided not to issue a summons for a private prosecution of the former Prime Minister and others on the basis that their actions and participation in the invasion of Iraq amounted to the crime of aggression.

The claimant argued that the findings and reports of the Chilcot Inquiry demonstrated that there was a case to answer on the part of the former Prime Minister and others for the crime of aggression. Therefore, those individuals should be held accountable for a criminal legal breach. Whilst the crime of aggression existed in international law, and prosecutions in respect of

international crimes could be brought before international tribunals, where it was not possible to bring a prosecution for such a crime before such a tribunal, the domestic courts should themselves hear the prosecution. Such a move was necessary in order to uphold the rule of law and international criminal law.

A previous decision of the House of Lords (*R v Jones (Margaret)* [2006] UKHL 16) had held unanimously that the crime of aggression was not a part of domestic English law. The claimant argued that it was necessary for there to be a reconsideration of the decision in the *Jones* case in order for those responsible for international crimes to be properly held accountable.

Decision

The Divisional Court (Lord Thomas LCJ and Ouseley J) refused permission for judicial review.

Whilst the Rome Statute of 2003 had established the International Criminal Court with jurisdiction to hear prosecutions for the crime of aggression, the International Criminal Court did not have temporal jurisdiction over the crime of aggression until one year after at least 30 States Parties had ratified certain amendments. On that basis, no prosecution for the crime of aggression could take place in respect of conduct committed before June 2017.

The decision in the *Jones* case had held that the international law crime of aggression had not been incorporated or assimilated into English domestic criminal law since Parliament had not passed an Act of Parliament creating the offence of the crime of aggression. The passing of the International Criminal Court Act 2001, giving effect to the Rome Statute, did not include the crime of aggression in the list of offences thereby created.

Any prosecution would involve the English courts having to decide on the culpability of going to war. It is well-established that the English courts are slow to undertake a review of decisions taken by the executive under prerogative powers concerning foreign affairs and the use of the UK's armed forces. On the basis of the above, the Divisional Court considered that there was no prospect of the Supreme Court deciding that the decision of the House of Lords in *Jones* was wrong or did not apply.

The Divisional Court considered that there was some force in the argument that if there was an international law crime of aggression, there should be a means of prosecuting such crimes in order to uphold the rule of law. However, the Divisional Court did not consider that such a contention justified a departure from the rule that the making of actions criminal under English law was a matter for Parliament alone.

Since there was not as yet an established offence or crime of aggression under English law, it would be unfair to examine the contention that there was a case to answer on the part of the former Prime Minister and others.

Concluding Remarks

This decision demonstrates that Public International Law which creates crimes must be given domestic effect by Parliament so as to form part of English law. This case is an example of the important interaction between international law and domestic law.