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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 1209 (Admin)



No. CO/4892/2018

Royal Courts of Justice

Thursday, 28 March 2019

Before:

MR JUSTICE SUPPERSTONE

B E T W E E N :

The Queen on the application of
DANIEL SHUTTLEWOOD

Claimant

- and -

MINISTRY OF DEFENCE

Defendant

MR A. KHAN (instructed by Pandya Arbitration Global) appeared on behalf of the Claimant.

MISS C. PALMER (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE SUPPERSTONE:

1 The claimant renews his application for permission to apply for judicial review to challenge the decision of the defendant, the Ministry of Defence, to try him by way of court martial proceedings in reliance upon a decision of the Solicitor General dated 17 November 2014 to extend the statutory time limit within the Armed Forces Act 2006 to prosecute him.

2 Mr Arfan Khan appears for the claimant. Miss Claire Palmer appears for the defendant and the Attorney General. I am grateful to both counsel for their helpful submissions.

3 The background to this claim is that the claimant was arrested and tried, by way of court martial in 2015, for a number of sexual offences, some involving children, committed in 2003/2004 and 2009. He was convicted and sentenced to ten years' imprisonment and is currently, I understand, detained at HMP Oakwood.

4 He has never been a serving member of the Armed Forces but was, at the time the offences were committed, a civilian living in Germany and subject to service jurisdiction and trial by court martial.

5 He applied to appeal his convictions to the Court Martial Appeal Court. Leave to appeal was refused by the President of the Queen's Bench Division, Singh J (as he then was) and Holgate J on 20 July 2016.

6 Mr Khan advances two grounds of challenge. First, that the Solicitor General's fiat, dated 17 November 2014, is *ultra vires* s.61(1) of the Armed Forces Act 2006 because it was not signed in the name of the Attorney General with sufficient reasons. So effectively two issues there. Second, there exists a procedural irregularity in that the Attorney General's consent was never disclosed to the claimant until recently, when the decision was communicated to him.

7 As to the first, Mr Khan submits that the Solicitor General's fiat does not contain any reasons as to why court martial is the appropriate procedure when the time limit under s.58 of the Armed Forces Act has expired. Fairness, he submits, requires reasons as to why a court martial is appropriate over the right to a trial by jury. The absence of reasons was not a point taken in the original claim. Mr Khan raises it for the first time in draft amended grounds of claim. Miss Palmer formally opposes the amendment but is content for me to take a pragmatic approach to the amendment, which I do, and I allow it.

8 Mr Khan further submits that although the Solicitor General may discharge the functions of the Attorney General, the nature of the consent is such that this must be expressed in the name of the Attorney General, even if it is signed by the Solicitor General for and on behalf of the Attorney General. He submits that s.1(4) of the Law Officers Act 1997 provides support for this submission. It suggests there is good policy reasoning behind the provision. Once the functions are exercised in the name of the Attorney General, it is presumed that the Attorney General has made the necessary and proper enquiries before giving consent. That, it is said, does not necessarily follow where the consent is given in the name of the Solicitor General.

9 As for the second ground, that there has been a procedural impropriety, Mr Khan submits that even if the Solicitor General's fiat is valid consent on behalf of the Attorney General, it has not been proved that the consent was communicated to the claimant prior to the commencement of the proceedings. It is said that the consent was referred to in a list of

exhibits at trial, but that exhibit has not been produced by the defendant. The consent to prosecute in s.61(2) of the Armed Forces Act is a statutory requirement which must, as a matter of substance, be proven.

10 Miss Palmer, in response to the first ground, reminds me of the terms of s.1 of the Law Officers Act. Section 1(1) provides that any function of the Attorney General may be exercised by the Solicitor General. She emphasises the words “any function”. Section 1(2) provides that anything done by the Solicitor General, in the exercise of or in connection with the function of the Attorney General, has effect as if done by or in relation to the Attorney General. The Attorney General may give consent to prosecute outside the standard time limit. Section 61(2) does not require, Miss Palmer submits, that consent is given “in the name of the Attorney General, rather that a person may be charged if the Attorney General consents”. This function was exercised by the Solicitor General and takes effect as if done by the Attorney General. Critically, in answer to Mr Khan’s submission on s.1(4), Miss Palmer submits that s.1(4) does not mean that where the Solicitor General signs a document consenting to extend time to prosecute that he must do so in the name of the Attorney General.

11 Insofar as the claimant places any reliance on s.326 of the Armed Forces Act, which provides that:

“Subject to section 61(2), no enactment requiring the consent of the Attorney General or the Director of Public Prosecutions in connection with any proceedings has effect in relation to proceedings under this Act for a service offence”,

Miss Palmer submits that this simply provides that there is no other requirement for the Attorney General’s consent. It does not mean that the Law Officers Act does not apply.

12 Finally, Miss Palmer submits that there was no requirement that the Solicitor General give reasons for his fiat. This is a matter that has only now been raised. If the Solicitor General had been asked for reasons he may well have given reasons. However, in any event, the judicial review claim is against the Ministry of Defence. It is not against the Attorney General.

13 In my judgment, Miss Palmer’s submissions are plainly correct. I do not consider the first ground of challenge to be arguable.

14 I have reached a similar conclusion in relation to the second ground. There is no requirement that the decision to prosecute outside the time limits be communicated to a defendant in court martial proceedings.

15 The further point taken by Miss Palmer is that the Attorney General’s consent was, in fact, referred to on a list of exhibits and the admissions at trial included the admission that the claimant was subject to service jurisdiction. He was represented throughout and Miss Palmer comments that if it was considered that the requisite consent was lacking, that issue could have been raised (although, as Mr Khan observes, if the court had no jurisdiction, absence of jurisdiction cannot be cured by admissions by the parties).

16 However, for the reasons I have given, I do not consider this challenge to be arguable.

17 Accordingly, permission is refused.

CERTIFICATE

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This transcript has been approved by the Judge.