

R v. Jones : A crime against justice.

Introduction

On 29th March, 2006, the Appeals Committee of the House of Lords gave its judgement in the matter of *Regina v Jones et al.* [2006] UKHL 16, which was given together with their judgement in the cases of *Ayliffe et al. v. the DPP* and *Swain v the DPP*, (hereinafter “*Ayliffe & Swain*”) and which were all heard together over four days in February, the only fully reasoned opinions being given by Lords Bingham of Cornhill and Hoffman¹. In *Jones*, a total of five appellants were heard, on appeal against a judgement of the Court of Appeal [Criminal Division] delivered by Latham L.J.², in which that court had denied their earlier appeal, against a preparatory criminal ruling³ given by Grigson J., sitting then as a trial judge, in the Crown Court at Bristol.

These Appellants are charged with a variety of inchoate and/or preparatory criminal damage charges, under the Criminal Damage Act, 1971, in relation to their having been arrested inside the perimeter wire fence at RAF Fairford in Gloucestershire, at various different times in the week immediately prior to the launch of the military attack upon, and subsequent invasion of, Iraq, beginning on 20th March, 2003. These charges are yet to be heard in a trial later this year at Bristol. The base was at time being used for the stationing of US Air Force B-52 long-range strategic bomber aircraft, and each of the Appellants had entered with the intention of doing damage to the equipment on the base, so as to inhibit and/or delay, the war-fighting capacity of those aircraft. In the case of Dr. Jones, and her co-accused Paul Milling, they were arrested only after having done an alleged \$80 000 worth of damage to various support vehicles.

These appellants sought permission to put before their trial jury that, they had been justified in acting as they had, or had intended to act, because they were employing only reasonable means to try to prevent the commission of a crime; to wit, the on-going military preparations for the aerial bombardment of Iraq, which they contended comprised in the commission of “a crime against peace” / “crime of aggression”⁴, under *ius cogens*⁵ rules of customary international criminal law. They further argued that these crimes were “crimes” for purpose of the provisions of s.3(1) of the Criminal Law Act, 1967 (s.3 CLA 1967)⁶, use of reasonable force for crime prevention.

In particular, it is to be appreciated that the definition of a “crime against peace”⁷ comprises in the “planning, *preparation*, initiation *or* waging of a war of aggression or in violation of international treaties etc.”; and that consequently, in so far as the activities on the airbase, on the days in question, contributed to the making of “preparations” for the waging of such a war, then the *actus reus* of that crime was then being committed in Gloucestershire, within the ordinary domestic territorial jurisdiction, even before the war had begun in earnest, and whether or not anyone on the base at that time was a sufficiently responsible “war planner” to be individually liable for committing it themselves.

In essence, and this was never specifically refuted by the prosecution, the point at issue was this : if the attack upon Iraq, by the combined military forces of the US and the UK, was not in fact authorised by the Security Council of the United Nations, nor was otherwise justifiable under the international law on the resort to the use of armed force, the so-called *ius ad bellum*⁸, which is undoubtedly the position taken by most eminent and distinguished international jurists in the world today, and indeed even in the UK ; then it would follow that, it constituted instead an act of naked international aggression⁹, and specifically, that

¹ The other members of a panel of five being Lord Rodger of Earlsferry, Lord Carswell and Lord Mance.

² *Jones et al v the Glos. C.P.S.* [2005] QB 259

³ Given pursuant to s.29 of the Criminal Procedure & Investigations Act, 1996

⁴ for the purposes of this essay I will assume that there is no practical difference between “a crime against peace” and “crime of aggression”, although this is most certainly not a supposition which I subscribe to generally.

⁵ Fundamental and peremptory norms of customary international law, from which states are not permitted to derogate or ignore

⁶ “A person may use such force as is reasonable in the circumstances in the prevention of crime...”

⁷ see Principle VI(a) of the ILC Nuremberg Principles affirmed by Resolution 95[I] of the UN General Assembly, 6 Nov 1946

⁸ such as a justified act of national “self-defence” as preserved by reason of Art.51 of the UN Charter (1945)

⁹ for a definition of which see esp. Art.3 of the Definition of Aggression annexed to UN Gen Assbly. Res 3314 [XXIX] 1973.

those individuals concerned with planning and preparations for launching it, would be guilty of the same crimes against peace, for which the victorious allied authorities indicted, tried and convicted several leading German Nazi statesmen and military commanders at Nuremberg, at the conclusion of the Second World War, before then hanging them.

In the *Ayliffe* case, acting about six weeks before the start of the war, 14 members of the crew of the Greenpeace ship the “*Rainbow Warrior*”, then at anchor in Southampton Water, went ashore at the MoD “sea-mounting” centre at Marchwood, where they then entered the compound and chained themselves to several Scimitar armoured fighting vehicles and Scorpion tanks, then awaiting loading for trans-shipment to Kuwait, prior to their deployment in the assault on Iraq. Valerie Swain had cut her way through the perimeter fence, again at RAF Fairford, earlier in March than the appellants’ in *Jones* had acted, but this time in an overt act of protest during daylight hours, being arrested as soon as she entered the base.

In all these case the accused were charged with “aggravated trespass” under s. 68(1) of the Criminal Justice and Public Order Act, 1994, in that they had so trespassed onto to land with the intention of disrupting or obstructing the “lawful activity” taking place thereon. A lawful activity being defined, by s.68(2) of that Act, as meaning anything done by a person lawfully on the land without their thereby committing an “offence”. The cases of these defendants were heard, and they were convicted by, District Judges, sitting at Southampton and Cirencester magistrates’ courts respectively. Defences under both s.3 CLA 1967, and in relation to the activities so disrupted being unlawful, in that those activities were part and parcel of the commission of an “offence” of aggression, were summarily rejected by those Judges respectively. “Case stated” defendants’ appeals were then made in each of these matters, to the Queen’s Bench Division of the High Court, judgement being given in 2005 in a joined hearing, after the decision of the Court of Appeal in *Jones*, and which then bound the High Court in relation to their earlier findings.

The Court of Appeal [Criminal Division] cited the following point of law as being raised by their decision in the *Jones* appeals matters¹⁰:

"Is the crime against peace and/or crime of aggression capable of being a 'crime' within the meaning of section 3 of the Criminal Law Act 1967 and, if so, is the issue justiciable in a criminal trial?"

The Administrative Court of the Queen’s Bench Division cited the following point of law as being raised by their decision in the *Ayliffe & Swain* appeals matters¹¹:

"Is a crime of aggression capable of being an 'offence' within the meaning of section 68(2) of the Criminal Justice and Public Order Act 1994, and if so is the issue justiciable in a criminal trial?"

My analysis of the judgement of the House

I have found it convenient to divide this present critique of the judgement of the House on those appeals into the following four parts , viz.:

Part 1 – The prohibition on “judge-made” crimes:

in which I have set out to examine in detail the merit to the conclusion, reached by all the Law Lords who gave their reasons in this case that, applying the earlier authority of the House in the matter of *Kneller (Publishing, Printing and Promotions) Ltd v the D.P.P.* [1973] AC 435, it therefore follows that, the established prohibition on the creation of new “judge-made” crime in the common law, works then also as a prohibition or bar on the recognition by our judges of the adoption, into our municipal or domestic common law, of crimes existing under customary international law.

¹⁰ The court also cited a point regarding the scope of the “lawful excuse” defence to a charge of criminal damage, under s.5(2) of the Criminal Damage Act, 1971, but this point was later withdrawn by the Crown before the hearing.

¹¹ The court in these cases also cited a second point on s.3 CLA 1967 which was in identical terms to that in the *Jones* cases.

Part 2 – Incorporation by statute v. adoption by the common law:

in which I examine in depth the merit to the statement made by Lord Bingham that “... *when it is sought to give domestic effect to crimes established in customary international law, the practice is to legislate.*” (see para.28 of his opinion), by implication as being at least preferred to adoption by the common law.

Part 3 – Constitutional duty v. judicial discretion:

in which I examine the comparative position of our courts, on the one hand, respecting their judicial discretion to decline to review the exercise of certain aspects of government activity, when that is undertaken by the executive, in right of its common law royal prerogative powers, in certain “subject-matter” areas of the most politically sensitive and consequential nature, namely national security and foreign affairs ; and, on the other hand, respecting their constitutional duty to hold that same executive to account, pursuant to the notion of a government subject to “the rule of law”

Part 4 – Who decides what is “reasonable”?

finally I turn to examine the quite extraordinary reasoning given by Lord Hoffmann, in the latter part of his opinion, and offered quite egregiously outside of anything required to justly dispose of these appeals, in which he concludes that, in future, wherever a defence, which requires the prosecution to prove only that the defendant has behaved “unreasonably” in order to negative or disprove it, be that under statute, such as here under s.3 in right of crime prevention, or presumably equally at common law, such as in right of “necessity” or “self-defence”, is advanced ; then, where the evidence would suggest that the defendant was acting under an honest, and even objectively reasonable, apprehension, that the state itself was responsible for acting unlawfully, then in a functioning democratic state such as this, that defence should be withdrawn from the jury, evidence as to illegal state behaviour ruled irrelevant and inadmissible, as too also anything said by international lawyers !

I should add in summary that, having been hired by the solicitors instructing in some of the *Jones* cases, initially as a paralegal consultant, in the case in the lower courts, and then as their caseworker on the House of Lords appeal, I was in a position to witness first hand the proceedings throughout the hearing of all parts of these appeals to-date. Alas, my conclusion is that this judgement is a most regrettable further example of a House of Lords decision :

(a) wrongly citing authority (without quoting from it) as having an effect which on closer examination it does not bear, e.g. Lord Hoffmann’s reference to the *A-G for N.I. v. Gallagher* (see Part 4)

(b) wrongly referring to legislation (without quoting from it) as having an effect which on closer examination it does not bear, e.g. Lord Bingham’s reference to s.26(1) of the Merchant Shipping and Maritime Security Act 1997 (see Part 2), and finally,

(c) launching into a polemic with enormous and outrageous constitutional implications, without even the benefit of deigning to hear argument from both parties on the subject matter, re Lord Hoffmann and the “reasonableness” of action taken to prevent unlawful activity committed by or on behalf of the state

There are, of course, many further grave and significant implications from the decision itself, going to both the future treatment of so-called “protest” cases by the courts in this country, and the international standing and character of this nation state, now that it has renounced and repudiated what it once claimed to the world at Nuremberg, and I hope that the following may contribute to these and other public debates, which are so clearly now needed more than ever.

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co-founder of the Institute for Law and Peace.

Fiat iustitia ruat cælum