Neutral Citation Number: [2022] EWHC 1374 (Admin)

Case No: CO/2969/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2022

Before

LADY JUSTICE MACUR AND MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

DEFENDING CHRISTIAN ARABS **Claimant**

- and -

DIRECTOR OF PUBLIC PROSECUTIONS **Defendant**

-and-

(1) TAMIM BIN HAMAD AL THANI
(2) HAMAD BIN JASSAM BIN JABER AL THANI
(3) SECRETARY OF STATE FOR JUSTICE **Interested Parties**

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Dr Abdul-Haq Al-Ani (instructed under the direct access scheme) for the **Claimant**
Mr Louis Mably QC and Paul Jarvis (instructed by the **Crown Prosecution Service**) for the **Defendant**

Hearing date: 19 May 2022

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Approved Judgment

LADY JUSTICE MACUR AND MR JUSTICE SWIFT

A. Introduction

1. The Claimant, Defending Christian Arabs, is a company limited by guarantee incorporated in March 2019; it describes itself as a charitable society. It seeks permission to apply for judicial review of a decision of the Director of Public Prosecutions ("the Director"), made on 10 June 2021 refusing consent for a proposed private prosecution of the First and Second Interested Parties. The permission application was originally considered on the papers by Sir Duncan Ouseley. He adjourned the application to open court giving directions for the Secretary of State for Justice to be joined as an interested party and served with the proceedings so he could make representations on whether permission to apply for judicial review should be granted. As matters have turned out, the proceedings were not served on the Secretary of State. However, the Secretary of State is aware of these proceedings and has indicated, having considered the Skeleton Argument filed and served for the Director, that there are no further representations he wishes to make. The hearing was listed for a half day. We have had the benefit of full argument from Counsel for the Claimant, Dr Al-Ani and Leading Counsel for the Director, Louis Mably QC who appeared together with Paul Jarvis of Counsel.

2. The First Interested Party is the Emir of Qatar, the head of state of Qatar. He has held that position since 25 June 2013. The Second Interested Party was the Prime Minister of Qatar from 2007 until 26 June 2013. The consent requested was for permission to institute proceedings against each for what was described as the "offence of Terrorist Finance contrary to section 63 of the Terrorism Act 2006". It is common ground that the reference should have been to the Terrorism Act 2000, and that the relevant offence was the one specified in section 15(3) of the 2000 Act, of providing money or property knowing or having reasonable cause to suspect that it will or may be used for the purposes of terrorism. The relevance of section 63 of the 2000 Act is territorial. Section 63 provides that if a person does anything outside the United Kingdom which would if done inside the United Kingdom constitute an offence under section 15 of the 2000 Act, he is guilty of that offence. Section 117 of the 2000 Act provides so far as relevant for present purposes, that proceedings for an offence under section 15 "shall not be instituted in England and Wales without the consent of the Director of Public Prosecutions". Section 117(2A) further provides:

> "(2A) But if it appears to the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland that an offence to which this section applies has been committed outside the United Kingdom or for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for the purposes of this section may be given only with the permission–
>
> (a) in the case of the Director of Public Prosecutions, of the Attorney General; and
>
> (b) in the case of the Director of Public Prosecutions for Northern Ireland, of the Advocate General for Northern Ireland."

It is common ground that this provision applied to the proceedings the Claimant wishes to institute.

3. The Claimant originally made its application to the Attorney General by letter dated 28 June 2019. That letter enclosed a narrative document running to 18 pages which, among other matters, referred to reports that the Qatari state had provided funds and other assistance to groups operating in Syria, fighting against the Assad government. The group specifically mentioned was al-Nusra Front, a jihadist organisation which has, since 2013, been regarded as the official Syrian branch of al-Qaeda. The application included two draft indictments. The particulars of offence prepared in respect of the First Interested Party stated:

> "On and since 25 June 2013 Tamim bin Hamad Al Thani, has provided money to the terrorist organisation, Free Syrian Army (FSA), with the knowledge that it was going to be used for the purposes of terrorism, namely to influence the Government of the Syrian Arab Republic for the purpose of advancing the FSA's political objective of regime change."

The conduct alleged therefore corresponds in time to the date when the First Interested Party became Emir of Qatar. The particulars of offence prepared in respect of the Second Interested Party stated:

> "On unknown days between 29 July 2011 and 26 June 2013 Hamad bin Jassam bin Jaber Al Thani provided money to the terrorist organisation, the Free Syrian Army (FSA), with the knowledge that is was going to be used for the purposes of terrorism, namely to influence the Government of the Syrian Arab Republic for the purpose of advancing the FSA's political object of regime change."

This allegation concerned events that took place when the Second Interested Party was Prime Minister of Qatar.

4. After the application sent on 28 June 2019, correspondence followed. The Attorney General made it clear that the application could only be considered if there was evidence that the Director was willing to consent to the prosecution. The Attorney General also requested, among other matters, copies of evidence relied on and the basis on which the evidence would be admissible in proceedings in England, details of the specific offence(s) to be charged, an explanation of how the evidence relied on provided a realistic prospect of conviction, and an explanation of why the Claimant considered prosecution of those offences would be in the public interest. The Claimant declined to provide further information. The Claimant contended there was no requirement to apply the Full Code test to a proposed private prosecution (i.e. the test in the Director's Code for Crown Prosecutors which sets out the general principles to be followed when making decisions whether to prosecute). The correspondence then went around in circles; it was brought to an end by a letter from the Attorney General in December 2019 which made it clear that, in the first instance,

it was for the Director to decide if he wished to apply for the Attorney General's consent to the proposed prosecution.

5. On 20 December 2019, the Claimant commenced correspondence with the Director. The Director's decision was delayed. It was provided by letter dated 10 June 2021. The decision letter referred to the Full Code test stating that before the Director could apply to the Attorney General seeking her consent he would need to be satisfied that the Full Code test was met. The letter then stated that in this instance there was an additional factor – that state immunity prevented prosecution:

> "The additional factor is that the proposed defendants … are, respectively, the current Head of State of Qatar and the former Prime Minister and Foreign Minister of Qatar. Given their current or former roles, both individuals benefit from immunity from criminal prosecution in England and Wales for the proposed section 15 Terrorism Act 2000 offences and hence as no prosecution could be brought, no consent to prosecute could ever be validly be given."

So far as concerned the First Interested Party the decision then relied on section 20 of the State Immunity Act 1978, and Schedule 1 to the Diplomatic Immunity Act 1964.

> "Applying the principle of *ratione personae* and the relevant sections of the aforementioned statutes to the Head of State of Qatar … for the period reflected in the proposed indictment ("on and since 25 June 2013"), I am satisfied that he has the benefit of complete immunity from prosecution for offences in England and Wales and therefore the Director of Public Prosecution's consent to prosecute could not be given <u>even</u> were there deemed to be realistic prospect of conviction and a conviction were deemed to be in the public interest. I make clear that I have not made any determination as to the two stages of the Full Code Test because of my conclusions on immunity."

So far as concerned the Second Interested Party, the decision letter stated that he enjoyed state immunity in respect of acts committed in his public capacity for the period he was Prime Minister.

> "… I am satisfied that he has the benefit of immunity from prosecution for offences in England and Wales relating to acts performed while Head of State and done in his public capacity. Given the applicable immunity and taking account of the proposed basis for your prosecution, I have concluded that the Director of Public Prosecution's consent to prosecute could not be given even were there deemed to be a realistic prospect of conviction and a conviction were deemed to be in the public interest. Again, I have not made any determination as to the two stages of the Full Code Test because of my conclusions on immunity."

6. The Claimant's judicial review claim raises the following matters. *First* that the requirement for consent to institute proceedings at section 117 of the 2000 Act is contrary to EU law. *Second* that the same requirement is contrary to the provisions of the Human Rights Act 1998. *Third* that for the purpose of discharging his function under Section 117 of the 2000 Act, the Director was wrong to have regard to the Full Code test and/or to the principles of state immunity. *Fourth* that in any event, the conclusion that neither the First nor Second Interested Party could be prosecuted by reason by state immunity was wrong. The Claimant's pleaded case contained a further ground of challenge to the effect that the decision in the letter of 10 June 2021 had been taken by a person not permitted to do so, having regard to section 1 of the Prosecution of Offences Act 1985. However, that ground of challenge is no longer pursued.

B. Decision

7. Having carefully considered the written and oral representations we are satisfied that the Claimant's case is not arguable. We refuse permission to apply for judicial review.

(1) Is the requirement for consent contrary to EU law?

8. The Claimant's submission rests on article 10 of Directive 2012/29/EU "… establishing minimum standards on the rights, support and protection of the victims of crime". Article 10 is in the following terms:

> "*Article 10*
>
> **Right to be heard**
>
> 1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity.
>
> 2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law."

9. The Claimant's submission is that the requirement in section 117 of the 2000 Act for consent to institute proceedings derogates from the guarantee in article 10. The Director makes as number of points in response. He submits that article 10 says nothing touching on conditions that may be attached to the ability to institute criminal proceedings. Next, he submits, that the Claimant is not a victim as defined in article 2 of the Directive and cannot therefore found any claim on any right that may arise from article 10. Further, he submits that no part of article 10 is retained EU law pursuant to the provisions of the European Union (Withdrawal) Act 2018 so that, in any event, the Claimant cannot now contend that a decision made after 31 December 2020 had to comply with article 10 of the Directive.

10. We tend to agree with the Director's submission on this last point, but we do not need to decide the matter to conclude that this part of the Claimant's case is unarguable. On any reading of article 10 of Directive, that provision says nothing about the circumstances in which criminal proceedings may or may not be instituted. The Claimant submitted there is a right arising from article 10 for victims to initiate criminal proceedings. Article 10 as made, contains no such right. Rather it makes some provision concerning the position of victims of crime during such criminal proceedings that may be commenced they "may be heard" and "may provide evidence". The Claimant relies on two decisions of the CJEU: *Gambino v Procura della Repubblica Presso Il Tribunale di Bari* (Case-38/18, judgment 29 July 2019); and *Katz v Istvan Roland* (Case-404/07, judgment 9 October 2008, a case concerning the Framework Decision that was the predecessor of the Directive). However, neither of these decisions is authority for the proposition that a victim of crime has any right under EU law to initiate criminal proceedings. We also accept the Director's submission that the Claimant is not a "victim" within the definition at article 2 of the Directive. The word is defined in this way.

> "(a) 'victim' means
>
> (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
>
> (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death'
>
> (b) 'family members' means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim."

The Claimant is a company limited by guarantee. It has legal personality but is not a natural person. Dr Al-Ani draws attention to paragraph 6 of the Statement of Facts and Grounds that says that when the Claimant applied for consent it was acting for Nafi Muhammad Meeri. Dr Al-Ani tells us that Mr Meeri's son was killed during the fighting in Syria. Save for the bald statement in the pleading that the Claimant acted for Mr Meeri, there is no evidence in these proceedings to support this or to explain Mr Meeri's circumstances so far as they are relevant for the purposes of the article 2 definition. Nor can we see any mention of Mr Meeri in any of the documents provided either to the Director or the Attorney General when the application for consent was made. Be that as it may, the absence of any relevant substantive right in article 10 is sufficient to ground our conclusion that this part of the claim raises no arguable issue.

(2) Is section 117 contrary to Convention rights?

11. The Claimant's submission is that the requirement for consent in section 117 of the 2000 Act is incompatible with article 2 and/or article 6 ECHR. Linked to this is the submission that the consent requirement gives rise to a discretionary power that is arbitrary and undermines "the Rule of Law". Dr Al-Ani submitted that it was

sufficient reason to grant permission to apply for judicial review simply because the case raised the claim that a statutory provision was incompatible with Convention rights. We disagree; the fact that the relief sought is a declaration under section 4 of the Human Rights Act says nothing as to whether the underlying claim is an arguable claim that should be considered at a final hearing.

12. In this case we do not consider the Human Rights Act claim is arguable. No right to institute criminal proceedings can be extracted from article 2. Article 2 can impose obligations on public authorities to investigate situations where death has occurred, and it is also correct that criminal proceedings are one means by which that investigative obligation can be discharged. However, that only goes so far as, in some cases, requiring the state to undertake a criminal investigation and consider criminal proceedings. It does not give rise to any right for an individual to commence criminal proceedings. Nor does the Claimant's reliance on article 6 assist its claim. The parts of article 6 that concern criminal proceedings are all directed to the rights of a defendant; they are concerned to ensure that a defendant has the opportunity to meet charges made against him, and has a fair trial that takes place within a reasonable period of time. So far as concerns criminal proceedings article 6 provides no further right of access to court, and no right of access for the purposes of initiating criminal proceedings.

13. The position is different so far as concerns determination of civil rights and obligations. In that context, article 6 does give rise to a right of access to court in the sense of a right of access for the purpose of commencing proceedings. But even that right is not absolute. It may be restricted in pursuit of a legitimate objective so long as the restriction is proportionate to that objective. Even were we to assume in the Claimant's favour that the right of access to court for the purpose of initiating proceedings extended to a right of access to initiate criminal proceedings, the Claimant's case would remain unarguable. The requirement at section 117 of the 2000 Act is that proceedings for specified offences under that Act only be initiated with the consent of the Director, and that if the proceedings concern an offence committed

> "… outside … the United Kingdom or for a purpose wholly or partly connected with the affairs of a country outside the United Kingdom or for a purpose wholly for or partly connected with the affairs of a country other than the United Kingdom …"

the Director may give consent only with the permission of the Attorney General. This consent requirement pursues a legitimate objective. Provisions requiring consent of the Director or the Attorney General before criminal proceedings can be commenced may not be widespread, but nor are they unknown. The Law Commission considered the matter of requirements for consent to prosecution in a Report published in 1998. That report recorded provisions to this effect across 153 statutes. The general reasons for such provisions are well known. They recognise that is some instances harm can be caused by the institution of inappropriate criminal proceedings. That being so, consent requirements can be a means of securing consistency of practice where the law concerned is framed in wide terms; they can provide some central control over decisions to prosecute where the area of law covers matters that are sensitive or controversial; they can ensure that decisions whether to prosecute occur only after consideration of relevant public policy where the criminal law is applied to matters raising political (in the wide sense) or international considerations; and so on.

14. The offences under the 2000 Act which are subject to section 117 are obvious examples of offences involving international elements as they were introduced to combat terrorism, an international phenomenon. The offences may exist to give effect to the United Kingdom's international obligations, and the prosecution of such offences may, depending on the facts concerned, bear upon the United Kingdom's international relations. The consent requirement at section 117 of the 2000 Act is also, plainly, a proportionate measure. Any decision taken in exercise of the power must be taken in accordance with the well-established principles of public law, and is potentially, subject to the oversight of the court on application for judicial review.

15. As we have said, the need for the proportionality analysis just described does not arise in this case because the Claimant's claim does not give rise to any matter engaging Convention rights. The Claimant's practical concern is that the role of the Director and/or the Attorney General under section 117 of the 2000 Act gives rise to some kind of arbitrary interference with the ability to commence private prosecutions, the possibility for which is preserved by section 6(1) of the Prosecution of Offences Act 1985. For sake of completeness we do not consider this matter gives rise to any arguable ground of claim. The provisions of section 117 are not any form of arbitrary interference with the freedom to commence a private prosecution. This is for the reasons already given: section 117 pursues a legitimate objective, and any exercise of that power must be undertaken in accordance with the requirements of public law and may be subject with oversight of the courts through proceedings for judicial review.

(3) Unlawful to exercise the section 117 power taking account of the Full Code test and/or state immunity.

16. The Claimant's submission on this ground is that even assuming that the consent requirement in section 117 of the 2000 Act is not unlawful *per se* (as contrary to EU law or Convention rights) it was unlawful for the Director to exercise that power taking account of the Full Code test and whether either of the First or Second Interested Parties was immune from prosecution under principles of state immunity.

17. This submission raises no arguable point. As enacted, section 117 provides a power at large. The Director must exercise the power for a proper purpose, but that requirement apart he is entitled, within the grounds of *Wednesbury* reasonableness, to decide for himself which matters are relevant to the exercise of his power. The Director's published policy on how he will decide applications for consent is as follows:

> "If an offence requires the DPP's consent to prosecute, the private prosecutor must seek that consent. If the proposed prosecution passes the Full Code Test, the CPS will take over the prosecution. Conversely, if the proposed prosecution fails the Test the DPP's consent to prosecute will not be given."

That is the general policy, applicable in all instances where there is a statutory requirement for consent. The policy was not formulated specifically for applications for consent under section 117 of the 2000 Act

18. In this instance, the decision challenged, set out in the letter dated 10 June 2021, did not depend on the application of the Full Code test. However, the Director's general

policy to apply that test when deciding whether to give consent is not unlawful. The Claimant seeks to rely on the decision of the Supreme Court in *R(Gujra) v Crown Prosecution Service* [2013] 1 AC 484. However, the decision in that case, that is was lawful for the Director to apply the Full Code test when deciding to exercise the power at section 6(2) of the Prosecution of Offences Act 1985 to take over a private prosecution, is squarely against the Claimant's submission in this case. If it is lawful for the Director to apply that approach in the context addressed in *Gujra*, it is beyond argument that it is lawful to apply that criterion when exercising the power under section 117 of the 2000 Act to grant or refuse consent for initiation of criminal proceedings.

19. On the facts of this case, the operative question is whether the Director was entitled to consider the state immunity issue. The answer to that question is, clearly, yes. Mr Mably QC submitted that in circumstances where state immunity was a relevant issue, consideration of it was part and parcel of the Full Code test.

20. So far as material, the Full Code test is described in the Code for Crown Prosecutors as follows:

> "**The Full Cost Test**
>
> 4.1 Prosecutors must only start or continue a prosecution when the case has passed both stages of the Full Code Test. The exception is when the Threshold Test may be applied (see section 5).
>
> 4.2 The Full Code Test has two stages: (i) the evidential stage; followed by (ii) the public interest stage.
>
> …
>
> **The Evidential Stage**
>
> 4.6 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each subject on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential test stage must not proceed, no matter how serious or sensitive it may be.
>
> …
>
> **The Public Interest Stage**
>
> 4.9 In every case where there is sufficient evidence to justify a prosecution or to offer an out - of court - disposal, prosecutors must go on to consider whether a prosecution is required in the public interest.
>
> 4.10 It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A

> prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour…"

21. We see force in that submission given that: (a) the evidential stage of the Full Code test requires consideration of likely defences, and on one view a plea of state immunity could be characterised as a form of defence; and (b) the public interest stage of the test is certainly wide enough to permit consideration of the public interest in pursuing a prosecution against a person who has the benefit of state immunity so far as concerns the offences to be prosecuted. On this basis the submission the Claimant makes on state immunity for the purposes of this ground of challenge would fail for the same reasons as the submission concerning the application of the Full Code test.

22. This point may also be considered in a different way. On one view where state immunity applies, criminal proceedings would be outside the jurisdiction of the court: see *R v Madan* [1961] 2 QB 1. Looked at in this way, the point would fit less comfortably within the terms of the Full Code test. Yet even if this analysis is correct, it was not in the present case unlawful – even arguably – for the Director to consider the state immunity question for the purposes of deciding the section 117 consent issue. The Director's stated policy on consent applications is not a straightjacket. If a public law decision-maker, having a policy on how he will approach the exercise of a function, is faced with a situation which although within the ambit of that policy has unusual features that make it obvious that something not stated in the policy need to be considered, the decision-maker is not, in law, prevented from taking that matter into account. In fact, quite to the contrary. If the unusual feature were not considered it is likely the decision would be susceptible to challenge on the ground it had been taken without regard to a relevant matter. It follows that, regardless of the analysis, this ground of challenge is not arguable.

(4) Wrong conclusion on state immunity.

23. The Claimant's final ground of challenge is that the Director was wrong to conclude that no prosecution could be brought against either the First Interested Party or the Second Interested Party by reason of state immunity. The Claimant does not challenge the Director's reasoning *per se*. Rather, the Claimant's submission rests on an analogy with the reasoning of the majority of the House of Lords in *R v Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte No. 3* [2000] 1 AC 147. The Claimant's submission is that any immunity which might attach, whether by reason of the State Immunity Act 1978, or under customary international law must fall away because the crime alleged is terrorism. Thus, the submission goes, the proposed prosecutions would not fail by reason of state immunity.

24. We do not accept that this submission discloses any arguable case. The reasoning in *Pinochet* was specific to the international law crime of torture. While the reasoning of the judges in the majority was not identical, there was general acceptance that immunity *ratio materia* could not be available in respect of a crime defined in such a way by article 1 of the UN Convention Against Torture that it could only be committed in circumstances that would ordinarily give rise to the immunity: see per Lord Browne-Wilkinson at page 205C – F; Lord Hutton at page 261F; Lord Saville at pages 266H – 267A; and Lord Millett at page 278A – B. Thus, in that case, what was critical was not only that the prohibition against torture was recognised as having the

character of *jus cogens* – i.e. as a fundamental standard amounting to a peremptory norm of international law – but also how that prohibition had been addressed in the provisions of the UN Convention Against Torture.

25. There is no parallel in the circumstances of this case. *First* in international law there is no crime of terrorism recognised as a peremptory norm. States agree on the need for mutual cooperation to combat terrorism but there is no consensus on the definition of terrorism. The Claimant relies on the 1999 UN Convention for the Suppression of the Financing of Terrorism, and specifically on the fact that the provisions of section 62 to 64 of the 2000 Act were intended to give effect to aspects of that Convention. However, it is notable that the 1999 Convention is drafted so as to avoid the need for any definition of "terrorism". *Second* in the present context, there is no provision comparable to article 1 of the UN Convention Against Torture. In *Pinochet* it was significant that article 1 of the UN Convention Against Torture defined the act of torture as an act undertaken "… by or at the instigation of with the consent or acquiescence of a public official or other person acting in an official capacity". That proved fatal to a contention that a charge of torture could be met by a plea of state immunity. In the premises, this ground of challenge is also unarguable.

C. Disposal

26. For the reasons above, this application for permission to apply for judicial review is refused.