



Government Legal Department

Ms Angie Zelter on behalf of three PICAT Groups
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Your ref:

Our ref: Z1730129/AHN/B4

24 January 2018

Dear Ms Zelter,

Pre action response: AG's decision to refuse consent to prosecute as sought by PICAT

We write in response to your letter of claim dated 5 December 2017, outlining your proposed claim for judicial review of the Attorney General's decision to refuse to grant consent to a private prosecution that various sub-groups of the Public Interest Case Against Trident project ("PICAT") seek to bring against The Rt Hon Theresa May MP and The Rt Hon Sir Michael Fallon MP, as well as the corporate offices of the Prime Minister and the Secretary of State for Defence. The proposed prosecution is for the alleged offence of "*a conspiracy to commit a war crime (per a plan to launch a disproportionate nuclear attack) under s.51 of the International Criminal Court Act 2001 and s.1 of the Criminal Law Act 1977.*" Your claim asserts that the Prime Minister and the Secretary of State for Defence have committed, and are committing, the crime of conspiracy to commit war crimes, identified as a conspiracy to cause excessive incidental death, injury or damage contrary to Article 8(2)(b)(iv) of the Rome Statute.

We note that your purported letter before action is headed "without prejudice" and therefore does not comply with the Pre-Action Protocol for Judicial Review ("the Protocol"). Given the contents and format of your letter we are assuming that that heading was in error; and are responding to it in accordance with the Protocol.

1. Proposed claimant

Ms Angie Zelter for Knighton Peace & Justice Group, Norfolk Peace & Justice Group and Sevenoaks Action for Peace & Justice Group.

2. Proposed Defendant

The Attorney General.

3. Reference Details

The Government Legal Department is instructed to act on behalf of the potential Defendant. Please address any future correspondence to Miss Ashley Newburn quoting the reference Z1730129/AHN/B4.

Emma Robinson - Head of Division
Elizabeth Mackie / Lorna Robertson - Deputy Directors, Team Leaders Litigation B4



4. Details of the matter being challenged

On 10 November 2017 the Attorney General notified PICAT that he would not consent to the proposed prosecution. In your letter of claim dated 5 December 2017 you "*formally request and require*" the Attorney General to "*reconsider [his] decision*" and consent to the prosecution within 21 days of receipt of your letter.

5. Response to the proposed claim

The Attorney considered the original application very carefully (including all of the material provided by PICAT), its admissibility as evidence in criminal proceedings, and the extent to which it might establish the elements of the offence set out above. It is a constitutional principle that, when deciding whether or not to give his consent to any proposed prosecution, the Attorney General acts independently of Government applying the well-established prosecution principles of evidential sufficiency and, only if there is sufficient evidence for a realistic prospect of conviction, the public interest.

The Attorney General's view was and remains that the material provided by PICAT is insufficient to show that any offence has been committed and, therefore, there is insufficient evidence to provide a realistic prospect of the convictions of any of the proposed defendants on either of the proposed offences. It has been the practice of the DPP and the Attorney when confirming that prosecutions won't be brought because the evidential test has not been met to keep those reasons brief. The burden rests on the prosecutor to identify adequate evidence in respect of each of the elements of the alleged crime. PICAT failed to do this and it is not for the Attorney General to seek to supplement that evidence or to provide detailed advice on its shortcomings. The Attorney General having considered your letter sees no reason to revise his refusal of consent for the private prosecution proposed by PICAT, whether against corporate offices or individuals.

The claim you make is a deeply surprising one and appears in reality to be a challenge to the Government's policy on maintaining nuclear weapons. If that is indeed the basis of your challenge, it is for the reasons set out below an obviously untenable one.

It appears to involve the proposition that extremely serious criminal offences have been, and continue to be, committed by the Prime Minister and the Secretary of State for Defence. It is difficult to see, on your analysis, why the commission of the offence you allege is confined to those two Ministers / individuals. It has been the continuous policy of successive Governments for many years to maintain a nuclear deterrent. That is a policy for which, under the principle of collective cabinet responsibility, all Cabinet Ministers have been and are responsible. The logic of your case appears therefore to be that every Cabinet Minister, under numerous successive Governments has been guilty of the same offence.

It challenges, as criminal, the maintenance without more of a nuclear deterrent. The proposed prosecution appears to be based on the premise that any actual use of the UK's nuclear deterrent would necessarily cause excessive civilian losses, regardless of the circumstances. The consequence of your arguments would be to preclude the maintenance by the British Government of a nuclear deterrent.

The suggestion that it is prohibited under international law just to maintain a nuclear deterrent is a surprising one and contrary to the conclusions of the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2. There is a plain and fundamental distinction between the maintenance of such a deterrent, on the one hand; and its use, or a decision as to its use, in circumstances that are or would be, in summary, excessive on the other hand.

Moreover, the allegation you make would appear to cut directly across the will of Parliament. As recently as July 2016, Parliament, by a majority of 355 and with substantial cross-party support, voted for the maintenance and renewal of Britain's nuclear deterrent, the Trident programme.

If you do pursue such a claim the Attorney General will seek to recover his costs.

6. Address for further correspondence and service of court documents

All further correspondence should be addressed to Miss Ashley Newburn on behalf of the Treasury Solicitor via the contact details set out in the letterhead and citing the case reference at paragraph 3 above.

Service of court documents may be effected by post and DX. Service of process by email or fax is subject to prior arrangement through Susanna McGibbon, Head of Litigation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ashley Newburn', written in a cursive style.

Ashley Newburn
For the Treasury Solicitor

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