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International law: The UK Supreme Court's latest look at its impact on state immunity in the UK

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Abstract

This article examines the recent UK Supreme Court case of *US v Nolan* concerning the rights of a dismissed civilian employee of a US military facility in England. It sets out a summary of the court's findings on European law and *ultra vires*. It considers the public international law aspects of the appeal and asks if the court's acceptance that a plea of state immunity is procedural (and does not therefore affect the state's underlying duty or obligation) means that the UK approach to the relationship between immunity and Article 6 of the European Convention on Human Rights (access to justice) needs to be re-examined. The UK courts have hitherto held that Article 6 is not automatically engaged by a plea of immunity on the basis that such a plea deprives the court of substantive jurisdiction so there can be no denial of access as access does not exist in the first place. The European Court of Human Rights in Strasbourg has consistently maintained the opposite view and *Nolan* may have an impact on appeals touching on this issue pending before the Supreme Court.

Keywords: *International law and state immunity; nature of a plea of state immunity; access to justice and state immunity; Article 6 of the European Convention on Human Rights; 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property; employment rights and immunity.*

I. Introduction

It is a rule of customary international law that a state is entitled to plead immunity in the courts of another state at the very least in respect of its sovereign activities. It is trite law that a state can waive its immunity.

In *The United States of America (Appellant) v Nolan (Respondent)*, it was unsuccessfully claimed that the USA could rely on principles of construction under European Union or international law to avoid a statutory duty to consult employees made redundant by its closure of a military facility in the UK.¹ The underlying argument was that one had to

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interpret the relevant EU Directive and UK Act and Regulations as inapplicable to the *jure imperii* or sovereign non-commercial activities of foreign states. The interest for international lawyers lies in the US attempt to circumvent substantive liability, having failed to plead state immunity at the initial Employment Tribunal hearing.²

The US, not entitled to rely on immunity, was effectively claiming to be exempt from liability under the relevant UK employment law. The state argued, in part, that as a matter of binding international law, the legislation had to be interpreted as though it did not apply to the activities of a foreign state committing a sovereign act overseas, even though those activities would otherwise have attracted liability. Lord Mance (giving the only judgment on international law³) was not persuaded, finding that such a far reaching exception would effectively lead to all legislation being interpreted to exclude foreign state liability where state immunity could have been pleaded. The creation of what was, in effect, a second chance at state immunity was unwarranted and the appeal was lost on this ground⁴.

The decision is important, despite the seemingly thin US arguments, because of the Supreme Court's endorsement of the thesis that state immunity is a procedural plea which is distinct from the foreign state's duty or obligation under English law or the domestic court's underlying jurisdiction. This concept is gaining momentum internationally, was relied upon in the seminal International Court of Justice case on immunity, *Jurisdictional Immunities of the State (Germany v Italy)*, and may have important implications for recent arguments about the relationship between immunity and the right of access to a court raised, in particular, by Article 6 of the European Convention on Human Rights.⁵ This endorsement of immunity as a

¹ [2015] UKSC 63 [2015] 3 WLR 1105 (on appeal from The Court of Appeal [2014] EWCA Civ 71). The Supreme Court in *Nolan* decided that the employment law question as a matter of English law had to be decided by a further Court of Appeal hearing- as explained in Part II below.

² A sovereign state is immune from domestic adjudication except in specific circumstances as a matter of international law (the restrictive doctrine). The doctrine is arguably now embedded in customary international law and is reflected in the 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property, Annex, UN Doc. A/RES/59/38 (not yet in force) much of which represents customary law: *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 [2007] 1 A.C. 270 paras 8 and 26 (per Lord Bingham). Once a state has submitted to the jurisdiction in a particular set of proceedings it is deemed to have waived immunity. UN Convention Article 8(1) (b). The relevant UK provisions are to be found in the UK State Immunity Act 1978 ("SIA"). S 2 of SIA deals with waiver and submission.

³ The bench was composed of Lord Neuberger, Lady Hale, Lord Mance, Lord Reed and Lord Carnwath.

⁴ *Nolan*, (n.1) para 38.

⁵ *Jurisdictional Immunities of the State*, ICJ Reports (2012) 99 para 57. As discussed below in part IV, there is some controversy in international law and English law about the jurisprudential nature of a plea of state immunity. If the effect of such a successful plea is to remove a state from the court's jurisdiction altogether then it is said that the right of access to a court protected by Article 6 of the European Convention on Human Rights is in doubt (is engaged) and the domestic court has to look at whether the plea is proportional and legitimate

matter of procedure which has the effect of exempting a state from the jurisdiction rather than removing jurisdiction altogether⁶ may have ramifications for a number of cases on appeal to the Supreme Court and suggests that the approach of the Court of Appeal may need to be refined in the Supreme Court.⁷

This note will focus on state immunity and jurisdiction and not on the EU or public law issues.

II. Facts and procedural history

The United States maintains a number of military establishments in the UK and employed 200 civilian employees at its water repair centre in Hampshire (“the Base”). It decided to close the facility in March 2006 and in April told its employees of the planned closure. In June all employees were informed that they were at risk of redundancy and the US began collective redundancy consultation. Mrs. Nolan, a civilian employee, was made redundant the day before the Base was closed. Mrs. Nolan started Employment Tribunal proceedings under Part IV Chapter II (which includes sections 188 to 198) of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587) (“TULCRA” and the “Regulations”). Mrs. Nolan alleged that TULCRA required the US to consult when it took the decision to carry out collective redundancies and not when it did consult, which was after the decision had been taken. There being no trade union at the Base, her claim was founded on her being an “employee representative” under TULCRA s 188(IB).⁸

as a matter of European law which will follow customary international law on this. Some UK lawyers and judges have preferred the approach which denies that Article 6 is engaged by a plea of immunity, meaning that it is a matter of UK law not EU law whether the immunity plea is accepted or not, see Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583D-F [2000] 3 All ER 833, 846-47 and *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 [2007] 1 A.C. 270 paras 14 (Lord Bingham) and para 64 (Lord Hoffmann). See Hazel Fox and Philippa Webb, *The Law of State Immunity* (revised and updated 3rd edn) OUP 2015 Part 1 p11, p 20 and chapter IV p 82. See also Andrew Sanger, “State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights” (2016) *ICLQ* 213-228 at 219.

⁶ The procedural approach is also the key to the normative argument that state immunity as a rule of international law can exist alongside international rules of *jus cogens* prohibiting or criminalising violations of human rights, despite the seemingly inherent conflict between the two, and by those who claim that “immunity does not mean impunity”. See the discussion in part IV below and n.57. That debate, although at the forefront of many discussions about state immunity, is not the focus here.

⁷ *Benkhroube v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 and *Belhaj v Straw* [2014] EWCA Civ. 1394.

⁸ *The United States of America (Appellant) v Nolan (Respondent)* [2015] UKSC 63 [2015] 3 WLR 1105 Para 2. The original Employment Tribunal found the US to be in breach of the

The decision to close the Base was a sovereign public act of the US taken in respect of a military facility in the UK and would have attracted immunity if pleaded.⁹ The US had not pleaded immunity as it believed that the duty to consult under TULCRA s 188 did not apply to the decision to close the base as opposed to later in the process of closure. This view turned out to be controversial and potentially wrong when, a year after Mrs. Nolan had instituted proceedings, an Employment Appeal Tribunal in a different matter came to a wider interpretation of the duty to consult.¹⁰ By then it was too late for the US to plead state immunity as it had already submitted to the jurisdiction of the Employment Tribunal.¹¹ It was duly found in breach of the Regulations and ordered to pay Mrs Nolan a month's wages.¹² Undaunted, the US argued before the Court of Appeal and the Supreme Court that it was not liable on the basis that the underlying duty had to be interpreted to exclude decisions made outside the UK for sovereign purposes (*acta jure imperii*).¹³

The proceedings did not take a "straightforward course"¹⁴, and before getting to the Supreme Court had involved a referral to the Court of Justice of the European Union ("the Court of Justice") (that resulted in an unhelpful decision that did not answer the question posed), a decision of the Employment Appeal Tribunal and two Court of Appeal decisions which found against the US.¹⁵

relevant provisions on redundancy consultations. The Employment Appeal Tribunal upheld the order [2009] IRLR 923. The matter was considered by two UK Courts of Appeal and the European Court of Justice before going before the Supreme Court.

⁹ It was common ground that the US could have successfully pleaded state immunity when Mrs. Nolan first issued her complaint but had not done so. The Supreme Court found that it was immaterial whether the immunity would have arisen under the State Immunity Act 1978 or at common law. Lord Mance, assuming s 16(2) of the State Immunity Act applied (which provides that a state's immunity in respect of activities of its armed forces in the UK is to be decided at common law) held that there would have been immunity at common law following *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583D-F [2000] 3 All ER 833, 846-7. This case involved a libel claim brought by an instructor at a US military base arising out complaints about her teaching set out in a memorandum sent by an education services officer. The court upheld the claim to immunity and applied *Littrell v. United States of America* (No. 2) [1995] 1 W.L.R. 82, [1994] 4 All E.R. 203 which concerned the provision of medical services on a US armed forces base in England and held that the plaintiff could not bring an action for personal injuries against the US Government as it was immune from suit.

¹⁰ *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area)* [2008] ICR 163.

¹¹ UK State Immunity Act s 2.

¹² [2009] IRLR 923.

¹³ At common law and under the UK State Immunity Act 1978 a state will generally be immune in respect of its sovereign acts- (*acta jure imperii*) but not its commercial acts (*acta jure gestionis*).

¹⁴ *Nolan*, (n. 1) para 8.

¹⁵ See n.9 above. The Supreme Court appeal was from [2014] EWCA Civ 71. The Employment Appeal Tribunal case is *US v Nolan* [2009] IRLR 923. The related Court of Appeal case is *US v Nolan* [2010] EWCA Civ 1223. The Court of Justice (part of the Court

The EU dimension arose because Part IV Chapter II of TULCRA is intended to give effect to the UK's duty to implement a European Directive on collective redundancy consultation.¹⁶ The UK statute, as originally drafted, had failed fully to do so, and the Regulations amended s188 of the statute to comply with the Directive in requiring that, in non-unionised enterprises, consultation take place with employee representatives. The EU Directive however expressly excluded workers employed by public administrative bodies which would have given the US the exception they claimed. The UK Regulations, while in some respects going further than the Directive, do not exclude public administrative bodies¹⁷ hence the argument that they bound the US in respect of redundancies of civilian employees at the Base, a public administrative body.

The Court of Justice was asked to interpret the UK Regulations in light of the EU Directive and conflicting English and EU authority¹⁸ but declined to decide the timing question on the basis it did not have jurisdiction. It found that EU law did not require or intend a foreign state to be subject to the consultative obligations because national defence, being an exercise of public power, was in principle not an economic activity subject to regulation of the internal market (the role of EU law).¹⁹ Having thus decided that the application of the EU Directive to foreign states was an excluded matter, the court declined to rule on the interpretation of the relevant duty to consult, as EU law does not require a uniform interpretation of excluded matters.²⁰

The UK Court of Appeal, to which the matter returned after the unsuccessful reference to Europe, declined to accept the US argument that since EU law did not require the Directive to apply to a foreign state neither should UK law. The timing issue was not addressed in these proceedings and the Supreme Court agreed to hear the appeal on the condition that the US pay costs including those of any advocate appointed to the court. Mrs Nolan did not appear and was not represented (as had been the case in the second Court of Appeal hearing.)²¹

III. The findings

A. The international law interpretation argument

of Justice of the European Union charged with interpreting EU legislation) decision is *US v Nolan* (C-583/10) [2013] 1 CMLR 32.

¹⁶ EU Council Directive 98/59/EC and its predecessor Council Directive 77/187/EEC.

¹⁷ TULCRA itself explicitly excludes UK armed forces, Crown employees and the police. See *Nolan* (n.1), paras 4-8.

¹⁸ *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area)* (2008) ILR 4; *Akavan Erityisalojen Keskuslitto AEK ry v Fujitsu Siemens Computers Oy* (C-44/08) [2010] 1 CMLR 11.

¹⁹ *US v Nolan* (C-583/10) [2013] I CMLR 32; *US v Nolan* [2010] EWCA Civ 1223; *US v Nolan* [2014] EWCA Civ 71.

²⁰ *US v Nolan* (C-583/10) [2013] I CMLR 32.

²¹ *US v Nolan* [2014] EWCA Civ 71. Permission to appeal was given on 8 September 2014 by Lords Mance, Sumption and Carnwath.

The doctrine of state immunity is justified on the basis of the sovereign equality and independence of states. A state will generally no longer be immune from the jurisdiction of another state's courts in respect of its private commercial activities but remains immune in relation to its sovereign activities. The distinction is sometimes expressed as one between acts *jure imperii* (of a sovereign nature) and acts *jure gestionis* (of a commercial nature) with immunity from suit being removed from acts *jure gestionis*.²²

While the application of this test can be problematic, in *Nolan* it was common ground that a decision to close a military establishment was an act *jure imperii* which would have attracted state immunity if the US had raised this plea at the initial Employment Tribunal hearing.²³ The focus instead was on whether there was a binding international law principle to the effect that UK legislation had to be interpreted to exclude its application to *jure imperii* activities of foreign states. Sir Daniel Bethlehem KCMG QC (the ex-UK principal Legal Adviser of the UK Foreign and Commonwealth Office now back in private practice) for the US argued that settled international law principles of territorial jurisdiction justified such an exclusion. If a state were to legislate extra-territorially, that legislation had to be interpreted to exclude its application to the sovereign acts of a foreign state taking place outside its territory. He further argued that to deny such an exemption to the US would be discriminatory as the legislation clearly excluded the UK's Crown employees from its ambit.²⁴

Lord Mance considered first the general principles of public international law on jurisdiction. His judgment relies on long extracts from the Permanent Court of International Justice decision in the *Lotus* case²⁵ and from a standard international law textbook.²⁶ Given the presumption of the legality of a state's prescriptive jurisdiction (clear from *Lotus*) and, given that TULCRA applied to procedures for dismissal affecting employees working in the UK, the fact the decision was taken in Washington did not mean the UK was "legislating extra-territorially". As Lord Mance pointed out, that is what immunity is for. The right to legislate exists as a matter of public international law but if the acts of a foreign sovereign acting in a sovereign capacity (*jure imperii*) are caught by the legislation, the state's dignity is preserved by the immunity plea which bars the domestic action from proceeding.²⁷ Lord Mance did not consider it helpful to rely on the principle deriving from the US Supreme

²² Sir Michael Wood, "Immunity from Jurisdiction and Immunity from Measures of Constraint", in Roger O'Keefe and Christian Tams, *The United Nations Convention on the Jurisdictional Immunities of States and their Properties, A Commentary* (OUP 2013), p.14; Rosalyn Higgins, "Equality of States and Immunity from Suit: A Complex Relationship" (2012) *Netherlands Yearbook of International Law* 43 and *Jurisdictional Immunities of the State*, ICJ Reports (2012) 99 para 57; see also the sources cited in n.5 above.

²³ *Nolan*, (n. 1) para 3.

²⁴ *Ibid.*, paras 27-28.

²⁵ *The Case of the SS Lotus France v Turkey* (1927) PCIJ Series A-No 10, pp 18-19.

²⁶ James Crawford, *Brownlie's Principles of Public International Law* 8th Ed (2012) (OUP), *Nolan* (n.1) para 30.

²⁷ *Ibid.*, para 30.

Court decision in *Hoffmann-la-Roche v Empagran SA* and its discussion of the *Charming Betsy* principle that legislation needs to be interpreted consistently with international law.²⁸ In his view, there was no lack of clarity in the drafting of TULCRA (unlike in the relevant statute in *Hoffmann la Roche*) and the exclusion claimed by the US in *Nolan* for its decisions admittedly *jure imperii* taken abroad but affecting employees in the UK went too far.²⁹

Lord Mance secondly found that the suggested “tailored” exception “would make quite largely otiose the rules on claiming state immunity”.³⁰ The US met this argument by emphasising that its case was not about immunity but about the substantive application of the domestic remedy- the existence or application to the US of the relevant rule.³¹ Lord Mance rejected this proposition as overly broad and suggested that it risked making “redundant a plea of state immunity at least in respect of any statutory claim”.³²

Lord Mance finally rejected the argument that to apply the consultation requirement to foreign states but not to the Crown was discrimination in breach of an alleged international law principle against discrimination between states. The US argued that non-discrimination is a general principle of international law relying in part on the English Court of Appeal decision in *Benkharbouche v Sudan* (discussed in part IV below).³³ The Court rejected this, in part, as the alleged principle applied in *Benkharbouche* was based on human rights conventions on non-discrimination (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms) which benefit human beings not states.³⁴ Lord Mance relied on *Oppenheimer’s International Law* 9th ed (1992) to the effect that ...” there is in customary international law no clearly established general obligation on a state not to differentiate between other states in the treatment it accords to them...”³⁵

B. the European Union law interpretation argument: non-discrimination

The US argued that under EU law UK courts had to extend to member states exemptions from TULCRA equivalent to those afforded to Crown employees. The US also argued that the EU rules on non-discrimination should apply to it horizontally even though it is neither a European citizen nor a member state, invoking cases on age discrimination.³⁶ The Supreme

²⁸ *Ibid.*, paras 32-34. *Hoffmann-la-Roche v Empagran SA* (2004) (542 US 155). *Murray v Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) is authority for the rule that US legislation ought never to be interpreted to “violate the law of nations if any other possible construction remains.”

²⁹ *Nolan*, (n.1) paras 35-36.

³⁰ *Ibid.*, para 36.

³¹ *Ibid.*, para 38.

³² *Ibid.*,

³³ *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33.

³⁴ *Nolan*, (n. 1) para 40.

³⁵ *Ibid.*, para 41.

³⁶ *Nolan*, (n.1) para 39. Court of Justice cases discussed included *Mangold v Helm Case* (C-144/04) [2010] All ER (EC) 383 and *Kucukdeveci v Swedex GmbH & Co KG* (Case C-555/07) [2010] All ER (EC) 867. See the discussion in Andrew Sanger, “State Immunity and

Court decided to leave both these issues open, in part because the Court of Justice, in declining jurisdiction in this case, had found non-member states to be specifically outside any protection under the relevant treaties in any event. In addition, Lord Mance was clear that non-member states were outside the protection of the relevant Human Rights conventions on the basis that there is no principle against discrimination against third party nationals. None of this is controversial as Lord Mance pointed out in making the comparison with a member state's ability to discriminate in respect of tuition fees charged to non EU citizens.³⁷

C. The ultra vires argument

The US's last argument was that, in legislating for consultation to be required of public administrative bodies in the Regulations, the UK had gone further than the EU Directive (which excluded public administrative bodies) required. The Regulations were thus *ultra vires* under the European Communities Act 1972 s 2 which enables the UK to legislate by delegated legislation to give effect to EU law.³⁸ If the UK legislation was *ultra vires* it could not bite against the US.

The majority rejected the *vires* argument on the basis that, as the original scheme under TULCRA (an Act of Parliament which predated the Directive) had been wider than EU law later required (in applying to US military bases), later UK regulations amending the scheme would not be *ultra vires* in applying to the wider scheme. The court considered case law on the point and was clear that, where a directive applied to internal market situations only, s 2(2) of the 1972 Act did not permit extensions to non-domestic situations by delegated legislation. Where the original instrument was an Act of Parliament which extended to non-domestic situations however, the instrument could be supplemented by delegated legislation – here in the form of the UK Regulations and any extension would apply to the wider catchment.³⁹

Lord Carnwath dissented on the *vires* point finding that the extension of the Regulations to public administrative bodies by secondary legislation, such as the US military facility, was not within the power conferred by the 1972 European Communities Act and were therefore *ultra vires*, as Parliament itself had not legislated.⁴⁰

IV. Analysis and Commentary

The Supreme Court's decision in *US v Nolan* in finding that a plea of immunity is procedural which, unless successfully pleaded, does not deny the domestic court jurisdiction over the subject matter of the alleged dispute is significant for international law but where it leaves the

the Right of Access to a Court under the EU Charter of Fundamental Rights" (2016) *ICLQ* 213-228 at p.215.

³⁷ *Nolan*, (n.1), para 46.

³⁸ *Ibid.*, para 48.

³⁹ *Ibid.*, para 72.

⁴⁰ *Ibid.*, para 100.

debate about the relationship between the international law rules and domestic rules on immunity, jurisdiction and access to justice is still problematic.

Lord Mance accepted the argument that immunity is a procedural plea. In doing so he relied on the influential book on state immunity written by Hazel Fox CMG QC and Philippa Webb.⁴¹ They argue forcibly that state immunity as a procedural plea does not as such affect a state's jurisdiction. This approach was favoured by the International Court of Justice in 2012 in the *Jurisdictional Immunities of the State (Germany v Italy)*.⁴²

If it is accepted that immunity is a procedural plea distinct from the underlying primary obligation of the foreign state then, as Lord Mance concluded, the US argument that there is some exemption from underlying liability for acts *jure imperii* cannot have any merit⁴³. It is one thing to accept that immunity, although it can have the effect of denying a remedy to a claimant, is necessary to preserve a state's sovereign dignity. It is quite another to argue that the UK is not capable of legislating for acts in the UK affecting employees of a foreign state employed in the UK. As Lord Mance put it:

...carried to its logical conclusion it would mean that all legislation should, however clear in scope, be read as inapplicable to a foreign state in any case where the state could plead State Immunity. That would elide two distinct principles, and, as noted already, very largely make redundant a plea of State Immunity at least in respect of any statutory claim.⁴⁴

The distinction between a procedural plea of immunity and the underlying obligation or duty (and the debate about the jurisprudential nature of state immunity which goes with it) is also material to the discussion about whether or not immunity is a denial of a claimant's human right of access to justice. In the European context this is usually put in terms of whether immunity is a breach of a claimant's rights under Article 6 of the European Convention on Human Rights. The European Court of Human Rights has always maintained that the making of a plea of immunity itself requires a consideration of Article 6 (the article is *per se* engaged) but, as the right is a relative one, immunity may not be a denial of access if the extent of the immunity is legitimate and proportionate. The Strasbourg court has held that Article 6 not only guarantees fair trial rights once proceedings have been instituted but also a right to institute proceedings to begin with.⁴⁵ It has also so far found that the UK courts' acceptance of a plea of immunity in a given case has been consistent with the court's view of customary international law and thus proportionate.⁴⁶

⁴¹ *Ibid.*, para 36 and Fox and Webb, (n.5) p 20.

⁴² ICJ Reports (2012) 99 para 57.

⁴³ *Nolan*, (n.1) para 36.

⁴⁴ *Ibid.*, para 38.

⁴⁵ *Golder v United Kingdom* (1979-80) 1 EHRR 524.

⁴⁶ *Jones v UK* (2014) 59 EHRR 1; *Al-Adsani v United Kingdom* (2001) 123 ILR 24; *McElhinney v. Ireland and United Kingdom* (2002) EHRR 13 and *Fogarty v UK* (2001) 123c ILR 53. Other cases include *Kalogeropoulou v Greece* (2002) 129 ILR 537; *Sabeh El Leil v*

The Strasbourg court's approach is to be contrasted with the findings of English courts to the effect that, as immunity deprives a court of jurisdiction in a given case, a plea of immunity cannot give rise to a claim under Article 6 as this requires the existence of an underlying jurisdiction.⁴⁷ As Lord Bingham put it in *Jones v Saudi Arabia* "a state cannot be said to deny access to its court if it had no access to give."⁴⁸

The potential disjuncture between this approach and that of Lord Mance and the Supreme Court in *Nolan* may have resonance when the Supreme Court hears the appeal in the case of *Benkharbouche v Sudan*. The Court of Appeal, in a case about the employment rights of domestic staff of foreign embassies in London, decided that the UK State Immunity Act 1978 ss 16 (1) (a) and s 4 (2) (b) were incompatible with Article 6 of the ECHR as going beyond the international customary law requirement of immunity in employment cases. The immunity afforded to Sudan under s 4 of the SIA was, in other words, not proportionate or legitimate.⁴⁹ The Court of Appeal did not actually decide whether Article 6 was engaged by a mere plea of immunity however, and stated that it was bound by the approach of Lord Millett in *Holland v Lampen Wolfe* to the effect that the article was not so engaged.⁵⁰

France (2012) 54 EHRR 14; *Cudak v. Lithuania* (2010) 51 EHRR 15 and *Oleynikov v. Russia* (2013) 57 EHRR 15.

⁴⁷ *Holland v Lampen-Wolfe* [2000] 1 WLR 1573; and *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 [2007] 1 A.C. 270.

⁴⁸ *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 [2007] 1 A.C. 270 p. 280, 289 and 293 (per Lord Bingham). See also articles cited at n.5 and n.22 above. The UK Supreme Court Judge, Lord Sumption makes this point writing extra-judicially in giving the James Wood Lecture at the University of Glasgow "The right to a court: Article 6 of the Human Rights Convention". Page 18 available at <http://schooloflaw.academicblogs.co.uk/2015/10/13/james-wood-memorial-lecture-the-right-to-a-court/> (accessed 17 March 2016) Lord Sumption distinguishes the meaning of 'procedural' in stating that the plea of immunity is "not procedural in the sense that the organisation and practices of the court system are procedural" p 18 where he is expressing concern at the width of some Article 6 decisions of the European Court of Human Rights.

⁴⁹ *Benkharbouche*, (n.33), para 53 and 66. The case is largely about EU law and is the first case to consider the effect of the recent EU Charter of Fundamental Rights which contains a right of access identical to that of Article 6 (1) of the European Convention on Human Rights. As Andrew Sanger has pointed out, Lord Justice Dyson in *Benkharbouche* followed the English approach of finding that a plea of immunity does not engage Article 6 –the right of access to the court- following Lord Millett. The Court of Appeal refused to interpret the SIA to comply with what it had found was inconsistent customary law –the declaration of incompatibility did not affect the validity of the SIA merely operated as a signal to Parliament that it needs to consider amending the legislation." A.S. Garnett "State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?" (2015) 64 (4) *ICLQ* 783, 816 and note 129.

⁵⁰ *Benkharbouche*, (n.33), para 16.

In *Benkarbouche* the Court of Appeal was not convinced that where sovereign immunity applied there was room for recourse to Article 6. It is helpful to quote from the judgment *in extenso*:

It is difficult to see how Article 6 can be engaged if international law denies to the Contracting State jurisdiction over a dispute. There can be no denial of justice for which the State is responsible if there is, as a matter of international law, no court capable of exercising jurisdiction. Moreover, Article 6 cannot have been intended to confer on Contracting States a jurisdiction which they would not otherwise possess, nor could it have conferred a jurisdiction denied by general international law in such a way as to be binding on non-Contracting States. It is unfortunate that in none of its many decisions in which the point has arisen has the Strasbourg court grappled with these considerations. (The statement of the court in the Fogarty case 34 EHRR 302, para 26, that the grant of immunity does not qualify a substantive right but is a procedural bar on the national courts' power to determine the right, while correct as a matter of domestic law, does not meet the point. See also *Jones v United Kingdom*, para 164.) However, we consider that in the present case it is not necessary for us to choose between these competing approaches. The approach of the Strasbourg court would not result in a contracting state being held to be in breach of article 6 simply because it gave effect to a rule of international law requiring the grant of immunity. In any such case the grant of immunity would be held to be a proportionate means of achieving a legitimate aim. Under the Strasbourg jurisprudence, any debate as to what are the applicable rules of international law is transferred to a later stage of the analysis and addressed in the context of article 6.⁵¹

Whether or not a plea of immunity engages Article 6 of the ECHR did not matter to the Court of Appeal's decision in *Benkarbouche*. It did not matter because the court itself decided that the relevant provisions of the UK SIA were out of line with international law and, given the EU context, could be declared incompatible.⁵²

The issue may arise beyond the European context however which is why *Nolan* is significant. Does a domestic court have jurisdiction or not when a state raises a plea of immunity? Lord Mance in *Nolan* seems to be saying it does and that immunity merely operates as a procedural bar which mirrors the Strasbourg court's approach. The court in other words is looking at immunity as a threshold issue. There are no doubt many meanings to the words "procedural" and "substantive" in this context and the answer may lie in the approach of Article 6 (1) of the UN Convention on the Jurisdictional Immunity of States and Their Property 2004 which provides that "a State shall give effect to State immunity by refraining from exercising jurisdiction in a proceeding before its courts against another

⁵¹ *Ibid.*, para 16.

⁵² *Ibid.*, para 53.

State.”⁵³ This suggests there is jurisdiction but the court has to exercise restraint. This would be consistent with the fact that a state can waive immunity in advance or by submitting to the jurisdiction--and once waived immunity cannot be revived--despite the US arguments in *Nolan*.⁵⁴

The debate is also very relevant to whether there may be a need for Parliament to amend the UK SIA to take account of changes to customary law rules on immunity, particularly in the employment context. One might also ask whether the view (accepted by the Supreme Court and both parties) that the US would have been entitled to immunity had she pleaded it in *Nolan*, can survive the attack on state immunity in relation to claims by employees of diplomatic missions (the subject matter in *Benkharbouche*). Is there in other words a real difference between an embassy and a military establishment such as the one in *Nolan*?⁵⁵

The approach of treating immunity as a procedural plea is also important to the argument that immunity can exist alongside international rules prohibiting or criminalising violations of human rights, despite the seemingly inherent conflict between the two. This view is used to refute the suggestion that human rights norms as *jus cogens* norms in some way trump immunity which must as a result therefore be denied to the defendant state. It is the premise behind the statement “immunity does not mean impunity”.⁵⁶ As stated by Judges Higgins, Kooijimans and Buergenthal in their Joint Separate Opinion in the ICJ *Arrest*

⁵³ The Convention is not in force but persuasive and much is customary. See in Roger O’Keefe and Christian Tams, *The United Nations Convention on the Jurisdictional Immunities of States and their Properties*, A Commentary (OUP 2013). See discussion on restraint in Sanger, (n.5), page 220.

⁵⁴ In *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank* [2015] EWHC Mr Justice Henderson set aside a notice of discontinuance he found Pakistan to have issued to preserve its state immunity after it had instituted proceedings- thereby waiving immunity. Pakistan’s attempt was an abuse of the court- once immunity was waived it could not be revived. Another approach might be to discuss immunity as a threshold matter.

⁵⁵ S. 16(2) of the SIA provides that the statute does not apply to foreign military establishments in the UK and S. 16(1)(a) states that embassy staff are not to benefit from the restrictive immunity in S. 4 (instead the absolute immunity conferred by the Diplomatic Privileges Act 1964 applies).

⁵⁶ L. McGregor “Torture and state immunity: deflecting impunity, distorting sovereignty”, 2007 18(5) EJIL 903-919; L. McGregor ‘Questioning the Impact of the UN Convention on State Immunity on the Evolving Relationship between State Immunity and Jus Cogens Norms Under International Law (2006) 55 ICLQ 437-45; Roger O’Keefe and Christian Tams, *The United Nations Convention on the Jurisdictional Immunities of States and their Properties*, A Commentary, (OUP 2013) ; Xiadong Yang, *State Immunity in International Law*, (CUP 2012); Hersch Lauterpacht, “The problem of jurisdictional immunities of foreign States” 3 Collected Papers 315 (1951).

*Warant Case*⁵⁷ and by the ICJ in the *Jurisdictional Immunities* case, immunity as a procedural plea in a domestic court can co-exist with substantive liability in both domestic and international law.⁵⁸ This is not the place to discuss issues of trumping and *jus cogens* as the focus here has been on employment rights not grave breaches of fundamental norms.

As explained in the introduction, the point being made here is that the procedural approach as stated in *Nolan* has been espoused by those who argue that access to justice may be compromised by a plea of immunity, in other words that immunity may itself be a denial of justice. This is particularly so in Europe where the right of access to justice is protected by Article 6 of the European Convention on Human Rights. This is not however the position taken in English law to date and where this leaves the debate about the relationship between the international law rules on immunity, domestic rules on immunity, jurisdiction and access to justice is therefore open to question.

V. Conclusion

The Supreme Court in *US v Nolan* found against the state on all its grounds of appeal. The findings on the application of EU law and on *ultra vires* have been explained in outline only here. The US argument that UK primary and secondary legislation (in this case TULCRA and the Regulations) had to be read subject to a pervasive exclusion in respect of the sovereign acts of a foreign state was firmly rejected by the court as being in effect a justification for a second bite at the cherry of immunity. There was nothing very surprising about this but it is interesting that the decision depended in part on Lord Mance's acceptance of the concept of immunity as a procedural plea whose effect is not to deny the court jurisdiction in the first place. This approach has an impact on the discussion about whether or not Article 6 of the ECHR (access to justice) is engaged by an immunity plea and may be inconsistent with the decision of the Court of Appeal in *Benkarbouche* and earlier House of Lords authority.

This is not the place to settle these questions. It will be for the Supreme Court when the *Benkarbouche* appeal is heard to analyse the impact if any of the approach taken by the court in *US v Nolan*.

⁵⁷ *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3, Joint Separate Opinion para 71.

⁵⁸ ICJ Reports (2012) 99 paras 55-57.