Clarifying the scope of state and diplomatic immunity

08/03/2016

Dispute Resolution analysis: Watch this space...Dominic Roughton, partner and global head of public international law at Herbert Smith Freehills in London, and Andrew Cannon, a partner in the firm’s Paris office, point out that there are a number of cases passing through the English courts raising important issues that are likely to affect the English position on immunity.

Original news

Attiya v Jaber Al Thani [2016] EWHC 212 (QB), [2016] All ER (D) 210 (Feb)

The Queen’s Bench Division struck out the trespass claimant’s case and accepted the defendant’s submission that in the case as pleaded, the claimant was indirectly impleading the State of Qatar and therefore Qatar was entitled to claim sovereign immunity in respect of the subject matter of the claims under the provisions of the State Immunity Act 1978.

What issues did this case raise? Why is it significant?

The case concerns the application and effect before the English courts of claims to state immunity and diplomatic immunity. The claim was for damages for trespass to land of the claimant and to his person, and concerned allegations of abuse of power allegedly amounting to torture by the defendant. The defendant sought to strike out these claims on the basis that he was acting at all relevant times as a public official of the State of Qatar (as Foreign Minister and as Prime Minister), and as an accredited diplomat of the State of Qatar, and that accordingly he enjoyed state immunity and diplomatic immunity such that the English court had no jurisdiction over the claims brought against him.

Of particular interest in this case are the claimant’s arguments that:

- state immunity should not bar the jurisdiction of the English court over claims involving torture and/or abuse of power, and
- the English court may question a claim to diplomatic immunity pursuant to the Vienna Convention on Diplomatic Relations 1961 (the Vienna Convention), as incorporated into English law by the Diplomatic Privileges Act 1964, if the party claiming immunity could not satisfy the ‘functional’ test and demonstrate that he had in fact performed his duties as a diplomat.

In the course of his judgment, Blake J reviewed a number of previous decisions concerning state immunity and diplomatic immunity, clarifying the scope of each, and, in the context of diplomatic immunity, confirming the conclusive nature of a certificate from the Foreign & Commonwealth Office (FCO) concerning the fact of the UK’s acceptance of a person’s diplomatic accreditation.

How did the court approach the legal issues in this case? What did it decide?

The court first approached these matters by considering state immunity (including act of state). In doing so, the court accepted the defendant’s argument that claims of abuse of public power arising from his actions as Qatar’s former Foreign Minister and Prime Minister indirectly impleaded the state of Qatar. As the court observed:

‘...the direct focus of the claim in the present case is the acts of foreign public officials done in pursuance of their public authority in Qatar and under the laws of Qatar.’ (para [30])

Consequently, and following the authority established by the House of Lords in Jones v Ministry of Interior of Saudi Arabia [2006] UKHL 26, [2006] All ER (D) 145 (Jun), the court considered that state immunity was engaged and that ‘the claim should be struck out for want of jurisdiction’ (para [21]).
In addition, the court held that the claimant’s allegations that the defendant had acted for personal motives were ‘irrelevant to the application of the act of state principle’ (para [26]). The claimant had sought to rely upon the exception to this doctrine established in the case of Belhaj v Straw [2014] EWCA Civ 1394, [2014] All ER (D) 337 (Oct) in the event of serious abuse of core human rights such as acts of torture. However, the court considered that the facts of this case were significantly different. In contrast to Belhaj, the law of state immunity clearly applied in this case, and, following Jones, that immunity should be upheld.

Although this conclusion would have been enough to defeat the claim, the court nevertheless went on to consider the further issue of diplomatic immunity. In this context, the court considered that the defendant was a diplomatic agent within the meaning of the Vienna Convention and the Diplomatic Privileges Act 1964, and could therefore claim immunity. In doing so, it followed previous decisions that:

- Recognition of states, heads of state and diplomats are within the exclusive jurisdiction of the FCO
- A certificate of the FCO is ‘conclusive evidence of the certified facts’ and must be acted upon by the court, but
- Whether immunity attaches to a diplomat is ‘a matter of law for the court to determine’ (para [59])

The claimant had adduced evidence questioning the extent to which the defendant was in fact acting as a diplomatic agent, which included statements from the defendant describing himself as a private citizen who no longer represented the government of Qatar. While the court was not satisfied on this evidence that the defendant could prove that he was ‘exercising diplomatic functions’ (para [64]), nevertheless, it was not for the court to assess any ‘functional requirement' necessary to determine whether a person is a diplomatic agent (para [73]). Instead, the question of diplomatic status was to be decided by the FCO and where that status was confirmed by the FCO in a certificate, as it had been here, diplomatic immunity would follow.

**To what extent is the judgment helpful in clarifying the law in this area? Are there any grey areas or unresolved issues remaining?**

The judgment is very helpful in its thorough review of case law concerning state immunity and diplomatic immunity and in clarifying the wide extent to which state and diplomatic immunity may be claimed—including claims by individuals for state immunity by reason of their position within a government and by individuals who enjoy certified diplomatic accreditation but who do not obviously perform any diplomatic functions.

**What does all this mean for lawyers and their clients? What should they do next?**

Greater care should be taken by lawyers and their clients in their dealings with individuals and entities who may be able to claim state immunity or who may enjoy diplomatic accreditation by a state. In such cases, proper due diligence should be undertaken in contractual dealings to require waivers of both state and diplomatic immunity in the appropriate terms. However, since diplomatic immunity may only be waived under art 32.1 of the Vienna Convention by the sending state, waiver of diplomatic immunity may be difficult to obtain as a practical matter—assuming the ‘formal test’ for diplomatic immunity espoused in this case remains the law (as to which please see below).

**How does this case fit in with other developments in this area? Do you have any predictions for future developments?**

There are a number of cases passing through the English courts raising important issues that are likely to affect the English position on immunity.

The first case is Belhaj v Straw. This case is subject to appeal to the Supreme Court with respect to the Court of Appeal’s decision that there was no state immunity. In view of the differences mentioned above, the court in Attiyah, however, rejected the contention of the claimant that it should await the outcome of the Supreme Court ruling before itself deciding.

Second is the case of Estrada v Al Juffali [2016] EWHC 213 (Fam), [2016] All ER (D) 113 (Feb), decided by Hayden J on 8 February 2016, one week before Blake J’s decision in Attiyah. Estrada was a divorce case where the respondent husband claimed diplomatic immunity on grounds of his accreditation by St Lucia as its permanent representative to the International Maritime Organization in London—this accreditation was confirmed by a certificate from the FCO. Following
consideration of art 39.1 of the Vienna Convention as a basis for assessing whether or not the respondent had in fact ‘taken up his post’, the court found that the respondent ‘has not, in any real sense, taken up his appointment, nor has he discharged any responsibilities in connection with it. It is an entirely artificial construct’ (para [36]). Accordingly, and notwithstanding the FCO certificate of the respondent’s diplomatic status, his claim to diplomatic immunity was rejected.

Given that both the respondent in Estrada and the claimant in Attiyah have indicated that it is their intention to appeal the decisions of Hayden J and Blake J respectively, assuming leave to appeal is given, the Court of Appeal may provide some clarification as to the proper test for diplomatic immunity—whether functional or formal—and the extent to which it would be proper for a court to make enquiry into a diplomat’s activities.

Further developments may also arise in the case of Benkhabouche v Embassy of Sudan [2015]EWCA Civ 33, [2015] All ER (D) 51 (Feb), also concerning the law of state immunity and cited in this judgment, and which is currently under appeal to the Supreme Court, to be heard later this year.

Domini Roughton has extensive experience in many aspects of public international law and is thought to be unique in Asia for his experience of international boundary disputes and state-to-state dispute resolution procedures. Dominic also advises on commercial matters in international arbitration and international litigation across all major industry sectors, particularly energy-related disputes.

Andrew Cannon specialises in international arbitration and public international law. He has extensive experience of advising states, state-owned entities and major companies on all aspects of public international law. Andrew has acted in ad hoc and institutional arbitrations across multiple jurisdictions and under a range of governing laws. He has also acted in high-profile litigation cases before a range of international and domestic judicial bodies.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.