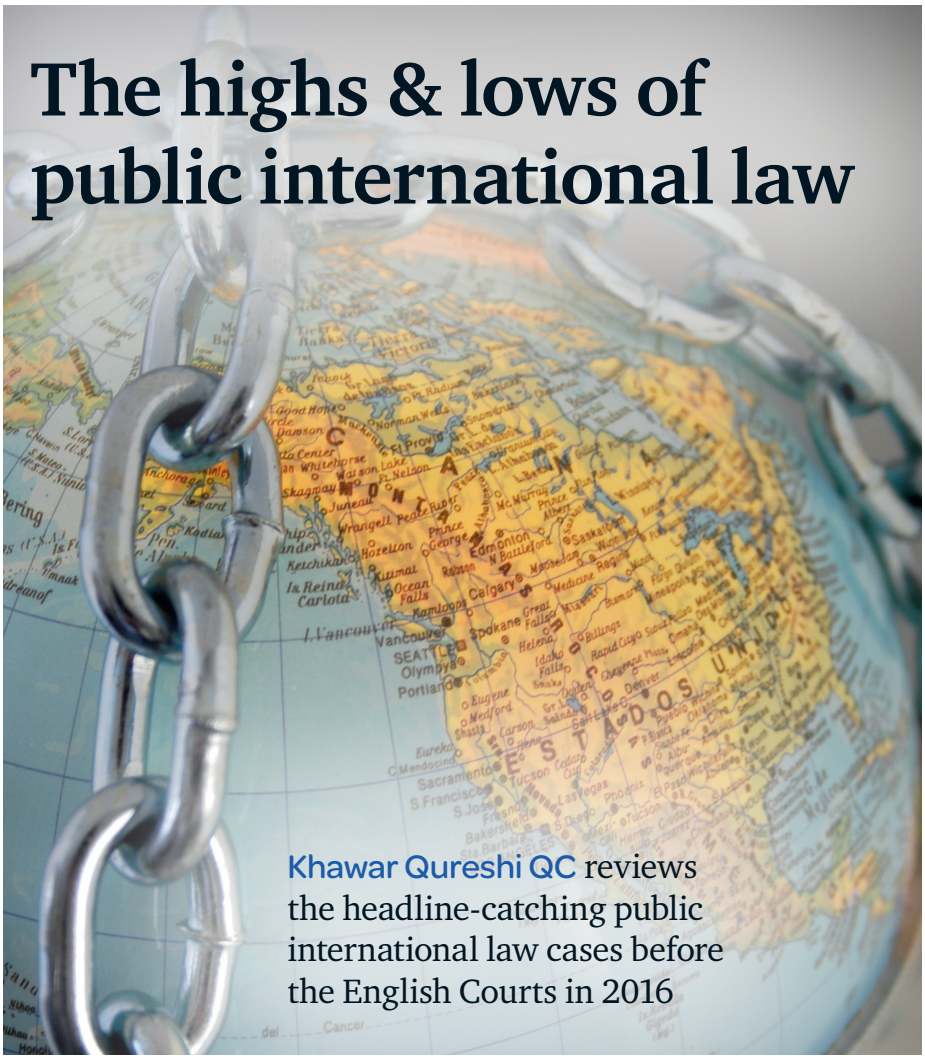
IN BRIEF

- Abuse of immunity considered.
- Enforcement of judgments and awards and the "commercial" exception.
- Act of state/non-justiciability and a state as a trustee discussed.

The highs & lows of public international law



Khawar Qureshi QC reviews the headline-catching public international law cases before the English Courts in 2016

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Last year saw the Supreme Court confirm the limited scope for judicial review of a decision to include a person's name on the UN sanctions list (*Youssef v SSHD* [2016] UKSC 3 27/1/16). The UK policy of recognising states rather than governments was vividly illustrated in the long running saga concerning disputes as to which rival faction in Libya ("Tripoli" or "Tobruk") controls the Libyan sovereign wealth fund (*Hassan Bouhadi v Abdulmagid Breish* [2016] EWHC 602 (Blair J) 17/3/16). The Divisional Court comprehensively reviewed the Customary International Law rule reflected in the common law, which requires a state which had agreed to receive a special mission to secure the inviolability and immunity from criminal jurisdiction of the mission's members during the period of the mission (*R v Freedom & Justice Party and others v FCO others* [2016] EWHC 2010 (5/8/16)).

State & diplomatic immunity—the scope for abuse

Underpinning the development and operation of immunity in this sphere is the need for inter-state relations to be conducted free from constraint and based upon mutual respect/reciprocity. However, wherever any person or entity is permitted to operate outside the sphere of public transparency and accountability, abuse is inevitable.
In the context of diplomatic immunities, readers will be familiar with the on-going spat between certain embassies/members of their missions and local authorities on issues such as disregard for parking restrictions. Of course, it is always possible for the receiving state to declare a person or persons "persona non-grata" and give them a reasonable period of time to leave the jurisdiction. This rarely happens and pragmatism generally prevails.

Two cases last year shed some light on this issue, the first of which concerned a former prime minister of a foreign friendly state who was accredited as a member of the UK mission and successfully claimed immunity in response to a civil claim. His claim to immunity was challenged, inter-alia, on the basis that there was no evidence of him ever having carried out any diplomatic functions. The other case concerned a recently deceased thrice-married Saudi gentleman who was being pursued for financial relief by his second ex-Pirelli calendar model ex-wife. His claim to immunity (as the representative for St Lucia to the International Maritime Organisation (IMO) which has its headquarters in London) failed. Both cases are explained further below.

Al Attiya v Al Thani [2016] EWHC 212, [2016] All ER (D) 210 (Feb) (Blake J) (15/2/16)

The claimant through a claim issued in August 2015 alleged that the defendant abused his power in Qatar during the period 2009 to 2011, leading to a claim for trespass to land and his person. The defendant sought to strike out the claim and contested jurisdiction. He contended that the claim alleged acts which occurred during his tenure as prime minister and engaged state immunity considerations pursuant to State Immunity Act 1978, s 1 (Section 1). He also invoked diplomatic immunity as an accredited member of the Qatari Embassy in London.

The court sought and received a certificate from the UK Foreign & Commonwealth Office (FCO) pursuant to the Diplomatic Privileges Act 1964, s 4 (the certificate) which confirmed that the defendant had been notified (on 28 May 2014) as having arrived as a member of the Qatari Embassy on 6 November 2013 which was the date from which he was entitled to invoke diplomatic immunity. Such a certificate is "conclusive" evidence as to the facts stated therein.

Prior to the certificate having been issued, the claimant had made representations to the FCO contending that the defendant, inter-alia, had actively pursued substantial business interests since November 2013 and had travelled extensively for personal purposes during that period.

The court concluded that: (i) Section 1 was engaged, as a former prime minister could not be sued in a private capacity for inducing breaches of duty by other public officials resulting in torts being committed against the claimant; (ii) the certificate led to the conclusion that the defendant was entitled to diplomatic immunity.

W v H v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 176 (22/3/16)

The Court of Appeal rejected an appeal against the order of Hayden J dated 8 February 2016 which in turn reflected a dismissal of the ex-husband's (H) contention that he was entitled to invoke immunity in response to a financial relief claim brought by his ex-wife (W). However, the Court of

Appeal did not uphold the judge's reasoning which was underpinned by his finding of the absence of any exercise of official functions by H. Furthermore the Court of Appeal rejected the judge's conclusion that H's appointment on 1 April 2014 to the IMO was an "artificial construct" designed to defeat the jurisdiction of the court. The judge had received an FCO certificate (pursuant to International Organisations Act 1968, s 8) which confirmed that H's arrival date had been notified as 14 April 2014. Nevertheless, the Court of Appeal held that the judge had improperly undertaken an investigation as to whether H "actually had undertaken any duties of any kind". There was no support for such an approach in the Vienna Convention on Diplomatic and Consular Relations 1961 (VCDR) or the Diplomatic Immunities and Privileges Act 1964 giving effect thereto.

However, the claim to immunity failed because Article 38 VCDR (as reflected in the 1964 Act) limited immunity for individuals who were permanently resident in the jurisdiction to "official acts performed in the exercise" of their functions. There was compelling evidence that H was permanently resident in the UK, and the claim against him did not engage any official functions. The Court of Appeal heard the appeal on an expedited basis at the behest of W, as H was suffering from a terminal condition (and died very soon after judgment was handed down).

Enforcement of judgments & awards—the commercial exception / procedural pitfalls

Two cases at first instance illustrate the importance of complying with the specific requirements for serving proceedings on states, and the narrow scope of the "commercial" exception with regard to state assets which are not immune from enforcement/execution measures.

Gold Reserve Inc Venezuala [2016] EWHC 153 , [2016] All ER (D) 67 (Feb) (Teare J) (2/2/16)

The claimant (a Canadian company) had been awarded USD 713m plus interest against Venezuala by an ICSID arbitral tribunal on 22 September 2014 in respect of alleged interference with mining rights it indirectly held. On 19 May 2015 the claimant sought an ex parte order from the court to enforce the award as if it were a judgment. The order was granted the following day (the order).

Venezuala contested the order, inter-alia, on the grounds that while the arbitral tribunal had found that the claimant was an "investor" under the applicable Investment Treaty, Venezuala was not bound by this finding and the court had to consider this jurisdictional matter afresh. If Venezuala was right, then it had not agreed to arbitrate with the claimant, with the consequence that it was entitled to immunity as State Immunity Act1978, s 1 applied. Teare J examined the relevant Investment Treaty provision to conclude that the claimant had satisfied the broadly expressed requirement of an "investor". The immunity claim therefore failed.

A further point raised by Venezuala was that the claimant had failed to comply with the specific procedural requirements set out in State Immunity Act 1978, s 12 for service of proceedings against a state, namely that there had been a failure to serve the arbitration claim form. The judge rejected this contention with reference to CPR Pt 62, Section III which only required the order to be served.

However, the judge was critical of the failure to give full and frank disclosure on the ex parte application of the possibility that Venezuala would claim state immunity and contest jurisdiction. Rather than setting aside the order, the judge ordered the claimant to pay the costs of the "full and frank disclosure issue" on an indemnity basis.

LR Avionics v. Nigeria and another [2016] EWHC 1761, [2016] All ER (D) 76 (Jul) (Males J) 15/7/16

The central question for the court to consider was whether premises owned by Nigeria in Fleet Street which were leased to a private company for £150,000 per annum were "in use.. for commercial purposes" pursuant to the State Immunity Act 1978, s 13 (4) so as to be outside the scope of immunity. The company was providing visa and passport services for Nigeria (and, apparently, others).

The claimant was an Israeli company which had been awarded USD 5m by an arbitral tribunal in Nigeria on 8 February 2013 in respect of breaches of a contract for the supply of military equipment. A challenge to the award failed in Nigeria and on 30 June 2014 the Federal High Court gave leave to enforce the award as if it were a judgment.

On 14 March 2015 the claimant applied ex parte to register the award pursuant to the Arbitration Act 1996, s 101and also to register the Nigerian judgment under s 9 of the Administration of Justice Act 1920. Phillips J made the orders sought on 14 April 2015.

The judge was presented with a certificate from the Acting Nigerian High Commissioner under s 13(5) of the State Immunity Act 1978 which "shall be accepted as sufficient evidence of [the fact stated therein] unless the contrary is proved." The certificate stated that the property was being used for consular activities. The judge upheld the claim to immunity and stated (para [38]): "In this case the use (or at least the primary use) to which the property is being put is the processing of Nigerian visa and passport applications which is the performance of a public function on behalf of the defendant state."

The judge also drew attention to a number of procedural defects in the approach adopted by the claimant, including significant failures to allow for or to comply with stipulated procedural time periods, as well as the absence of permission for service out of the jurisdiction of an interim charging order or final order for sale.

Inter-state relations, act of state & non-justiciability

High Commissioner for Pakistan v India, 8th Nizam of Hyderabad and others [2016] EWHC 1465 (Henderson J as he then was) (21/6/16). It is very rare for states to present themselves before domestic courts, not least given the availability and existence of Immunity. Moreover, it is an extremely rare event for an inter-state dispute to be ventilated before any domestic court.

In this case, a dispute as to entitlement to funds deposited in the claimant's bank account in 1948 had been stayed since 1958 as a result of a House of Lords' decision. In mid-2013 the claimant "descended into the arena" and abandoned its immunity. In mid-2015, all other parties claiming the funds applied to strike out the claimant's claim and/or obtain summary judgment against the same. A five-day hearing took place in March 2016 which led, inter-alia, to dismissal of the strike out and summary judgment applications.

The matter is likely to proceed to trial where the claimant's contentions, inter-alia, that: (i) a state is only held to be a trustee if it expressly assumes such an obligation; and (ii) the facts and matters engage an act of state and the doctrine of non-justiciability will no doubt be examined further, as will be the competing claims to entitlement to the funds otherwise.

The judgment provides a very clear and useful summary of the scope of act of state and the doctrine of non-justiciability (paras [75]–[93]) and confirms that, unlike immunity, the application of these principles is not capable of waiver by a state. The principles reflect abstention from the exercise of jurisdiction by our courts.

Concluding remarks

The cases dealing with immunity and enforcement issues reveal the tension which exists between providing immunity and the potential for abuse, as well as providing a necessary reminder as to the importance of ensuring that the full rigours of procedural requirements are complied with. **NLJ**

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