

# Immunity update

Khawar Qureshi QC reports on recent immunity decisions of the High Court

## IN BRIEF

- ▶ Claims to state and diplomatic immunity to avoid court jurisdiction are increasingly being seen as potentially abusive.
- ▶ The High Court has rejected a claim to diplomatic immunity as a sham.
- ▶ The High Court will not go behind the facts stated in an FCO certificate.

The English Courts have recently delivered two very significant rulings in the context of claims to state and diplomatic immunity by high-net worth foreign individuals who have asserted immunity to avoid being subjected to the jurisdiction of the court.

Both cases will be examined below and we will also consider a decision of the English High Court giving leave to enforce a high value Nigerian Court judgment against a Nigerian General (while refusing leave in respect of the President and Attorney General of Nigeria).

## Estrada

*Estrada v Al-Juffali* [2016] EWHC 213 (Fam), concerned a 13-year marriage between a high net worth Saudi and a former model that ended acrimoniously. The wife claimed financial relief pursuant to divorce proceedings issued on 13 August 2014. The thrice married husband was appointed Permanent Representative of St. Lucia to the International Maritime Organisation in April 2014 (which is a UN body with headquarters in London). He invoked immunity and applied to strike out the wife's claims. St. Lucia was invited by the UK Foreign Office to waive the husband's immunity but declined to do so.

Mr Justice Hayden reviewed the provisions of the Diplomatic Privileges Act 1964 (the 1964 Act) and the Vienna Convention on Diplomatic Relations of 1961 (VCDR), specifically Arts 38, 39. In the context of Art 6 of the European Convention on Human Rights (the Convention) which has been considered to permit public international law-based immunity from jurisdiction, the judge interestingly observed: "If functionality is extracted from the equation, because no functions have been discharged or, to adopt Lord Justice Diplock's terms, the diplomat is not 'en poste', there can remain only unjustified privilege or immunity linked solely

to the private activities of the individual."

The judge held, inter-alia, that the husband had not undertaken any duties of any kind in the pursuit of function of office, and further, that the husband had "sought and obtained a diplomatic appointment with the sole intention of defeating W's claims".

The judge considered the application of Art 15 of the IMO Order In Council (giving effect to the IMO Headquarters Agreement pursuant to s 1(2)(c) of the International Organisations Act 1968). Article 1 conferred immunity from suit and legal process as is accorded to the head of a diplomatic mission, but this was limited in the case of a person permanently resident in the UK "only while exercising his official functions".

The judge considered Foreign & Commonwealth Office (FCO) guidance issued in 1969, international practice and the facts surrounding permanent residence to conclude that the husband was permanently resident in the UK—not least because the (separate) family homes for the children from all three marriages were in the UK—a point which had "magnetic attraction". Accordingly, the husband's claim to immunity in respect of the matrimonial proceedings failed.

## Fawaz Al-Attiya

In *Fawaz Al-Attiya v Al Thani* [2016] EWHC 212 (QB), the claimant was a dual UK/Qatar national who had held the title of Ambassador for Qatar. The defendant was a former Foreign Minister and Prime Minister of Qatar and one of the world's wealthiest men. The claimant alleged, inter-alia, that the defendant had conducted a campaign of intimidation, imprisonment and mistreatment against him in the period 2003-2011, to enable forceful acquisition of his land in Qatar. In August 2015, the claimant commenced proceedings before the High Court for damages in respect of trespass to land and his person, which the defendant sought to have struck out on grounds of state and diplomatic immunity. The defendant contended that he was presently a member of the diplomatic staff of the Qatar Embassy in the UK, in addition to the positions he had previously held.

Mr Justice Blake held that the alleged acts concerned conduct of the defendant which sought to implead acts/omissions of a former Prime Minister of a sovereign state. The judge held that "it is difficult to see how the two

hats [public function/private capacity] can be severed and how the alleged private motive in inducing the torts can be separated from the public office that gave the defendant the status and ability to direct others and issue instructions".

Pursuant to s 4 of the 1964 Act the FCO issued a certificate confirming that the defendant was notified as having arrived in the UK on 6 November 2013 as a member of the diplomatic staff of the Qatari Embassy. Blake J held that the fact that the certificate "was conclusive as to the facts stated therein" precluded the court from conducting its own factual enquiry as to whether the defendant had in fact performed any functions as a diplomat (there being cogent evidence that he had not performed any such functions since his arrival).

## Ogelegbanwei

In *Ogelegbanwei v The President of Nigeria and others* [2016] EWHC 8 (QB), chiefs of 53 communities in the Delta State of Nigeria obtained a judgment from the Nigerian High Court on 5 December 2013 for the sum of \$400m against the President and Attorney General of Nigeria, as well a Major-General Bello who led army action in 2009 in the state, which allegedly caused personal injury and damage in violation of the Nigerian Constitution.

The claimants applied (without notice to the defendants) for leave to enforce the judgment against all three defendants—initially pursuant to s 2 of the Foreign Judgments (Reciprocal Enforcement) Act 1933, but then s 9 of the Administration of Justice Act 1920.

The judge declined to grant leave to enforce against the President and the Attorney General, on the basis that they benefitted from state immunity. The judge held that the exclusion from immunity in respect of personal injury in s 5 of the State Immunity Act 1978 was justifiable in being limited to "damage caused by an act or omission in the UK". The judge concluded that Major-General Bello was not capable of invoking immunity and granted leave to enforce against the judgment against him.

## Comment

These cases illustrate just how important it is for practitioners to be aware of the potential availability of state and diplomatic immunity, as well as signalling that the courts may be less reluctant to remark upon abuses of immunity than hitherto.

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**Khawar Qureshi QC** specialises in commercial litigation and international law. His book *Public International Law before the English Courts* (foreword Lord Phillips of Worth Matravers) is out in March 2016 (Wildys).