TORTURE AND RENDITION CIVIL CLAIMS NOT BARRED BY STATE IMMUNITY OR 'FOREIGN ACT OF STATE'

Belhaj v Straw; Rahmatullah v Ministry of Defence [2017] UKSC 3

Introduction

By a decision handed down on 17 January 2017 in *Belhaj v Straw; Rahmatullah v Ministry of Defence*[2017] UKSC 3 the UK Supreme Court rejected the British Government's attempts to invoke the doctrines of 'state immunity' and 'foreign act of state' to bar the English courts from adjudicating claims that the British Government had been complicit in serious tortious wrongdoing that was allegedly committed by other States and their agents in overseas jurisdictions. The allegations included unlawful detention and rendition, assault and torture or other cruel and inhumane treatment.

Background

Both cases have had a complex appellate history to date but at no point has there been a judicial investigation of the facts (indeed whether such an investigation is permissible is the entire point of these appeals). Thus the appeals proceed on the basis of assumed facts.

In February/March 2004, Mr Belhaj, a Libyan national who was an opponent and critic of Colonel Gaddafi, and Mrs Boudchar, a Moroccan national who is Mr Belhaj's wife, attempted to fly from China to the United Kingdom, but were deported by the Chinese authorities to Malaysia where they were detained. The British intelligence services allegedly informed the Libyan intelligence services of Mr Belhaj's whereabouts. Following this, Mr Belhaj and his wife claim that they were unlawfully detained by Malaysian officials in Kuala Lumpur and then by Thai officials and United States agents in Bangkok. Eventually they were put on a US airplane which flew them to Libya. Both were detained in Libya. Mr Belhaj was detained until 23 March 2010. Mrs Boudchar, who was pregnant at the time of the aforementioned events, was released from detention in June 2004. The Court of Appeal decided that the English courts had jurisdiction to hear these claims.

On 28 February 2004, during the time when the UK and the USA were occupying forces in Iraq, Mr Yunus Rahmatullah, a Pakistani citizen, was detained by British forces in Iraq on suspicion of being a member of a proscribed organisation with links to Al-Qaeda. Mr Rahmatullah was then transferred into the custody of US forces. By the end of March 2004, Mr Rahmatullah had been transferred to Bagram Airbase in Afghanistan. He was detained at Bagram Airbase for more than a decade without a trial or even any charges being brought against him. He was released on 15 May 2014. Mr Rahmatullah alleges that he was subjected to severe mistreatment, including assault and torture, in both British and United States detention. The High Court decided that the English courts had jurisdiction to hear these claims.

On appeal to the Supreme Court in both cases, the British Government contended that the jurisdiction of the English courts as respects the claims of Mr Belhaj and his wife and the claims of Mr Rahmatullah is barred on the grounds of the doctrine of 'state immunity' and/or the doctrine of 'foreign act of state'.

Decision

The Supreme Court dismissed the appeals. Whilst the Supreme Court decided so unanimously, there were important differences in the reasoning and the routes by which the Justices arrived at their conclusions regarding 'foreign act of state'.

State Immunity

As regards 'State Immunity', the Supreme Court held:

(a) that what the British Government had needed to show was impleading of the foreign states in question;
(b) there was clearly no direct impleading (for the foreign states had not been sued);
(c) indirect impleading only occurred where a foreign state's property or other interests were affected;
(d) "other interests" for these purposes referred to a legal interest of a foreign state (the British Government's reliance on the concepts of "interests or activities" as contained in Article 6(2)(b) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property was rejected – the concept of "interests" for these purposes was not wide enough to cover reputational or other disadvantage that the foreign states in question could potentially suffer as a result of findings made in these proceedings);
(e) the legal positions of the foreign state's would not be affected by tortious claims brought against the United Kingdom alone;
(f) moreover, if the British Government were allowed to invoke state immunity before its own courts, the result would be that the foreign states could (theoretically) be pursued in their own courts but the British Government could not be pursued in any judicial forum anywhere.

Foreign Act of State

As regards the doctrine of 'Foreign Act of State', Lord Mance and Lord Neuberger (whose judgment Lady Hale and Lord Clarke considered to contain the same reasoning as that of Lord Mance) identified three types of foreign act of state:

(1) the rule whereby a foreign state's legislation would be recognised and treated as valid insofar as it affected property within that foreign state's jurisdiction ("the first type"). This is a rule of private international law;
(2) the rule that a domestic court would not normally question a foreign sovereign act affecting property within that foreign state's jurisdiction ("the second type"); and
(3) the rule that a domestic court would not adjudicate on certain categories of sovereign act by a foreign state abroad, even where those acts occurred outside of that state's jurisdiction ("the third type").

It was held that the first type did not apply to the instant case. The British Government's argument that the second type and third type should be broadened so as to preclude the domestic courts from adjudicating on sovereign acts committed by a foreign state anywhere abroad was rejected. The second type was confined to acts affecting property. Even if the second type did cover acts directed against the person, it would be subject to a public policy qualification that would enable allegations of the instant type (such as torture) to be pursued in the English courts. Whether the third type rendered a particular issue non-justiciable fell to be considered on a case-by-case basis. It was noted that certain matters (such as interstate activities, sovereignty and the separation of powers) were best adjudicated in the international (rather than domestic) legal arena. However, an adjudication of the instant case would only involve the English courts investigating facts and identifying the applicable law, which did not involve sovereign, international or interstate considerations of such a nature that the English courts could not appropriately adjudicate upon them. Although overseas detention during armed conflict could be a 'foreign act of state', such arbitrary detention and rendition as in the instant case went far beyond any conduct previously recognised as requiring judicial abstention. 'Foreign act of state' (as a domestic English law doctrine) was defined and delimited by English law, which would always have regard to the extent to which fundamental rights were engaged in any case. If the British Government could rely on 'foreign act of state', the foreign states could (theoretically) be pursued in their own courts, whilst the United Kingdom would enjoy complete immunity.

Lord Sumption adopted a different route in his analysis, separating 'foreign act of state' into two rules which he termed: (1) "municipal law act of state"; and (2) "international law act of state". The rule of "municipal law act of state" is territorially limited to the foreign state's territory but is not limited to acts affecting property. The rule of "international law act of state" covered matters where the lawfulness of a foreign state's acts in its dealings with other states and their subjects is in question (with no territorial limitation). Lord Sumption considered that the instant cases were within the category of "international law act of state". However, Lord Sumption went on to find (echoing the ultimate analysis of Lord Mance and Lord Neuberger) that there was a public policy qualification/exception as regards the prohibitions on torture and rendition as *jus cogens* rules of international law and as fundamental principles of English law.

Concluding Remarks

The doctrines of 'state immunity', 'act of state' and 'non-justiciability' are often considered to be interrelated doctrines, notwithstanding that there are significant differences in their definition, operation and application. In particular, the application 'Act of state' and 'non-justiciability' has at times led to confusion and the Supreme Court's decision (notwithstanding the differences in analysis amongst the Justices) is likely to help the English courts to resolve some of this confusion going forward.

On the same day as this judgment was handed down, the Supreme Court also handed down two other important judgments concerning British military operations in Iraq and Afghanistan:

(1) in *Iraqi Civilians v Ministry of Defence* [2017] UKSC 2, the Supreme Court held (by a majority of 7:2) that British legal forces had the legal power to detain individuals for periods exceeding 96 hours; and
(2) in *Mohammed v Ministry of Defence* [2017] UKSC 1, the Supreme Court held that the

British Government was permitted to rely on the doctrine of 'Crown act of state' in tortious proceedings governed by foreign law if the claim related to sovereign acts committed abroad in the conduct of British foreign policy and were so closely connected to that policy as to be necessary in the pursuit of it.

2nd February 2017