

ENGLISH COURT OF APPEAL UPHOLDS THE FORMER KING OF SPAIN'S IMMUNITY IN RESPECT OF FROM HARASSMENT ALLEGATIONS CONCERNING ACTS THAT TOOK PLACE DURING HIS REIGN

Corinna Zu Sayn-Wittgenstein-Sayn v His Majesty Juan Carlos Alfonso Victor María de Borbón y Borbón [2022] EWCA Civ 1595

Introduction

By a decision handed down on 6 December 2022 in *Corinna Zu Sayn-Wittgenstein-Sayn v His Majesty Juan Carlos Alfonso Victor María de Borbón y Borbón* [2022] EWCA Civ 1595, the English Court of Appeal allowed an appeal by the former King of Spain and upheld his immunity against harassment claims insofar as they concerned acts that had taken place before his abdication.

Background

The claimant was the former partner of the defendant who was the former King of Spain until he abdicated in 2014. The claimant brought English proceedings in which she alleged that, from 2012, the defendant had engaged in various acts which amounted to harassment, including an allegation that her home in Monaco had been covertly searched by Spanish intelligence agents on the orders of the head of Spain's national intelligence agency at the defendant's direction.

The defendant challenged the jurisdiction of the English courts on the basis of his immunity under the State Immunity Act 1978, including that he had functional immunity under Section 14(1) in respect of acts that occurred pre-abdication. In the course of resisting the defendant's jurisdiction challenge, the claimant contended that the underlying conduct had caused her distress and anxiety such as to bring the claims within the "personal injury" exception to State immunity contained in Section 5 of the State Immunity Act 1978. For the purposes of determining the State immunity issue only, the alleged facts were assumed to be true.

At first instance, the High Court (Nicklin J) rejected the defendant's invocation of State immunity. Our previous case note on that decision can be found [here](#).

Decision

The Court of Appeal allowed the defendant's appeal on the issue of functional immunity under Section 14(1) of the State Immunity Act 1978.

The "proper approach" to the court's assessment of functional immunity was whether, during the period when the defendant was Spain's sovereign, he acted in a private capacity or a public capacity when he engaged in the relevant acts. Since States could only act through agents or employees, consideration of whether those persons had improper motives when carrying out the relevant acts (or, indeed, if they were abusing public power) was irrelevant to that assessment. The key question was whether (applying the decision of the House of Lords in *Jones v Saudi Arabia* [2006] UKHL 26) the relevant acts were done "under colour of authority" with the consequence that the State bore responsibility for them.

An act that could only be performed by a government, and could not be performed by a private citizen, was by its nature a sovereign act. Accordingly, the role of the head of Spain's national intelligence agency (and the operatives acting under his direction) was "*determinative*" of whether their acts were done "*in a public capacity*". On the claimant's original pleaded case, it was only by virtue of the defendant's position as Head of State that he was allegedly able to procure Spain's national intelligence agency to engage in that conduct. It was, indeed, "*wholly implausible*" to suggest that private citizens could undertake international surveillance operations and similar conduct. The High Court had, by focusing on whether harassment (under English law) was something any private citizen could do, fallen into error.

The Court of Appeal also considered that the High Court had been wrong to proceed with its assessment of State immunity on the basis of promised amendments to the claimant's pleaded case that had not been properly applied for. That was of significance because, in the Court of Appeal's view, the promised amendments were "*simply a device to meet the state immunity arguments*".

However, the Court of Appeal found that the High Court had been correct to reject the claimant's arguments in relation to the Section 5 exception. The claim was not pleaded as a personal injury claim, and did not seek damages for personal injury. Without more, distress arising from harassment did not amount to a personal injury claim for Section 5 purposes.

Concluding Remarks

The Court of Appeal's judgment contains helpful guidance on the correct judicial approach to assertions of functional immunity under the State Immunity Act 1978. Further, the emphasis placed by the Court of Appeal on the manner in which the claimant had sought to amend her case provides a stark illustration of how important it is for parties litigating in England (and their legal representatives) to undertake a full and careful assessment of State immunity at the outset, including how claims potentially engaging immunity ought to be pleaded.