



# Reflections on public international law

Khawar Qureshi KC looks back on the key public international law cases before the English courts in 2022

## IN BRIEF

- ▶ The 'commercial purposes exception' and 'functional immunity' provisions of the State Immunity Act 1978 considered by the Court of Appeal.
- ▶ The Supreme Court's decision in *Basfar v Wong*—correct or controversial?
- ▶ The scope of the Foreign Act of State Doctrine reviewed.

In 2022, the English courts have considered a number of significant public international law issues, including those affecting the immunity of diplomats and who has access to sovereign funds of a state.

## Sections 3(3), 10(4) (a) & 17, SIA 1978

The first case to be highlighted is *Argentum Exploration Ltd v The Silver and all persons claiming to be interested in and/or to have rights in respect of, the Silver (Secretary of State for Transport and another intervening)* [2022] EWCA Civ 1318, [2022] All ER (D) 35 (Oct).

The SS *Tilawa* (a privately owned cargo liner) was en route from Bombay to Durban when it was hit by a Japanese torpedo and sunk in the Indian Ocean on 23 November 1942. While many lives were lost forever, 2,364 silver bars sold to the South African authorities under a commercial contract with a free on board (FOB) clause were salvaged and brought to Southampton in 2017. Could a claim to salvage be maintained? This all depended

upon whether the silver was 'in use or intended for use for commercial purposes' pursuant to the State Immunity Act 1978 (SIA 1978).

The Court of Appeal majority focused on the arrangements for the silver to be placed on board the vessel and carried as cargo to South Africa to conclude that the commercial purposes exception was satisfied. The strong and carefully reasoned dissenting opinion noted that the silver was intended to be minted into coinage—a non-commercial, sovereign purpose. Moreover, when the vessel sank, the silver was not in use, but merely being carried.

## Sections 5 & 14(1)(a), SIA 1978

On 18 June 2014, King Juan Carlos I of Spain abdicated in an atmosphere of controversy, including allegations of an affair with Corinna zu Sayn-Wittgenstein-Sayn. She was a Danish national who alleged that she had an affair with Juan Carlos I from 2004–2009 and that after 2012, a campaign of harassment was commenced against her at the instigation of the king. In proceedings issued on 16 October 2020 invoking the Protection from Harassment Act 1997, she alleged, inter alia, that between April and June 2012 the head of Spain's National Intelligence Centre, General Sanz Roldán, had been involved in searches of her Monaco home, as well as the placing of a book on the death of Princess Diana on her coffee table at

her residence in Switzerland. Critically, her own pleading alleged that this was done at the direction of the king.

In *Zu Sayn-Wittgenstein-Sayn v De Borbon y Borbon* [2022] EWCA Civ 1595, [2022] All ER (D) 52 (Dec), the issue for the Court of Appeal to consider, in overturning the judgment of Mr Justice Nicklin who had concluded head of state immunity was not available to Juan Carlos I (2022) EWHC 668 (QB)), was (applying previous case law considerations, including in the case *Pinochet No3* [2000] 1 AC 147 by the House of Lords) 'whether the conduct [alleged] was engaged in under the colour of or in ostensible exercise of the head of state's public authority'. The court rejected the assertion that the conduct was simply a reflection of friendship and upheld the claim to head of state immunity for acts done under the 'colour of [Juan Carlos I's] authority' prior to his abdication.

The court also rejected the contention that the exception to immunity reflected in s 5, SIA 1978 (in respect of, inter alia, personal injury caused by an act or omission in the jurisdiction) was engaged because a claim for distress and anxiety was not, without more, a personal injury claim.

## Art 31(1)(c), VCDR 1961

Schedule 1 of the Diplomatic Privileges Act 1964 incorporated the comprehensive international framework which, inter alia, provides for the privileges and immunities available to diplomats who are members of a diplomatic mission in the UK.

A Saudi diplomat had brought a Filipino woman to work in his household. She alleged that she was exploited—in essence, trafficked—and subject to conditions of modern slavery, by, inter alia, not being paid the salary stated in documentation provided to secure her visa to enter the

UK, and that in fact for around two years she received a fraction of her contractual entitlement and nothing at all at some points. The diplomat was recalled and thus no longer in the jurisdiction. Nevertheless, could a claim against him be pursued?

In *Basfar v Wong* [2022] UKSC 20, [2022] All ER (D) 15 (Jul), the Supreme Court majority held that he had made a substantial gain in money's worth (by paying less or nothing) and this was accurately to be described as 'commercial activity... outside [his]... official functions' (Art 31(1)(c), Vienna Convention on Diplomatic Relations 1961 (VCDR 1961)).

In a sharp and compelling contrast, the dissentients observed 'where we disagree with the majority is in their conclusion that the conditions under which a person is employed or how they came to be employed can convert employment which is not of itself a "commercial activity" exercised by her employer into such an activity falling within the exception [to immunity]'.

For more on this judgment, see 'Diluting diplomatic immunity?' on pp11-12.

### Art 3, ECHR

A Saudi diplomat and his wife prevented local authority access to and denied accusations by their six children of harsh

discipline and punishment. The four eldest children left home and claimed asylum. The father was recalled to Saudi Arabia (with the mother) and declared persona non grata by the UK authorities.

In *Barnet London Borough Council v AG (a child) and another* [2022] EWCA Civ 1505, [2022] All ER (D) 76 (Nov), the Court of Appeal upheld the Divisional Court's decision that European Convention on Human Rights (ECHR) jurisprudence under Art 3 thereof (inhuman and degrading treatment prohibition) did not require the UK to override VCDR 1961 in situations of serious child abuse. Indeed, the VCDR structure provides its own remedies, including waiver of immunity and recall of diplomats, as well as closure of missions.

The court also had heavy regard to the international nature of frameworks for all diplomats, and the potential consequences for UK diplomats abroad in terms of reciprocal actions against them.

### Foreign Act of State Doctrine

The question in *A v B/Banco Central De Venezuela and Governor and Company of the Bank of England* [2022] EWHC 2040 (Comm) was: who controlled access to around \$US2bn of Venezuela's gold reserves held at the Bank of England

and monies held by receivers appointed by the court—Mr Guaidó, who had been recognised as the head of state by the UK government on 2 February 2019, or Mr Maduro, who contended that he was the president?

The court had previously held that it was bound to accept the position as stated by the executive, in accordance with the 'one voice doctrine'. Did the fact that the Venezuelan courts had issued many judgments annulling or casting doubt on Mr Guaidó's authority make any difference? No, and in any event the judgments were seriously flawed as they were issued *erga omnes* without giving affected parties any right to a hearing.

### Concluding remarks

The English courts have determined potentially far-reaching issues affecting the immunity of diplomats and who has access to sovereign funds of a state. The significance of public international law in a broad range of issues—not least commercial, criminal, human rights and public law—will undoubtedly continue to develop. **NLJ**

**Khawar Qureshi KC** is head of McNair International and specialises in commercial litigation and international arbitration ([www.mcnairstinternational.com](http://www.mcnairstinternational.com)).

## Lexis® PSL Public Law

Practical commercial advice and tools to help you get more done each day

LexisPSL Public Law is devised for government lawyers. Covering core legal areas such as administrative and constitutional law, Human Rights, data protection and freedom of information, European and devolution, this LexisPSL practice area has clear and concise practice notes, enriched by direct links to amended legislation, case law and more in-depth commentary.

### Trial today

[www.lexisnexis.co.uk/legal/public-law](http://www.lexisnexis.co.uk/legal/public-law)

