INTERNATIONAL LAW: THE UK SUPREME COURT’S LATEST LOOK AT STATE IMMUNITY

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Abstract: This article examines the recent UK Supreme Court case of *United States v Nolan* concerning the rights of a dismissed civilian employee of a US military facility in England. It sets out a summary of the court’s findings on European law and *ultra vires*. It considers the public international law aspects of the appeal and asks if the court’s acceptance that a plea of state immunity is procedural (and does not therefore affect the state’s underlying duty or obligation) means that the UK approach to the relationship between immunity and art.6 of the European Convention on Human Rights (access to justice) needs to be re-examined. The UK courts have hitherto held that art.6 is not automatically engaged by a plea of immunity on the basis that such a plea deprives the court of substantive jurisdiction so there can be no denial of access as access does not exist in the first place. The European Court of Human Rights in Strasbourg has consistently maintained the opposite view and *Nolan* may have an impact on appeals touching on this issue pending before the Supreme Court.

Keywords: international law and state immunity; nature of a plea of state immunity; access to justice and state immunity; art.6 of the European Convention on Human Rights; 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property; employment rights and immunity

I. Introduction

It is a rule of customary international law that a state is entitled to plead immunity in the courts of another state at the very least in respect of its sovereign activities. It is trite law that a state can waive its immunity.

In *United States of America v Nolan*, it was unsuccessfully claimed that the US could rely on principles of construction under European Union (EU) or international law to avoid a statutory duty to consult employees made redundant by its closure of a military facility in the UK.1 The underlying argument was that one had to interpret the relevant EU Directive and UK Act and Regulations as inapplicable

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1 [2015] UKSC 63, [2015] 3 WLR 1105 (on appeal from the Court of Appeal [2014] EWCA Civ 71). The Supreme Court in *Nolan* decided that the employment law question as a matter of English law had to be decided by a further Court of Appeal hearing as explained in Section II of this article.

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to the *jure imperii* or sovereign non-commercial activities of foreign states. The interest for international lawyers lies in the US attempt to circumvent substantive liability, having failed to plead state immunity at the initial Employment Tribunal hearing.²

The US, not entitled to rely on immunity, was effectively claiming to be exempt from liability under the relevant UK employment law. The state argued, in part, that as a matter of binding international law, the legislation had to be interpreted as though it did not apply to the activities of a foreign state committing a sovereign act overseas, even though those activities would otherwise have attracted liability. Lord Mance (giving the only judgment on international law³) was not persuaded, finding that such a far-reaching exception would effectively lead to all legislation being interpreted to exclude foreign state liability where state immunity could have been pleaded. The creation of what was, in effect, a second chance at state immunity was unwarranted and the appeal was lost on this ground.⁴

The decision is important, despite the seemingly thin US arguments, because of the Supreme Court’s endorsement of the thesis that state immunity is a procedural plea which is distinct from the foreign state’s duty or obligation under English law or the domestic court’s underlying jurisdiction. This concept is gaining momentum internationally, was relied upon in the seminal International Court of Justice (ICJ) case on immunity, *Jurisdictional Immunities of the State (Germany v Italy)*, and may have important implications for recent arguments about the relationship between immunity and the right of access to a court, raised, in particular, by art.6 of the European Convention on Human Rights (ECHR).⁵ This endorsement of immunity as

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² A sovereign state is immune from domestic adjudication except in specific circumstances as a matter of international law (the restrictive doctrine). The doctrine is arguably now embedded in customary international law and is reflected in the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property, Annex, UN Doc A/RES/59/38 (not yet in force) much of which represents customary law: *Jones v Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 [8] and [26] (Lord Bingham). Once a state has submitted to the jurisdiction in a particular set of proceedings it is deemed to have waived immunity. UN Convention art.8(1)(b). The relevant UK provisions are to be found in the UK State Immunity Act 1978 (SIA). Section 2 of SIA deals with waiver and submission.

³ The bench was composed of Lord Neuberger, Lady Hale, Lord Mance, Lord Reed and Lord Carnwath.

⁴ *United States v Nolan* (n.1), [38].

⁵ ICJ Reports (2012) 99 [57]. As discussed below in Section IV, there is some controversy in international law and English law about the jurisprudential nature of a plea of state immunity. If the effect of such a successful plea is to remove a state from the court’s jurisdiction altogether then it is said that the right of access to a court protected by art.6 of the ECHR is in doubt (is engaged) and the domestic court has to look at whether the plea is proportional and legitimate as a matter of European law which will follow custom international law on this. Some UK lawyers and judges have preferred the approach which denies that art.6 is engaged by a plea of immunity, meaning that it is a matter of UK law not EU law whether the immunity plea is accepted or not, see Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583D–F, [2000] 3 All ER 833, 846–847 and *Jones v Ministry of Interior for the Kingdom of Saudi Arabia* (n.2), [14] (Lord Bingham) and [64] (Lord Hoffmann). See Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford, Oxford University Press, revised and updated 3rd ed., Pt.1, pp.11, 20 and Ch.IV, p.82). See also Andrew Sanger, “State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights” (2016) ICLQ 213–228, 219.
a matter of procedure which has the effect of exempting a state from the jurisdiction rather than removing jurisdiction altogether may have ramifications for a number of cases on appeal to the Supreme Court and suggests that the approach of the Court of Appeal may need to be refined in the Supreme Court. This note will focus on state immunity and jurisdiction and not on the EU or public law issues.

II. Facts and Procedural History

The US maintains a number of military establishments in the UK and employed 200 civilian employees at its water repair centre in Hampshire (the Base). It decided to close the facility in March 2006 and in April 2006 told its employees of the planned closure. In June, all employees were informed that they were at risk of redundancy and the US began collective redundancy consultation. Mrs Nolan, a civilian employee, was made redundant the day before the Base was closed. Mrs Nolan started Employment Tribunal proceedings under Pt.IV, Ch.II (which includes ss.188–198) of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587) (TULCRA and the Regulations). Mrs Nolan alleged that TULCRA required the US to consult when it took the decision to carry out collective redundancies and not when it did consult, which was after the decision had been taken. There being no trade union at the Base, her claim was founded on her being an “employee representative” under TULCRA s.188(IB).

The decision to close the Base was a sovereign public act of the US taken in respect of a military facility in the UK and would have attracted immunity if pleaded. The US had not pleaded immunity as it believed that the duty to consult

6 The procedural approach is also the key to the normative argument that state immunity as a rule of international law can exist alongside international rules of jus cogens prohibiting or criminalising violations of human rights, despite the seemingly inherent conflict between the two, and by those who claim that “immunity does not mean impunity”. See the discussion in Section IV and the works referred to in note 57. That debate, although at the forefront of many discussions about state immunity, is not the focus here.


8 United States v Nolan (n.1), [2]. The original Employment Tribunal found the US to be in breach of the relevant provisions on redundancy consultations. The Employment Appeal Tribunal upheld the order [2009] IRLR 923. The matter was considered by two English Courts of Appeal and the European Court of Justice before going to the Supreme Court.

9 It was common ground that the US could have successfully pleaded state immunity when Mrs Nolan first issued her complaint but had not done so. The Supreme Court found that it was immaterial whether the immunity would have arisen under the SIA 1978 or at common law. Lord Mance, assuming s.16(2) of the SIA applied (which provides that a state’s immunity in respect of activities of its armed forces in the UK is to be decided at common law) held that there would have been immunity at common law following Holland v Lampen-Wolfe (n.5). This case involved a libel claim brought by an instructor at a US military
C. The ultra vires argument

The US’s last argument was that, in legislating for consultation to be required of public administrative bodies in the Regulations, the UK had gone further than the EU Directive (which excluded public administrative bodies) required. The Regulations were thus ultra vires under the European Communities Act 1972 s.2 which enables the UK to legislate by delegated legislation to give effect to EU law.\(^\text{38}\) If the UK legislation was ultra vires it could not bite against the US.

The majority rejected the vires argument on the basis that, as the original scheme under TULCRA (an Act of Parliament which predated the Directive) had been wider than EU law later required (in applying to US military bases), later UK regulations amending the scheme would not be ultra vires in applying to the wider scheme. The court considered case law on the point and was clear that, where a directive applied to internal market situations only, s.2(2) of the 1972 Act did not permit extensions to non-domestic situations by delegated legislation. Where the original instrument was an Act of Parliament which extended to non-domestic situations, however, the instrument could be supplemented by delegated legislation — here in the form of the UK Regulations and any extension would apply to the wider catchment.\(^\text{39}\)

Lord Carnwath dissented on the vires point finding that the extension of the Regulations to public administrative bodies by secondary legislation, such as the US military facility, was not within the power conferred by the 1972 European Communities Act and were therefore ultra vires, as Parliament itself had not legislated.\(^\text{40}\)

IV. Analysis and Commentary

The Supreme Court’s decision in \textit{United States v Nolan} in finding that a plea of immunity is procedural which, unless successfully pleaded, does not deny the domestic court jurisdiction over the subject matter of the alleged dispute is significant for international law but where it leaves the debate about the relationship between the international law rules and domestic rules on immunity, jurisdiction and access to justice is still problematic.

Lord Mance accepted the argument that immunity is a procedural plea. In doing so, he relied on the influential book on state immunity written by Hazel Fox CMG QC and Philippa Webb.\(^\text{41}\) They argue forcibly that state immunity as a procedural

\(\text{\textsuperscript{38}}\) \textit{Ibid.}, [48].
\(\text{\textsuperscript{39}}\) \textit{Ibid.}, [72].
\(\text{\textsuperscript{40}}\) \textit{Ibid.}, [100].
\(\text{\textsuperscript{41}}\) \textit{Ibid.}, [36] and Fox and Webb (n.5), p.20.
The UK Supreme Court’s Latest Look at State Immunity

plea does not as such affect a state’s jurisdiction. This approach was favoured by ICJ in 2012 in the Jurisdictional Immunities of the State (Germany v Italy).42

If it is accepted that immunity is a procedural plea distinct from the underlying primary obligation of the foreign state, then, as Lord Mance concluded, the US argument that there is some exemption from underlying liability for acts jure imperii cannot have any merit.43 It is one thing to accept that immunity, although it can have the effect of denying a remedy to a claimant, is necessary to preserve a state’s sovereign dignity. It is quite another to argue that the UK is not capable of legislating for acts in the UK affecting employees of a foreign state employed in the UK. As Lord Mance put it:

“… carried to its logical conclusion it would mean that all legislation should, however clear in scope, be read as inapplicable to a foreign state in any case where the state could plead State Immunity. That would elide two distinct principles, and, as noted already, very largely make redundant a plea of State Immunity at least in respect of any statutory claim”.44

The distinction between a procedural plea of immunity and the underlying obligation or duty (and the debate about the jurisprudential nature of state immunity which goes with it) is also material to the discussion about whether or not immunity is a denial of a claimant’s human right of access to justice. In the European context, this is usually put in terms of whether immunity is a breach of a claimant’s rights under art.6 of the ECHR. The European Court of Human Rights has always maintained that the making of a plea of immunity itself requires a consideration of art.6 (the article is per se engaged) but, as the right is a relative one, immunity may not be a denial of access if the extent of the immunity is legitimate and proportionate. The Strasbourg Court has held that art.6 not only guarantees fair trial rights once proceedings have been instituted but also a right to institute proceedings to begin with.45 It has also so far found that the UK courts’ acceptance of a plea of immunity in a given case has been consistent with the court’s view of customary international law and thus proportionate.46

The Strasbourg court’s approach is to be contrasted with the findings of English courts to the effect that, as immunity deprives a court of jurisdiction in a given case, a plea of immunity cannot give rise to a claim under art.6 as this requires

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42 Jurisdictional Immunities of the State (Germany v Italy) (n.5).
43 United States v Nolan (n.1), [36].
44 Ibid., [38].
the existence of an underlying jurisdiction. As Lord Bingham put it in Jones v Saudi Arabia “a state cannot be said to deny access to its court if it had no access to give”.

The potential disjuncture between this approach and that of Lord Mance and the Supreme Court in Nolan may have resonance when the Supreme Court hears the appeal in Benkharbouche v Sudan. The Court of Appeal, in a case about the employment rights of domestic staff of foreign embassies in London, decided that the UK State Immunity Act (SIA) 1978 ss.16(1)(a) and 4(2)(b) were incompatible with art.6 of the ECHR as going beyond the international customary law requirement of immunity in employment cases. The immunity afforded to Sudan under s.4 of the SIA was, in other words, not proportionate or legitimate.

The Court of Appeal did not actually decide whether art.6 was engaged by a mere plea of immunity however, and stated that it was bound by the approach of Lord Millett in Holland v Lampen-Wolfe to the effect that the article was not so engaged.

In Benkarbouche the Court of Appeal was not convinced that where sovereign immunity applied there was room for recourse to art.6. It is helpful to quote from the judgment in extenso:

“It is difficult to see how Article 6 can be engaged if international law denies to the Contracting State jurisdiction over a dispute. There can be no denial of justice for which the State is responsible if there is, as a matter of international law, no court capable of exercising jurisdiction. Moreover, Article 6 cannot have been intended to confer on Contracting States a jurisdiction which they would not otherwise possess, nor could it have conferred a jurisdiction denied by general international law in such a way as to be binding on non-Contracting States. It is unfortunate

47 Holland v Lampen-Wolfe (n.5) and Jones v Ministry of Interior for the Kingdom of Saudi Arabia (n.2).
48 Jones v Ministry of Interior for the Kingdom of Saudi Arabia (n.2), pp.280, 289 and 293 (Lord Bingham). See also articles cited at notes 5 and 22. The UK Supreme Court Judge, Lord Sumption makes this point writing extra-judicially in giving the James Wood Memorial Lecture at the University of Glasgow “The right to a court: Article 6 of the Human Rights Convention”, available at http://schooloflaw.academicblogs.co.uk/2015/10/13/james-wood-memorial-lecture-the-rt-hon-lord-sumption/ (visited 17 March 2016), p.18. Lord Sumption distinguishes the meaning of “procedural” in stating that the plea of immunity is “not procedural in the sense that the organisation and practices of the court system are procedural” (p.18), where he is expressing concern at the width of some art.6 decisions of the European Court of Human Rights.
49 Benkharbouche v Embassy of the Republic of Sudan (n.7), [53] and [66]. The case is largely about EU law and is the first case to consider the effect of the recent EU Charter of Fundamental Rights which contains a right of access identical to that of art.6(1) of the ECHR. As Andrew Sanger has pointed out, Lord Justice Dyson in Benkharbouche followed the English approach of finding that a plea of immunity does not engage art.6 — the right of access to the court — following Lord Millett. The Court of Appeal refused to interpret the SIA to comply with what it had found was inconsistent customary law — the declaration of incompatibility did not affect the validity of the SIA merely operated as “a signal to Parliament that it needs to consider amending the legislation”. R Garnett, “State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?” (2015) 64(4) ICLQ 783, 816 and fn.129.
50 Benkharbouche v Embassy of the Republic of Sudan (n.7), [16].
that in none of its many decisions in which the point has arisen has the Strasbourg court grappled with these considerations. (The statement of the court in the Fogarty case 34 EHRR 302, para 26, that the grant of immunity does not qualify a substantive right but is a procedural bar on the national courts’ power to determine the right, while correct as a matter of domestic law, does not meet the point. See also Jones v United Kingdom, para 164.) However, we consider that in the present case it is not necessary for us to choose between these competing approaches. The approach of the Strasbourg court would not result in a contracting state being held to be in breach of article 6 simply because it gave effect to a rule of international law requiring the grant of immunity. In any such case the grant of immunity would be held to be a proportionate means of achieving a legitimate aim. Under the Strasbourg jurisprudence, any debate as to what are the applicable rules of international law is transferred to a later stage of the analysis and addressed in the context of article 6”.

Whether or not a plea of immunity engages art.6 of the ECHR did not matter to the Court of Appeal’s decision in Benkarbouche. It did not matter because the court itself decided that the relevant provisions of the UK SIA were out of line with international law and, given the EU context, could be declared incompatible.

The issue may arise beyond the European context, however, which is why Nolan is significant. Does a domestic court have jurisdiction or not when a state raises a plea of immunity? Lord Mance in Nolan seems to be saying it does and that immunity merely operates as a procedural bar which mirrors the Strasbourg court’s approach. The court in other words is looking at immunity as a threshold issue. The words “procedural” and “substantive” may have many meanings in this context and the answer may lie in the approach of art.6(1) of the UN Convention on the Jurisdictional Immunity of States and Their Property 2004 which provides that “a State shall give effect to State immunity … by refraining from exercising jurisdiction in a proceeding before its courts against another State.” This suggests there is jurisdiction but the court has to exercise restraint. This would be consistent with the fact that a state can waive immunity in advance or by submitting to the jurisdiction — and once waived immunity cannot be revived — despite the US arguments in Nolan.

51 Ibid., [16].
52 Ibid., [53].
53 The Convention is not in force but persuasive and much is customary. See in O’Keefe and Tams (eds), The United Nations Convention on the Jurisdictional Immunities of States and Their Property, A Commentary (n.22). See discussion on restraint in Sanger “State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights” (n.5), p.220.
54 In High Commissioner for Pakistan in the United Kingdom v National Westminster Bank [2015] EWHC 55, Mr Justice Henderson set aside a notice of discontinuance he found Pakistan to have issued to preserve its state immunity after it had instituted proceedings — thereby waiving immunity. Pakistan’s attempt
The debate is also very relevant to whether there may be a need for Parliament to amend the UK SIA to take account of changes to customary law rules on immunity, particularly in the employment context. One might also ask whether the view (accepted by the Supreme Court and both parties) that the US would have been entitled to immunity had she pleaded it in *Nolan*, can survive the attack on state immunity in relation to claims by employees of diplomatic missions (the subject matter in *Benkharbouche*). Is there in other words a real difference between an embassy and a military establishment such as the one in *Nolan*?55

The approach of treating immunity as a procedural plea is also important to the argument that immunity can exist alongside international rules prohibiting or criminalising violations of human rights, despite the seemingly inherent conflict between the two. This view is used to refute the suggestion that human rights norms as *jus cogens* norms in some way trump immunity which must as a result therefore be denied to the defendant state. It is the premise behind the statement “immunity does not mean impunity”.56 As stated by Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinion in the ICJ * Arrest Warrant* case57 and by the ICJ in the *Jurisdictional Immunities* case, immunity as a procedural plea in a domestic court can co-exist with substantive liability in both domestic and international law.58 This is not the place to discuss issues of trumping and *jus cogens* as the focus here has been on employment rights not grave breaches of fundamental norms.

As explained in the “Introduction”, the point being made here is that the procedural approach as stated in *Nolan* has been espoused by those who argue that access to justice may be compromised by a plea of immunity, in other words that immunity may itself be a denial of justice. This is particularly so in Europe where the right of access to justice is protected by art.6 of the ECHR. This is not however the position taken in English law to date and where this leaves the debate about the relationship between the international law rules on immunity, domestic rules on immunity, jurisdiction and access to justice is therefore open to question.

55 Section 16(2) of the SIA provides that the statute does not apply to foreign military establishments in the United Kingdom, and s.16(1)(a) states that embassy staff are not to benefit from the restrictive immunity in s.4 (instead the absolute immunity conferred by the Diplomatic Privileges Act 1964 applies).


58 *Jurisdictional Immunities of the State* (Germany v Italy) (n.5), [55]–[57].
The Supreme Court in *United States v Nolan* found against the state on all its grounds of appeal. The findings on the application of EU law and on *ultra vires* have been explained in outline only here. The US argument that UK primary and secondary legislation (in this case TULCRA and the Regulations) had to be read subject to a pervasive exclusion in respect of the sovereign acts of a foreign state was firmly rejected by the court as being in effect a justification for a second bite at the cherry of immunity. There was nothing very surprising about this but it is interesting that the decision depended in part on Lord Mance’s acceptance of the concept of immunity as a procedural plea whose effect is not to deny the court jurisdiction in the first place. This approach has an impact on the discussion about whether or not art.6 of the ECHR (access to justice) is engaged by an immunity plea and may be inconsistent with the decision of the Court of Appeal in *Benkarbouche* and earlier House of Lords authority.

This is not the place to settle these questions. It will be for the Supreme Court when the *Benkarbouche* appeal is heard to analyse the impact, if any, of the approach taken by the court in *United States v Nolan*. 