Neutral Citation Number: [2021] EWCA Civ 890

Appeal Ref: B4/2021/0610

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Wednesday, 9th June 2021

Before:
LORD JUSTICE MOYLAN
LORD JUSTICE DINGEMANS
Remotely via Microsoft Teams

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Between:

HIS HIGHNESS MOHAMMED BIN RASHID AL MAKTOUM	**Appellant**
- and -	
HER ROYAL HIGHNESS HAYA BINT AL HUSSEIN	**Respondent**

- -

LORD PANNICK QC, MR. RICHARD SPEARMAN QC, MR. SUDHANSHU SWAROOP, MR. NIGEL DYER QC, MR. DANIEL BENTHAM, MR. STEPHEN JARMAIN, MR. GODWIN BUSUTTIL, MS. PENELOPE NEVILLE and MR. JASON POBJOY for the Appellant

MR. TIMOTHY OTTY QC, MR. GUGLIELMO VERDIRAME QC, MR. JUSTIN RUSHBROOKE QC and MS. KATE PARLETT for the **Respondent**

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Approved Judgment
In Private
Re Permission to Appeal

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd
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LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an application for permission to appeal against the judgment of the High Court Family Division [2021] EWHC 660 (Fam) dated 19th March 2021, which followed a hearing on 10th and 11th February 2021. I directed an oral hearing of the application so that this court could determine whether to grant permission to appeal and whether the appeal should be heard in private, if permission was granted. In deciding whether to grant permission to appeal, the issue for this court pursuant to CPR 52.61 is whether the appeal has a real prospect of success or whether there is some other compelling reason why the appeal should be heard.

Background

2. For the purposes of this judgment, it is necessary only to set out some of the background facts. The father is His Highness Sheikh Mohammed Bin Rashid Al Maktoum. The mother is Her Royal Highness Princess Haya Bint Al Hussein. They have two children. The father is the Ruler of the Emirate of Dubai and Prime Minister and, therefore, Head of Government of the United Arab Emirates. He commenced proceedings on the inherent jurisdiction of the High Court seeking the return of the two children from this jurisdiction. The father also commenced an application for interim child arrangements.

3. The mother issued applications to make the children wards of court and prevent their removal, for a forced marriage protection order and for a non-molestation order. The mother made a claim for financial provision for the children under the Children Act 1989.

4. In the skeleton argument the father reports that he has waived immunity for that application and made what he calls a substantial open offer. The full background of the proceedings are set out in other judgments of the Family Division. It is sufficient to say that both mother and father have at times asserted immunities and have at other times waived immunities.

5. The mother has now issued two applications against the father for financial support for herself and the children under Part 3 of the Matrimonial and Family Proceedings Act 1984 and an application under the inherent jurisdiction for financial support for herself and the children.

6. The father claimed immunity from jurisdiction in respect of these two applications and this was on the basis that he asserted that customary international law confers immunity on Heads of Government, in respect of civil proceedings relating to personal and private matters.

7. The High Court held that he did not have such immunity and the High Court accepted that a Head of Government may have immunity from criminal jurisdiction from execution of any civil and criminal judgment and inviolability in respect of civil and criminal proceedings. The High Court held that the father had not established to the requisite standard a rule of customary international law conferring immunity from civil jurisdiction on Heads of Government in respect of non-official acts. The mother

claimed that in any event the father had waived any immunity. The court held that if the father did have immunity, he had not waived it in respect of the two applications. The mother has made it clear that if the father is granted permission to appeal she will seek to cross-appeal.

8. The ground of appeal is that the High Court was wrong in law in finding that the father had not established the existence of a rule of customary international law conferring immunity from civil jurisdiction on Heads of Government in respect of non-official acts. Permission to appeal was refused below on the basis that given the extent of the disagreement on the scope of immunity from jurisdiction enjoyed by Heads of Government under customary international law, an appeal would have no real prospect of success and there was no other compelling reason why an appeal should be heard.

The respective submissions

9. In the skeleton arguments and oral submissions today, there were said to be five reasons for showing that there was a real prospect of success and I will deal with the reasons first before turning to compelling reasons which were advanced to hear the appeal.

10. The first reason and much of the argument in the written and oral submissions before us has turned on whether the High Court took an overly narrow approach to the interpretation of the case concerning the arrest warrant of 11th April 2002 reported as *Democratic Republic of Congo v Belgium* ICJ reports page 3, and known as the *Arrest Warrant* case. There is a need for particular examination of paragraph 51 of the judgment on which both parties rely. The father asserts that the proper reading of paragraph 51 is that the ICJ said that it is firmly established that Heads of Government enjoy immunities from jurisdiction in civil matters.

11. The second reason was the analogy between Heads of Government and diplomatic agents which was said to have been drawn by the ICJ in the *Arrest Warrant* case. The father asserts that the analogy drawn means that Heads of Government have immunity from jurisdiction in civil matters. In oral submissions, Lord Pannick QC emphasised that the ICJ had decided the *Arrest Warrant* case on principle which supported the proposition that a Head of Government would have the same immunities available to diplomats and Heads of State, and it was submitted that it would be a surprising result which lacked any principled justification, if the Head of Government was not equated with the Head of State for those purposes. Mr. Otty QC reminded the court of the limit of Article 31 of the Vienna Convention on Diplomatic Immunities and that it applied only to the diplomat when in the receiving State.

12. The third reason advanced as showing why there was a real prospect of success was that it was said that the High Court had failed to have regard to the fact that the Head of State did have immunity and, again, the analogy drawn by the International Court of Justice between Heads of Government and Heads of State in the *Arrest Warrant* case.

13. The fourth reason was that it was said that decision was inconsistent with the *Arrest Warrant* case because the High Court had drawn an unprincipled distinction between the functional basis for immunity from civil jurisdiction and immunity from execution

and inviolability. Lord Pannick emphasised that the International Court of Justice had relied on the mere risk of impeding the functions of the Minister for Foreign Affairs and that the same must apply to a Head of Government. In oral submissions, Lord Pannick particularly relied on Lord Sumption's explanation of the need for immunity from civil proceedings for diplomats to ensure that they are protected from baseless claims to enable them to perform their functions.

14. Finally, and in the fifth reason set out in the written submissions, it was said that the court had failed to have proper regard to State practice relied on by the father. The State practice relied on by the father related to proceedings which were commenced in New York by the Prime Minister of India, in California against the Prime Minister of Singapore and in New York again, against the Prime Minister of Grenada and his wife. Written submissions in those cases on behalf of the United States Government have made it clear that the Head of Government had immunity from civil proceedings and those written submissions relied in particular on the *Arrest Warrant* case. Reliance was also placed on academic writings. The mother submitted that none of the reasons were sustainable and that the High Court had come to the right result on the issue of immunity.

No real prospect of success

15. It is common ground that there is no international treaty governing immunities for Heads of Government. The scope of the immunities is therefore governed by customary international law. It is established that "to identify a rule of customary international law, it is necessary to establish that there is a widespread representative and consistent practice of State on the point in question, which is accepted by them on the footing that it is a legal obligation", see *Benkharbouche v The Embassy of the Republic of Sudan* [2019] AC 777. There is no need for complete uniformity, but there is a need for substantial uniformity.

16. The father's concentration on the judgment of the International Court of Justice in the *Arrest Warrant* case is understandable. This is because judgments of the ICJ are pursuant to article 92 of the UN Charter, authoritative as to the content of customary international law because the ICJ is the principal judicial organ of the United Nations. As Lord Pannick stressed today, it was accepted by the High Court that such a judgment had to be read in context.

17. In the *Arrest Warrant* case, a Belgian investigating judge of a Tribunal of First Instance had issued a warrant for the arrest of the Minister for Foreign Affairs of the DRC. The DRC had objected on the grounds of absolute inviolability and immunity from criminal process, see paragraphs 12, 21 and 47. No part of the argument engaged the issue of immunity from civil proceedings. The ICJ held that the Minister for Foreign Affairs enjoyed full immunity from criminal jurisdiction and inviolability. This applied to public and private acts when customary international law accorded those immunities to Ministers for Foreign Affairs, not for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states. The ICJ referred to the fact that exposure to legal proceedings could deter the Minister from travelling.

18. As to the first reason relied on by the father, paragraph 51 of the *Arrest Warrant* case stated that:

> "... it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State Head of Government ... enjoy immunities from jurisdiction in other States, both civil and criminal."

19. The statement was repeated in *Djibouti v France* in the ICJ reports 2008. This dicta was an accurate statement of public international law. This is because Heads of Government do enjoy immunities from jurisdiction in other States in both civil and criminal matters, and Mr. Otty, in oral submissions, referred to the fact that a Head of Government has immunity from civil proceedings in relation to official acts.

20. In my judgment, this statement in the ICJ was an introductory remark, as is apparent from the way it was repeated in *Djibouti v France*. The *Arrest Warrant* case was concerned with criminal immunity and the inviolability of the Minister of Foreign Affairs. The wording in paragraph 51 of the judgment of the ICJ was a reference to the fact, which is established, that there are immunities. The ICJ did not say, and it would have been very surprising given the issues in the case if they had said, that there was immunity from civil jurisdiction for the private acts of the Head of Government.

21. As Mr. Otty emphasised in oral submissions, the last sentence of paragraph 51 makes this clear by saying that "for the purposes of this case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the court to consider". This means that reliance is being placed, in my judgment, on an oblique reference in the *Arrest Warrant* case and it is clear that this is not a way to develop principles of public international law and customary international law in national courts.

22. As to the second reason, I do not accept that the reference to diplomatic agents in paragraph 51 in the *Arrest Warrant* case can bear the weight placed on it by the appellants, even where, as Lord Pannick rightly emphasised, the ICJ had referred to an analogy with diplomatic agents. The need for a specific treaty to protect diplomats who may be located in an unfriendly state is well-known and derived from long-standing public international law practice. The ICJ held that the Vienna Convention on Diplomatic Relations 1961, provided useful guidance on certain aspects of immunity but did not define immunities enjoyed by Ministers for Foreign Affairs, still less in my judgment did it define the immunities enjoyed by Heads of Government. The ICJ did not equate Heads of Government with diplomatic agents for all purposes.

23. As to the third reason, I do not accept that it can be fairly said that the High Court failed to have regard to the fact the Heads of State have immunity. The High Court was well aware of this point, but there is no exact equivalence between a Head of Government and Head of State, no matter how logical a development that might be. It is fair to state that the same distinction is made in statute, in that the State Immunities Act which refers only to Heads of State. The court below specifically referred to Lord Millett's statement in this respect in *Pinochet* at paragraph 30.

24. As to the fourth reason, namely that the decision was inconsistent because the court had drawn an unprincipled distinction between the functional basis for immunity from civil jurisdiction and immunity from execution and inviolability, in my judgment, the

point is there is a distinction between Heads of State, Ministers for Foreign Affairs and Heads of Government. The High Court was entitled to explain what those distinctions might be. This really was another way of emphasising that the ICJ had, so far as the father was concerned, altered public international law in this respect. In my judgment, for the reasons given earlier, paragraph 51 had not had the effect contended for by the father.

25. As to the final reason, less emphasis was placed on that in the oral submissions before us but it was fully addressed in writing. I agree with the High Court that US State practice and the academic writing are not sufficient in my judgment to establish customary international law on this point. This is because, as the High Court rightly stated, there is a marked lack of consensus in this area. As Mr. Otty referred in oral submissions, there is, at most, evidence of some seven States adopting the practice relied on by the father and, in my judgment, this is a very long way short of the proof required.

26. For those reasons, in my judgment, the High Court was right to find that there was no immunity from civil jurisdiction for the private acts of the Head of Government and, moreover, there is no real prospect of success on the appeal. That, of course, is not the end of the matter, because permission to appeal can be granted if there is a compelling reason to hear the appeal and Lord Pannick did start this morning's submissions by referring to the compelling submission.

No compelling reason

27. In writing, the compelling reason for hearing the appeal was said to be that the appeal raises issues of principle of considerable importance with far-reaching implications for foreign relations around the world. It is said there is a strong public interest in the definitive resolution of this issue and that the court below has reached a conclusion which was inconsistent with that adopted in a number of other States, including the United States.

28. In oral submissions, Lord Pannick emphasised that whether the Head of Government enjoys immunity in respect of civil claims was a matter of importance, the High Court judgment would be cited around the world and on an international matter of such importance, it was important that the court should be fully addressed in relation to these matters. It was submitted that this, alone, was sufficient to grant permission.

29. In oral submissions, Mr. Otty noted that the case was about whether the father had discharged the burden of proof, but as Lord Pannick fairly pointed out, the High Court had made a decision on a point of law.

30. I do not accept that there is a compelling reason to hear this appeal. The legal position at least at this moment is, in my judgment, clear and there is no immunity for Heads of Government from civil proceedings in respect of private acts. I see force in the father's position that things might change, but I am also conscious of the warning from Lords Hoffmann in *Jones v Ministry of Interior* [2007] 1 AC 270 at paragraph 63 when he said:

> "It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however

> desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

31. Finally, I should say that the court has been treated to excellent written and oral submissions, succinct and focused on the issues involved. I am very grateful for those submissions, but a willingness, even a desire, to hear more of them is not a principled basis to grant permission to appeal. For all these reasons, I do not grant permission to appeal.

LORD JUSTICE MOYLAN: Thank you. I agree.

(For continuation proceedings: please see separate transcript)

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