Neutral Citation Number: [2021] EWHC 652 (Admin)

Case Nos: CO/1091/2020 AND CO/1856/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2021

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT

-and-

MRS JUSTICE McGOWAN

- -

Between :

BRIGADIER ANDIGE PRIYANKA INDUNIL FERNANDO	**Appellant**
- and -	
MAJURAN SATHANANTHAN	**Respondent**

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- -

Hugh Southey QC and Nick Wayne (instructed by **Ronald Fletcher Baker LLP**) for the **Appellant**
Peter Carter QC and Shanthi Sivakumaran (instructed by **Public Interest Law Centre**) for the **Respondent**

Hearing date: 2 December 2020

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Approved Judgment

Sir Julian Flaux Chancellor of the High Court and Mrs Justice McGowan:

1. This case raises the issue whether the actions of the appellant were carried out in "the exercise of his functions" as a member of the Sri Lankan mission in London, and, accordingly, whether he has continuing functional immunity from prosecution, after departure from the United Kingdom, by virtue of article 39(2) of the Vienna Convention on Diplomatic Relations ("VCDR").

2. We are extremely grateful to counsel for their helpful written and oral submissions. We also observe that we do not doubt the real concerns of the Private Prosecutor in initiating these proceedings.

Factual History

3. Brigadier Andige Priyanka Indunil Fernando, ("the appellant") was the Minister Counsellor for Defence at the Sri Lankan High Commission to the United Kingdom. He was a serving diplomatic agent and accordingly, whilst in post, had the protection of diplomatic immunity from prosecution.

4. On 4 February 2018 a protest was held outside the High Commission. One of the appellant's functions was to safeguard the High Commission and to monitor those protesting against the Sri Lankan government.

5. On that date he stood on the steps of the High Commission in full uniform and watched the demonstration. He was seen to draw his fingers across his neck in a "cut-throat" gesture on three occasions. The incident was filmed and there was no dispute that it had taken place. Further there is no dispute that he had diplomatic immunity on that date.

6. The incident was witnessed by Majuran Sathanathan, ("the respondent"). On 6 February 2018, an information was laid by the respondent at Westminster Magistrates Court. The information alleged offences against the appellant of using threatening or abusive words or behaviour, contrary to section 5 of the Public Order Act 1986; threatening unlawful violence contrary to section 4 of the Public Order Act 1986 and making threats to kill contrary to section 16 of the Offences against the Person Act 1861.

7. Cases which raise the issue of diplomatic immunity are designated as "Chief Magistrate's Business" and the court follows a particular procedure. At the time the information was laid the court was not told that there was, or may be, any issue of diplomatic immunity. The respondent was acting in person but had the assistance of a solicitor.

8. On 22 February 2018 a summons was issued in the usual manner. It required the appellant's attendance at Westminster Magistrates Court on 13 March 2018. On 21 January 2019 the appellant was convicted, in his absence. The appellant had in fact left the UK on 18 April 2018 and returned to Sri Lanka. On 15 March 2019, the conviction was set aside using powers under section 142 of the Magistrates Court Act 1980. The court had become aware of the issue of diplomatic immunity and reviewed the proceedings under its inherent powers. The Chief Magistrate set aside the conviction and ordered that the matter be re-heard and the issue of immunity be fully canvassed.

9. Proceedings recommenced and the issue of immunity was argued before the Chief Magistrate at a hearing 1 March 2019. On that date the Chief Magistrate ruled that the appellant was not entitled to diplomatic immunity as she found that the acts complained of did not form part of his "job description". Following further argument, at a hearing on 6 December 2019, she declined to set that finding aside and she found him guilty of the section 4 offence, the alternative section 5 offence was adjourned sine die.

Current Proceedings

10. The matter comes before this court as an appeal by case stated and a claim for judicial review. The court has joined the applications. The case stated was formulated by the Chief Magistrate in the form of a single question,

> *"Was I right to determine that the actions he performed, whilst he was a diplomat, were outside the functions of the mission and therefore not covered by residual immunity when the defendant faced trial?"*

11. The claim for judicial review arises out of the decision of the Chief Magistrate to answer the request to state a case in the form of that single question, rather than four separate answers to the four questions posed, as follows:

    a. Whether the Magistrates' Court had jurisdiction and/or should have dismissed the prosecution in circumstances in which the information was laid and the summons issued at a time when the Defendant remained a diplomat entitled to diplomatic immunity?

    b. Whether the Magistrates' Court erred by concluding that the acts alleged were not covered by diplomatic immunity in circumstances in which it appeared to have been found that the act in question occurred at a time when the Defendant was performing functions as a member of the mission?

    c. Whether the Magistrates' Court erred by relying on an implicit conclusion that the acts alleged were wrong or unacceptable when concluding that the acts alleged were not covered by diplomatic immunity?

    d. Whether the Magistrates' Court erred by appearing to find that the Defendant could perform functions as a member of mission and perform private acts at the same time?

12. The respondent submits that the Chief Magistrate was acting within her discretion to limit the case stated to the single question. The appellant's primary position is that all the issues which are required to be determined by this court are covered by the case stated. As Keene LJ said in *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199 (Admin) this court needs: "*clear findings of fact, and a clear identification of the issues of law which are said to arise,"*. The issues here are clear and the facts are relatively straightforward. Accordingly, we have determined the issues as set out in the single question in the case stated. In all the circumstances, it is not necessary to consider the claim for judicial review further.

13. Furthermore, we do not consider it necessary to deal with the issue as to jurisdiction upon which Mr Southey QC spent some time in oral argument, namely whether there

was jurisdiction to issue the summons on 22 February 2018 at a time when the appellant was still in the UK and thus had full diplomatic immunity. This is because ultimately, Mr Southey QC seemed to us to accept that the respondent could have legitimately sought to issue a fresh summons after the appellant left the jurisdiction, which is obviously correct.

14. In relation to the question posed in the case stated, it is for this court to consider whether the decision of the Chief Magistrate was "wrong in law" in her determination that the appellant did not have immunity from suit which continued after his departure from the UK: see section 111(1) of the Magistrates Court Act 1980.

Legal Framework

15. The Diplomatic Privileges Act 1964 gives effect to the VCDR. The VCDR is the consolidation of all the historical strands of diplomatic immunity, which have developed over time. It has been described as "a cornerstone of the modern international order", by Professor Denza in the leading textbook, *Diplomatic Law.*

16. Diplomatic immunity is immunity from suit. It does not determine whether an offence has been committed by an individual, rather it protects the holder from prosecution in the receiving state. Article 31 of the VCDR grants immunity to a diplomatic agent from the criminal jurisdiction of the receiving state.

17. In this case the issue concerns the doctrine of "residual immunity". The appellant, it is accepted, had immunity from suit whilst serving his country in their mission here, under the terms of articles 31 and 39(1). Whether that immunity continues after his departure from the UK depends on whether his conduct falls within the terms of article 39(2). Article 39 provides:

Article 39

> *1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceeding to take up his post or, if already in its territory, from the moment which his appointment is notified to the Ministry for Foreign Affairs or such other ministry as maybe agreed.*
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> *2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person* ***in the exercise of his functions as a member of the mission,*** *immunity shall continue to subsist.* (emphasis added)

18. Section 2(1) of the Diplomatic Privileges Act 1964 provides that the articles of the VCDR dealing with diplomatic immunity, which include article 39, "shall have the force of law in the United Kingdom".

19. The history and development of the protection from suit granted by diplomatic immunity is long established and was set out in the judgment of Lord Sumption in the Supreme Court in *Reyes v Al-Malki and another* [2017] UKSC 61; [2019] AC 735. At paragraph 12 of his judgment, he explained the over-arching importance of the principles:

> *"In the case of the Convention on Diplomatic Relations, there are particular reasons for adhering to these principles:*
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> *(1) Like other multilateral treaties, the text was the result of an intensely deliberative process in which the language of successive drafts was minutely reviewed and debated, and if necessary amended. The text is the only thing that all of the many states party to the Convention can be said to have agreed. The scope for inexactness of language is limited.*
>
> *(2) The Convention must, in order to work, be capable of applying uniformly to all states. The more loosely a multilateral treaty is interpreted, the greater the scope for damaging divergences between different states in its application. A domestic court should not therefore depart from the natural meaning of the Convention unless the departure plainly reflects the intentions of the other participating states, so that it can be assumed to be equally acceptable to them. As Lord Slynn observed in R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477, 509, an international treaty has only one meaning. The courts*
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> *"cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Convention."*
>
> *(3) Although the purpose of stating uniform rules governing diplomatic relations was "to ensure the efficient performance of the functions of diplomatic missions as representing states", this is relevant only to explain why the rules laid down in the Convention are as they are. The ambit of each immunity is defined by reference to criteria stated in the articles, which apply generally and to all state parties. The recital does not justify looking at each application of the rules to see whether on the facts of the particular case the recognition of the defendant's immunity would or would not impede the efficient performance of the diplomatic functions of the mission. Nor can the requirements of functional efficiency be considered simply in the light of conditions in the United Kingdom. The courts of the United Kingdom are*

independent and their procedures fair. It is difficult to envisage that exposure to civil claims would materially interfere with the efficient performance of diplomatic missions. But as the Secretary of State for Foreign and Commonwealth Affairs pointed out, the same cannot be assumed of every legal system in every state. The threat to the efficient performance of diplomatic functions arises at least as much from the risk of trumped up or baseless allegations and unsatisfactory tribunals as from justified ones subject to objective forensic appraisal. It may fairly be said that from the United Kingdom's point of view, a significant purpose of conferring diplomatic immunity of foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel enjoy corresponding immunities elsewhere.

(4) Every state party to the Convention is both a sending and receiving state. The efficacy of the Convention depends, even more than most treaties do, on its reciprocal operation. Article 47.2 of the Convention authorises any receiving state to restrict the application of a provision to the diplomatic agents of a sending state if that state gives a restrictive application of that provision as applied to the receiving state's own mission. In some jurisdictions, such as the United States, the recognition of diplomatic immunities is dependent as a matter of national law on their reciprocity. As Professor Denza observes, op cit, 2 -

> *"For the most part, failure to accord privileges or immunities to diplomatic missions or their members is immediately apparent and is likely to be met by appropriate countermeasures"*

> *In the graphic words of her introduction to the Vienna Convention on the United Nations law website, a state's "own representatives abroad are in a sense hostages who may on a basis of reciprocity suffer if it violates the rules of diplomatic immunity"."*

20. The protection of residual immunity conferred by Article 39(2) depends on whether the actions of the defendant were performed in "the exercise of his functions as a member of the mission". The interpretation of that term is governed by article 31(1) of the Vienna Convention on the Law of Treaties 1969 which provides: *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*. Lord Sumption makes the approach to interpretation under that article clear at paragraph 11 of his judgment,

> *"The principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as*

> *the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions."*

21. Although it was a case dealing with state immunity, the implications and effect of article 39(2) were central to the consideration of the House of Lords in *R v Bow Street Magistrates, ex parte Pinochet (No 3)* [2000] 1 AC 147. Lord Browne-Wilkinson stated at page 202:

> *"The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed ratione personae while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person. However in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is necessary to provide that immunity is afforded to his official acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador's time. Accordingly under article 39(2) the ambassador, like any other official of the state, enjoys immunity in relation to his official acts done while he was an official. This limited immunity, ratione materiae, is to be contrasted with the former immunity ratione personae which gave complete immunity to all activities whether public or private."*

22. Dealing with the question of state immunity as it arose in the Divisional Court, Lord Bingham CJ said, *"a former head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. One cannot therefore hold that any deviation from good democratic practice is outside the pale of immunity."*

Submissions

23. We deal with the submissions on the case stated as the principal ground of contention in this case. In his primary submission Mr Southey QC, on behalf of the appellant, submits that the residual immunity, which he argues protects the appellant from prosecution is, in reality, that of the sending state and not of the individual. He relies on *Zoernsch v Waldock and another* [1964] 1 WLR 675 in support of that proposition. He submits that the reasoning of the Chief Magistrate in the case stated that she was entitled to distinguish *Zoernsch* by virtue of section 16(4) of the State Immunity Act 1978 is flawed. He submits that the Chief Magistrate was wrong to conclude that section 16(4) would mean that Sri Lanka would not be immune from prosecution for a criminal offence committed in this jurisdiction.

24. He argues that the appellant was performing his official functions in monitoring the demonstrations outside the High Commission. It was whilst performing those functions that he committed the unlawful acts and therefore the unlawful acts were committed in the course of exercising his official functions. The criminal acts overlay or piggy-back

upon the legitimate function and therefore are committed in the course of performing that function.

25. Mr Carter QC submits in response that the Chief Magistrate was correct to say that the description of his role did not include an instruction to behave in the way described, further that the sending state positively instructed him to be of good behaviour, so that any criminal act must be outside his prescribed role and could not therefore attract residual immunity as it could never have been carried out in the exercise of his official functions.

26. He argues that a diplomatic agent can step outside the official functions of his office, as in the case of a police officer performing his role qua officer but stealing in the course of a legitimate search. He submits that is what the appellant did in this case in order to commit the crime of which he is accused. He argues that it is not an overlay on an official function, rather it would be the individual switching between the two, one is the persona performing his official function, the other is a distinct and separate persona committing a criminal act. He submits that the Chief Magistrate was correct to find that the threatening gestures were not part of his official function and therefore the immunity which attached to his role ceased to protect him when he left the UK.

Analysis

27. To adopt the phrase of Lord Bingham in Pinochet and apply it to this case, if this was a criminal act, was it performed in the course of exercising a public function?

28. The doctrine of diplomatic immunity affords protection to all diplomatic staff in the UK in exchange for the equivalent protection afforded to our diplomatic staff abroad. The grant of immunity does not depend on ministerial fiat, rather it exists by virtue of statute and the VCDR. The receiving state can request the home state to waive privilege in certain cases, but that has not happened here.

29. There is no issue that the facts complained of could amount to the commission of an offence contrary to section 4 of the Public Order Act 1980, nor that the Chief Magistrate was wrong to find the elements of the offence made out on the evidence. The issue is not whether the appellant committed the offence but whether, by virtue of residual immunity, he was protected from prosecution for the offence.

30. The interpretation of the treaty should not be an exercise in ‘pedantic literalism’. It should be read in the context of its ‘object and purpose’.

31. In *Al-Malki* the issue was whether the **activities** complained of fell under article 31(1)(c) and whether immunity from the civil jurisdiction existed in respect of professional or commercial activities exercised outside the official functions of a diplomatic agent. The case concerned the activities of the diplomatic agent as an employer of domestic staff. The crucial question was whether his activities as an employer were within or without a protected person’s functions as a member of the mission. As Lord Sumption, observed that the distinction is fundamental. What is done by a diplomat in the course of his official functions, is done on behalf of the sending state.

> *"By comparison, the acts which an agent of a diplomatic mission does in a personal or non-official capacity are not acts of the state which employs him. They are acts in respect of which any immunity conferred on him can be justified only on the practical ground that his exposure to civil or criminal proceedings in the receiving state, irrespective of the justice of the underlying allegation, is liable to impede the functions of the mission to which he is attached."*

32. In the instant case the issue is whether the **act** complained of was performed at a time when the appellant was performing his functions as a member of the mission. If it was within his official functions the immunity from suit granted to him by articles 31 and 39(1) and existing at the time of the act continues and offers him residual immunity, notwithstanding his having left the UK.

33. At the time in question the appellant was in his uniform standing on the threshold of the High Commission monitoring the protest taking place outside the mission. It is common ground that monitoring such demonstrations was part of his official functions. We accept that he committed the act complained of, namely that he carried out threatening behaviour by drawing his fingers across his neck in a "cut-throat" gesture. Further, we accept that the Chief Magistrate was entitled to find that those who witnessed the action were threatened by such behaviour.

34. The Chief Magistrate found that "the crucial question for this court was whether what is said to have happened on 4th February 2018 was an act in the exercise of the Brigadier's functions in his mission." She continued.

> *"I turn to the Job Description of Brigadier Fernando. It contains a number of provisions of which the relevant ones are points 1, 2 and 9: the Brigadier has to monitor anti-Sri Lankan activities in the United Kingdom and report them, monitor activities of the LTTE and prepare strategies to safeguard the High Commission.*
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> *9. The defence contends that the Brigadier's actions were within his duties to monitor any anti Sri Lankan or LTTE activities and report to them to the Sri Lankan High Commission and to prepare appropriate strategies to safeguard the High Commission premises. Mr Carter's submissions were that the relevant act of making a cut-throat gesture is not within the functions of the mission or indeed within the Brigadier's job description.*
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> *10. I noted that the Brigadier was expected to strictly adhere to the personal behaviour (sic) and professional standards of the High Commission.*
>
> *14. I find it was not part of Brigadier Fernando's job description to make the alleged cut-throat gestures on the three occasions, it could not be any part of the mission's function and therefore the Minister Counsellor's behaviour is not given immunity by Article 39(2) of the Vienna Convention. The Brigadier cannot call on the residual immunity that he would have been able to had the acts been performed in the exercise of his functions."*

35. We do not find the question of whether the unlawful acts were included in the job description of his role to be of great assistance. It will be rare, if it ever happens, that the job description of a diplomatic agent would expressly include instructions to commit criminal acts. Even if an agent had been instructed to carry out acts amounting to espionage in a receiving state it would not be usual to find such instructions overtly expressed. We do not therefore find the listing of acts within such a job description to be determinative. We approach the question from the premise that the government of Sri Lanka would not have commissioned or condoned such behaviour.

36. If the exclusion from the description of the role was determinative then it seems to us that there would be few, if any, cases, in which residual immunity was of any effect. In his submissions Mr Carter QC for the respondent conceded that would be a likely consequence of such a finding. It would mean that, for there to be the protection of residual immunity from suit, the instruction to commit the unlawful act would have to be, at least, implicit in the description of the role or list of tasks provided by the sending state. Applying the mirror of reciprocal protection it is not difficult to see how that would have an invidious effect on British diplomatic agents who, without instructions to commit an unlawful act, would on this analysis have no protection from suit after their term of office had concluded.

37. As Lord Browne-Wilkinson observed in Pinochet at page 203:

> *"It is not enough to say that it cannot be part of the functions of a head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae (functional immunity)".*

38. In our judgment, that reasoning is as applicable to a diplomatic agent as it is to a head of state. The appellant was in uniform, on the steps of the High Commission monitoring a demonstration in accordance with his duties. That much of his activities were unquestionably part of his official function. Does the act of making the threatening gesture take him not simply outside his diplomatic role but away from it? To pursue Mr Carter's analogy, does the commission of the additional unlawful act stop the underlying activity from being that of a member of the mission performing his official function? We are very firmly of the view that that question should be answered in the negative. The contrary conclusion would, for the reasons we have given, severely limit the scope of residual immunity in a manner which we do not consider was intended by the VCDR.

39. In considering whether a person has residual immunity under Article 39(2), the cases draw a distinction in effect between acts performed *qua* diplomat and acts performed in a personal capacity: see per Lord Sumption in *Al-Malki* at paragraph 20 and the English and US authorities cited there. We consider that the acts in question in the present case were ones which were performed by the appellant in the exercise of his functions as a member of the mission and thus *qua* diplomat. They did not somehow lose that quality and become acts performed in a personal capacity merely because they were criminal. They remained acts performed by the appellant in the exercise of his functions as a member of the mission despite their criminality.

40. It follows that the answer to the single question posed by the case stated as set out in paragraph 10 above is that the Chief Magistrate was not right to determine that the actions the appellant performed, whilst he was a diplomat, were outside the functions of the mission and therefore not covered by residual immunity when the defendant faced trial. This appeal must be allowed.