

Human Trafficking and the “Commercial Activity” exceptions to International Immunities

Introduction

Two decisions on both sides of the Atlantic this year have brought the issue of human trafficking vis-à-vis jurisdictional immunity to the fore. On July 6, 2022, the Supreme Court of the United Kingdom rendered a groundbreaking judgment in *Basfar v. Wong*¹ regarding the “commercial activity” exception to diplomatic immunity under the Vienna Convention on Diplomatic Relations (VCDR).² On March 29, 2022, the U.S. Court of Appeals for the District of Columbia Circuit issued its own judgment in *Rodriguez v. Pan American Health Organization (PAHO)*³ on the “commercial activity” exception under the Foreign Sovereign Immunities Act (FSIA).⁴ These decisions involving alleged human trafficking expanded the scope of the “commercial activity” exception under the respective applicable legal instruments. This *Insight* addresses how these cases determined the scope of the jurisdictional immunity of diplomats and international organizations under the respective “commercial activity” exception, as well as any implications for international law development.

Background

International immunities include those of diplomats, states, and international organizations, which all serve important and different purposes. Diplomatic immunity was codified by the VCDR in 1961, which has been ratified by 191 states. Under the VCDR, a diplomat is immune from the jurisdiction of the courts of the receiving state in criminal matters, as well as in civil and administrative matters with three enumerated exceptions.⁵ State immunity renders a foreign state immune from the jurisdiction of a forum state. states, like the U.S. and the UK, have enacted national legislation to codify the restrictive

doctrine of state immunity, the central tenet of which is that states are not immune for their “commercial activity.” The U.S. enacted the FSIA in 1976, and the UK followed suit with the State Immunity Act (SIA) in 1978.

International organizations derive their immunity mostly from multilateral treaties by their member states, as well as from national legislation such as the International Organizations Immunities Act (IOIA)⁶ in the U.S. In 2019, the U.S. Supreme Court held in *Jam v. International Finance Corporation*⁷ that the IOIA grants international organizations the “same immunity” from suit “as is enjoyed by foreign governments” which means today that the FSIA governs the immunity of international organizations under the IOIA.

Human trafficking, which is considered a form of modern slavery, is repugnant as evidenced by both international and national instruments to combat it. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) which has been ratified by 178 states, including the U.S. and UK, defines human trafficking and requires state parties to criminalize trafficking and to ensure that their legal systems afford victims the possibility of compensation. The Trafficking Victims Protection Act (TVPA) was enacted by the U.S. in 2000 to prevent human trafficking, and protect victims and survivors of trafficking. The UK enacted the Modern Slavery Act in 2015 to protect human trafficking victims.

Basfar v. Wong

In *Basfar v. Wong*, the domestic servant alleged that she was a victim of human trafficking and was forced to work for the diplomat in circumstances of modern slavery in the UK. She brought a claim against the diplomat in an employment tribunal for wages and breaches of employment rights. The diplomat applied to have the claim dismissed on the grounds of diplomatic immunity, but the tribunal declined to dismiss the claim. The diplomat appealed, and the case was “leapfrogged” to the Supreme Court, where the issue was whether the alleged exploitation of the domestic servant fell within the commercial activity exception under Article 31(1)(c) of the VCDR which provides pertinently that a diplomat shall enjoy immunity from a host country’s civil and administrative jurisdiction, “except in the case of ... an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.” By a 3-2 majority, the Supreme Court decided that the diplomat was not immune because the exception applied to the claim.

Basfar was presaged by the 2017 *Reyes v. Al-Malki*⁸ case, where the Supreme Court also considered whether alleged human trafficking came under the commercial activity

exception under Article 31(1)(c) of the VCDR. The Court unanimously held that the diplomat who had left his post in the UK does not have residual immunity under Article 39(2) of the VCDR but was split on whether the employment of the domestic servant under conditions of human trafficking amounted to commercial activity. *Reyes* was noteworthy for the disquisition by Lord Sumption on VCDR. He opined that “the employment of a domestic servant to provide purely personal services” does not fall under the exception including when the employment had come about through human trafficking. He noted that “the implications of human trafficking for the scope of diplomatic immunity have been considered ... by the federal courts of the United States” which have rejected the argument that the participation of a diplomat in human trafficking constituted commercial activity. He stated that “the mere employment of a domestic servant on exploitative terms is not a commercial activity, and the fact that it is unlawful, contrary to international policy and morally repugnant cannot make it into one.”⁹ Lady Hale, Lord Clarke, and Lord Wilson, however, expressed doubts about Lord Sumption’s construction of Article 31(1)(c) “especially in light of what we would regard as desirable developments in this area of the law.”¹⁰

Returning to *Basfar*, Lord Briggs and Lord Leggatt (with whom Lord Stephens agreed) noted “that the exception to diplomatic immunity created by article 31(1)(c) is not based on whether the relevant activity is contrary to international law or violates human rights. The sole question is whether the activity is ‘professional or commercial.’” In that regard, they departed from Lord Sumption’s opinion in *Reyes* on the meaning of commercial activity and stated that they cannot agree with his views that the meaning of “commercial activity” is limited to “carrying on a business” or “setting up shop.” According to them, “personal profit is an element of what may make a particular activity commercial,” and on the facts of the case, the diplomat made substantial financial gain from his exploitation of the labor of the domestic servant. Lord Hamblen and Lady Rose (in dissent) disagreed with the majority’s “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 ‘commercial activity’ exercised by her employer into such an activity falling with the exception.” They, instead, agreed with Lord Sumption’s conclusions in *Reyes*.

Rodriguez v. PAHO

A group of Cuban doctors sued PAHO in the U.S. for its role in facilitating a medical program under which they were sent to Brazil on a medical mission allegedly without their consent and in violation of TVPA. PAHO invoked its immunity under the IOIA. The district court broke down the alleged violation of the TVPA into three separate claims: (1) 18 U.S.C. § 1589(a) obtaining and providing human labor through intimidation; (2) 18 U.S.C.

§ 1589(b) benefitting financially from human trafficking; (3) 18 U.S.C. § 1590 trafficking the doctors. The district court upheld PAHO's immunity with respect to the first and third claims because they were based upon forced labor or human trafficking which it determined not to be commercial activity but rejected the immunity regarding the second claim because the commercial activity exception under the FSIA applied. The Court of Appeals upheld the judgment and noted that PAHO played the role of financial intermediary for a fee which constituted financial benefits in violation of § 1589(b). It discounted PAHO's argument that the gravamen of the suit is the alleged human trafficking that occurred outside the U.S., not the financial intermediation, and concluded that the financial activity is the wrongful conduct that violated § 1589(b) and that it occurred in the U.S.

Observations and Conclusion

There is no denying that human trafficking is an abhorrent practice, but what is debatable is whether it constitutes commercial activity for purposes of applying an exception to jurisdictional immunity. In *Basfar*, while the court agreed that the ordinary employment of a domestic servant by a diplomat does not constitute commercial activity under Article 31(1)(c) of the VCDR, it disagreed on whether the employment of a domestic servant under the conditions of modern slavery transforms the employment into a commercial activity. The dissent disagreed with the majority that how a person came to be employed and the conditions of the employment can convert what might otherwise appear to be an ordinary employment into a commercial activity that falls under the exception.

Basfar noted:

the fact that an activity is illegal under international law or violates human rights does not make it a 'commercial activity.' Nor do we suggest that the adoption of international measures during the last 60 years to combat human trafficking and other forms of modern slavery and to secure rights of compensation for victims has somehow caused such activities to become 'commercial activities.'¹¹

The dissent agreed with the majority that the concept of commercial activity is ambulatory so as to encompass forms of activities that did not exist when the VCDR was signed in 1961 but disagreed that the meaning of commercial activity has changed over time to encompass human trafficking. However, it also agreed "with Lord Sumption's conclusion in *Reyes* that there is nothing either in the Palermo Protocol or in the other international treaties, or in state practice or in academic writings to support the proposition that the

meaning of ‘commercial activity’ has changed since 1961 so that it now encompasses trafficked employment.”¹²

Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)¹³ requires the interpretation of a treaty provision to take into account any relevant rules of international law applicable in the relations between the parties. The VCDR must mean the same thing to all parties to the Convention. The interpretation of Article 31(1)(c) of VCDR by the UK Supreme Court in *Basfar* appears to be a departure from the interpretation of that provision in other countries. In *Tabion v. Mufti*,¹⁴ cited in both *Reyes* and *Basfar*, the Court of Appeals for the Fourth Circuit in the U.S. had held that the commercial activity exception did not apply where the domestic servant had been exploited. *Basfar* is groundbreaking, but it remains to be seen whether the courts of other state parties will follow the expansion of the meaning of commercial activity adopted by it.

Since *Jam* in 2019, lower courts in the U.S. have been grappling with the application of the commercial activity exception of the FSIA to international organizations. In *Jam*, the Supreme Court noted that “it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA.” The problem is that it is also not clear whether several other activities carried out by international organizations under their mandates qualify as commercial activity under the FSIA. In *Rodriguez*, the U.S. filed an amicus in support of neither party and argued that “an international organization’s receipt of program support costs paid by a member state to cover costs associated with the organization’s implementation of a national or multinational public program is public rather than commercial in nature and so does not come within the commercial activity exception.”¹⁵ The Court focused on PAHO’s activity of financial intermediation, not the alleged human trafficking, for its determination of the application of the commercial activity exception. Considering the difficulty of applying the FSIA to international organizations and that there is no indication that Congress, when it enacted the FSIA, intended for it to apply to international organizations, Congress should amend the IOIA to clearly delineate the scope of jurisdictional immunity of international organizations under the statute.

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¹ *Basfar v. Wong*, [2022] UKSC 20.

² Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, 23 U.S.T. 3227 (1961).

³ *Rodriguez v. Pan Am. Health Org.*, 29 F.4th 706 (D.C. Cir. 2022).

⁴ Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611.

⁵ Article 31(1) of VCDR provides that a diplomat shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

⁶ International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.*

⁷ *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019).

⁸ *Reyes v. Al-Malki*, [2017] UKSC 61.

⁹ *Id. Reyes*, ¶ 45.

¹⁰ *Id.* ¶ 69.

¹¹ *Basfar*, *supra* note 1, ¶ 71.

¹² *Id.* ¶ 152.

¹³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S 331 (1969).

¹⁴ *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996).

¹⁵ USCA Case #20-7114, Document #1902340, pp.26-7, Filed: 06/14/2021