Act of state

Habib v Commonwealth of Australia [2010] FCAFC 12

In *Habib* the full court of the Federal Court considered the applicability and scope of the act of state doctrine in Australian civil law. The Commonwealth's reliance on the doctrine in opposition to the justiciability of Mr Habib's claims gave rise to questions concerning the operation of the doctrine on the exercise of federal jurisdiction and its application to cases involving serious breaches of human rights.

The claim

Mr Habib's allegations against military and intelligence agents of Australia, the United States, Pakistan and Egypt are reasonably well known. In essence, Mr Habib alleges that following the events of 11 September 2001 and immediately prior to the outbreak of the war in Afghanistan, he was captured and detained in Pakistan and rendered, first to Egypt, then to Afghanistan (at the time under United States control) and finally to Guantánamo Bay. While in the custody of government officials of each of those countries, Mr Habib says that he was subjected to torture.

Mr Habib also alleges that officials of various Australian departments were implicated in his mistreatment and sought his continued detention. His claim in the Federal Court[1] seeks damages for the torts of misfeasance in public office and the intentional infliction of harm, arising from Commonwealth officers having aided, abetted and counselled officers of the foreign governments to inflict torture on him.

Mr Habib alleges that the conduct of the foreign agents constituted acts of torture contrary to various Australian criminal statutes[2] giving effect to Australia's obligations under international conventions against torture and the treatment of prisoners of war (the Torture and Geneva Conventions[3]). Each of the foreign states are parties to the conventions. Mr Habib says that, by aiding, abetting or counselling these offences, the Commonwealth officers committed the same offences as accessories, and acted in excess of power and so as to cause him harm.

The Commonwealth's objection

The Commonwealth contended that the claim was not justiciable in the Federal Court because it was precluded by the act of state doctrine, which prevents the court from examining the legality of acts performed in the exercise of foreign sovereign authority, based on principles of separation of judicial and executive power and international comity.[4] Because Mr Habib's claims involved determination of whether foreign officials committed acts of torture in the exercise of their public functions, the doctrine was engaged.

Mr Habib briefs the media. Photo: Newspix

Mr Habib contended that, while the act of state doctrine is part of Australian law, it is not engaged where the claim concerns the acts of a foreign state in grave violation of human rights and international law.[5]

Public policy exception

Jagot J (with whom Black CJ agreed) held that the act of state doctrine did not operate to exclude examination by the court of clearly established principles of public international law (at [116]). Her Honour considered the United States and United Kingdom authorities,[6] and concluded that none supported the

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proposition that the doctrine should apply regardless of the nature of the foreign state acts to be adjudicated. In fact, United Kingdom law accepted the existence of a public policy exception to the doctrine.

The question for the court could be described as whether the doctrine should be excluded in circumstances that would (if the claim was justiciable) permit the court to exclude an applicable foreign law on the grounds that it offended public policy. In that context, the court considered cases where the implications for international comity were somewhat simpler than in the present case.[7]

In *Oppenheimer* and *Kuwait Airways*, the expropriations were committed by states with which the nation of the forum court was at war at the relevant time, and where the actions of the foreign states were roundly condemned by the international community. The Commonwealth submitted that the present case was different, involving as it did the conduct of Australia's allies.

Jagot J rejected this contention for a number of reasons. First, the analogous doctrine of sovereign immunity (which would have been available had the foreign agents been parties to the proceedings) did not require the application of the doctrine to a claim against officers of the Commonwealth in this country (at [113]).

Second, any sensitivities that may arise from Australia's relationship with the United States should be weighed against the fact that the claim involved an Australian court determining the conduct of its own officials in contravention of rules of international law and human rights embodied in the Torture and Geneva Conventions (to which the foreign states had acceded) and of such a degree of international acceptance that they may be considered non-derogable peremptory norms (at [108], [115]).

Third, there was no justification for distinguishing the alleged conduct in this case (which is strongly disputed by the Commonwealth) from those in other cases in which the conduct of the foreign state was notorious. The conduct at issue represented (if proved) a clear violation of international law and Australian criminal laws, and there was no question of a lack of judicially acceptable standards by which the issues could be determined.[8]

The Act of State Doctrine and federal jurisdiction

The court also considered whether the Commonwealth's invocation of the act of state doctrine in this case was inconsistent with Chapter III of the Constitution. The Commonwealth asserted that, not only were the claims non-justiciable under the common law, but they gave rise to no 'matter' within the jurisdiction of the court pursuant to ss 39B and 44(3) of the *Judiciary Act 1903* (Cth) and s 77(i) of the Constitution.

Perram J considered that this consideration overrode any need to examine the exceptions to the doctrine. The obligation of a court exercising federal jurisdiction to ensure that officers of the Commonwealth act within their lawful authority (as embodied in ss 75(iii) and 75(v)) excluded any principle of the common law that purported to limit such an inquiry.

Mr Habib's claim involved allegations that officers of the Commonwealth had acted in contravention of Australian criminal law and therefore in excess of their lawful powers as conferred by s 61 of the Constitution. Those claims were necessarily justiciable by a federal court notwithstanding that the proceedings concerned a civil law claim. There was no basis for an assertion that, by acceding to the Torture and Geneva Conventions and enacting consequent criminal legislation, the Commonwealth did not impliedly exclude the act of state doctrine in respect of civil actions (at [36], see also [129] per Jagot J).

Jagot J agreed and added that, by enacting criminal legislation implementing the Geneva and Torture Conventions, applicable regardless of where the impugned conduct occurred and by whom, parliament can be taken to have intended that issues of this nature should be judicially determined (at [123]). There was no basis for preventing judicial examination of the conduct of Australian officials alleged to have been involved in serious breaches of internationally protected human rights and Australian criminal law, and against an Australian citizen (at [131]).

Conclusions

Habib was in some respects an easy case. While the case involves determination of the legitimacy of acts of United States officials, a country with which, for better or worse, Australia enjoys a close relationship, the involvement of Australian officials gave rise to a constitutional question about which there can be little debate. Questions of when a forum court may comfortably refuse to apply the doctrine were thus deftly avoided.

Mr Habib's claim also concerned breaches of human rights so offensive that they are elevated to peremptory norms of public international law. It may not be as easy to ascertain the limits of the public policy exception in cases where the state acts may be reprehensible in Australia, but acceptable by legal and cultural standards in other countries. Issues of international

comity may acquire greater significance in these cases.

Lastly, the court's conclusions in *Habib* rendered it unnecessary to consider the basis and scope of the doctrine. In his reasons, Perram J devoted lengthy consideration to whether the doctrine is properly characterised as a choice of law rule concerned with the validity of state acts, or a rule of deference or abstention according to which the forum treats cases lacking any judicial or manageable standards by which to determine the issues as non-justiciable. His Honour considered the latter characterisation to preclude the existence of a public policy exception (at [43]).

It may be appropriate that the doctrine be confined on this basis: when it is recognised that the act of state doctrine effectively operates only in cases where the foreign state is not a party (because of sovereign immunity), it may be an ideal approach to reserve the application of the doctrine to cases in which the forum court is unable to determine the matter according to manageable judicial standards.[9] The narrower basis of the doctrine would remove the necessity in most cases to consider the messy question of public policy.

By Catherine Gleeson

Endnotes

1. Originally commenced in the High Court of Australia but remitted to the Federal Court pursuant to section 422 (2A) of the *Judiciary Act 1903* (Cth).
2. The *Crimes (Torture) Act 1988* (Cth) ss 3(1), 6(1), the *Geneva Conventions Act 1957* (Cth) ss 7(2)(c), the *Criminal Code Act 1995* (Cth) ss 268.26(1) and 268.74(1).
3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977.
4. *R v Bow Street Stipendiary Magistrate; Ex Parte Pinoche Ugarte* [2000] 1 AC 61 at 106; see also *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479 at 495, 506-7 and 511; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Limited* (1988) 165 CLR 30 at 40-41; *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354.
5. An argument was also raised that the acts of the US agents did not come within the territorial scope of the doctrine because they took place outside of the territory of that country. In the event it was not necessary to determine this issue.
6. *Banco Nacional de Cuba v Sabbatino* [1964] USSC 48; 376 US 398 (1964); *W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International* [1990] USSC 11; 493 US 400 (1989) *Doe I v Unocal Corp* [2002] USCA9 708; 395 F. 3d 932 (9th Cir. 2002); *Sarei v Rio Tinto PLC* 456 F.3d 1069 (9th Cir. 2006), *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883; *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270.
7. *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249; *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883.
8. At [110] cf *Buttes Gas and Oil Co v Hammer* [1982] AC 888 at 938.
9. That is, when the matter involves true political issues between states not suitable for judicial determination.

Verbatim

Aktas v Westpac Banking Corporation Limited [2009] HCATrans 326 (11 December 2009)

Hayne J: The point therefore comes, Mr Sackar, is there anything that would make this an inappropriate vehicle to determine the question if the question is alive and otherwise of general importance?

Mr Sackar: Well, no, I could not candidly say there would be anything in that way except to say the bleeding obvious, namely, that the Court of Appeal, in our view, was right. They are our submissions.

French CJ: Thank you, Mr Sackar. There will be a grant of special leave in this matter.

Where are the court books?

Counsel: I am instructed your Honour that the court books were in fact filed in the registry on level 5 marked to the attention of your Honour's associate. We have not been able to ascertain what has happened to the court books but will continue to make enquiries.

Justice Hammerschlag: When I am told that something was filed in the Registry, evidence of its absence on the court file is proof positive that it was filed.'