KERAJAAN MALAYSIA

v.

LFL SDN BHD & ANOTHER APPEAL

Federal Court, Putrajaya
Abang Iskandar Abang Hashim PCA, Nallini Pathmanathan, Zabariah Mohd Yusof, Rhodzariah Bujang, Hanipah Farikullah FCJJ
[Civil Appeal Nos: 01(i)-17-05-2023(W) & 01(i)-16-05-2023(W)]
27 November 2024

Civil Procedure: *Striking out — Originating summons — Striking out respondent's originating summons on grounds they were scandalous, vexatious, frivolous and otherwise abuse of process of court — Sovereign or state immunity and extraterritoriality under international law — Application of sovereign immunity to Singapore Home Affairs Minister in his exercise of governmental function — Extraterritorial effect that Protection from Online Falsehoods and Manipulation Act 2019 had in relation to Malaysian citizen in light of art 10 Federal Constitution*

International Law: *Sovereign immunity — Singapore issued correction direction to respondent under s 11 Protection from Online Falsehoods and Manipulation Act 2019 in relation to statement published by respondent — Whether exercise of governmental function by Singapore Home Affairs Minister could be adjudicated by Malaysian Courts*

These appeals concerned the concepts of sovereign or state immunity and extraterritoriality under international law. On 16 January 2020, the respondent published a press statement on its website alleging that the method of execution of the death penalty in Singapore was unlawful and brutal ('LFL Press Statement'). As a result, the Government of Singapore directed the issuance of a correction direction to the respondent under s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 ('POFMA'). The respondent did not comply with the correction direction and, instead proceeded to file two Originating Summonses ("OS") in the High Court, ie OS 46 against the Government of Malaysia and OS 51 against the Singapore Home Affairs Minister. Vide an order dated 23 December 2020, the Attorney General of Malaysia ("AGM") was granted leave to intervene in OS 51. The Government of Malaysia, as the defendant in OS 46, and the AGM, as the intervener in OS 51, applied to strike out the respondent's OS on the grounds that they were scandalous, vexatious, frivolous and otherwise an abuse of the process of Court. The High Court allowed their applications. The respondent appealed to the Court of Appeal, which allowed both the respondent's appeals. Hence, the present appeals; Appeal No 16 was by the AGM while Appeal No 17 was by the Government of Malaysia. There were two primary issues herein that required consideration: (a) the application of

sovereign immunity to the Singapore Home Affairs Minister in his exercise of a governmental function; and (b) the extraterritorial effect the POFMA had in relation to a Malaysian citizen in light of art 10 of the Federal Constitution ('Constitution').

Held (allowing Appeal No 16 and dismissing Appeal No 17):

(1) In the instant appeals, the sovereign status of the Singapore Home Affairs Minister could be evinced from a certificate issued and produced by the Government of Malaysia. It was evident that the issuance of the said certificate amounted to conclusive evidence of a foreign state's sovereign status, which meant that a foreign state, a head of state, or a head of Government acting in an official capacity would enjoy immunity from the jurisdiction of the local courts. Accordingly, no proceedings could be instituted against them by any party (subject to the waiver of immunity and other exceptions). In this case, it was clear that the relevant acts complained of were public acts of a sovereign state in relation to its Governmental function. In other words, the Singapore Home Affairs Minister was acting in his official capacity when committing the conduct complained of and, thus, there could be no dispute that this attracted state immunity. The exceptions under the restricted immunity regime largely encompassed commercial, employment and other such exceptions. However, those exceptions were plainly inapplicable here. To that extent, this Court was unable to exercise any adjudicative jurisdiction over the acts of a sovereign nation which included the act of the Home Affairs Minister of Singapore. Appeal No 16 pivoted on these aspects of state or sovereign immunity and, therefore, ought not to be the subject matter of adjudication by the Malaysian Courts. The Court of Appeal erred in failing to address the existence of the certificate certifying Singapore as a sovereign state and in failing to treat state immunity as a threshold issue. Insofar as Appeal No 16 and OS 51 were concerned, it was not open to the Malaysian Courts to examine the merits of the suit. In the result, Appeal No 16 was allowed and the OS was struck out. (paras 37-40)

(2) While there was no absolute prohibition on states extending the reach of their local laws beyond the borders of their territory, an extraterritorial expansion of a state's prescriptive jurisdiction must first be predicated upon a recognised basis in international law. This in turn involved consideration of whether there was an obviously substantial link with the state seeking to enact laws with extraterritorial effects. It was clear, therefore, that the question of whether Singapore possessed the necessary jurisdiction to prescribe in this instance involved an evaluation of multiple factors, such that this issue could not be decided summarily for the purposes of striking out. In light of the above, Appeal No 17 was unanimously dismissed. (paras 56, 58 & 59)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 1 MLRA 611 (refd)

Benkharbouche (Respondent) v. Secretary Of State For Foreign And Commonwealth Affairs (Appellant) And Secretary Of State For Foreign And Commonwealth Affairs And Libya (Appellants) v. Janah (Respondent) [2017] UKSC 62 (refd)

Benkharbouche v. Embassy Of The Republic Of Sudan [2019] AC 777 (refd)

Cassirer v. Kingdom Of Spain, 616 F 3d 1019 (2010) (refd)

Cohen v. Beneficial Industrial Loan Corp, 337 US 541 (1949) (refd)

Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor [1990] 1 MLRA 364 (refd)

Democratic Republic Of The Congo v. Belgium [2002] ICJ Rep 25 (refd)

Deutsche Bank AG London Branch v. Receivers Appointed By The Court [2021] UKSC 57 (refd)

Hape v. R [2007] SCC 26; 22 BHRC 585 (refd)

Jurisdictional Immunities Of The State (Germany v. Italy: Greece Intervening) [2012] ICJ Rep 99 (refd)

McElhinney v. Ireland [2001] 34 EHRR 323; [2001] 12 BHRC 114 (refd)

NYSA-ILA Pension Trust Fund Ex Rel Bowers v. Garuda Indonesia, 7 F 3d 35, 39 (2d Cir 1993) (refd)

R v. Gul (Mohammed) [2014] AC 1260 (refd)

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 2 MLRA 263 (refd)

SS Lotus (France v. Turkey) [1927] PCIJ Series A, No 10 (refd)

Subramaniam Letchimanan v. The United States Of America And Another Appeal [2021] 4 MLRA 153 (refd)

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLRA 1 (refd)

The United States Of America v. Menteri Sumber Manusia & Ors And Another Appeal [2022] 5 MLRA 134 (refd)

Trendtex Trading Corp v. Central Bank of Nigeria [1977] QB 529 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s 23

Federal Constitution, art 10(1)(a)

Protection from Online Falsehoods and Manipulation Act 2019 [Sing], ss 11, 15

State Immunity Act 1978 [UK], s 2(1)

United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, arts 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

Other(s) referred to:

Am Soc'y Int'l L, *Jurisdictional, Preliminary, and Procedural Concerns,* Benchbook on International Law § II.A (Diane Marie Amann ed, 2014), www.asil.org/benchbook/jurisdiction.pdf

C Staker, *Jurisdiction,* M Evans (ed), International Law, 4th Edn, 2014, Ch 4

Cedric Ryngaert, *Jurisdiction in International Law*, Oxford University Press, 2nd Edn, 2008, Chapter 3, pp 82-84

Colangelo, Anthony J, *What is Extraterritorial Jurisdiction?* (April 17, 2014), Cornell Law Review, Vol 99, No 6, 2014, SMU Dedman School of Law Legal Studies Research Paper No 131, p 1305

FA Mann, *The Doctrine of Jurisdiction in International Law*, (1964-I) 111 RCADI 1, A W Sijthoff, 1964, 36

Fox and Webb, *The Law of State Immunity*, Oxford University Press, 3rd Edn, 2013, pp 12, 36, 37, 75

ICJ Advisory Opinion, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of The Commission on Human Rights* [1999] ICJ Rep 62, 29 April 1999, para 63

ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium*), ICJ Rep 3 (2002), paras 5, 47

James R Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th edn, 2012, p 458

Jennings & Watts (eds), *Oppenheim's International Law,* 9th Edn, 1992, p 456

O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept,* Journal of International Criminal Justice, Vol 2, Issue 3, September 2004, pp 735-760

Counsel:

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For the respondent: Gurdial Singh Nijar (Latheefa Koya, Shahid Adli & Abraham Au with him); M/s Daim & Gamany

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] These appeals concern the concepts of sovereign or state immunity and extraterritoriality under international law. The issues which emerge for consideration by this Court essentially relate to:

(i) whether an impugned act by the Minister of a foreign state amounts to a public act attracting state immunity; and

(ii) whether state immunity may be relied upon as a defence when there is a dispute as to the extraterritorial nature of a foreign statute.

The Salient Facts

[2] The Appellant in Civil Appeal No: 01(i)-17-05/2023(W) is the Government of Malaysia. The Appellant in Civil Appeal No: 01(i)-16-05/2023(W) is the Attorney General of Malaysia.

[3] The Respondent for both appeals are Lawyers for Liberty, a Malaysian non-Governmental organization ('NGO').

[4] The facts giving rise to these appeals are as follows:

(a) On 16 January 2020, the Respondent published a press statement on their website alleging that the method of execution of the death penalty in Singapore was unlawful and brutal ('LFL Press Statement'); and

(b) The Government of Singapore directed the issuance of a Correction Direction dated 22 January 2020 ("the Correction Direction") to the Respondent under s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 ('POFMA'), notifying the Respondent that:

(i) the LFL Press Statement contained false statements of fact;

(ii) Singapore's Minister of Home Affairs ('the Minister'), in exercise of his statutory powers under POFMA, directed the Respondent to insert a correction notice ('correction direction') not later than 23 January 2020 and failure to comply with the correction direction, without reasonable excuse, would amount to an offence under s 15 of the POFMA;

(iii) the Respondent could apply to the Minister to vary or cancel the correction direction; and

(iv) in the event the application for variation or cancellation was refused, the Respondent could appeal to the High Court of Singapore to set aside the correction direction.

[5] The Respondent did not comply with the correction direction and, instead proceeded to file the two applications in the High Court, by way of Originating Summonses (OS), namely OS 46 and OS 51.

[6] In OS 46 against the Government of Malaysia, the Respondent sought the following reliefs -

(i) a declaration that the Respondent has the right to express their opinion in Malaysia with regard to any matters, pursuant to art 10(1)(a) of the Federal Constitution;

(ii) a declaration that the Respondent's rights could not be impaired by a law in Singapore, namely the POFMA, which purports to extend beyond Singapore, that is assuming extraterritorial jurisdiction; and

(iii) a declaration that the Respondent could not be subjected to any process within Malaysia in furtherance of the Singapore law.

[7] In OS 51, against the Singapore Home Affairs Minister, the Respondent sought the following reliefs:

(i) a declaration that the direction issued by the Singapore Home Affairs Minister could not be enforced against the Respondent in Malaysia;

(ii) a declaration that the Singapore Home Affairs Minister, or anyone acting under his authority, could not take any action to enforce any provision of the POFMA against the Respondent within Malaysia; and

(iii) an injunction to restrain the Singapore Home Affairs Minister, his servant or agents or anyone acting under his direction from enforcing Singapore's laws, in particular the POFMA, or taking any action related thereto, within Malaysia against the Respondent.

[8] Vide an order dated 23 December 2020, the Attorney General of Malaysia was granted leave to intervene in OS 51. The Government of Malaysia, as the defendant in OS 46, and the Attorney General of Malaysia, as the intervener in OS 51, applied to strike out the plaintiff's OS on the grounds that they were scandalous, vexatious and frivolous and otherwise an abuse of the process of court.

Proceedings At The Courts Below

[9] The High Court allowed the Government of Malaysia and Attorney General of Malaysia's applications to strike out OS 46 and OS 51 with no order as to cost.

[10] Aggrieved with the decision of the High Court, the Plaintiff appealed to the Court of Appeal, which allowed both the Plaintiff's appeals.

[11] The Court of Appeal set aside the decision of the High Court which struck out both of the Plaintiff's OS 46 and OS 51. The Court of Appeal further ordered for OS 46 and OS 51 to be remitted back and heard before another High Court Judge.

These Appeals

[12] The Attorney General and Government of Malaysia then obtained leave to appeal to the Federal Court. Appeal No 16 is by the Attorney General while Appeal No 17 is by the Government of Malaysia.

The Questions Of Law

[13] Both the Attorney General and Government of Malaysia obtained leave for seven (7) questions of law which are as follows:

(a) Whether in the face of the certificate issued by the Yang di-Pertuan Agong recognizing a country as a foreign sovereign, the Malaysian Court has the jurisdiction to ventilate on the country's foreign law?

(b) Whether the Malaysian Court can exercise jurisdiction when the issue of sovereign immunity over a foreign Governmental act is raised?

(c) Whether the Malaysian Court has jurisdiction to adjudicate over the conduct of a foreign state for an act of *jure imperii*?

(d) Whether the Malaysian Court has jurisdiction to assess the legality of the acts of a foreign state in that state?

(e) Whether a dispute on extraterritoriality alone overrides immunity enjoyed by a foreign sovereign state in any civil suit which seeks to challenge the legality of a decision by that foreign sovereign state over the conduct of a local citizen/organization affecting the affairs of the foreign sovereign?

(f) Whether a foreign sovereign state no longer enjoys immunity from civil suit in the courts of another state where acts of extraterritoriality are being challenged?

(g) Whether a foreign sovereign state no longer enjoys immunity from civil suit in the courts of another state where questions of right to access to court and freedom of speech are engaged?

[14] From these questions, we consider that there are two primary issues that require consideration.

(a) The application of sovereign immunity to the Singaporean Minister of Home Affairs in his exercise of a Governmental function.

(b) The extraterritorial effect POFMA has in relation to a Malaysian citizen in light of art 10 of the Federal Constitution.

Our Deliberations And Analysis In Relation To The Questions Of Law In Issue (a)

The Submissions Of The Parties

[15] The Appellants assert that the Court of Appeal erred when it failed to appreciate that the plea of immunity is a procedural plea independent of the question of extraterritorial reach of a foreign law domestically. They submit that the impugned act of the Singaporean Minister of Home Affairs was an act of a sovereign state in exercise of a sovereign which attracted state immunity, and this was a threshold question which the Court of Appeal should have considered instead of wrongly remitting the matter back to the High Court to be heard on the merits.

[16] The Appellants further submit that the certificate issued by the Ministry of Foreign Affairs and the statement of the Attorney General adduced in Court (through an affidavit) on the status of immunity of the Singaporean Minister of Home Affairs was conclusive under customary international law, and that the Court of Appeal in disregarding the executive Government's stand on the question of foreign immunity has encroached upon a matter of foreign policy which has led to a potential breach by Malaysia of its obligation under international law.

[17] The Respondent on the other hand submits that the court will assume jurisdiction where any immunity claimed by a sovereign state is incompatible with the exercise of fundamental rights, in reliance on the United Kingdom Supreme Court case of *Benkharbouche v. Embassy Of The Republic Of Sudan* [2019] AC 777, and the local cases of *Subramaniam Letchimanan v. The United States Of America And Another Appeal* [2021] 4 MLRA 153 and *The United States Of America v. Menteri Sumber Manusia & Ors And Another Appeal* [2022] 5 MLRA 134. According to the Respondent, immunity to a foreign state may be denied if it violates fundamental rights and access to justice.

[18] The Appellants' reply to this is that the UK Supreme Court in *Benkharbouche* has made it abundantly clear that a claim for immunity was unjustified in disputes arising from employment contracts (at [76]), but otherwise, 'a claim to state immunity which is justified in international law, would be an answer' (at [77]).

Jurisdiction In International Law

[19] Jurisdiction is 'the extent of each state's right to regulate conduct or the consequences of events' which is 'limited by the equal rights and sovereignty of other States' (see: Fox and Webb, *The Law of State Immunity* (Oxford University Press, 2013) 75 citing Jennings and Watts (eds), *Oppenheim's International Law* (9th edn, 1992), 456; C Staker, *'Jurisdiction'* in M Evans (ed), *International Law* (2014, 4th edn) Ch 4; and Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011)).

[20] 'Jurisdiction' in 'international law' is not a single concept. The different components of a state's jurisdiction are prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction (*Hape v. R* 2007 SCC 26; 22 BHRC 585 (SC) at [57]-[65]). According to the Restatement (Third) of the Foreign Relations Law of the United States:

(i) prescriptive jurisdiction refers to a country's ability to make its law applicable to persons, conduct, relations, or interests;

(ii) adjudicative jurisdiction refers to a country's ability to subject persons or things to the process of its courts or administrative tribunals; and

(iii) enforcement jurisdiction refers to a country's ability to induce or compel compliance or to punish non-compliance with its laws or regulations.

(See: Am Soc'y Int'l L, *"Jurisdictional, Preliminary, and Procedural Concerns," in Benchbook on International Law* § II.A (Diane Marie Amann ed, 2014), available at www.asil.org/benchbook/jurisdiction.pdf)

[21] There are those who, particularly in a criminal context, do not see the need to distinguish between adjudicative and enforcement jurisdiction. O'Keefe for instance explains that adjudicative jurisdiction simply describes the application of a state's criminal law by its criminal courts; in other words, adjudicative jurisdiction is simply the actualization of prescriptive jurisdiction. (See: O'Keefe, '*Universal Jurisdiction: Clarifying the Basic Concept*', Journal of International Criminal Justice, Vol 2, Issue 3, September 2004, pp 735-760)

[22] In any case, this disagreement, particularly for the purposes of our present case, is academic and does not require final resolution.

State Immunity

[23] It is a basic principle of both public and private international law that a foreign State is immune from the jurisdiction of another State. Lord Denning in *Trendtex Trading Corp v. Central Bank of Nigeria* [1977] QB 529, 555 (CA) cited this 'classic restatement' by Lord Atkin:

> "[T]he courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages."

[24] In customary international law,[1] a foreign state is immune from claims based on sovereign or Governmental acts, ie, *jure imperii*.[2] *Jure imperii* refers to 'the public acts that a country undertakes as a sovereign state, for which the sovereign is usually immune from suit or liability in a foreign country' (*Black's Law Dictionary*, 11th edn).

[25] State or sovereign immunity is a jurisdictional immunity, i.e. immunity from legal or judicial process. Jurisdictional immunity 'is essentially procedural in nature' (*Democratic Republic Of The Congo v. Belgium*[2002] ICJ Rep 25 at [60]) and 'is entirely distinct from the substantive law which determines whether the conduct is lawful or unlawful' (*Jurisdictional Immunities Of The State (Germany v. Italy: Greece Intervening*) [2012] ICJ Rep 99 at [58]). The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on national courts' power to determine rights (*McElhinney v. Ireland* [2001] 34 EHRR 323; [2001] 12 BHRC 114 at [25]).

[26] As such, a national court should address immunity as a threshold matter before it can apply any other rule of law (*NYSA-ILA Pension Trust Fund Ex Rel Bowers v. Garuda Indonesia*, 7 F 3d 35, 39 (2d Cir.1993)). In other words, a national court is required to determine whether or not a foreign state is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. Once satisfied that the defendant is a foreign state, the forum court will dismiss the proceedings, unless satisfied that the foreign state has waived its immunity or that the proceedings fall within an exception to state immunity. In the common law, and as enacted by statute in s 2(1) of the State Immunity Act 1978 (SIA), English law requires the court to give effect to immunity even though the State does not appear (*The Law of State Immunity*, Hazel Fox CMG QC et al., 3rd Ed., Oxford, at p 12).

[27] A trial court's denial of a claim of immunity is an immediately appealable collateral order (*Cohen v. Beneficial Industrial Loan Corp*, 337 US 541 (1949)). As immunity is a threshold issue that goes to a court's subject matter jurisdiction, the standard of review (by the appellate court) is *de novo* (*Cassirer v. Kingdom Of Spain*, 616 F 3d 1019 (2010)). 'The point of immunity is to protect a foreign state that is entitled to it, from being subjected to the jurisdiction of courts in a national court, protection which would be meaningless were the foreign state forced to wait until the action is resolved on the merits to vindicate its rights not to be in court at all' (*Cassirer* at p 1025).

[28] In the *ICJ Jurisdictional Immunities Case*, Germany complained at the International Court of Justice that Italy was in breach of international law by reason of the Italian courts' denial of immunity to Germany in proceedings relating to war damage caused by German armed forces in 1943-1945. Germany alleged that this breach by Italy related to the denial of German immunity from adjudication by the Italian courts as well as the denial of German immunity from enforcement by orders of the Italian court enforcing judgments of Italian and Greek courts in respect of German Government property in Italy. Italy responded by supporting her claim with three strands of argument: first, that there is no immunity in international law when a State has committed serious violations of international humanitarian law amounting to war crimes and crimes against humanity; secondly, that there is no State immunity for violations of norms of j*us cogens* character; thirdly, that the denial of immunity

is justified because all other attempts to obtain reparations for the victims had failed.

[29] The ICJ in deciding against Italy's claim, dismissed all three arguments and further rejected Italy's contention that the combined effect of the three strands of argument justified an exception to State immunity. In doing so, the ICJ based its reasoning on the straightforward exclusionary proposition that the plea of immunity was a procedural plea independent of the issues raised in the Italian claim relating to State responsibility and their determination. The Court stated:

> "The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."

(*The Law of State Immunity*, Hazel Fox CMG QC et al., 3rd Ed., Oxford, at pp 36-37).

[30] It is necessary to note at this juncture that there has been recent state practice to suggest it is possible that violations of *Jus cogens* norms constitute an exception to state immunity. In particular, courts that have found such an exception often rely on constitutional safeguards of a victim's right to access courts. There is no tenable allegation in the present case that the conduct being complained of violates norms of a j*us cogens* nature. As such, we express no opinion here as to the applicability of this exception in Malaysian law.

South Korea, Seoul Central District Court, Joint Case No 2016/505092, 34th Civil Division, Judgment (8 January 2021); Brazil, Federal Supreme Court (Supremo Tribunal Federal), Recurso Extraordinario com Agravo 954.858 Rio de Janeiro)

[31] In Malaysia, States generally enjoy immunity from the jurisdiction of foreign courts unless a matter falls within exceptional circumstances. Most of these circumstances are set out in arts 7 to 18 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (UNCSI):[3]

> Article 7
>
> States are not immune to proceedings in respect of which they have submitted to the jurisdiction of Malaysia;
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> Article 10
>
> States are not immune to proceedings relating to (a) a commercial transaction entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in Malaysia;

Article 11

States are not immune to proceedings relating to a contract of employment between the State and an individual where the contract was made in Malaysia or the work is to be wholly or partly performed in Malaysia, unless (a) at the time when the proceedings are brought the individual is a national of the State, or (b) at the time when the contract was made the individual was neither a national of Malaysia nor habitually resident there, or (c) the parties to the contract have otherwise agreed in writing;

Article 12

States are not immune to proceedings in respect of (a) death or personal injury or (b) damage to or loss of tangible property, in each case where it was caused by an act or omission in Malaysia;

Article 13

States are not immune to proceedings relating to any interest of the State in, or its possession or use of, immovable property in Malaysia, or any obligation of the State arising therefrom;

Article 13

States are not immune to proceedings relating to an interest arising by way of succession, gift or *bona vacantia* in movable or immovable property, nor does any interest of a State in property prevent the exercise of any jurisdiction relating to the estates of the deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts;

Article 14

States are not immune to proceedings relating to:

a. any patent, trademark, design or plant breeders' rights belonging to the State, and registered or protected in Malaysia or for which the State has applied in Malaysia;

b. an alleged infringement by the State in Malaysia of any patent, trade mark, design, plant breeders' rights or copyright; or

c. the right to use a trade or business name in Malaysia.

Article 15

States are not immune to proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which (a) has members other than States, and (b) is incorporated or constituted under the law of Malaysia or is controlled from or has its principal place of business in Malaysia, being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners, unless provision to the contrary has been made by agreement in writing or by the instrument establishing the body or partnership.

Article 16

In admiralty proceedings (or proceedings on any claim which could be made the subject of admiralty proceedings) a State is not immune in respect to:

a. an action in rem against a ship belonging to that State, or an action *In personam* for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes; or

b. an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or an action i*n personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use for commercial purposes.

Article 17

Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, it is not immune to proceedings in the courts of Malaysia which relate to the arbitration, except (a) where contrary provision is made or (b) where the arbitration agreement is between States.[4]

State Immunity As A Preliminary Issue

[32] In the ICJ Advisory Opinion on 29 April 1999 in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of The Commission on Human Rights* [1999] ICJ Rep 62 ('*Re Param Cumaraswamy*'), the ICJ held that the Malaysian courts had violated international law by failing to consider Dato' Param Cumaraswamy's immunity status in a summary fashion. The ICJ made the following observation:

"63. Section 22(b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in* limine litis on the immunity of the Special Rapporteur (see para 17 above), thereby nullifying the essence of the immunity rule contained in s 22(b). Moreover, costs were taxed to Mr Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State-even an organ independent of the executive power – must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law."

[33] The ICJ Advisory Opinion, indeed on this specific ground, was referred to and applied by this Court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLRA 1. It is worth reproducing in full the court's reasoning on this point:

"[72] With respect, what had escaped the attention of learned SFC was the fact that the matter of Dato' Param Cumaraswamy was eventually brought to the International Court of Justice ('ICJ') for an Advisory Opinion through a resolution passed by the United Nations Economic and Social Council which was communicated to the ICJ by way of a note from the UNSG. The ICJ considered written statements from numerous sources namely the UNSG, Costa Rica, Germany, Greece, Italy, Malaysia, Sweden, the United Kingdom and the United States of America. The ICJ eventually delivered its Advisory Opinion on 29 April 1999 in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of The Commission on Human Rights* [1999] ICJ Rep 62 ('*Re Param Cumaraswamy*').

[73] Most importantly, the Advisory Opinion reflects that the ICJ:

> "2. Calls upon the Government of Malaysia to ensure that all judgments and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.".

[74] With that firmly in mind, this Court was minded to pay due regard to the Advisory Opinion of the ICJ. Substantively, the ICJ held that the Malaysian courts had essentially violated international law by failing to consider Dato' Param Cumaraswamy's immunity status in a summary manner. The ICJ made the following observation:

> "63. Section 22(b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided in *limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule in *limine litis* on the immunity of the Special Rapporteur (see para 17 above), thereby nullifying the essence of the immunity rule contained in s 22(b). Moreover, costs were taxed to Mr Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State − even an organ independent of the executive power − must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.".

[75] In our view, the judgment of the ICJ is correct and in light of it, *MBf Capital (supra)* cannot, with respect, be sustained as representing the current state of the law. It and any authorities which followed it or decided along similar lines are in the same vein no longer good law.

[76] In every case where immunity is claimed, certificates produced by the relevant authorities (especially the UNSG or other international bodies) are conclusive of that fact. If immunity is absolute (*ratione personae*) the production of the certificates would be the end of the matter. If the immunity is *ratione materiae* (functional) then affidavit evidence (which the court should presume to be true) should be considered in *limine litis* to ascertain whether the conduct

or omission of the official in question was within the scope of his functions.If they were, then they are cloaked with immunity.

[77] In any event, we did not think that it is sound judicial policy to suggest that functional immunity can be determined at trial or be treated as a 'statutory defence' because doing so would be to defeat the very purpose of immunity. The trial process and interlocutory processes such as discovery (in civil cases) have the effect of sidestepping the inviolability of archives and documents and hence defeat the purposes of immunity or in this appeal, the very legislative intent of Act 485. In our considered view, this is a complete answer to the otherwise legally unsustainable suggestion that the appellant's immunity can and ought to be determined at trial in the criminal court or that his immunity ought to be treated as a 'statutory defence'."

[34] It is therefore clear that the question of whether state immunity is applicable to the present proceedings must be determined as a preliminary issue and not later.

The Certificate By The Ministry Of Foreign Affairs

[35] In *Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor* [1990] 1 MLRA 364 Gunn Chit Tuan SCJ stated that:

"In applying the doctrine of sovereign immunity, our Courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di-Pertuan Agong has recognized the Commonwealth of Australia as a foreign state."

[36] More recently, the UK Supreme Court in *Deutsche Bank AG London Branch v. Receivers Appointed By The Court* [2021] UKSC 57 has held:

"69. As the conduct of foreign relations is entrusted to the executive branch of Government, this is a field where the judiciary must normally defer to the executive which alone is competent to determine foreign policy. This is embodied in the "one voice principle" which finds its classic formulation in the speech of Lord Atkin in *The Government Of The Republic Of Spain v. SS "Arantzazu Mendi*" [1939] AC 256, 264:

> "Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of states: and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone."

As a result, courts in this jurisdiction accept as conclusive statements made by the executive relating to certain questions of fact in the field of international affairs. These questions include the sovereign status of a state or Government and whether an individual is to be regarded as a head of state (*Mighell v. Sultan Of Johore* [1894] 1 QB 149; *Carr v. Fracis Times & Co* [1902] AC 176)."

[37] In the instant appeals, the sovereign status of the Singaporean Minister for Home Affairs can be evinced from the certificate issued and produced by the Government of Malaysia. Based on our discussion above, it is evident that the issuance of a certificate from the Government of Malaysia amounts to conclusive evidence of a foreign state's sovereign status, which means that a foreign state, a head of state, or head of Government acting in an official capacity shall enjoy immunity from the jurisdiction of the local courts. Accordingly, no proceedings may be instituted against them by any party (subject to the waiver of immunity and other exceptions).

[38] In this case it is clear that the relevant acts complained of are public acts of a sovereign state in relation to its Governmental function. In other words, the Singaporean Minister of Home Affairs is acting in his official capacity when committing the conduct complained of and therefore there can be no dispute that this attracts state immunity. As alluded to earlier, the exceptions under the restricted immunity regime largely encompass commercial, employment and other such exceptions; exceptions which are plainly inapplicable here. To that extent we are unable to exercise any adjudicative jurisdiction over the acts of a sovereign nation which includes the act of the Home Minister of Singapore.

[39] Appeal No 16 pivots on these aspects of state or sovereign immunity and therefore ought not be the subject matter of adjudication by the Malaysian Courts. The Court of Appeal erred in failing to address the existence of the certificate certifying Singapore as a sovereign state and in failing to treat state immunity as a threshold issue. Insofar as Appeal No 16 and OS 51 are concerned, it is not open to the Malaysian Courts to examine the merits of the suit.

[40] In the result we are of the unanimous view that Appeal No 16 is allowed and the OS is struck out.

Our Deliberations And Analysis In Relation To The Questions Of Law In Issue (b)

The Submissions Of The Parties

[41] The Appellants submit that the extraterritorial application of POFMA over the LFL Statement published by the Respondent is not objectionable at all since the exercise of the prescriptive jurisdiction by the Singaporean legislature was more than justified by the objective territorial principle and the effects doctrine, as amply supported by the prevailing practice under customary international law.

[42] It is also submitted by the Appellants that since there is 'widespread, representative and consistent practice' under customary international law that the existence of a right of access to Court to ventilate a civil claim for violation of human rights is not a recognized exception for which a foreign state is disentitled to enjoy immunity from civil suit in the courts of another state, the case for the Respondent in the present appeal is plainly unsustainable.

[43] The Respondent on the other hand argues that the question of state immunity does not arise as Appeal No 17 does not involve the Singaporean Government.

Extraterritoriality

[44] Extraterritoriality connotes the exercise of jurisdiction, or legal power, outside territorial borders (see: Colangelo, Anthony J, *What is Extraterritorial Jurisdiction?* (April 17, 2014). *Cornell Law Review*, Vol 99, No 6, 2014, SMU Dedman School of Law Legal Studies Research Paper No 131, Available at SSRN: https://ssrn.com/abstract=2363695). The question of what 'extraterritorial' means, requires a fact-dependent, fundamentally legal determination that turns on the particular type of jurisdiction in issue (see: Colangelo, op. cit., at 1305).

[45] The High Court struck out OS 46 as it was of the view that the Respondent's suit called for the court to determine the validity of the Singaporean Minister for Home Affairs' action against the Respondent under POFMA. The High Court held that it lacked the requisite jurisdiction under s 23 of the Courts of Judicature Act 1964 to adjudicate on the validity of POFMA. The High Court further held that issuance of the certificate recognising Singapore as a foreign sovereign was conclusive evidence of Singapore's immunity and that such recognition barred the High Court from exercising jurisdiction to further inquire into the Respondent's complaints.

[46] The Court of Appeal took a diametrically opposite view, holding that the Respondent was not asking the court to assess the validity of the POFMA, but was instead challenging the extent of its application to a citizen or entity of this country, lawfully exercising within Malaysia his right to freedom of speech as enshrined and guaranteed by the Federal Constitution. The Court of Appeal held that the High Court failed to address the issue of the applicability of the principle of comity of nations as regards the extraterritorial effect of a national law. The Court of Appeal disagreed that OS 46 disclosed no reasonable cause of action and remitted the matter back to the High Court.

The Law On Striking Out

[47] The domestic law relating to striking out is trite (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 1 MLRA 611 and *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 2 MLRA 263). In these cases, the subject matter of the applications usually relates to the need for the parties to ventilate evidence in full before arriving at a final decision, as a consequence of which the option of striking out becomes untenable. In other words, these applications are related to the requirement for further evidence at trial.

[48] However, the present appeal relates to public international law, where the legal concepts, procedure and considerations differ from the issues arising in

domestic case law. There is a dearth of case law relating to striking out in relation to public international law. We therefore turn to international case law to ascertain the principles that comprise the basis for striking out.

[49] The core issue that necessitates examination in the present appeal is: can Singapore exercise its prescriptive jurisdiction over Malaysian citizens committing acts within Malaysia? The answer, to our minds, is that it would depend on the circumstances obtaining before the court.

[50] The case of *SS Lotus (France v. Turkey)* (1927) PCIJ Series A, No 10 is frequently cited as authority for the proposition that, with respect to prescriptive jurisdiction, states can exercise the said jurisdiction provided there is no prohibitive rule to the contrary:

> "The first and foremost restriction imposed by international law on a state is that − failing the existence of a permissive rule to the contrary − it may not exercise its power in any form in the territory of another state. It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed states to do so in certain specific cases. But this is certainly not the case under international law as it stands at the present. Far from laying down a general prohibition that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."

[51] This proposition has been vehemently criticized (see for instance FA Mann, "*The Doctrine of Jurisdiction in International Law*," (1964-I) 111 RCADI 1, 36; ICJ, Arrest Warrant (*Democratic Republic of Congo v. Belgium*), ICJ Rep 3 (2002), Dissenting Opinion of Judge Van den Wyngaert [51]).

[52] The modern approach to territoriality in international law is well encapsulated as follows: 'if a state wishes to project its prescriptive jurisdiction extraterritorially, it must find a recognized basis in international law for doing so' (*R v. Gul (Mohammed)* [2014] AC 1260 (SC) at [58]) (*Brownlie's Principles of Public International Law*, 8th Ed (2012), p 458).

[53] On what amounts to 'recognized basis in international law', it has been held that extraterritorial prescriptive jurisdiction is usually only exercised 'where a real and substantial link with the state is evident' (*Hape v. R* [2007] SCC 26; 22 BHRC 585 (SC) at [64]).

[54] One of these recognized bases in international law includes, for instance, the passive personality principle; this is where jurisdiction is exercised on the basis of harm to a national abroad. (See Judges Higgins, Kooijmans and Buergenthal at [47] in Arrest Warrant of 11 April 2000 (*Democratic Republic Of The Congo v. Belgium*), International Court of Justice, 14 February 2002 ('Arrest Warrant'); see also the Separate Opinion of President Guillaume at [5] in Arrest Warrant.)

[55] With respect to the specific 'recognized basis' that the Appellants rely on, that is the 'effects doctrine', it must be noted that such a doctrine is used primarily in antitrust cases (Cedric Ryngaert, *Jurisdiction in International Law*, 2nd Edition, Chapter 3, pp 82 − 84). While this does not act as a complete bar to the effects of the doctrine being utilized in analogous situations, it does mean that caution must be exercised against an overbroad application of this exception to the norm that prescriptive jurisdiction is meant to be exercised within one's own territory.

[56] What can be distilled from the above is that while there is no absolute prohibition on states extending the reach of their local laws beyond the borders of their territory, an extraterritorial expansion of a state's prescriptive jurisdiction must first be predicated upon a recognized basis in international law. This in turn involves consideration of whether there is an obviously substantial link with the state seeking to enact laws with extraterritorial effects.

[57] We note that in the Appellants' own Joint Reply Submissions, it is acknowledged that:

> "Even under an expanded view of jurisdiction, however, a nation can only exercise jurisdiction to prescribe when the exercise of such jurisdiction is reasonable. Whether the exercise of jurisdiction to prescribe is reasonable or not should be determined by considering various factors, such as the strength of the link of the activity to the territory of the regulating state, the importance of regulation to the regulating state ... Reasonableness is also required for jurisdiction to adjudicate: nations only have authority to exercise adjudicatory (jurisdiction) through their courts if the relationship between the nation and the person or thing that is the object of the adjudicative effort is sufficiently close. Factors to take into account include whether the suspect is present or domiciled in the territory of the state, and whether the person has carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state" (*Cybercrime and Jurisdiction: A Global Survey*, edited by Bert-Jaap Koops and Susan W. Brenner, TMC Asser Press (2006), pp 4-6).

[58] It is clear therefore that the question of whether Singapore possesses the necessary jurisdiction to prescribe in this instance involves an evaluation of multiple factors, such that this issue cannot be decided summarily for the purposes of striking out.

[59] In light of the above, we unanimously dismiss Appeal No 17. We therefore order the OS to proceed for hearing but only in respect of the relief sought in prayers 1 and 2 as amended to read as follows:

"A declaration as to the extraterritorial jurisdiction of POFMA in relation to a Malaysian citizen in Malaysia in light of art 10(1)(a) of the FC."

[60] Prayer 3 is disallowed in that it encroaches on state immunity.

[61] We reiterate that the determination of OS 51 in the High Court is purely on questions of law, i.e. on the extraterritorial effect of POFMA. Extraterritoriality is the main subject matter of OS 51. As amended, it does not encroach into state or sovereign immunity but involves only Malaysian parties over which our courts enjoy jurisdiction. It also entails construction of the Federal Constitution.

[62] The Respondent expressed concern and sought clarification on the extent of their rights of freedom of expression under art 10(1)(a) of the Federal Constitution in relation to statements made in Malaysia which are the subject matter of foreign legislation, namely POFMA. This in effect amounts to an issue relating to the extraterritorial jurisdiction of POFMA and its compatibility with the supreme law of our land: the Federal Constitution. This, in our view is not obviously and plainly unsustainable. This is all the more so, in light of our amendments to the relief sought in OS 51.

[63] Given the foregoing, we decline to answer the Leave Questions.

[64] We make no order as to costs.

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[1] While the United Nations Convention on the Jurisdictional Immunities of States and their Property 2004 (UNCSI) is not yet in force, the authority for State immunity is grounded in customary international law.

[2] *Benkharbouche (Respondent) v. Secretary of State for Foreign and Commonwealth Affairs (Appellant) and Secretary of State for Foreign and Commonwealth Affairs* and *Libya (Appellants) v. Janah (Respondent)* [2017] UKSC 62 at [53]. It is not disputed by the Respondent that the issuance of the Correction Direction is not such as act (Enclosure 24, Appellant's Written Submissions)

[3] The UNCSI has yet to take effect as treaty law as of 21st June 2024 because it has not met the requisite 30 ratifications to bring it into force (Article 30) but it is the first authoritative written text of the international law of State immunity and cited in Hamid, Public International Law, A Practical Approach (Sweet & Maxwell Asia, 2011) 159. See also the United Nations Treaty Collection website https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en accessed 21st June 2024.

[4] Dicey, A. V., Dicey, Morris & *Collins on the Conflict of Laws* (first published in 1896, Sweet & Maxwell, 2023) 357-369.