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Case Digest

Law Review Staff

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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles to new and different factual situations. The cases are grouped in topical categories, and references are given for further research.

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I. ACT OF STATE

ACT OF STATE DOCTRINE AND FOREIGN SOVEREIGN IMMUNITIES ACT DO NOT NECESSARILY INSULATE A FOREIGN GOVERNMENT FROM CIVIL LIABILITY FOR THE ASSASSINATION OF A PERSON ON UNITED STATES SOIL - *Liu v. Republic of China*, slip op. No. 85-7461 (N.D. Cal. Aug. 11, 1986).

Helen Liu sued the Republic of China (ROC) and several former officers of the ROC government alleging their responsibility for the assassination of her husband, Henry Liu, on October 15, 1984. The ROC government agreed that the named officers participated in the killing. In fact, a criminal tribunal set up by the ROC convicted the former officers of murder. The criminal tribunal concluded, however, that the ROC had no part in the killing. While the ROC did not claim that the act of state doctrine applies to assassinations by foreign states, the ROC maintained that the instant action would require a detailed investigation into the tribunal's findings. That sort of inquiry, the ROC argued, was precluded by the act of state doctrine. The district court disagreed and held that neither the act of state doctrine nor the For-

Foreign Sovereign Immunities Act (FSIA) bar the court from considering the plaintiff's claims. The court stated three reasons for rejecting the ROC's act of state argument. First, the defendant failed to demonstrate that an act of state occurred. The court explained that proceedings in foreign tribunals generally are not considered acts of state. Instead, the doctrine encompasses government actions which give effect to the government's public interests. Second, the court reasoned that the possibility the litigation may involve embarrassing or intrusive discovery would not necessarily invoke the act of state doctrine. Third, the court maintained that the litigation would not necessarily require it to consider the legitimacy of the ROC's tribunal's findings. The court reminded the parties that the act of state doctrine may justify a later dismissal of the action, requiring the court to weigh the integrity of the ROC tribunal's findings. In addition, the district court put aside the contention that the FSIA deprived the court of jurisdiction. The court found that under the facts alleged, the ROC waived its sovereign immunity pursuant to section 1605(a)(5) of the FSIA. Subsection (a)(5) waives immunity of foreign states for deaths occurring in the United States which were caused by the tortious acts of foreign officials who were acting within the scope of their nondiscretionary authority. *Significance* - Even though the court purports to follow precedent, the court has allowed the plaintiff to advance beyond the preliminary steps in pursuing a claim which would be nothing more than a repeat of the ROC tribunal's investigation of official government involvement. The act of state doctrine purports to bar this sort of litigation.

II. EXTRADITION

POLITICAL OFFENSE EXCEPTION DOES NOT APPLY TO BAR EXTRADITION IF OFFENSES ARE COMMITTED WHERE NO UPRISING EXISTS — *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986).

The United Kingdom sought the extradition of William Joseph Quinn, a United States citizen and Irish Republican Army (IRA) member, for his alleged role in the murder of a policeman and a bombing conspiracy in England in 1974 and 1975. After a United States magistrate found him extraditable, Quinn petitioned the United States District Court for the Northern District of California for a writ of habeas corpus. Using the incidence test for the political offense exception, the district court granted Quinn's peti-

tion. The district court did not reach the statute of limitations question. On appeal, the Ninth Circuit Court of Appeals vacated and remanded the decision. The panel unanimously vacated the writ to remand the conspiracy count for consideration of the statute of limitations question. The judges could not agree, however, on the rationale for vacating the writ pertaining to the murder charge. As a result, each wrote an opinion. Judge Reinhardt discussed at length the historical development of the political offense exception and criticized the analysis set forth in *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). Judge Reinhardt argued that the *Eain* court strayed from the traditional political offense analysis and rationale by considering whether the particular forms of conduct used were acceptable means for carrying out a political uprising. He maintained that the traditional, two-part incidence test was appropriate. The incidence test asks (1) whether the offense occurred during an uprising and (2) whether the offense was committed in connection with the uprising. According to Judge Reinhardt, the first prong imposes a geographic limit which prevents extradition for only those acts committed where an uprising exists. Using the facts determined by the magistrate, he found that in 1974 and 1975 an uprising was present in Northern Ireland, but not in England. Since the alleged offenses occurred in England, Reinhardt concluded that the political offense exception could not apply to bar Quinn's extradition. Judge Duniway, on the other hand, used the *Eain* test and held that the political offense exception did not apply. Moreover, he doubted the general usefulness of a geographic limit because it might preclude genuine political offenses. Judge Fletcher, concurring and dissenting, stated that the incidence test was appropriate, but reached a different result. Citing the constitutional ties between Northern Ireland and England, she found that the uprising extended to England. Judge Fletcher remanded the matter to determine whether Quinn had sufficient contacts with Northern Ireland since the issue was not argued below. *Significance* — These opinions demonstrate the current confusion surrounding the political offense exception. The result affirms the importance of the incidence test, proposes a geographic limit within the incidence test, and suggests that the political offense exception will not prevent the extradition of international terrorists.

III. JUDGMENTS

UNITED STATES COURTS HAVE NO AUTHORITY TO ENFORCE FOREIGN JUDGMENTS WHEN THE REQUEST FOR JUDICIAL ASSISTANCE IS MADE VIA LETTERS ROGATORY FILED DIRECTLY IN THE COURT, *In Re Civil Rogatory Letters Filed By The Consulate of the United States of Mexico*, 640 F. Supp. 243 (S.D. Tex. 1986).

The Mexican consulate in Laredo, Texas filed letters rogatory with the United States District Court for the Southern District of Texas. The letters sought judicial assistance in enforcing a judgment by a Mexican court against a Mexican national who was residing in Laredo, Texas. The court recognized that the procedure followed by the Mexican consulate was proper under the applicable consular conventions in effect between the United States and Mexico. But the court stated that the normal procedure for enforcing foreign country judgments via letters rogatory called for the foreign government to submit the letters to the United States Department of State rather than to the court directly. The State Department then would sift through the claims, sending some to the courts for enforcement and returning the others unexecuted. The court added that the scope of judicial assistance to foreign tribunals and litigants before such tribunals was limited by 28 U.S.C. § 1782. Section 1782 applies only to obtaining evidence for use in those tribunals and makes no mention of the enforcement of foreign judgments. Citing the normal procedure set down by the state department and the limits on judicial authority in § 1782, the court dismissed the request without prejudice. The court explained that it lacked the authority to enforce the judgment as presented. *Significance* — This decision demonstrates that the directives of the State Department are followed even ahead of treaty obligations.

IV. JURISDICTION

FEDERAL DISTRICT COURT HAD SUBJECT MATTER AND PERSONAL JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE ALIEN TORT CLAIMS ACT IN ACTION AGAINST SOVIET UNION FOR VIOLATION OF DIPLOMATIC IMMUNITY, *Von Dardel v. Union of Soviet Socialist Republics*, 623 F.Supp. 246 (D.C.D.C. 1985).

Plaintiffs sought declaratory and injunctive relief and damages against the Soviet Union for the unlawful seizure, imprisonment, and possible death of Raoul Wallenberg, a Swedish diplomat.

Plaintiffs alleged that in 1945 Wallenberg, was arrested in Budapest by representatives of the Soviet Union. Wallenberg was in Budapest acting on behalf of the United States in an attempt to save Jews from Nazis. Plaintiffs maintained that since then he has suffered imprisonment and possible death. The Soviet Union's only response to this lawsuit was a diplomatic note which asserted absolute sovereign immunity. Plaintiffs applied for a default judgment. Before discussing the merits of the case, the United States District Court for the District of Columbia considered three major issues: (a) sovereign immunity; (b) subject matter jurisdiction under the Alien Tort Claims Act; and (c) the statute of limitations.

The court found that it had subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 and took note of four of the plaintiffs' arguments why the Soviet Union should not enjoy immunity. First, by virtue of its decision to default, the Soviet Union failed to raise the defense of sovereign immunity. By raising the issue of sovereign immunity only in a diplomatic note, the Soviet Union knowingly chose a procedure that is no longer available under United States law. Second, the FSIA could not be read to extend immunity to a foreign sovereign's clear violation of a universally recognized principle of international law such as diplomatic immunity. Third, even though the FSIA is limited by treaties to which the United States is a party, the Soviet Union cannot claim immunity under the FSIA for acts which constitute violations of conventions to which the Soviet Union is a party. Fourth, by explicitly agreeing to be bound by terms of international human rights agreements and of treaties codifying the fundamental principle of diplomatic immunity, the Soviet Union, under § 1605(a)(1) of the FSIA, implicitly waived its sovereign immunity.

Next, the court considered whether the Alien Tort Claims Act, 28 U.S.C. § 1350, vested it with subject matter jurisdiction over this action. The Act granted federal district courts jurisdiction of any civil tort actions allegedly committed by aliens in violation of the law of nations or a treaty of the United States. The court noted that the plaintiffs were aliens and the causes of action were brought in tort. The court identified an unquestionable violation of the law of nations, as defined by legal scholars, confirmed in international conventions to which the United States is a party, and codified in United States law. The court explained that alleged violations involved an area of international law in which

standards and norms had long been well-defined. For these reasons, the court concluded that it enjoyed subject matter jurisdiction of this action. Finally, the court determined that plaintiffs' claims against the Soviet Union were not barred by any applicable statute of limitations. The court held that the statute of limitations had not yet begun to run because the unlawful detention of the diplomat was a continuing violation of the laws of the United States, the law and treaties of the Soviet Union, and the law of nations.

The court turned to the merits of the case and held that the Soviet Union's seizure and subsequent detention of Wallenberg violated the law of nations, as well as a number of international treaties and conventions relating to human rights, all of which had been signed by the Soviet Union. The court also held that an accredited Swedish diplomat was an "internationally protected person" within the meaning of the Act of Prevention and Punishment of Crimes Against Internationally Protected Persons, 18 U.S.C. §§ 1116, 1201(a)(4), (e).

Significance — This case constitutes an unprecedented action against a foreign sovereign because it involves actions which the Soviet Union has already declared unlawful and actions which were committed in gross violation of the universally recognized principle of diplomatic immunity.

V. LABOR

ARBITRATOR'S ORDER REINSTATING WITH BACKPAY TWO UNDOCUMENTED ALIENS WAS NOT REVIEWABLE IN FEDERAL COURT BECAUSE THE AWARD DID NOT VIOLATE PUBLIC POLICY AND WAS NOT IN DISREGARD OF THE LAW — *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986).

Relying on a California statute which outlawed employers from knowingly employing illegal aliens, Bevles Company dismissed two of its employees, Baraza and Dorme, when they could not prove they were in the United States legally. The dismissed employees' collective bargaining agent, Teamsters Local 986, sought reinstatement claiming that the dismissal lacked just cause. An arbitrator granted reinstatement with backpay to Baraza and Dorme. The arbitrator found that Bevles lacked just cause because the California law cited by the employer was dormant. The arbitrator's order was upheld by both the federal district court and the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit explained that it would not review the arbitrator's decision unless Bevles could prove that the decision violated a clearly defined public policy or was in manifest disregard of the law. The court rejected Bevles' claim that the arbitrator's order violated public policy because Congress has not passed any law which imposes liability upon an employer for employing illegal aliens. The court added that the award was not in manifest disregard of the law because California officials has not actively enforced the law in question. Further, the court supported its decision by pointing out that allowing labor remedies to illegal aliens would not result in a conflict between the policies behind labor law and the policies behind immigration law. *Significance* — The *Bevles* court's decision contradicts the Court's analysis in *Sure-Tan v. N.L.R.B.*, 467 U.S. 883 (1984). The *Sure-Tan* articulated a policy of reconciling labor law with immigration law. *Id.* at 903. The *Bevles* court, however, did not consider that Baraza and Dorme were not entitled under immigration law to be present in the United States at the time the arbitrator ordered their reinstatement with backpay.

