

Vanderbilt Journal of Transnational Law

Volume 17
Issue 4 Fall 1984

Article 5

1984

Case Digest

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Recommended Citation

Law Review Staff, Case Digest, 17 *Vanderbilt Law Review* 1029 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol17/iss4/5>

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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 apply established legal principles to new and different factual situations. The cases are grouped in topical categories, and references are provided for further research.

TABLE OF CONTENTS

I. ALIENS' RIGHTS	1029
II. CUSTOMS AND TRADE REGULATIONS	1031
III. JURISDICTION AND PROCEDURE	1032

I. ALIENS' RIGHTS

MILITARY ACTIVITIES OF THE PROVISIONAL IRISH REPUBLICAN ARMY FALL WITHIN THE SCOPE OF THE POLITICAL OFFENSE EXCEPTION TO THE TREATY OF EXTRADITION BETWEEN THE UNITED STATES AND THE UNITED KINGDOM—*In the Matter of the Requested Extradition of Joseph Patrick Thomas Doherty*, Crim. Misc. No. 83-1 (S.D.N.Y. Dec. 12, 1984).

Petitioner United States, on behalf of the United Kingdom, requested the extradition to the United Kingdom of Doherty, a member of the Provisional Irish Republican Army (PIRA). In Northern Ireland, Doherty had participated in a PIRA organized ambush of a British Army convoy during which a British soldier was shot and killed. Doherty was arrested and charged with the murder and other related offenses. After completion of his trial but prior to the issuance of a verdict, Doherty escaped from a Belfast prison and fled to the United States. The Northern Irish court convicted Doherty in absentia. Based on this conviction and on other alleged crimes connected with the prison escape, the United Kingdom sought his extradition pursuant to the Treaty of Extradition, Jan. 21, 1977, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468, and 18 U.S.C. § 3184 (1982). Respondent Doherty contended that his conduct was not an extra-

ditable offense under the Treaty's political offense exception, Article V(1)(c)(i). The United States District Court for the Southern District of New York determined that the offenses were political in nature and, therefore, the court denied the extradition request. In finding the PIRA activities within the parameters of the political exception doctrine, the court espoused a standard for ascertaining the presence of nonextraditable political offenses that is more refined than that previously articulated in *In re Mackin*, Crim. Misc. No. 80-1 (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981). *In re Mackin* based nonextradition under the political offense exception only on the existence of a political conflict and an offense committed during course and in furtherance of the conflict. Dismissing that examination as only preliminary, the district court in the present case engaged in an intensive factual analysis of the circumstances of the offenses. Operative factors identified by the court included: "the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place." The court concluded that Doherty's actions fell within the exception because they (1) took place in the area where change was to be effected, (2) did not clearly violate the Geneva Convention and international law, (3) were directed in furtherance of military objectives, and (4) were not aimed at civilians. The court denied that the informality of guerilla warfare rendered such activities beyond political offense treatment. Although acknowledging that no act in violation of international law will be regarded as political under the treaty, the court emphasized that the particular characteristics of the PIRA distinguished it from groups engaged in acts of random violence. The court stated that the PIRA's organizational qualities, hierarchical command structure, internal system of discipline and integration of activities illustrated its political character. *Significance*—The district court's construction of the political offense exception imparts needed substance and specificity to the proper scope of examination in an extradition context while retaining the definitional flexibility required to address particular circumstances.

THE IMMIGRATION AND NATIONALITY ACT PERMITS THE DEPORTATION OF AN ALIEN WHEN THE IMMIGRATION AND NATURALIZATION SERVICE ESTABLISHES BY CLEAR AND CONVINCING EVIDENCE THAT

THE ALIEN, UNDER THE AEGIS OF NAZI GERMANY, PERSONALLY AND ACTIVELY PARTICIPATED IN THE PERSECUTION OF INDIVIDUALS BECAUSE OF THEIR POLITICAL OPINIONS—*Laipenieks v. Immigration and Naturalization Service*, No. 83-7711, slip op. at 62 (9th Cir. Jan. 9, 1985).

An alien who immigrated to the United States from Chile in 1960 had been a member of the Latvian Political Police (LPP). The LPP was an organization allegedly acting in concert with the Nazi government to investigate and arrest Soviet participants in the occupation of Latvia. The Immigration and Naturalization Service instituted deportation proceedings under section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19) (1982), which subjects to deportation any alien who, under the direction of the Nazis, persecuted individuals for their political beliefs. The immigration judge dismissed the action, holding that the government had not produced clear and convincing evidence that Laipenieks actively participated in the persecution of Communists, and, therefore, failed to sustain its burden of proof under section 1215(a)(19). The Board of Immigration Appeals reversed the decision; however, the Ninth Circuit Court of Appeals reinstated the decision of the immigration judge. The court explained that membership alone in the LPP did not constitute active participation in the persecution of individuals and that the government failed to satisfy the evidentiary standard of section 1251(a)(19). The court explicitly limited this decision to its facts, noting that section 1251(a)(19) does not prohibit deportation in all instances in which an individual actively participated in the persecution of individuals under the Nazi Government. *Significance*—This decision delineates the appropriate evidentiary standard applicable in deportation cases brought under section 1215(a)(19) and enunciates the principle that an alien is subject to deportation under that section only if the alien actively participated in the persecution of individuals for their political opinions.

II. CUSTOMS AND TRADE REGULATION

AN AIRLINE CANNOT INVOKE THE LIABILITY LIMITATIONS OF THE WARSAW CONVENTION WHEN ITS TICKETS FAIL TO GIVE ADEQUATE WARNING OF THE LIMITATIONS—*In re Air Crash Disaster at War-*

saw, *Poland*, on March 14, 1980, 748 F.2d 94 (2d Cir. 1984).

Plaintiffs sued for the wrongful death of passengers killed in the crash of a LOT Polish Airline jet on route to Poland from New York. Before boarding LOT, the passengers, who were traveling as a group, flew to New York on domestic flights pursuant to reservations that had been made separately from the LOT reservations. Although the domestic flight tickets gave adequate notice of the Warsaw Convention liability limitations, the LOT ticket warnings were insufficient because they were printed in type smaller than the ten-point size required by the Convention. The airline, citing *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982), argued that it nevertheless should come within the protection of the Convention because the passengers had received notice of the limitations on their domestic tickets and had reason to know that the flight was international. The court rejected the analogy to *Stratis* and held that notice of the Convention limitations on successive flights is adequate only when three conditions are satisfied. First, the passengers must consider the domestic and overseas flights as a "single operation." Second, the successive carriers must likewise consider the flights as a "single operation." Last, the defendant carrier must deliver its own tickets with appropriate notice for the flight at issue. The court concluded that the parties did not consider the flights as one operation because some passengers had flown to New York more than twenty-four hours before the flight to Poland, and reservations for the domestic and international flights had been made separately. The Warsaw Convention, therefore, did not apply to limit the wrongful death recoveries. *Significance*—This case describes when passengers and carriers deem successive flights as a "single operation" for purposes of notice regarding the liability limitations of the Warsaw Convention.

III. JURISDICTION AND PROCEDURE

UNITED STATES CITIZEN IN FOREIGN PRISON CANNOT COMPEL THE TESTIMONY OF A CONSULAR OFFICIAL—*Flynn v. Shultz*, 748 F.2d 1186 (7th Cir. 1984).

Flynn, a United States businessman, was tried and jailed in Mexico for fraud in connection with a corporate contract dispute. Flynn's family filed a complaint seeking mandamus or an injunction under 22 U.S.C. section 1732 (1982) (the Hostage Act) to compel the Secretary of State to force a consular official in Mex-

ico who had been present during some of the contract negotiations to testify on Flynn's behalf. The court of appeals affirmed the district court's grant of summary judgment in favor of the Secretary of State and held that:

[O]nce the Executive Branch conducted an inquiry into whether Flynn was unjustly deprived of his liberty, the court could not determine whether it was consistent with the requirements of the Hostage Act because there was a lack of judicially discoverable and manageable standards.

Rejecting the conclusion of the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), that the Hostage Act applies only when the incarceration of United States citizens results from the lack of recognition of their citizenship, the court explained that the Hostage Act applies to all United States citizens who are arrested abroad. The court applied the general rule that requests for relief involving foreign affairs are political questions because the requested relief was not based on a treaty or administrative procedure and Flynn's Fifth and Sixth Amendment rights had not been violated. The court noted that although Flynn's request for relief was premised on the Hostage Act, it lacked judicially discoverable and manageable standards to monitor compliance with the Act. *Significance*—The court limited the judiciary's role in regard to the Hostage Act while broadening the applicability of the Act to include all United States citizens imprisoned by a foreign government.

FOREIGN COUNTRY EXCEPTION TO FEDERAL TORT CLAIMS ACT IS INAPPLICABLE IN A WRONGFUL DEATH ACTION ARISING IN ANTARCTICA—*Beattie v. United States*, No. 84-5413 (D.C. Cir. Dec. 31, 1984).

Plaintiffs filed a wrongful death action under the Federal Tort Claims Act (FTCA) based on the fatal crash of an Air New Zealand airliner in Antarctica. The plaintiffs alleged United States Navy air traffic controllers at an Antarctic naval base and the Defense Department supervisors who trained and supervised the controllers were negligent. The district court denied the defendants' motion to dismiss for lack of subject matter jurisdiction based on an FTCA exception excluding jurisdiction over claims arising in a foreign country. The court ruled that the exception applies only when the government of a foreign nation has or asserts sovereignty in the matter. It reasoned that while Antarctica

is a large continent, it is not subject to the sovereignty of any nation and, therefore, is not a foreign country within the plain meaning of the FTCA "foreign country" exception. The court of appeals affirmed the district court decision and remanded for further proceedings. *Significance*—This decision is the first to determine that the Antarctic continent, like outer space and the high seas, is not subject to the sovereignty of any nation and is not a "foreign country" within the meaning of the FTCA jurisdictional provisions.

EXTRATERRITORIAL NATURE OF SALVADORAN RELOCATION ORDER TO SALVADORAN AIRLINE PRECLUDES ACT OF STATE DEFENSE TO CLAIMS ARISING FROM THE ORDER—*Airline Pilots Assoc. v. TACA International Airlines*, 748 F.2d 965 (5th Cir. 1984).

A Salvadoran airline violated the United States Railway Labor Act (RLA) by unilaterally moving its base of operations from New Orleans to El Salvador during collective bargaining negotiations with a pilots' union. The relocation had been ordered by the Salvadoran Ministry of Labor upon a mandate from the Salvadoran Constitution, which requires Salvadoran public service companies to maintain their base of operations in El Salvador. Rejecting the airline's act of state and foreign compulsion defenses, the district court pursuant to the RLA granted the union an injunction preventing the relocation. The court of appeals affirmed, holding that the act of state doctrine should not be used, absent overriding sensitive foreign relations considerations, to effectuate foreign actions that violate United States laws. The court reasoned that the Government's order to relocate the United States base of Salvadoran business operations constituted an extraterritorial act not subject to protection under the act of state doctrine. The court also found that enforcement of the domestic labor law would not engender any foreign relations problems that might compel deference to the foreign law. *Significance*—This decision evidences continued lower court erosion of the deferential stance in applying the act of state doctrine to the executive and foreign actors taken by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

FOREIGN SOVEREIGN IMMUNITIES ACT—CHILEAN NATIONAL AIRLINE NOT SUBJECT TO EXECUTION AGAINST PROPERTY TO SATISFY A DEFAULT JUDGMENT BECAUSE THE TRANSPORTATION OF ASSASSINS DOES NOT OVERCOME THE PRESUMPTION OF SEPARATENESS AND IS NOT

COMMERCIAL ACTIVITY—*Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984).

The plaintiffs, personally representing the victims, initiated a tort action against the Republic of Chile for deaths and injuries allegedly caused by Chile's orchestration of a 1976 car bombing that killed the former Chilean Ambassador to the United States, and his wife, and seriously injured the ambassador's aide.

The United States District Court for the District of Columbia granted the plaintiffs a default judgment of over five million dollars. Plaintiffs subsequently filed the judgment in the United States District Court for the Southern District of New York to execute against defendant's property interest in Linea Aerea Nacional (LAN), the Chilean national airline that allegedly had transported the assassins and explosives. The district court in New York held that LAN's participation in the assassination conspiracy fell within the commercial activity exception to the Foreign Sovereign Immunities Act, section 1605(a)(5). Relying on *First National City Bank v. Banco Para El Comercio de Cuba (Bancec)*, 103 S. Ct. 2591 (1983), the court also held that it would violate equitable principles to regard LAN as a separate corporate entity and that it was proper to execute on assets to satisfy a tort judgment if the assets had been used commercially in the activity that gave rise to the cause of action.

The Second Circuit Court of Appeals reversed and remanded, holding that LAN's joint participation in the conspiracy, by its transportation of explosives and agents, was not the type of abuse of corporate form described in *Bancec* and could not overcome the presumption of separateness. The court explained that there was no evidence that LAN had been established to shield its owners from liability or that Chile had ignored corporate formalities in its dealings with LAN. The court further held that even if it had jurisdiction over LAN's assets, the defendant was still immune from execution because the district court had found Chile's actions to be tortious under section 1605(a)(2), and, therefore, Chile's conduct could not also be commercial because sections 1605(a)(2) and (a)(5) are mutually exclusive. The court also explained that the terrorist nature of Chile's activities was governmental, not commercial, because private individuals do not legally engage in state-sponsored terrorism. The court noted that in this case Congress created a right under section 1605(a)(5) to jurisdiction for tortious acts, but not a remedy under section 1610(a)(2) that would allow plaintiff to execute against property. The court,

however, counseled against the pitfall of hard cases making bad law. *Significance*—This decision illustrates the difficulties of using *Bancec*'s reasoning that "international equitable principles" justify piercing the corporate form to overcome the presumption of separateness enjoyed by government-owned instrumentalities.

BASED ON CONSIDERATIONS OF INTERNATIONAL COMITY AND FAIRNESS—UNITED STATES COURTS MAY DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION A CASE ALLEGING ILLEGAL ANTITRUST BEHAVIOR ABROAD, *Timberlane Lumber Co. v. Bank of America National Trust and Savings Ass'n*, 749 F.2d 1378 (9th Cir. 1984).

An Oregon lumber company brought an antitrust action against the Bank of America, its officers, and other individuals. The company alleged that the defendants conspired to prevent the company from purchasing a Honduran lumber mill in order to protect Bank of America's interests in competing lumber mills. The district court dismissed the action for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The district court relied on the three part jurisdictional test that the Ninth Circuit set forth in the original hearing of the *Timberlane* case. The considerations under the *Timberlane* test are: (1) the effect or intended effect on United States foreign commerce; (2) the type and magnitude of alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of international comity and fairness considerations. *Timberlane Lumber Co. v. Bank of America National Trust and Savings Ass'n*, 549 F.2d 597, 613 (9th Cir. 1976) (*Timberlane I*). The district court held that the suit failed the third part of the test. The court of appeals affirmed, holding that the intermeshing of the jurisdictional issue with the substantive issues necessary to warrant a summary judgment analysis was lacking in this case. Because it based the dismissal on international comity considerations, the court did not have to reach the merits of the case. The court reviewed the seven factors it had established in *Timberlane I* for determining international comity considerations and concluded that these factors precluded jurisdiction in this case. *Significance*—This decision is the first to apply the tripartite analysis set forth in *Timberlane I*.