

## CONSTITUTIONAL LAW

### ACT OF STATE : ATTORNEY-GENERAL v. NISSAN<sup>1</sup>

The case *Attorney-General v. Nissan*<sup>1</sup> came to the House of Lords (Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Pearson) on appeal by the Crown from the Court of Appeal, in what their Lordships unanimously described as an unusual and unsatisfactory way. Their Lordships had to decide certain questions of law, ordered by the judge at first instance to be tried as a preliminary issue. At this stage no court had established all the necessary facts, and therefore only the more basic (and non-disputed) facts could be accepted. This caused their Lordships difficulty on occasions and resulted in many of their conclusions being phrased in conditional terms.

The dispute between the respondent Nissan (the original claimant) and the Crown, arose out of the civil strife in Cyprus in 1963. The British, Turkish and Greek Governments offered men to act as a truce force in an effort to establish peace between the rival factions on the island. On 25th December, 1963, the Cyprus Government accepted this offer and on 26th December forces from the United Kingdom, Greece, Turkey were stationed there. From 26th December until 27th March, 1964, pursuant to an agreement with the Cyprus Government, the truce force operated on the Island under British command. From 27th March, after consent had been obtained from all relevant governments, a United Nations peace-keeping force was established in Cyprus.

As from 27th March, the British elements of the truce force became contingents in the U.N. force. On 5th May, 1964, the British forces were relieved by Finnish troops (part of the U.N. force). During the period 26th December, 1963, to 5th May, a hotel on the Island owned by the respondent Nissan, a British subject, was occupied by the British troops. It was in relation to this occupation that the respondent brought his claim against the Crown. The respondent was seeking compensation for the use of his hotel and chattels. He alleged that while the British troops were in occupation, they had damaged, destroyed and looted his goods and chattels and caused other damage to the hotel; these allegations were disputed. Nissan brought his action claiming various declarations. In particular, he sought to establish that the seizure and occupation of his hotel were lawful acts under the royal prerogative in respect of which he was entitled to the payment of compensation; that he had been promised compensation by an agent of the Crown when the hotel was first occupied, and was now entitled to damages for breach of contract; and finally, that he was entitled to damages for trespass to goods.

Doubts were raised as to the validity or applicability of these avenues of claim. However their Lordships felt no need (nor possessed adequate facts) to decide these arguments, since by nature of the order from the lower court, their only task was to pronounce on the validity of three defences which the Crown put forward to the claims.

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1. [1969] 1 All E.R. 629. See generally: Collier, "Act of State as a Defence against a British Subject" (1968) *Cambridge Law Journal* 102; "Note" (1968) 9 *Harvard International Law Journal* 158; de Smith, "Civis Britannium Sum" (1969) 32 *Modern Law Review* 427.

The three Crown defences were as follows:

- (1) During the periods 26th December 1963 to 27th March 1964 and 27th March to 5th May, the British forces were acting as agents of the Cyprus Government and the U.N. respectively, so as to make the actions of the forces the actions of these two bodies, thus relieving the Crown of any liability.
- (2) The action of the British forces were of such character as to amount to acts of state and thus it was outside the jurisdiction of a municipal court to entertain an action concerning liability arising from these acts.
- (3) The Crown was protected from liability because it was not exercising its prerogative in taking the hotel.

It should perhaps be noted at this stage that both the defendant and the plaintiff claimed the occupation of the hotel to be lawful, but for different reasons. It was asserted by the Crown that it was necessarily incidental to an act of state. P, on the other hand, was faced with the problem that English courts have disclaimed jurisdiction to hear claims for trespass to land situated outside the realm. He rested the legality of the occupation on the prerogative and argued that the seizure of a British subject's property under the prerogative gave rise to liability to pay compensation.

The first and third defences were fairly briefly dealt with by their Lordships, and the chief value of their judgments lies in their consideration of the defence of act of state. Consideration of the facts led their Lordships to unanimously dismiss the defence of agency. They concluded that throughout the British forces' occupation of Nissan's hotel, their sole principal was the British Government. Importance was attached to the various communications which passed between the British Government, the Cyprus Government and the U.N. With respect to the U.K.-Cyprus relationship it was held that the Cyprus Government accepted the British offer of a peace-keeping force but in Lord Reid's words, there was "no suggestion that the Cyprus Government had any control over them, or responsibility for them, or were under any obligation to pay for these services"<sup>2</sup>. Furthermore no agreement or arrangement regarding accommodation for the troops was made with the Cyprus Government. The only possible conclusion was that "the British troops came as allies and helpers, not agents" (per Lord Pearce)<sup>3</sup>. This status of non-agency did not change after 27th March, 1964, when the British troops occupied the hotel as part of the U.N. force, since it was held that "the U.N. is not a superstate, but an instrument of collective policy, which it enforces by using the sovereignty of its members. In carrying out the policies each member still retains its own sovereignty"<sup>4</sup>.

The question of the prerogative was dealt with rather cautiously by the House of Lords. The judgments are simply to the effect that the Crown was exercising its prerogative in directing the movement of the forces. The prerogative was the warrant for the presence of the troops in Cyprus. However all

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2. [1969] 1 All E.R. 629, 633.

3. [1969] 1 All E.R. 629, 647.

4. [1969] 1 All E.R. 629, 647 (*per* Lord Pearce).

their Lordships were uncertain as to the respondent's right to compensation by virtue of the prerogative or otherwise. They found no need to resolve at present the very difficult question whether the prerogative extends to the taking or destruction of the property of a British subject in a foreign land by way of extension of *Burmah Oil Co. Ltd. v. Lord Advocate*<sup>5</sup>. Lord Wilberforce was of the opinion that these matters could not be decided without a knowledge of the circumstances in which the respondent's hotel was taken or occupied and probably also of the local law<sup>6</sup>.

The question of act of state presented their Lordships with many difficulties and their treatment of it differs fundamentally. Lord Reid chooses to extrapolate from existing principles to conclude that a Crown defence of act of state against a claim by a British subject living in a foreign country must fail as would the same defence against a British subject living in British territory. The other Lords either doubt or reject this proposition, but also conclude that the Crown has no defence because the actions complained of do not constitute acts of state.

The concept of act of state is a difficult one because it has a diversity of meanings which take their colour from the circumstances. As Lord Reid points out, sometimes it seems to be used to denote any act of sovereign power or high policy or any act done in the execution of a treaty. Sometimes it is used to denote acts which cannot be made the subject of enquiry in a British court<sup>7</sup>. However the definition which gains most general acceptance in this case is that quoted from Professor Wade: "An act of the executive as a matter of policy performed in the course of its relations with another state including its relations with subjects of that state, unless they are temporarily within the allegiance of the Crown, is an act of state"<sup>8</sup>. Professor Wade's formulation is less a definition than a construction put together from what has been decided in various cases. It receives reserved approval from Lords Morris, Pearce, Wilberforce and Pearson, but is criticised for the vagueness of its terms by Lord Reid. However it does have the advantage of recording concisely the existing case law. This case authority relating to actions between the Crown and an individual may be stated in four propositions as follows:

- (1) Act of state is a defence to an act committed abroad to the prejudice of a foreigner (per *Buron v. Denman*)<sup>9</sup>
- (2) Act of state is not a defence to those acts committed against a British subject in British territory (per *Walker v. Baird*)<sup>10</sup>
- (3) Act of state is no defence to acts done against friendly aliens in British territory (*Johnstone v. Pedlar*)<sup>11</sup>

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5. [1964] 2 All E.R. 348. [1965] A.C. 75.

6. [1969] 1 All E.R. 629, 658.

7. [1969] 1 All E.R. 629, 637.

8. Professor E.C.S. Wade in (1934) *British Yearbook of International Law* 103.

9. (1948), 2 Exch. 167; 154 E.R. 450.

10. [1892] A.C. 491; 61 L.J.P.C. 92; 67 L.T. 513.

11. [1921] 2 A.C. 262; [1921] All E.R. Rep. 176.

- (4) Act of state is a defence to acts done against enemy aliens within British Territory (*R. v. Bottrill*)<sup>12</sup>.

In this particular case the Crown sought to withdraw the matter from cognisance by the courts on the two grounds that the acts complained of were (i) performed abroad and (ii) performed in pursuance of a treaty. It was made clear by counsel for the Crown that it was the combination of these characteristics on which he relied<sup>13</sup>. Lord Reid attacked the Crown defence on the former ground and his colleagues on the latter. Lord Reid arguing from principle contended that it would be a strange result if it were found that the rights of the subject were protected from arbitrary acts of the Crown committed within the realm, but were not so protected when the subject left the realm. He therefore felt logically compelled to conclude that the Crown could not plead the defence of act of state with respect to acts committed against a British subject outside the realm. While there was no case exactly in point, Lord Reid supports his conclusion with various dicta, in particular from the House of Lord's decision in *Johnston v. Pedler*<sup>14</sup> and the Court of Exchequer decision in *Buron v. Denham*<sup>15</sup>. These dicta are fairly ambiguous (despite Lord Reid's protestations to the contrary) and are open to Lord Wilberforce's very reasonable criticism that "read literally they support the proposition, read in their context and secundum materiam, they do not"<sup>16</sup>. Lord Morris like Lord Wilberforce feels that the weight of these ambiguous dicta, if anything is against Lord Reid's proposition. Lord Pearce and Lord Pearson are attracted by the logicity of the proposition but do not find it necessary to commit themselves on this point. Lords Morris and Wilberforce most emphatically find no logical compulsion in the proposition. Instead they believe acceptance of such a principle could lead to undesirable results. Lord Pearson cites examples of some of the problems involved. "What would be the position," he queries for instance, "if, in a foreign country, a British army or truce force seizes in one operation a row of ten houses of which one belongs to a British subject and the other nine to foreigners?"<sup>17</sup> These and similar examples lead him with Lord Morris and Lord Wilberforce to conclude that it would be too precarious to reason from principles. Such considerations must be contrasted with Lord Reid's claim that if his proposition is not accepted we are left with "the complicated and irrational rule that against acts done within the realm there is protection for both British subjects and aliens: against acts done on the high seas protection for British subjects but not for aliens: against acts done in foreign countries no legal protection for either"<sup>18</sup>.

Lords Morris, Wilberforce, Pearce and Pearson attack the second aspect of the Crown's defence plea. After considering the facts they hold that the acts complained of were not done pursuant to the peace-keeping treaty between the Cyprus and United Kingdom Governments. The respondent's complaint here was not that his rights had been directly infringed by the creation of a treaty.

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12. *R. v. Bottrill ex parte Kuchenmeister* (1947) 1 K.B. 41.

13. [1969] 1 All E.R. 629, 654.

14. [1921] 2 A.C. 262.

15. (1848), 2 Exch. 167.

16. [1969] 1 All E.R. 629, 656.

17. [1969] 1 All E.R. 629, 662.

18. [1969] 1 All E.R. 629, 635.

If the Crown infringed his ordinary legal rights and founded on its obligations under a treaty as a defence, that defence would not succeed. This point was made clear by the decision in *Walker v. Baird*<sup>19</sup>. However if the claimant's loss was only a consequence of the creation of a treaty between the Crown and another State, then the Crown may successfully plead the treaty in an act of state defence. *Rustomjee v. Reginam*<sup>20</sup> establishes this point. In this case the Crown relied on the latter point. They sought to establish that the occupation of the hotel by British troops was done pursuant to, or in enactment of, the peace-keeping treaty with the Cyprus Government, and that any loss suffered by the respondent, Nissan, was merely consequential. Hence they argued that the Crown was not liable to compensate. This contention was vigorously rejected by all of the House of Lords except Lord Reid. Lord Morris considered that there was an "air of unreality"<sup>21</sup> in talking about acts of state in relation to arrangements for the housing or provisioning of troops. Lord Wilberforce held that "between the acts complained of and the pleaded agreement with the government of Cyprus the link is altogether too tenuous, indeed it is not even sketched out; if accepted as sufficient to attract the description of act of state it would cover with immunity an endless and indefinite series of acts"<sup>22</sup>. Lord Pearce and Pord Pearson both concur in the belief that it would be too far-fetched to say that the acts of the British troops were performed pursuant to the treaty with the Cyprus government. Lord Reid, on the other hand, denies the right of the judiciary to pronounce on the genuineness of an act alleged by the Crown to be an act of state. He says that if the act was "not done in purported exercise of any legal right and was done by an officer of the Crown apparently in the course of his duty, then it appears to me that it must be for the Crown to say whether it claims that the act was an act of state"<sup>23</sup>. With all due respect to his Lordship it seems that this statement amounts to an abrogation of the judiciary's power, established in *Salaman v. Secretary of State in Council of India*<sup>24</sup>, to decide whether or not the act claimed is in fact an act of state.

This case is significant for its discussion of a hitherto unencountered aspect of act of state. Lord Reid's attempt to safeguard the rights of the British subject by extending existing principle is contrasted with the more pragmatic approach of his colleagues. All their Lordships, except Lord Reid, see danger in committing the Crown absolutely to liability to compensate a British subject, living in foreign territory, for the actions of British troops in that territory.

At the same time, however, the proposition is apparent in several of the judgments that "direct interference with the liberty or property of British subjects might be justified as acts of state if that interference were authorised by treaty or were necessary for the implementation of a treaty"<sup>25</sup>. Although

19. [1829] A.C. 491; 61 L.J.P.C. 92; 67 L.T. 513.

20. (1876), 1 Q.B. 487; 46 L.J.Q. B. 238.

21. [1969] 1 All E.R. 629, 642.

22. [1969] 1 All E.R. 629, 658.

23. [1969] 1 All E.R. 629.

24. [1906] 1 K.B. 613; 75 L.J.K.B. 418.

25. de Smith, "Civis Britannium Sum" (1969) 32 Modern Law Review 427 at 431.

instances of executive action of this type would probably be rare, such an approach opens avenues of abuse of power to an executive.

Perhaps Lord Wilberforce hints at the direction the law will take (and the most practical and universally fair solution) when he says that he does not necessarily accept the proposition that "in situations such as the present, justice, as between the claimant and the British taxpayer who will have to pay if the claim succeeds, is dependant on recourse to the courts rather than on appraisal by the executive"<sup>26</sup>.

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26. [1969] 1 All E.R. 629, 657.

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