

# Client Update

## UK Supreme Court Reassesses State Immunity and the Foreign Act of State Doctrine

### LONDON

Lord Goldsmith QC  
phgoldsmith@debevoise.com

Boxun Yin  
byin@debevoise.com

John Crook  
jcrook@debevoise.com

### NEW YORK

Catherine Amirfar  
camirfar@debevoise.com

On 17 January 2017, the U.K. Supreme Court handed down a long-awaited and landmark judgment of immense significance to States and those who deal with States.

In *Belhaj v Straw* [2017] UKSC 3, the claimants alleged that the UK Government and certain officials were complicit in their rendition and mistreatment at the hands of foreign States. They did not sue the foreign States or their officials, since such a claim would undoubtedly have been barred by State immunity. Instead, they sued the UK Government and its officials, including the then-Foreign Secretary, in tort.

The Court held that the claims against the UK Government were not barred by (1) State immunity, since no legal interests of any foreign States were involved, or by (2) the doctrine of foreign act of State, in light of the fundamental human rights principles at stake.

The UK Government applied to strike out the claims on the grounds that the Court should not entertain claims which involved investigating the acts of a foreign State (here in particular that of the United States). On this hearing the court was concerned only with the legal issues and not whether the facts alleged were true. The UK Government and the two individual defendants – the former Foreign Secretary Jack Straw and a senior Foreign Office official – indeed said that for reasons including the Official Secrets Act, they could not even put forward a positive case as to what had actually happened.

## STATE IMMUNITY

The Court reiterated that State immunity is based on the principle of sovereign equality and international comity, which is a fundamental principle of the international legal order. It can be invoked to strike out a claim where a State is directly or indirectly impleaded in proceedings against it without its consent.

In this case, the Court held that no relevant interest of a foreign State was engaged, and therefore State immunity could not be invoked. Here, at most, foreign States might suffer a level of reputational embarrassment, falling short of a legal interest. These cases were quite different from disputes involving property, which involve a legal interest of a proprietary nature.

Importantly, the Court also had regard to the 2004 UN Convention on Jurisdictional Immunities of States and their Property as “the most authoritative statement available in the current international understanding of the limits of State immunity in civil cases”, even though it has not been ratified by the United Kingdom and had not yet entered into force. The Convention provides that State immunity should apply in proceedings where a State is not named as a party, where “the proceeding in effect seeks to affect the property, rights, interests or activities of that other State” (emphasis added). The UK Government had argued that the reference to “interests” should be interpreted broadly to encompass non-legal interests, including of a reputational nature. However, the Court emphatically dismissed this in light of the drafting history of the Convention and academic commentary, holding that “some specifically legal effect should be required as distinct from a social, economic or political effect”.

## FOREIGN ACT OF STATE

On the second point, the question was whether a UK court could or would adjudicate a dispute touching on the lawfulness or validity of sovereign acts of foreign States, in circumstances where fundamental human rights and violations of *jus cogens* norms (such as torture) are engaged. This involved an analysis of the contours of the foreign act of State doctrine and the extent of its exceptions.

The Court rationalised the authorities on foreign act of state into three different types. The first two were not in issue. These were: (1) a UK court would not normally treat a foreign State’s legislation as valid insofar as it affects movable or immovable property within the foreign State’s jurisdiction, and (2) a UK court would not normally question the validity of a foreign governmental act in

respect of property within the foreign State's jurisdiction (although some judges expressed reservations as to the existence of the second rule).

It was the scope of the third type of foreign act of state that was principally in issue. This is the rule of non-justiciability or judicial abstention whereby a domestic court will not adjudicate upon sovereign acts committed by a foreign State abroad. Such a situation may arise where: (1) a court cannot properly hear a claim due to a lack of judicial or manageable standards, or (2) as a function of the separation of powers, where a court considers that it should not hear a claim since it is outside the proper bounds of its constitutional functions, bearing in mind any indication from the Executive about potential damage to UK foreign policy or security interests.

However, the Court also held that the doctrine is not limited to such situations. In considering whether a domestic court should abstain from considering a claim, it is important to bear in mind the importance of fundamental human rights principles under English law (whether as a matter of common law or as a matter of international law). The Court considered these principles to be so important and so fundamental that they can operate to confine the circumstances in which a court should abstain (whether as a matter of substance or by way of exception).

The Court emphasised that a court should determine on a case-by-case basis whether it should abstain from deciding a dispute. In the present case, the fundamental human rights considerations tended in favour of hearing the dispute. Moreover, it could not be said that there are no judicial or manageable standards to judge the nature and seriousness of the alleged detention and misconduct. Nor was there any formal or high-level inter-State agreement in issue. Accordingly, the claims could proceed to be tried on the merits.

### **KEY TAKEAWAYS**

This judgment will likely have significant persuasive force internationally.

On the issue of State immunity, the Court emphatically and unanimously decided that it is not enough simply for a foreign State to suffer reputational damage in order to be able to invoke State immunity. This is even though the potential for international embarrassment here involving accusations of rendition, torture and mistreatment at the hands of foreign States is high. The foreign State must have an interest of a legal nature that is in issue.

On the issue of foreign act of State, the Court recognised, for the first time, the relevance and indeed importance of fundamental human rights (as part of public policy considerations) in assessing whether a claim is non-justiciable. This is likely to spark more debate, since this will allow more human rights claims against the UK Government, even where foreign States are involved in some way. While courts will retain a level of deference to the Executive, they will now have to consider the nature and extent of the claims made, to assess whether the fundamental human rights considerations outweigh any concerns in favour of judicial abstention. This raises important questions about the proper role of the courts in a system premised on separation of powers principles.

The judgment also crystallises a divergence in the act of State doctrines of the United Kingdom and the United States. In contrast to the Court's judgment in *Belhaj*, U.S. precedent, as articulated by the U.S. Supreme Court, does not clearly recognise a public policy limitation on the application of the act of State doctrine, although the Restatement (Third) of Foreign Relations Law (Section 443, comment c), which is often cited by U.S. courts, leaves open some possibility of judicial review for acts that arise out of an alleged violation of fundamental human rights. The immediate implications of the judgment for similar cases in the United States may be limited, given the U.S. Supreme Court's more restricted practice of referring to foreign law, and the fact that U.S. cases raising similar facts have been dismissed on various other grounds, such as the state secrets doctrine or political questions doctrine. It remains to be seen what impact the historic *Belhaj* judgment will have on similar cases brought in other jurisdictions.

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Please do not hesitate to contact us with any questions.