Bouzari v. Iran

Between
Houshang Bouzari, Fereshteh Yousefi, Shervin Bouzari and
Narvan Bouzari, plaintiffs, and
Islamic Republic of Iran, defendant

[2002] O.J. No. 1624
Court File No. 00-CV-201372

Ontario Superior Court of Justice
Swinton J.

Heard: February 18-21, 2002.
Judgment: May 1, 2002.
(90 paras.)

Counsel:

Mark H. Arnold and David Matas, for the plaintiffs.
No one appearing for the defendant.
Peter M. Southey and Christine Mohr, for the intervenor Attorney General of Canada.
Michael F. Battista, for the intervenor Amnesty International (Canadian Section).

¶ 1 **SWINTON J.**:— This action has been brought by the plaintiff Houshang Bouzari, his wife and two children against the Islamic Republic of Iran claiming damages for torture. Mr. Bouzari and his family are landed immigrants in Canada, who are in the process of acquiring Canadian citizenship. The action arises out of events which occurred in Iran in 1993 and 1994.

¶ 2 Iran did not file a Statement of Defence and has been noted in default. This matter comes before me as a motion to determine whether the Superior Court of Justice has jurisdiction over this proceeding, both under the common law rules respecting conflicts of law and under the State Immunity Act, R.S.C. 1985, c. S-18. Section 3 of that Act states,

> (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
>
> (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

The plaintiffs argue that they fall within one of three exceptions specified in the Act - the commercial activity exception in s. 5, the tort exception in s. 6, or the penal proceedings provision in s.

18. Alternatively, they argue that a further exception should be read into the Act to permit a civil action for damages for torture against a foreign state. If the State Immunity Act bars this proceeding, they challenge the constitutionality of s. 3 under the Canadian Charter of Rights and Freedoms, arguing that it is contrary to s. 7 and not justified under s. 1.

¶ 3 The Attorney General of Canada was granted leave to intervene and present evidence with respect to international law and the constitutional issue, while Amnesty International (Canadian Section) was given leave to intervene and present argument, which it did in support of the plaintiffs' submissions respecting an exception from state immunity for actions for damages caused by torture.

The Facts

¶ 4 Since Iran did not defend this proceeding, it is deemed to have admitted the truth of all allegations of fact in the Statement of Claim under the Ontario rules with respect to default judgement (Rule 19.02(1)(a)). Nevertheless, Mr. Bouzari also testified about the events in Iran that led to these proceedings.

¶ 5 Mr. Bouzari was born in Iran and worked for the government there for several years in the 1980s. He ended his government employment in late 1987 and began to work as a consultant in the oil and gas industry. In early 1988, he moved his family - his wife, daughter and son - to Rome, and he conducted his business from Rome and Geneva. Essentially, his work consisted of aiding foreign companies to find oil and gas projects in Iran. He was paid commission and consulting fees by these companies.

¶ 6 In 1991, he was involved in the South Pars project, a very rich oil and gas field offshore Iran in the Persian Gulf. A consortium retained him to act for them on the project. They sought to provide oil and gas drilling and exploration technology and pipeline and refinery construction to NIOC, the National Iranian Oil Company. This was the main subsidiary of the Ministry of Petroleum for all oil projects and was 100% state-owned.

¶ 7 In April, 1992, a consortium of five companies signed a contract with NIOC for $1.8 billion (US). Mr. Bouzari was supposed to be paid 2% of the cost of the entire project for his commission, with the amount payable in installments.

¶ 8 From November, 1992 through to May, 1993, Mehdi Hashemi Bahramani, the son of the president of Iran, approached Mr. Bouzari and offered his father's help to bring the project into effect, in return for a commission of around $50 million. Mr. Bouzari refused.

¶ 9 On June 1, 1993, three plain clothes police officers broke into Mr. Bouzari's apartment in Tehran and searched it. They took money, jewelery, a computer and documents. Then he was ordered to drive at gunpoint to Even Prison. He was taken to Section 209, which belongs to the Ministry of Information. He was held in a small cell, blindfolded, for about 40 days. During that time, he was beaten and once had his head pushed into a toilet filled with excrement.

¶ 10 Around July 10, 1993, he was transferred by government agents to Towhid Detention Centre. By this time, they demanded a ransom of $1 million for his release, which he refused to pay. While incarcerated, he was subject to fake executions and many beatings with cables, which injured his feet. He was also hung by the shoulders for periods of time, which caused great pain and lasting injury to his shoulders, and beaten around the ears with slippers, which has damaged his hearing.

¶ 11 It is Mr. Bouzari's opinion that he was tortured in order to remove him from the South Pars project. In the summer of 1993, NIOC cancelled its contract with the consortium for South Pars. Later, Mehdi established a state-owned company for himself, Offshore Engineering and Construction Company, and signed a contract with the consortium for South Pars in around 1996.

¶ 12 Apparently, Mr. Bouzari's family paid $3 million as ransom in the summer of 1993. According to the Statement of Claim, the funds were transferred to the Foreign Currency Account of the Ministry of Information in a bank in Tehran. Again on January 22, 1994, the family transferred $250,000.00 (US) to the bank account of the Islamic Revolutionary Prosecutor General in Tehran. On January 22, 1994, Mr. Bouzari was taken from prison and released by being left, blindfolded, in the middle of a traffic circle in Tehran.

¶ 13 He ultimately was able to get a passport by promising a further $1.75 million to government agents in the Ministry of Information. He escaped in July, 1994 to Vienna and finally rejoined his family. After his escape, he received telephone threats from Iranian agents, threatening to kill him.

¶ 14 Mr. Bouzari and his family emigrated to Canada in July, 1998 as landed immigrants, and he has brought his action here because it is impossible to do so in Iran. He testified that he continues to suffer from his experiences in Iran, including post-traumatic stress disorder, ongoing pain in his shoulders and back, and deafness. He seeks both compensatory and punitive damages personally against Iran, while his wife and children have brought claims for damages under the Family Law Act, R.S.O. 1990, c. F.3.

Jurisdiction under Canadian Conflicts of Law Rules

¶ 15 Under the common law, a Canadian court has jurisdiction over a tort where there is a real and substantial connection between the subject matter of the litigation and the forum. In the words of LaForest J. in Tolofson v. Jensen, [1994] 3 S.C.R. 1022:

> In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393; Morguard, [1990] 3 S.C.R. 1077, supra; and Hunt, [1993] 4 S.C.R. 289, supra. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of forum non conveniens a court may refuse to exercise jurisdiction where, under the rule elaborated in Amchem, [1993] 1 S.C.R. 897, supra (see esp. at pp. 921, 922, 923), there is a more convenient or appropriate forum elsewhere.

The central issue in Tolofson was the choice of law to be applied, once a court has properly assumed jurisdiction. Normally, in the case of tort litigation that will be the lex loci delicti - the law of the place in which the tort occurred.

¶ 16 For purposes of this motion, I accept the truth of the facts as pleaded. Those facts clearly show that wrongful and brutal acts occurred in Iran. Those acts caused injury to Mr. Bouzari in Iran, although he suffers ongoing effects from those injuries. These events occurred in 1993 and 1994 - many years before Mr. Bouzari came to Canada. If one were to apply Canadian conflicts rules with respect to jurisdiction in the normal fashion, the logical conclusion would be that there is no real and substantial connection between the wrongdoing that gave rise to the litigation and Ontario, and therefore, Ontario courts have no jurisdiction. A similar result would come with a forum non conveniens analysis, given that events occurred in Iran; Iranian law would apply; and there was no link to Canada at the time of

these events.

¶ 17 However, the plaintiff is here seeking damages for torture. Clearly, he can not bring such an action in Iran, given the facts alleged. Given this reality, I do not feel it appropriate to decide this case on conflicts rules alone. It may be that the Canadian courts will modify the rules on jurisdiction and forum non conveniens where an action for damages for torture is brought with respect to events outside the forum. Therefore, I turn to the issue of state immunity.

The State Immunity Act

¶ 18 Historically, in accordance with customary international law, foreign states were granted absolute immunity from proceedings in the courts of other states. This practice was founded on principles of sovereign equality of states and non-interference of states in the internal affairs of another state. However, over the course of the last century, as certain exceptions developed, the doctrine of restrictive immunity has replaced absolute immunity. Section 3 of the Canadian State Immunity Act makes this clear. Essentially, foreign states are immune from civil suits in Canadian courts, unless one of the exceptions in the Act applies, or the state waives its immunity (s. 4). However, the number of exceptions to immunity is limited in the Act. Most notable in the Canadian legislation are the commercial activity exception found in s. 5 and the tort exception in s. 6.

¶ 19 The plaintiff also seeks to invoke s. 18, dealing with penal proceedings. Section 18 of the Act states, "This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings". The plaintiff argues that because he seeks punitive damages, as well as compensatory damages, this is a proceeding in the nature of criminal proceedings, and s. 18 applies.

¶ 20 Such a characterization of these proceedings is incorrect. Punitive damages are a civil remedy which can be awarded to deter conduct of the defendant that is "so malicious, oppressive and high-handed that it offends the court's sense of decency" (Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at paragraph 196). However, Cory J. went on to say that while the purpose of punitive damages is to deter the defendant and others from acting in this manner, punitive damages should only be awarded where the combined award of general and aggravated damages would be insufficient to achieve the goals of punishment and deterrence.

¶ 21 Thus, the punitive damage claim can only be determined after a finding of civil liability and a determination of the compensatory damages. Therefore, despite the deterrent aspect of punitive damages, they remain a remedy in a civil proceeding. The possibility that they may ultimately be awarded does not change the character of those proceedings. Therefore, s. 18 has no application here.

The Commercial Activity Exception

¶ 22 The commercial activity exception arose as a response to the increasing participation of states in the marketplace. Essentially, states continue to accord immunity in civil proceedings to foreign states provided that the acts to which the proceedings relate are an exercise of sovereign authority (acta iure imperii). Immunity is not accorded when the act of the foreign state is characterized as private or commercial (acta iure gestionis).

¶ 23 Section 6 of the Canadian Act sets out the exception for commercial activity:

> A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

Section 2 defines "commercial activity" to mean "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character". "Foreign state" is defined to include any government of a foreign state, including its departments and any agency of the foreign state.

¶ 24 The leading Canadian authority on the commercial activity exception is Re Canada Labour Code, [1992] 2 S.C.R. 50. This case arose out of union certification proceedings before the Canada Labour Relations Board, brought by the Public Service Alliance of Canada in respect of Canadian civilian employees at the United States naval base in Argentia, Newfoundland. LaForest J., writing for the majority, described the development of the restrictive theory of state immunity and then went on to adopt a contextual approach to determine whether the doctrine of restrictive immunity should apply to a particular claim (at 72-73). At 76, he stated:

> I would draw one simple lesson from the common law and the American experience in applying a statutory restrictive immunity model: the proper approach to characterizing state activity is to view it in its entire context. This approach requires an examination predominantly of the nature of the activity, but its purpose can also be relevant.

In this case, he held that the employment relationship had both a sovereign and a commercial aspect, but that the proceedings before the Board related to the sovereign aspect of the relationship. Therefore, the United States was immune from the tribunal's proceedings.

¶ 25 Mr. Bouzari has framed his claim in tort for damages for kidnapping, false imprisonment, assault, torture and death threats. He takes the position that he was abducted and held because he refused to pay monies to Mehdi, and the imprisonment and torture were aimed at extracting an advance payment from him on the commission that he had refused to pay Mehdi. As well, Iran sought to obtain ransom monies from him.

¶ 26 I can not characterize the nature of the activity here as commercial. This is far from the usual case where commercial activity is found - for example, where the plaintiff sues on a contract for goods provided to the foreign state, or where the foreign state has entered the marketplace as a trader. For example, in Playa Largo v. I Congreso Del Partido, [1983] A.C. 244 (H.L.), Lord Wilberforce explained that a court must decide whether a particular claim should be considered as "within an area of activity, trading or commercial, or otherwise of a private law character" (at 267).

¶ 27 Here, the activity or conduct that gives rise to the litigation was imprisonment by agents of the foreign state and acts of torture performed by them in a state prison. Even if the motive behind these acts was to obtain funds from Mr. Bouzari by way of ransom or to remove him from the South Pars project, the acts were those of state officials, and the funds paid were deposited to bank accounts of the state.

¶ 28 In my view, regardless of the state's ultimate purpose, the exercise of police, law enforcement and security powers are inherently exercises of governmental authority and sovereignty. In a case with a similar fact situation, Saudi Arabia v. Nelson, 122 L Ed 548 (1993), the United States Supreme Court reached the same conclusion. There, the plaintiff sought damages for wrongful arrest, imprisonment and torture in Saudi Arabia. Souter J. described the conduct as an abuse of police power by the government of Saudi Arabia, and went on to say that "a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature" (at 553).

¶ 29 I am aware that the United States Foreign Sovereign Immunities Act of 1976 instructs courts to look at the nature of the act, rather than its purpose, to determine whether it is commercial. In contrast, in Canada Labour Code, supra, the Supreme Court of Canada took the view that both the nature and the purpose of the activity were relevant, although the purpose was not predominant. Nevertheless, the acts on which this claim is based were exercises of sovereign and governmental authority, and they can not be characterized as analogous to those of a private actor engaged in commercial activity. The fact that the state sought to obtain funds from Mr. Bouzari as a ransom, or to assist Mehdi, can not turn this into a commercial transaction of the type contemplated by s. 5 of the Act. Therefore, s. 5 does not apply.

The Tort Exception

¶ 30 Section 6 states:

> A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
>
> (a) any death or personal or bodily injury, or
>
> (b) any damage to or loss of property that occurs in Canada.

¶ 31 This is a more recent exception to state immunity. However, a number of states have enacted a comparable provision in order to protect their citizens against wrongful acts by a foreign state in the forum state that cause injury to individuals or property. In contrast to the Canadian provision, some of these statutes more clearly say that the act causing injury must occur in the forum. For example, the legislation of the United Kingdom provides that a state is not immune from proceedings in respect of death or personal injury "caused by an act or omission in the United Kingdom" (State Immunity Act 1978, c. 33, s. 5).

¶ 32 Section 6 only permits a Canadian court to take jurisdiction if the injury occurs in Canada. The Ontario Court of Appeal has held that this provision can apply to psychological injury or mental distress, but only if that injury arises from or is linked to a physical injury as well, and that injury must occur in Canada (United States of America v. Friedland (1999), 46 O.R. (3d) 321 at 328; Schreiber v. The Federal Republic of Germany (2001), 52 O.R. (3d) 577 (C.A.) at 588-89). In this case, the physical injury, as well as the related psychological injury, occurred in Iran because of acts of torture there. While Mr. Bouzari continues to suffer from those injuries in Canada, both physically and mentally, that does not change the fact that the injury occurred in Iran.

¶ 33 While the Court of Appeal's decision in Walker v. Bank of New York (1994), 16 O.R. (3d) 504 is not directly on point, I note that the exception in s. 6 did not apply there where the arrest of the plaintiff occurred in New York and the mental distress and false imprisonment occurred there.

¶ 34 Therefore, s. 6 does not apply, unless a special exception must be read into the Act for damages caused by acts of torture in a foreign state.

Reading In a Further Exception

¶ 35 The plaintiff argued that s. 6 of the Act must be read in light of the current state of international law so as to include actions for damages for torture committed in a foreign state. Alternatively, it was submitted that a further exception should be read into s. 3 with respect to a civil action for damages for

torture by a foreign state. Specifically, it is argued that Canada is a signatory of the Convention Against Torture and, therefore, has an obligation to provide a civil remedy for victims of torture, even against foreign states acting within their territorial jurisdiction. Alternatively, the prohibition against torture is jus cogens - that is, a fundamental norm of international law which overrides customary rules of international law, such as state immunity from civil proceedings in the courts of foreign jurisdictions.

¶ 36 To assist me with the international law issues under this heading, as well as the Charter arguments, expert opinion evidence on international law was given by Ed Morgan, an Associate Professor of International Law at the University of Toronto, on behalf of the plaintiff, and Christopher Greenwood, Q.C., who holds the Chair in International Law at the London School of Economics, on behalf of the intervenor, the Attorney General of Canada.

¶ 37 In R. v. Finta (1994), 112 D.L.R. (4th) 513, the Supreme Court of Canada commented on the role of experts in international law (at 554). Essentially, such experts can assist the court in determining the applicable international law by setting out the relevant sources and describing the general principles of law accepted in the international community.

The Role of International Law in the Interpretation of Canadian Statutes

¶ 38 International law plays a role in the interpretation of Canadian laws in a number of ways. In National Corn Growers Association v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, the Supreme Court of Canada held that in interpreting legislation enacted to implement Canada's international obligations, a tribunal could reasonably could look to the international instrument to assist in interpreting unclear provisions (at paragraph 73). There, the issue was whether the Import Tribunal, whose decision was subject to judicial review, had erred in considering the General Agreement on Tariffs and Trade when interpreting the Special Import Measures Act, a statute designed to implement Canada's GATT obligations.

¶ 39 Customary rules of international law are directly incorporated into Canadian domestic law unless ousted by contrary legislation (Suresh v. Minister of Citizenship and Immigration (2000), 183 D.L.R. (4th) 629 (F.C.A.) at 659; appeal allowed on another basis: [2002] S.C.J. No. 3). In contrast, an international obligation under a treaty or convention has no direct application in Canada until implemented by legislation by the appropriate level of government. Nevertheless, even when an international obligation has not been implemented, the Supreme Court has observed that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review" (Baker v. Canada, [1999] 2 S.C.R. 817 at 861). Parliament and legislatures are presumed to respect the values and principles enshrined in international law, which constitutes part of the legal context within which legislation is enacted. However, if there is a conflict between Canadian legislation and a norm of international law, then the legislation continues in force.

The Interpretation of the State Immunity Act in Light of International Law

¶ 40 There are two bases for the plaintiff's argument that the State Immunity Act must be interpreted so as to permit this action to proceed. The first rests on that fact that Canada is a signatory of the Convention Against Torture (entered into force June 26, 1987, GA/res. 39/46, 39 UN GAOR Supp. (No. 51) UN Doc. A/39/51 (1984)). It was argued that Canada has an obligation to provide victims of torture with a civil remedy by the terms of the Convention. The second argument rested on the principle of jus cogens: as the prohibition on torture is jus cogens, an exception to the doctrine of state immunity for civil actions for damages for torture must be read into the Act in order that Canada not be in violation of international law. In the alternative, it was suggested that such an interpretation of the Act was

permissible, and it should be adopted, given the importance of deterring torture.

¶ 41 The hurdle for the plaintiff here is that the words of the Act seem clear. Section 3 appears to set out a general rule of state immunity and to specify certain exceptions. It appears to codify the law respecting state immunity. If so, any further exception would be for Parliament to specify, not a judge interpreting the legislation. Similarly, s. 6 appears to deal with acts causing injury in Canada, and the language does not lend itself to one approach for injury caused by torture outside the country and another approach for other kinds of acts causing injury in Canada.

¶ 42 However, even more important than the problem which the plaintiff faces with the language of the Act is the fact that the legislation in its current form, without a further exception, is consistent with both customary international law respecting state immunity and Canada's treaty obligations. Therefore, for the reasons that follow, there is no need to read in a further exception in order to comply with international law.

The Convention Against Torture

¶ 43 Canada, but not Iran, is a signatory of the Convention Against Torture, 1984. The convention defines torture in Article 1 as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (emphasis added)

Thus, the convention defines acts of torture as acts of public officials or persons acting in an official capacity.

¶ 44 Article 2 imposes an obligation on states party to the convention to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Article 4 imposes an obligation to ensure that acts of torture are offences under its criminal law, while Article 5 requires it to take jurisdiction not only over those who commit torture within the jurisdiction, but also over an alleged offender who is in the jurisdiction, if it does not extradite him. Article 14(1) provides that a state party shall ensure in its legal system that the victim of torture "obtains redress and has an enforceable right to fair and adequate compensation".

¶ 45 In implementing the convention, states have amended their criminal laws to allow them to prosecute individuals for acts of torture committed outside their jurisdiction. See, for example, the Canadian amendment found in An Act to Amend the Criminal Code (torture), S.C. 1987, c. 10 (3rd Supp.), s. 2.

¶ 46 Mr. Morgan concluded that the absence of a territorial constraint in Article 14, in contrast with the wording of Articles 11 through 13, meant that that there was no geographical limitation in Article 14. In his view, Canada has an obligation to provide a civil remedy for torture, even if the acts are committed outside the jurisdiction. Given the definition of torture in Article 1 and the need for acts by a

public official or a person acting in an official capacity, this would entail an assertion of jurisdiction by Canada over acts of a foreign state within its own territory. However, Mr. Morgan conceded that no country has enacted legislation to give a civil remedy for torture committed outside its jurisdiction by a foreign state.

¶ 47 Mr. Greenwood took issue with Mr. Morgan's interpretation of the Convention. In his view, Article 14(1) does not impose an obligation on signatories to provide a civil remedy for all acts of torture, including those committed outside its jurisdiction. The article is silent with respect to territorial reach, but state practice, in his view, does not support such an interpretation.

¶ 48 In interpreting a treaty, the principles of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 form part of customary international law. Therefore, one begins with the following principle:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

"Context" is defined to include both the text and agreements made by the parties in connection with the conclusion of the treaty. In addition to context, one is to take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", and both experts emphasized the importance of state practice in treaty interpretation. As well, Article 31 sets out other methods of interpretation. Significantly, Article 32 states that recourse is made to preparatory material only as a supplementary means of interpretation, if the interpretation made in accordance with Article 31 leaves the meaning ambiguous or leads to a manifestly absurd or unreasonable result.

¶ 49 Here, the text of Article 14 contains no specific territorial limitation, as do certain other articles dealing with investigation, for example. In contrast, the earlier articles dealing with criminal law explicitly require the state either to take jurisdiction over an individual who is in the state and who has committed torture elsewhere or to extradite him. On the other hand, Article 10, dealing with education and information for law enforcement and military personnel, among others, contains no territorial limitation. However, the terms suggest that this applies to individuals subject to the jurisdiction of the state party. Therefore, the text of the treaty does not provide clear guidance.

¶ 50 However, more importantly, state practice, both at the time the treaty was signed and since, indicates that no state interprets Article 14 to require it to take civil jurisdiction over a foreign state for acts committed outside the forum state. Specifically, the United States filed an interpretive declaration in 1994, on ratification, indicating its understanding that Article 14 requires a state to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the state party. Germany treated this as a declaration and not a reservation at the time. According to Mr. Greenwood, the American declaration, the German response and the silence of other states is evidence of state practice accepting that Article 14 requires a state to provide a civil remedy only for acts of torture committed in territory under its jurisdiction.

¶ 51 Mr. Greenwood also reviewed the state reports on the implementation of the Convention which are filed with the Committee Against Torture in accordance with states' obligations under the Convention. Canada has filed three such reports to date. None of these reports have indicated that a state has granted a civil remedy for torture committed outside its territory, and there has been no negative comment from the Committee. Therefore, Mr. Greenwood is of the opinion that Article 14 does not require a state to provide a civil remedy for acts of torture by a foreign state outside the forum, nor is it inconsistent with the Convention if Canada continues to provide immunity for such acts.

¶ 52 In my view, Mr. Greenwood's opinion with respect to the interpretation of the Convention, as well as other issues of international law, is more persuasive than Mr. Morgan's. Mr. Morgan described Mr. Greenwood's approach as "too conservative", since it describes where international law has been, but not where it is going. During his testimony, Mr. Morgan candidly admitted that he was advocating a position where international law was going (and, in his view, should be heading). At one point, he indicated that a trend was occurring, but no first step had been taken by any state to assert extraterritorial civil jurisdiction over a foreign state for acts of torture.

¶ 53 My task is to determine whether Canada's State Immunity Act should be interpreted to provide a further exception for damages for torture committed by foreign states outside Canada so as to be in compliance with international law, or whether s. 3 of the Act is unconstitutional. In making my decision, especially on the interpretation issue, I need to know the current state of international law. Therefore, I have found Mr. Greenwood's evidence much more helpful on the issues that I need to decide, and I have relied on it extensively.

¶ 54 I accept his opinion that the Convention creates no obligation on Canada to provide access to the courts so that a litigant can pursue an action for damages against a foreign state for torture committed outside Canada. Rather, Article 14 requires states like Canada, who are signatories, to provide a remedy for torture committed within their jurisdiction.

¶ 55 In addition, I accept Mr. Greenwood's opinion that there is no obligation under the International Covenant on Civil and Political Rights that requires access to the courts for actions alleging torture by foreign states committed outside Canadian jurisdiction. Article 14 provides that in determination of a criminal charge or rights and obligations in a suit at law, an individual shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. To date, this has not been interpreted to require a state to provide access to its courts with respect to sovereign acts committed outside its jurisdiction. As discussed more fully below, the European Court of Human Rights, in interpreting a similar, but differently worded article in the European Convention for the Protection of Human Rights and Fundamental Freedoms, did not find the United Kingdom in violation of that Convention because it granted sovereign immunity for acts of torture committed outside the state.

¶ 56 Therefore, Canada has no treaty obligation which requires it to provide a civil remedy for acts of torture committed by foreign states.

The Jus Cogens Argument

¶ 57 In the alternative, the plaintiff argues that the prohibition against torture is a norm of jus cogens, which obliges Canada to provide a right to sue a foreign state in a Canadian court for damages for torture committed outside Canada.

¶ 58 The sources of international law include treaties and customary international law. While treaties bind only those who are signatories, customary international law arises out of the general practice of states. As stated by the International Court of Justice in Case concerning the Continental Shelf, Libya/Malta (1985), 81 I.L.R. 239 at 261-2 (paragraph 27):

> It is, of course, axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.

Therefore, in determining whether there is a rule of customary international law, one must consider whether there is a widespread and consistent state practice and whether states accept that they have a legal obligation to follow that practice (Oppenheim's International Law (9th ed.), vol. 1 (New York: Longman) at 902-3).

¶ 59 A rule of jus cogens is a higher form of customary international law. It is a peremptory norm from which no derogation is permitted (Vienna Convention on the Law of Treaties, Article 53). Under international law, a norm of jus cogens overrides other rules of customary international law in conflict with it. As well, Articles 53 and 64 of the Vienna Convention on the Law of Treaties provide that a treaty obligation in conflict with a principle of jus cogens is of no force or effect in international law:

> 53. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
>
> 64. If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

¶ 60 With respect to the jus cogens argument, the first question must be whether the prohibition against torture is a norm of jus cogens and, if it is, what is the scope of the norm. The Supreme Court of Canada discussed this question in Suresh v. Canada (Minister of Citizenship and Immigration), [2002] S.C.J. No. 3, but did not have to finally decide whether the prohibition against torture was a peremptory norm. However, it did state that the norm could not be easily derogated from (at paragraph 65). Nevertheless, the Court went on to hold that in an exceptional case, deportation to face torture might be justified under either s. 7 or s. 1 of the Charter (at paragraph 78).

¶ 61 Courts of other countries have held the prohibition on torture to be a rule of jus cogens - for example, the House of Lords in R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3), [2000] 1 A.C. 147. Both experts took the position that the prohibition on torture is a norm of jus cogens. I accept that conclusion, which seems well-supported by the sources set out in the Supreme Court's reasons in Suresh.

¶ 62 That still raises the important question of the scope of the norm. Mr. Greenwood disagreed with Mr. Morgan that the prohibition of torture includes an obligation to provide a civil remedy against a foreign state for acts that occurred within that state. Indeed, Mr. Morgan conceded during cross-examination that states do not universally embrace the view that there must be a civil remedy for torture, and this is not currently accepted as an element of the prohibition of torture. Nevertheless, he urged me to rely on the dissenting opinions in the European Court of Human Rights in Al-Adsani v. The United Kingdom (November 21, 2001) and in the International Court of Justice in Democratic Republic of the Congo v. Belgium (The Arrest Warrant Case), dated February 14, 2002, and to find that state immunity should give way when damages are claimed for torture. This is not really an argument based on jus cogens, but rather a suggestion that I should take a step in developing a new exception to state immunity.

¶ 63 An examination of the decisions of national courts and international tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been

committed outside the forum, even for acts contrary to jus cogens. Indeed, the evidence of state practice, as reflected in these and other sources, leads to the conclusion that there is an ongoing rule of customary international law providing state immunity for acts of torture committed outside the forum state.

The Decisions of National Courts

¶ 64 The decisions of the English Courts have consistently respected the principle of state immunity for sovereign acts committed outside of the United Kingdom. This has been the case even where the acts were contrary to rules of jus cogens. For example, in Kuwait Airways Corporation v. Iraqui Airways Co. (No. 1), [1995] 1 W.L.R. 1147, the House of Lords held that Iraq and its instrumentalities were entitled to state immunity in the English courts in respect of Iraqui aggression against Kuwait, even though the illegal act was contrary to a rule of jus cogens. The Court went on to disagree three to two on a different issue - namely whether Iraqui Airways was immune in respect of acts subsequent to the invasion and takeover of Kuwait.Subsequently, in Al-Adsani v. Government of Kuwait (1996), 107 I.L.R. 536, the Court of Appeal held that Kuwait was entitled to immunity in a civil proceeding for damages for torture in Kuwait, and leave to appeal was denied by the House of Lords.

¶ 65 In Pinochet, supra, the House of Lords held that the former president of Chile was not entitled to immunity in respect of acts of torture allegedly committed in Chile. That case, however, concerned criminal proceedings against an individual, not civil proceedings against the state of Chile. Several of the Law Lords discussed immunity in civil proceedings in their speeches, and three expressly accepted the principle that immunity would apply in civil proceedings against a state for torture committed in that state (Lord Hutton at 254, 264; Lord Millett at 278-9; and Lord Phillips at 280-81). Lord Hutton, for example, states at 264:

> For the reasons given by Oppenheim's International Law, vol. 1, p. 545, which I have cited in an earlier part of this judgment, I consider that under international law Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court of the United Kingdom.

¶ 66 Courts in the United States have also refused to take jurisdiction in proceedings in which claims for damages for torture are made arising from acts outside the United States. In Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), the Court held that there was no exception to state immunity for acts of torture committed outside the United States, even though those acts were in violation of jus cogens (at 718-9). The Court also observed that any further exception to the Foreign Sovereign Immunities Act must come through legislation. (See also Argentine Republic v. Amerada Hess Shipping Corporation (1989), 488 U.S. 428; Princz v. Federal Republic of Germany, 26 F. 3d 1166 (D.C. Cir. 1994)).

¶ 67 Mr. Morgan could point to only one decision of any domestic court in the world in which the court has taken jurisdiction in a civil case involving torture against a foreign state: Prefecture of Voiotia v. Federal Republic of Germany (summarized in (2001), 95 A.J.I.L. 198). The Hellenic Supreme Court was dealing with a claim for damages arising from German atrocities in Greece during the Second World War. Thus, there was some analogy between that case and the tort exception in s. 6 of the Canadian State Immunity Act and its counterpart in other countries. However, the case appears to have turned on the view that the acts were crimes against humanity and so in violation of jus cogens. Therefore, the majority concluded that there was an implied waiver of state immunity - a conclusion that the commentator in the American Journal of International Law described as controversial and attributable only to "an acute case of judicial activism" (at 204).

The Decisions of International Tribunals

¶ 68 There are two recent decisions of international tribunals which have also upheld the principle of state immunity where there has been a violation of jus cogens. The decision of the United Kingdom Court of Appeal in Al-Adsani, supra was narrowly upheld by the European Court of Human Rights in Al-Adsani v. The United Kingdom (November 21, 2001). The Court held that the United Kingdom's state immunity legislation did not violate Article 6(1) of the European Convention on Human Rights, even though the result was to grant immunity from civil actions arising from acts of torture by a foreign state. That article provides that in the determination of civil rights and obligations or any criminal charge, an individual is entitled to a fair and public hearing within a reasonable period of time by a fair and impartial tribunal established by law.

¶ 69 The inquiry of the Court in Al-Adsani was whether the limitation on access to the courts was justified, in that it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aims sought to be achieved (at paragraph 53). In answering, the majority found that the grant of sovereign immunity in civil proceedings pursued the legitimate aim of compliance with international law to promote comity and good relations between states. The majority then went on to consider the current rules of international law with respect to state immunity and concluded that there was not yet acceptance in international law that states are to be denied immunity in civil proceedings for damages for alleged torture committed outside the forum state (at paragraph 66). Specifically, it stated in paragraph 61:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.

Therefore, it held that the British State Immunity Act was not inconsistent with the doctrine of state immunity in international law, and so the law met the proportionality test.

¶ 70 Finally, the most recent evidence that state immunity for acts of torture is consistent with customary international law is the decision of the International Court of Justice in The Arrest Warrant Case, supra. There, the Court held 13 to 3 that Belgium had violated its legal obligation to the Congo by failing to respect the immunity from criminal jurisdiction enjoyed by Congo's Minister of Foreign Affairs. Belgium unsuccessfully argued that the Foreign Minister had committed crimes against humanity in the Congo, and asserted jurisdiction in the Belgian courts. However, the International Court of Justice followed the rule of international law which provides immunity to a Foreign Minister from criminal prosecution in foreign courts while in office.

¶ 71 Thus, two international tribunals have very recently affirmed the doctrine of state immunity, even when there have been acts of torture or crimes against humanity. The only international tribunal which has expressed a different view is the International Criminal Tribunal for Former Yugoslavia in Prosecutor v. Furundzija (December 10, 1998). In an obiter comment, Judge Cassese expressed the view that a victim of torture could pursue a civil claim against one state in the courts of another state (at paragraph 155).

¶ 72 Mr. Greenwood provided a survey of legislation on state immunity which shows that no state has enacted legislation which includes an exception for human rights or jus cogens violations occurring outside the forum. No cases in domestic courts around the world have found an exception from state

immunity for human rights violations that occurred outside the forum. The closest example to an assertion of jurisdiction over acts outside the forum state is found in para 221 of the United States Anti-Terrorism and Effective Death Penalty Act of 1996, which permits an action against a foreign state by an American citizen for personal injury or death, wherever it occurs, if the defendant state has been listed as a state sponsor of terrorism. Thus, this is not directed broadly at acts of torture, but rather terrorism. It does not support the proposition that there is general or even emerging state practice accepting a departure from the principle of state immunity from civil action for acts of torture outside the forum.

¶ 73 Therefore, the decisions of state courts, international tribunals, and state legislation do not support the conclusion that there is a general state practice which provides an exception from state immunity for acts of torture committed outside the forum state. As a result, there is no conflict between the Canadian State Immunity Act as written, with its limited exceptions, and customary international law. Indeed, the Canadian Act, in its present form, is consistent with current norms of customary international law. While international law may someday evolve to include a further exception for acts of torture, it does not do so now. Were I to accept the suggestion of the plaintiff and find such an exception, not only would I be interpreting the legislation incorrectly, but also, in Mr. Greenwood's view, putting Canada in violation of customary international law. Therefore, the action is barred by s. 3 of the Act, unless s. 3 is unconstitutional.

The Constitutionality of the State Immunity Act

¶ 74 The plaintiff argues, in the alternative, that s. 3 of the Act is contrary to s. 7 of the Canadian Charter of Rights and Freedoms. Section 7 reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In accordance with s. 32, the Charter applies to the government of Canada or the provinces. Clearly, the Charter does not apply to acts of the state of Iran.

¶ 75 The interpretation of s. 7 is a two step process, requiring the plaintiff to prove, first, that there has been a deprivation of a right to life, liberty or security of the person, and secondly, that this deprivation was not in accordance with the principles of fundamental justice.

¶ 76 The plaintiff argues that his right to security of the person has been violated by Canada's failure to provide him with a civil remedy. More specifically, he submits that the failure to provide a civil remedy violates his security of the person because it leaves him without compensation. It also violates his security of the person because the government's failure to provide a remedy fails to deter heinous conduct by other states. Finally, he argues that the failure to provide him with a remedy causes him psychological distress. He submits that this is not in accordance with principles of fundamental justice, given the current state of international law with respect to torture.

¶ 77 The plaintiff is claiming damages here for tortious acts that occurred in Iran before he had any connection with Canada, and this makes it difficult for him to show that any action of the government of Canada has caused a deprivation of his rights. Moreover, the Supreme Court of Canada has generally been reluctant to find pure economic rights protected by the Charter. For example, it has held that the right to security of the person in s. 7 does not include economic rights as generally encompassed by the term "property" (Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 1003).

¶ 78 While the Court has not spoken expressly about the constitutionality of laws limiting actions for damages, in Whitbread v. Walley it dismissed an appeal from the bench with respect to a Charter challenge to a limitation on the damages that could be claimed in an action against the owner or operator of a ship ([1990] 3 S.C.R. 1273 at 1279). The British Columbia Court of Appeal had discussed the s. 7 argument in detail. McLachin J.A., as she then was, observed that the deprivation of life, liberty and security of the person which the plaintiff had suffered was not caused by the limitations in the legislation, but by the accident itself ([1988] 5 W.W.R. 313 at 325-6). In her words,

> The plaintiff's physical and psychological loss arose independently of the impugned provisions and will, in large part, continue, regardless of whether those provisions apply or not. What the limitations on liability in ss. 647 and 649 cause is not the plaintiff's physical loss of liberty and security, but his inability to recover more than a stipulated amount of money from the persons legally responsible for the accident. While money, as already noted, may almost always be argued to affect a person's liberty and security, that is an indirect and incidental effect not contemplated by s. 7 of the Charter.

Other courts have reached similar conclusions with respect to the constitutionality of limitations on access to the courts in civil cases (for example, Filip v. City of Waterloo (1992), 98 D.L.R. (4th) 534 (Ont. C.A.) at 537; Budge v. Alberta (Workers' Compensation Board) (1991), 77 D.L.R. (4th) 361 (Alta. C.A.)).

¶ 79 The plaintiff's injuries were not caused by s. 3(1) of the State Immunity Act. At most, that provision affects his ability to recover damages, but this is not a violation of his right to security of the person. As in Whitbread, the deprivation of liberty and security of the person was caused by the acts of Iranian officials.

¶ 80 In the alternative, the plaintiff suggested that Canada contributes to the deprivation of security of the person here if it fails to provide a remedy for torture. Were it to provide such a remedy, states would be deterred from acts of torture.

¶ 81 In Suresh, supra, the Supreme Court discussed whether there would be a violation of the principles of fundamental justice if a Convention refugee were deported to a state where he risked being tortured. The Court reiterated the view that it had expressed in earlier cases:

> ... the guarantee of fundamental justice applies even to deprivations of life, liberty and security effected by actors other than our government, if there is sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand (at paragraph 54).

¶ 82 The Court in Suresh was discussing a prospective act of torture by another state, in which Canada would be implicated by an act of deportation. In contrast, in this case, we are dealing with acts that occurred long in the past in Iran. Canada had no connection with Mr. Bouzari at the time of the torture. The failure to provide a civil remedy in the Canadian courts now to Mr. Bouzari for actions which occurred many years ago in Iran does not make Canada a participant in those acts of

torture. Even if the existence of a civil action for damages for torture might be a deterrent to torture by foreign states in the future, Canada's failure to provide such a remedy and its enactment of s. 3(1) does not constitute a deprivation of Mr. Bouzari's security of the person.

¶ 83 Finally, it was argued that the failure to give access to the courts causes Mr. Bouzari added psychological distress, and this is a denial of security of the person. In Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 , the Supreme Court discussed the application of s. 7 outside the criminal context. The Court confirmed that serious state interference with an individual's psychological integrity engages s. 7. Bastarache J. emphasized that the psychological harm must be state-imposed, and the psychological prejudice must be serious. He observed that in cases where violations of security of the person had been found because of state interference with psychological integrity, the state had interfered with an individual interest of fundamental importance (at 356).

¶ 84 Here, the major psychological distress to Mr. Bouzari arises from the acts of torture, which he alleges to have caused post-traumatic stress disorder with ongoing effects. At most, the distress caused by the actions of the government of Canada derives from the failure to provide him access to the courts to pursue his claim for damages. This is a distress that anyone is likely to feel if he or she cannot pursue a claim for damages because it is statute-barred. Where the Supreme Court has found harm that constitutes a Charter violation, in Rodriguez v. British Columbia, [1993] 3 S.C.R. 519 and R. v. Morgentaler, [1988] 1 S.C.R. 30, there has been a significant state-imposed harm in the context of state interference with an interest of fundamental importance to the individual - in the one case, because of the prohibition on assisted suicide which prevented Ms. Rodriguez from controlling the timing of her death; in the other, from a pregnant woman's inability to have an abortion in a timely manner because of the operation of therapeutic abortion committees. These cases are very different from Mr. Bouzari's. He is in the same position as any litigant denied access to the courts to pursue a civil proceeding. While he is understandably distressed by this, I can not characterize this as a serious psychological prejudice caused by the state's action. Therefore, there is no denial of the right to security of the person caused by s. 3 of the Act.

¶ 85 Given that there has been no deprivation of the right to security of the person, I need go no further. However, even if there were a deprivation of his rights, this provision would not be contrary to the principles of fundamental justice. Those principles are to be found in the "basic tenets of our legal system". Sopinka J. in Rodriguez, supra, described these as "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice" (at 590-91). The approach has been described as one of balancing the state interest against the deprivation alleged (Suresh, supra paragraph 45). The Supreme Court has stated that international law provides evidence of the principles of fundamental justice, although it is not controlling in itself (Suresh at paragraph 60).

¶ 86 Section 3 of the State Immunity Act is not inconsistent with customary international law respecting torture, nor Canada's treaty obligations under the Convention against Torture or the ICCPR. Indeed, it reflects the current norms of customary international law with respect to state immunity. As stated earlier, were Canada to deny immunity to a foreign state for acts done in that state's jurisdiction, unless those acts fell within the commercial exception, Canada would be in violation of international law.

¶ 87 Weighed against this is the fact that an individual like Mr. Bouzari is left without a civil remedy in the Canadian courts. However, there is not always a civil remedy for an injury done, even one so serious as the one alleged. As noted by LaForest J. in Re Canada Labour Code, supra,

> Any time sovereign immunity is asserted, the inevitable result is that certain domestic

> parties will be left without legal recourse. This is a policy choice implicit in the Act itself. (at 91)

In these circumstances, it can not be said that the state immunity legislation is contrary to fundamental tenets of our legal system. Therefore, s. 3 of the State Immunity Act is not contrary to principles of fundamental justice.

¶ 88 The plaintiff also argued that the denial of a remedy is contrary to the rule of law, a principle upon which Canada is founded. The reference to "rule of law" in the preamble to the Charter does not give an independent right. Here, the plaintiff must show that his rights in s. 7 have been violated, and he has failed to do so. Therefore, the Charter claim fails.

Conclusion

¶ 89 Canada is a signatory of the Convention against Torture and has passed legislation implementing the convention. While there is a widespread international consensus condemning torture, this does not require an interpretation of the State Immunity Act that imports a new exception for actions for damages for torture committed outside Canada, nor does it make the Act contrary to s. 7 of the Charter. Under current norms of international law, states continue to have immunity from civil claims in the courts of other countries for acts that have occurred within their territory, with very limited exceptions. Canada's State Immunity Act, with its limited exceptions, complies with both treaty obligations and customary international law as it now exists. Its provisions are also consistent with s. 7 of the Canadian Charter.

¶ 90 This action is barred by s. 3(1) of the State Immunity Act. As this Court has no jurisdiction over the Islamic Republic of Iran, the action is dismissed.

SWINTON J.

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