Zhang v Zemin [2010] NSWCA 255 (5 October 2010)

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Introduction

The issues raised in *Zhang v Zemin*,[1] heard in the NSW Supreme Court in 2008, have been revisited by way of appeal to the NSW Court of Appeal.[2] The case concerns the liability of a foreign state in tort for alleged acts of torture. The Court of Appeal approved the lower court's judgment and examined a number of issues not previously addressed. The judgment will not find favour with those wishing to see actions in tort available for acts of torture conducted by foreign states.

1. Facts

The Appellant, Cuiying Zhang, is an artist. She now lives on the Gold Coast, Australia, but used to live in the People's Republic of China (PRC). While in the PRC, she was a member of the Falun Gong meditation group. Ms Zhang alleges that it was due to her membership of Falun Gong that she was subjected to torture, assault, false imprisonment and wrongful arrest. Ms Zhang says that those responsible for her ill treatment were the (then) President of the PRC, the Falun Gong Control Office (the so-called '610 Office') and Mr Luo Gan. The 610 Office is a PRC government department and Mr Gan a member of the Politburo of the Chinese Communist Party who was in charge of law enforcement. The three parties were named, respectively, as the First, Second and Third respondents.

There was no appearance by any of the named respondents. The Commonwealth Attorney-General was granted leave to join the proceedings in the lower court (becoming Fourth respondent) and sought a declaration that Ms Zhang could not bring an action against the first three respondents on the basis of foreign state immunity. This was appealed and the appeal was dismissed.

Foreign state immunity is dealt with in Australia under the *Foreign States Immunities Act 1985* (Cth) ('the Act'). The Act states that a 'foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.' There is a list of (uncontroversial) exceptions, reflecting the position at international law,[3] in relation to matters such as commercial

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[1] *Zhang v Zemin & Ors* [2008] NSWSC 1296 (14 November 2008). See Phillip Wardle 'Case Note' (2009) 16 *Australian International Law Journal* 277.

[2] *Zhang v Zemin* [2010] NSWCA 255 (5 October 2010) (Spigelman CJ, Allsop P, McClellan CJ at CL).

[3] 'The principles thus enshrined within the Act are consistent with international law on the subject of foreign State immunity.' Above n 1, 19 (Latham J).

transactions.[4] Provision is made for a notification process to the Commonwealth Attorney-General when actions are brought against foreign states.[5]

The nub of this case is whether there should be another exception to foreign state immunity in relation to torture. Surely, as a *jus cogens* norm, it is not right that a person can be tortured and yet not have a remedy in tort?

The Act allows for the Attorney-General to provide a certificate, under section 40 of the Act, certifying that parties were part of the government of another state. The Attorney-General did so, thus arguing that the PRC, the Falun Gong Control Office and Mr Luo Gan were immune from the process of the Australian courts.[6] It was argued by the Appellant that foreign state immunity could not apply to *jus cogens* norms, such as the prohibition against torture.

2. Who has to Raise Immunity?

Spigelman CJ gave the lead judgement, with Allsop P and McClellan CJ at CL concurring. The first ground of appeal may be dealt with quickly. It stated that the lower court erred in finding immunity because it was not claimed by any of the respondents.[7] This ground of appeal was rejected. Spigelman CJ spends considerable time reviewing the Act[8] and the case law[9] to show that courts must satisfy themselves that they have jurisdiction over the matters before them, and that it is not necessary for a party immune from jurisdiction to attend court to assert that immunity. The finding of immunity without the attendance of the PRC at Court was correctly decided.

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[4] Exceptions to foreign state immunity listed in the Act include contracts of employment, personal injury, damage to property, copyright, patent, trademarks, arbitrations, actions *in rem*, etc. See ss 10-21.

[5] The Act contains a schedule, being a Form 1 to be sent to the Attorney-General of the Commonwealth, stating that a proceeding has begun against a foreign State with copy documents and a Form 2, being a similar notice to the Attorney-General when requesting a default judgment against a foreign state.

[6] Section 40 provides, in part, that 'the Minister for Foreign Affairs may certify in writing that, for the purposes of this Act... (a) a specified country is, or was on a specified day, a foreign State...(c) a specified person is, or was at a specified time, the head of, or the government or part of the government of, a foreign State...' Under s 40(5), such a certification is 'admissible as evidence of the facts and matters stated in it and is conclusive as to those facts and matters.'

[7] Not argued by the Appellant in the Supreme Court proceedings but raised for the first time by the Appellant on appeal (para 19). It was asserted in the Supreme Court by the Attorney-General as intervenor (para 26).

[8] In particular, s 10(7)(b) of the Act, which permits (i.e. allows) but does not demand that a party appear for the purpose of asserting immunity without thereby submitting to the Court's jurisdiction.

[9] On the court determining jurisdiction on its own motion and as a preliminary matter, see *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969; *Khatri v Price* [1999] FCA 1289; *Hearne v Street* [2008] HCA 36; *Federated Engine Drivers and Fireman's Association of Australasia v Broken Hill Pty Co Ltd* [1911] HCA 31; *King v Blakeley: Ex parte The Association of Architects, Engineers, Surveyors and Draughtsman of Australia* [1950] HCA 40. There are further numerous authorities cited by Spigelman CJ, above n 2, paras 19-51. No authorities were cited in support of the Appellants' contention that it was wrong for a Court to grant immunity when immunity was not claimed by the party concerned (para 49).

3. Does Immunity Refer to *Former* Heads of State?

The second ground of appeal relates to the interpretation of 'foreign State' and whether immunity extends to a former head of state.[10] The definitions section[11] of the Act states, without much illumination, that a 'foreign State' is a country (other than Australia) 'that is...an independent sovereign state...' To assist matters, section 40 of the Act allows the Minister for Foreign Affairs to certify in writing that 'for the purposes of this Act… (a) a specified country is, or was on a specified day, a foreign State…'.

As will soon become relevant, the Attorney-General under the same section may also certify that a 'specified person' is, or was at a specified time, a foreign head of government. Such certifications are to be treated by the Courts as 'conclusive' as to the facts and mattes stated therein.[12]

The Appellant submitted that the terms of immunity in respect of heads of state referred to current, and not former, heads of state. As the First respondent was a former head of state, it was argued that the immunity did not apply. As for those occupying former government positions, this was raised for the first time on appeal; it was held in any event that the appropriate time for the Court to examine immunity was in relation to the originating process and not the alleged torts in question. This ground of appeal was rejected.[13]

4. Does Immunity apply to Individuals other than the Head of State?

A more interesting point raised by the Appellant was whether state immunity applied to individuals other than the head of state.[14] Although senior government officials are clearly part of the 'executive government,'[15] how far down the chain of authority is it possible to go and still claim immunity? Would it apply to Mr Luo Gan—the Politburo member in charge of law enforcement?[16] This ground of appeal was dismissed quickly as a simple matter of statutory construction with the Court ruling that immunity did apply to Mr Gan.

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[10] The casual reader may be puzzled: has the immunity of former heads of state not been dealt with by Pinochet? However, the present case deals with liability in tort and not criminal liability. The tension created between the two is dealt with in the discussion section at the end of this case note.

[11] *Foreign States Immunities Act 1985* (Cth), s 3(3).

[12] Ibid, s 40(5).

[13] Above n 2, para 60.

[14] Ibid, paras 52-3. Above n 12, s 3(3)(c), the definitions section, says (in part): 'unless the contrary intention appears, a reference in this Act to a foreign State includes a reference to... (c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of a foreign State or subdivision...' There is no reference in this section to individuals.

[15] Above n 2, para 61.

[16] Mr Luo Gan, was a Member of the 16th CPC Central Committee, Member of the Politburo Standing Committee and State Councillor. As head of the Political and Legislative Affairs Committee of the Central Committee he was effectively in charge of law enforcement. He retired in 2007. (*Xinhua News Agency and China Vitae*, accessed online at <http://www.chinavitae.com/biography/27>.

What else would the certification procedure mean, when it refers to the powers of the Minister being able to certify that 'a specified person is, or was at a specified time... part of the government of the foreign State'?[17] This was supported by reference to the Australian Law Reform Commission Report on Foreign State Immunity[18] and case law.[19]

Propend Finance Pty Ltd v Sing[20] was most instructive as it held that policing was 'essentially a part of government activity'. It could be said in passing that this would seem to be more obviously the case the more totalitarian a state happens to be.

The Court further endorsed the reasoning of the House of Lords in *Jones*,[21] which held that individuals could be protected by State immunity.[22]

5. Final Ground of Appeal

The final ground of appeal is perhaps the most likely to excite international lawyers. The Appellant submitted that the lower court's finding of immunity in favour of the Respondents was in error, because 'no such immunity exists in respect of civil claims arising out of acts of torture.'[23] In the words of Spigelman CJ, those submissions:

> ... contended that international law confers universal jurisdiction on Australian courts to hear and determine a civil claim of torture. This was said to arise by the direct application of international law because a rule recognised as *jus cogens* is a peremptory, non-derogable norm of international law of a superior status to other rules of international law.[24]

This argument was rejected on appeal.

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[17] Above n 2, para 65.

[18] Ibid, para 68. *The Foreign State Immunity Report* (ALRC Report 24) was tabled on 10 October 1984 and its recommendations were implemented (with minor amendments not relevant to this article) by the *Foreign States Immunities Act 1985* (Cth). The Act came into operation on 1 April 1986. The main recommendations were that references to a 'foreign state' should be given an expansive definition; that foreign states otherwise immune should be able to submit to jurisdiction and that service of originating process should be via the Department of Foreign Affairs. The recommendations for exceptions to foreign State immunity were also adopted by the new legislation (commercial transactions, contracts of employment, local personal injury, local immovable property and taxes).

[19] Above n 2, paras 69-75; further cases cited, including *Grunfield v United States of America* [1968] 3 NSWLR 36; *Rahimtoola v The Nizam of Hyderabad* [1958] AC 379; *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 and *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 26 (for *Propend Finance and Jones*, see below).

[20] Of particular interest is the decision of the Court of Appeal of England and Wales, *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, 669, which referred to policing (as was the case here with the Third respondent) as being 'essentially a part of government activity,' thus allowing for state immunity to be claimed.

[21] *Jones v Ministry of Interior of Saudi Arabia*, above n 19.

[22] Ibid 30 (Lord Bingham) '...a State can only act through servants and agents; their official acts are the acts of the State; and the State's immunity in respect of them is fundamental to the principle of State immunity.' The counter-argument raised by the US case of *Samantar v Yousuf* 130 S.Ct 2278 (2010) (and relied upon by the Appellant) was not considered relevant to the very different 'constitutional and legislative position' found in Australia (para 78). The various purposes of State immunity were discussed in paras 87-113.

[23] Above n 2, para 114.

[24] Ibid, para 120.

Spigelman CJ cited a considerable list of authorities denying the existence of such universal jurisdiction in regard to civil claims.[25]

Additionally, it could be argued that immunity does not extend to acts of torture as a matter of statutory construction. As section 9 of the Act gives immunity to individuals acting in 'his or her public capacity', acts such as torture fall outside that job description and hence there is no immunity. This would be consistent with the Appellant's submission that:

> In the criminal law there is now a species of universal criminal jurisdiction in torture cases as a reflection of *jus cogens*...[and] Accordingly, it is not part of the public capacity of the executive government or of the head of state and the words 'foreign State' [in the Act]...do not extend to such conduct.[26]

Even if there were universal civil jurisdiction, Spigelman CJ says, Australian law prevails. He repeats the established position (and cites the usual authorities in support) that where 'an Australian statute applies to circumstances to which international law also applies, an Australian court must apply the local statute in accordance with its terms, even if doing so may conflict with a principle of international law.'[27] Spigelman CJ adds the usual rider that the interpretation of statutes in conformity with international law is possible where there is ambiguity in the local statute (and cites the usual cases in support).[28] However, in the present case, the words in section 9, 'except as provided by or under this Act...' are clear and allow for no addition of a civil action in respect of torture.[29] They are not ambiguous or obscure.[30]

Allsop P, in agreeing with Spigelman CJ, added that:

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[25] *Al-Adsani v United Kingdom* (2002) 34 EHRR 111 and *Kalogeropoulou v Greece and Germany*, Judgment on Admissibility 12 December 2002 (ECHR) (Europe); *Bouzri v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Canada); *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 26 (United Kingdom); *Fang v Jiang* [2007] NZAR 420 (New Zealand). There are two possible counter-examples. One is *Jurisdiction Immunities of the State (Germany v Italy) General List No 143*, ICJ, which concerns civil actions in Italy for torts (such as forced labour) committed by Nazi Germany (see <http://www.icj-cij.org/docket/files/143/14923.pdf>) This matter has yet to be decided. The other is *Ferrini v Federal Republic of Germany*. Lord Bingham in *Jones* (supra) at para 22 said: 'The Ferrini decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law.'

[26] Above n 2, from the submission of the Appellant quoted at para 123 (Spigelman CJ).

[27] Ibid, para 125 (Spigelman CJ). Authorities cited in support of the proposition were *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309; *Polities v The Commonwealth* [1945] HCA 3; *Koowarta v Bjelke-Peterson* [1982] HCA 27; *Minister for Foreign Affairs and Trade v Mango* (1992) 37 FCR 298; *Kartinyeri v The Commonwealth ('Hindmarsh Island Bridge Act Case')* [1998] HCA 22.

[28] Spigelman CJ lists a succinct list of issues that can arise in statutory interpretation. These relate to the meaning of ambiguous or obscure words, reading down general words, strained constructions, the natural and ordinary meaning of words, qualification, implications and 'filling gaps.' The full list with further reading can be found at paras 126-9.

[29] Of course, this point arose in *Jones* with similarly worded legislation. *Jones* (supra) (Lord Bingham, 13).

[30] Above n 2, para 138.

> To find that the perpetrators of such acts in an official or public capacity are able to be rendered liable under the civil law of the State for the consequences of their acts one must have recourse to the relevant law governing that State concerning state immunity. In Australia, that is the *[Foreign States Immunity] Act*.[31]

He added, 'if the Commonwealth Parliament wishes to remove the immunity of foreign States for civil liability for torture such as by legislating in accordance with Article 14 of the Torture Convention, it must amend the Act.'[32]

Discussion

The unanimous approval of Spigelman CJ, Allsop P and McClellan CJ of the Supreme Court's decision will come as a disappointment to those wanting a universal civil jurisdiction for torture. Those excited by the high point of such jurisprudence by the English Court of Appeal's decision in *Jones*[33] may feel let down (that decision was reversed by the House of Lords).

That there should be international jurisdiction in relation to *jus cogens* norms such as the prohibition on torture on the criminal plane but not on the civil plane is obviously incongruous. It seemingly conflicts with the sentiments of the recently decided Australian Federal Court decision of *Habib,* where the Act of State doctrine was displaced by the Court's high regard for torture as a *jus gentium* norm.[34] In a powerful judicial consensus, Jagot J quoted Lord Steyn in *Pinochet (No. 1)*, who was in turn quoting US authority: 'the international law of human rights [in relation to torture] is well established and contemplates external scrutiny of such acts.'[35] Australia is patently a part of that international consensus,[36] and has legislated domestically to that end in relation to criminal liability. [37] As was stated in *Pinochet (No. 3)* (albeit, an extradition case*)* the Court found that there were no exceptions to torture in relation to criminal proceedings and that the rationale of universal criminal jurisdiction was so that 'the torturer…could find no safe haven.'[38]

Many think that the incongruity between alleged torturers being criminally responsible but not civilly liable should change. This is especially so when many civil law systems do not have the strict division between criminal law and tort, and common law systems in any

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[31] Ibid, para 170.
[32] Ibid, para 172.
[33] Jones (supra).
[34] *Habib v Commonwealth of Australia* [2010] FCAFC 12 (25 February 2010).
[35] Lord Steyn in *Pinochet (No 1)* at 117, endorsed the text of the *American Law Institute Restatement (Third) of Foreign Relations Law of the United States* (1987) SS 443, cited by Jagot J with approval.
[36] Above n 34, paras 108, 117-120 (Jagot J).
[37] See *Criminal Code* (Cth), s 11.2(5).
[38] *Pinochet (No. 3)*, para 199.

event often have statutory schemes for the compensation of those criminally injured.[39] The reasons given above suggests why this should be so.

In the words of one commentator:

> As transnational litigation increases in volume and intensity, the influence of concepts such as territorial sovereignty and state interests should proportionally diminish to allow the full vindication of private rights and the free flow of international trade and commerce. Where cross-border litigation was rare and exceptional, little harm was done to private litigants by the preservation of unique protection for states - but these are harder to justify today.[40]

It is against the background of these considerations that the decision of the Court of Appeal in *Zhang v Zemin* may be correct as a decision applying Australian law, but Australian law itself is becoming more strained with the further development of international law.

[39] For a comprehensive treatment of some of the arguments for introducing tort liability for *jus cogens* violations, see Donald Donovan and Anthea Roberts, 'Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *American Journal of International Law* 142.

[40] Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 22, 29.