

## ENGLISH HIGH COURT UPHOLDS STATE IMMUNITY IN NIGERIA CASE

*L R Avionics Technologies Ltd v The Federal Republic of Nigeria & Anor* [2016] EWHC 1761 (Comm) (15 July 2016)

### Introduction

In a decision handed down on 15 July 2016 in *L R Avionics Technologies Ltd v The Federal Republic of Nigeria & Anor* [2016] EWHC 1761 (Comm), the English High Court accepted Nigeria's argument that state immunity applied to set aside a charging order over granted over premises owned by Nigeria.

### Background

On 8 February 2013, an arbitrator handed down an award in arbitral proceedings between L R Avionics Technologies Ltd and The Federal Republic of Nigeria in which he awarded US\$5million to L R Avionics. Following an unsuccessful challenge to the award in the Nigerian courts by Nigeria, L R Avionics applied for and was granted leave to recognise and enforce the award in the same manner as a judgment by the Federal High Court of Nigeria, who also entered judgment ordering the defendants (the Federal Government and the Attorney General) to pay the sums awarded together with interest.

After the Nigerian government failed to comply with that judgment, L R Avionics sought to enforce the award in England and Wales. On 14 April 2015, Phillips J granted orders to register the award under section 101 of the Arbitration Act 1996 and also to register the Nigerian judgment under section 9 of the Administration of Justice Act 1920, and gave permission for service of the claim form, the witness statement in support of the application and the order itself on the defendants out of the jurisdiction through diplomatic channels under section 12 of the State Immunity Act which were duly served on 24 June 2015.

On 6 November 2015, the claimant successfully applied for a charging order in respect of office premises owned by the Federal Republic of Nigeria at 56/57 Fleet Street in London (this followed the grant of an interim charging order which was served on Nigeria despite L R Avionics having not obtained permission to do so). Nigeria had granted a lease of the premises to a company called Online Integrated Solutions Ltd ("OIS") for the purpose of providing visa and passport services (although other office use is also permitted) in exchange for an annual rent of £150,000. OIS, which describes itself as an official partner of the Nigerian High Commission, provides Nigerian visa and passport services on behalf of the High Commission.

On 12 May 2016 Nigeria issued an application to discharge or set aside the final charging order and sought an extension of time within which to make that application. L R Avionics resisted that application and sought to cure the procedural errors which applied to the interim and final charging orders, either by retrospective validation of such errors or by orders dispensing with the need for service.

## Decision

The High Court (Mr Justice Males) set aside the charging orders on the basis that the property was immune from execution under the State Immunity Act 1978.

Three issues of substance arose to be resolved by the High Court, namely

- (a) whether the award can be enforced against the defendant state,
- (b) whether the Nigerian judgment can be enforced and
- (c) whether the property is in use for commercial purposes so as to be immune from enforcement. There is a further issue, albeit scarcely touched on in submissions, whether the property forms part of the Nigerian diplomatic mission to this country.

As to each:

(a) The arbitration exception to state immunity in section 9 of the State Immunity Act applied, and the claimant was entitled to register the award for recognition and enforcement under section 101 of the Arbitration Act.

(b) Enforcement of the Nigerian judgment was a separate matter, which was of importance in this case because it was the judgment and not the award which carried interest. The judgment could not be recognised or enforced under section 101 of the Arbitration Act because it was a judgment and not an award; it could only be enforced, if at all, under section 9 of the Administration of Justice 1920. Mr Justice Males concluded that any challenge to enforcement of the judgment must fail (although strictly speaking there was no such challenge before him).

(c) The critical issue was the use to which the property in question was put. As the Acting High Commissioner of the Nigerian High Commission in London had given a certificate under section 13(5) certifying that "the property is part of the Nigeria High Commission of the Federal Republic of Nigeria in the United Kingdom and it is in use for Consular activities", the burden was on the claimant to prove that the property was in use for commercial purposes. In the circumstances, the claimant had not discharged that burden. Mr Justice Males observed that while the property may be connected with a commercial transaction, namely a contract between the High Commission and OIS for the supply of services by OIS to the High Commission, the purpose for which it was in use was the provision of visa and passport services to Nigerian citizens and others wishing to travel to that country. That constituted the performance of a public function on behalf of the defendant state, regardless of whether it was carried out by the defendant state itself or, as in this case, by an agent to whom performance of the function in question has been delegated (or outsourced). Accordingly, the property was immune under the State Immunity Act 1978.

The full judgment can be read [here](#).

30<sup>th</sup> August 2016