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COURT OF APPEAL CONFIRMS CUSTOMARY INTERNATIONAL LAW RULE ON IMMUNITY OF MEMBERS OF A “SPECIAL MISSION”

R (Freedom & Justice Party) v Secretary of State for Foreign & Commonwealth Affairs
[2018] EWCA Civ 1719

Introduction

By a decision handed down on 19 July 2018 in *R (Freedom & Justice Party) v Secretary of State for Foreign & Commonwealth Affairs* [2018] EWCA Civ 1719, the Court of Appeal held that there was a Customary International Law rule that a State receiving a “*special mission*” from another State should grant immunity from arrest, detention and criminal proceedings to individuals recognised as members of the “*special mission*” throughout the mission and that that rule was also part of English common law.

Background

Lieutenant General Hegazy was the Chief of Staff of the Egyptian Armed Forces from 2014 to 2017. Prior to that he was the director of the Egyptian Military Intelligence Service.

The Egyptian political party called the Freedom & Justice Party (comprised of former members of the Government of Egypt) alleged that Lieutenant General Hegazy had been responsible for torture in the course of events which had led to the downfall of the Egyptian Government in 2013.

In 2015, Lieutenant General Hegazy visited the United Kingdom. The UK Foreign & Commonwealth Office recognised his visit as a “*special mission*” for the purposes of the UN Convention on Special Missions 1969 (“the UNCSM 1969”). The Freedom & Justice Party asked the UK police that Lieutenant General Hegazy should be arrested on grounds of suspicion of torture. The UK police relied upon guidance issued by the UK Foreign & Commonwealth Office and the Crown Prosecution Service and declined to arrest Lieutenant General Hegazy on the basis that, as a recognised member of a recognised “*special mission*”, Lieutenant General Hegazy benefitted from immunity from arrest. The Freedom & Justice Party applied to the Divisional Court seeking clarification of the guidance issued by the UK Foreign & Commonwealth Office and the Crown Prosecution Service and seeking a declaration that Lieutenant General Hegazy did not have immunity.

The Divisional Court (Lloyd Jones LJ; Jay J) upheld the guidance issued by the UK Foreign & Commonwealth Office and the Crown Prosecution Service and held that members of “*special missions*” to the United Kingdom were to be granted immunity from arrest, detention and criminal proceedings for the duration of the special mission’s visit by virtue of a rule of Customary International Law that was also given effect by English common law.

The Freedom & Justice Party appealed against the decision of the Divisional Court.

Decision

The Court of Appeal (Arden LJ; Sales LJ; Irwin LJ) dismissed the Freedom & Justice Party’s appeal.

The Court of Appeal held that Customary International Law rules were established by: (1) evidence of a substantial uniformity of State practice; (2) done out of a sense of legal obligation or duty (*opinio juris*). There was no automatic rule that the law of the UNCSM 1969 operated to exclude Customary International Law and it was possible that Customary International Law in existence before the promulgation of the UNCSM 1969 continued to exist in relation to non-parties. The Court of Appeal held that the Divisional Court was correct to find that there was a rule of Customary International Law that special missions were to be afforded immunities throughout their visit – special missions could not be expected to properly perform their role in the absence of such immunities. An international court examining the issue would recognise the importance and the long standing acceptance of the role that special missions played in international relations. Furthermore, the immunities granted to special missions were not subject to any qualifications in respect of serious international crimes.

The Court of Appeal held, following the judgment of Lord Mance in *R (Keyu) v Secretary of State for Foreign & Commonwealth Affairs* [2016] AC 1355, that there was a presumption that a Customary International Law rule would form part of English common law in the absence of a positive reason to the contrary premised upon an English constitutional principle or statutory principle or common law principle. The fact that a special mission required the acceptance of the executive branch of government for the immunities to be conferred did not entail that the English courts would refuse to recognise the Customary International Law rule as an English common law rule.

The Court of Appeal held that the decision of the Divisional Court did not involve a conflict between the United Kingdom’s international law obligations as to special mission immunity and as to the Torture Convention 1984.

Concluding Remarks

The Court recognised that special missions play a crucial role in international relations. For the period between 1 October 2014 and 30 September 2015, the UK Foreign & Commonwealth Office consented to 15 requests for special mission status, covering 47 visitors in total. Equally, the UK is generally under an important international law obligation to arrest those whose arrest is sought internationally on allegations of having been

responsible for acts of torture. The Court of Appeal's decision on special mission immunity thus represents a significant example of the English courts' contribution to the clarification of important aspects of the United Kingdom's performance of its international law obligations.