Case No: B4/2005/0071

Neutral Citation Number: [2005] EWCA Civ 632
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
PRINCIPAL REGISTRY.
DAME ELIZABETH BUTLER-SLOSS
FD04F00040

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 26 May 2005

Before:

LORD JUSTICE THORPE
LADY JUSTICE SMITH
and
LORD JUSTICE WALL

- -

Between :

Janan George Harb	**Appellant**
- and -	
His Majesty King Fahd Bin Abdul Aziz	**Respondent**

- -
- -

Mr J Turner QC and Mr P Marshall (instructed by **Messrs Burton Woolf & Turk**) for the **Appellant**
Mr A Moylan QC & Mrs J Roberts (instructed by **Messrs Howard Kennedy**) for the **Respondent**

- -

Judgment

LORD JUSTICE THORPE:

1. On the 16th January 2004 Janan George Harb (hereinafter Mrs Harb) issued an application against His Majesty King Fahd Bin Abdul Aziz (hereinafter the King). The application was an originating application under section 27 of the Matrimonial Causes Act 1973. The originating application asserted only the two essential facts, namely that Mrs Harb was the wife of the King and that the King had failed to provide reasonable maintenance for her.

2. The Family Proceedings Rules require an affidavit in support of such an originating application. Mrs Harb's affidavit of the 15th January runs to some forty-two paragraphs and makes a number of allegations that were likely to prove highly contentious.

3. Predictably the jurisdiction of this court was challenged on the simple ground that the King was immune from suit.

4. Accordingly there was an appointment before District Judge Maple on the 2nd March 2004. The order that emerged reveals the extent of the anxiety on the part of the King, or perhaps his advisors, to ensure that the issue of the proceedings and the determination of the plea of immunity should not be exposed to public gaze.

5. Clearly Mrs Harb was seen as a potential source of embarrassment. That is well illustrated by the fact that on the 1st March 2001 an undisclosed principal (in reality the King) had paid Mrs Harb a very substantial sum for entering into a binding deed of confidentiality covering all aspects of her past relationship with the King.

6. At the hearing before District Judge Maple Mrs Harb was represented by her solicitor whilst the King was represented by leading and junior counsel. Mr Andrew Moylan QC for the King laid before the court proposed directions. His proposal was adopted by District Judge Maple subject to the insertion of dates in his own hand to establish the time frame of the trial of the preliminary issue. I note that Mr Moylan's heading reads "before District Judge Maple in private". In the first paragraph of the order Mr Moylan wrote that the trial of the preliminary issue was "set down for a hearing before a judge of the Family Division sitting in private" (District Judge Maple only amended to designate the President rather than a judge of the Division). It has not been necessary to question what Mr Moylan intended by writing "in private" at two points in his draft. Perhaps no more than that both hearings would be in chambers, as is customary in family proceedings.

7. Paragraph 2 provided that each party must file and serve a full skeleton and summary of argument with a paginated bundle of all authorities relied upon. The King's skeleton had to be filed by the 30th July and Mrs Harb's by the 10th of September.

8. Paragraph 3 sensibly provided that pending determination of the preliminary issue no further evidence should be filed without the court's permission.

9. The order was preceded by the following recital: -

> "Upon basis that the applicant accepts that for the purposes of the State Immunity Act 1978 and the Diplomatic Privileges Act 1964,…
>
> A. The Kingdom of Saudi Arabia is a State for the purposes of Part 1 of the 1978 Act;
>
> and
>
> B. The Respondent is the Sovereign and Head of that State for the purposes of section 20(1) (A) of the 1978 Act."

10. I emphasise that the only facts necessary for the determination of the preliminary issue were the agreed facts contained in that recital. All else would be legal argument. That proposition is underlined by paragraphs 2 and 4 of the order which I have summarised. Thus Mrs Harb's affidavit of the 15th January was irrelevant to the issue set down for preliminary trial. There was no need for its inclusion in the bundle prepared for the trial before the President.

11. Mrs Harb's skeleton was late and was not filed until the 29th September. Mr James Turner QC on her behalf submitted that the trial of the preliminary issue should be in open court rather than in chambers.

12. The order of the 2nd March had fixed the trial of the preliminary issue for two days commencing on 5th October. The morning of the first day was consumed by the despatch of Mr Turner's application for a hearing in open court and a second issue which is irrelevant to this judgment. The President refused Mr Turner's application for reasons which she gave in an extempore judgment. That cleared the way for the argument on the preliminary issue elaborated by Mr Moylan and Mr Turner respectively. At the conclusion of submissions on the 6th October the President reserved her decision.

13. At the trial it is clear that Mr Moylan not only successfully resisted Mr Turner's application for a hearing in open court but persuaded the President of his client's entitlement to the greatest confidentiality amounting to secrecy. The order drawn on the 5th October 2004 does not refer to the rejection of Mr Turner's application. It looks like this: -

> "The President sitting in Private
>
> BETWEEN:
>
> Applicant
>
> and
>
> Respondent

Order

IT IS ORDERED THAT:

The tape recordings of these proceedings and/or any typed transcripts thereof shall not be released or disclosed to any person or published in any form whatsoever without specific written permission from the President

Dated this 5th October 2004."

14. Although that order does not indicate the identity of applicant and respondent it seems that at the hearing the President gave the case the fictional identity of District Judge Maple. Thus the transcript of her judgment of the 5th October has on the front sheet: -

"Between

Maple

And

Maple"

15. The President handed down her reserved judgment on the 15th December 2004. She upheld the King's claim to immunity. Mr Turner sought permission to appeal. The President refused his application and made stringent orders designed to ensure that the proceedings and their outcome remained secret, subject of course to Mr Turner's right to renew his application for permission to the Court of Appeal. Thus the order of the 15th December carried the same heading and title. More significantly paragraphs four to six of the order read as follows: -

"4. The Applicant's application for an order that permission be given for the judgment of 15th December 2004 to be reported or published is refused.

5. The applicant's application for permission to obtain transcripts of the proceedings on 5th and 6th October is refused, but each party is granted permission to obtain a transcript of the judgments (and nothing but the judgments) given on 5th October 2004 and 15th December 2004, on condition that any such transcript is released only to the parties' respective legal advisers and may be used by them solely for the purposes of these proceedings.

6. The following matters have been withheld from the public in the proceedings before the court:

(a) the publication of the names of the parties, or either of them, and/or of any other information which

> might lead to their identification in connection with these proceedings is prohibited;
>
> (b) the publication of the documents filed in connection with these proceedings and/or of any other particulars of, or information relating to, any part of these proceedings is prohibited, save in so far as such publication by or on behalf of either party is for the purposes solely of these proceedings."

16. The Appellant's Notice was filed in this court on the 14th January 2005 and sought permission to appeal the orders of the 5th October and 15th December. The Notice raised three issues and this judgment deals only with the question of whether the President correctly exercised her discretion to afford the King protection from scrutiny and comment. As a matter of case management I directed that that issue be listed for the determination on 10th May whilst the other two issues should be listed on that day merely as permission applications for oral hearing on notice. Our conclusions on the permission applications are the subject of separate judgments.

17. Mr Moylan had given notice of an application that the hearing before the Court of Appeal on the 10th May should be in private. I directed that that application should be made to the full court and we heard the application at the outset sitting in private. It was not an easy application for Mr Moylan to advance successfully. He drew attention to the terms of CPR 39.2(3)(c). He submitted that the appeal fell within that category, that is to say a hearing which may be in private if "it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality." He rested his fall back submission on the terms of paragraph (4) of the Rule which enables the court to "order that the identity of any party …must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party…" So Mr Moylan's first objective was a completely private appeal and his fall-back position was that the judgment should be published but the anonymity of the parties should be maintained by the continuation of the fiction of *Maple v. Maple.*

18. In support of his arguments Mr Moylan suggested that the terms of Article 6 of the ECHR were not incompatible with his application since Article 6(1) allows a hearing in private and that the margin of appreciation should extend to reflect the principles underlying State immunity.

19. His principal reliance was upon Article 29 of the Vienna Convention brought into force in the United Kingdom by the Diplomatic Privileges Act 1964. The Article reads: -

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

20. Mr Moylan's bold submission was that the Court of Appeal is a limb of the receiving State and were we to sit in public we would be failing in our duty to prevent an attack on the King's dignity.

21. Mr Moylan also sought to place reliance on the deed of the 1st March 2001 which by paragraph 2 required Mrs Harb to "keep confidential and not, directly or indirectly, divulge, disclose or otherwise disseminate or cause to allow to be divulged, disclosed or otherwise disseminated… any information or knowledge or documentation …in relation to …the Undisclosed Principal."

22. We refused Mr Moylan's application. The power to order a private hearing exists and the grant or refusal of such an application involves the exercise of a discretion. However in the almost ten years that I have sat in the Court of Appeal I have never experienced a hearing in private. There is a discernable move in the Family Justice system towards greater openness. In this court the decision in *Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs as an interested party)* (2004) 2FLR 823 recognised that our practice of automatically imposing reporting restrictions in children's cases could no longer stand. The suggestion that the hearing of the appeal would constitute an attack on the King's dignity seemed to me particularly unpersuasive.

23. Paragraph 2 of the deed of the 1st March 2001 was clearly designed to prohibit Mrs Harb from publicising her relationship with the King, whether or not for reward, in print or in the media.

24. Mr Turner's essential criticism of the President's judgment of the 5th October was that she had misunderstood his case. Any defence of the Section 27 application would of course be heard in chambers. However if the King chose to claim immunity from suit that issue alone was likely to result in a public hearing since it involved only issues of law and the possible evolution of a doctrine of International Law that had to some extent to reflect changing times. Mr Moylan in response essentially relied upon the President's judgment. He submitted that she had wisely exercised a discretion in recognition of the extremely sensitive nature of the issues. For the purposes of his argument Mr Moylan repeatedly introduced and relied upon the content of Mrs Harb's affidavit of the 15th January. He submitted that there was much material that was gratuitously offensive and that its disclosure would cause embarrassment and distress either to the King or to the Royal Family.

25. The resolution of those submissions require an analysis of the President's reasoning. It is essentially to be found in paragraphs 8 and 9 of her judgment which I cite in full: -

> "8. …The starting point in litigation is, of course, the importance of the principle of open justice. Nonetheless that is tempered by the need for privacy and confidentiality in certain sets of proceedings. The first of those, and the most important, is in child cases and the second, in my view, also very important, is in financial disputes between parties, particularly after divorce. The 1991 Family Proceedings Rules incorporates that approach to confidentiality in financial proceedings after divorce in Rule 2.66 and I read under sub-paragraph (1):
>
> > "Where an application for ancillary relief or any question arising thereon has been referred or adjourned to a judge…

(2) the hearing or consideration shall, unless the court otherwise directs, takes place in chambers."

That approach was to some extent challenged at first instance in the decision of Clibbery v Allen [2002] Fam. 261 where the Court of Appeal held that the 1991 Family Proceedings Rules were not ultra vires the primary legislation and in the judgments I said at p.278 that the procedure was of the ancillary relief applications as regulated by Rule 2.66(2), which I have just read out, and I went on to say:

"Applications for ancillary relief are almost invariably heard in chambers".

Lord Justice Thorpe said at para.106 at p.295:

"I have no difficulty in concluding that in the important area of ancillary relief where the table confirms that the volume of business is large all the evidence… and all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge".

There has been a challenge in children cases to the European Court at Strasbourg in the case of DP, and the reference I do not think is very important at the moment, and I derive support from the approach of the court in Strasbourg that the English rules in relation to children and therefore, in my view, by analogy, to financial disputes after divorce, are not in breach of Article 6 of the Human Rights Convention, the right to a fair trial, and that judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial, and then a number of reasons are set out under the Article in which such cases can be excluded from public hearing. The court starts with the practice that such cases are heard in private. Clearly there is a discretion to hear them in public. Clearly it is possible for preliminary issues, which would come under Rule 2.66, as a question arising from an application for ancillary relief, to be severed from the main hearing and to be heard in public or part of it. For those issues not to be heard in public is not in any way, in my view, to be incompatible with Article 6.

9. This is a very delicate and sensitive issue affecting an applicant for sovereign immunity. If it had been heard in the civil court, as Mr. Turner points out, or criminal court, such as in Pinochet, or the Sultan of Jahore, then, yes, it would have to have been heard in public whatever might be the consequences for the litigant seeking sovereign immunity. But I do not at the moment see why a public figure such as the King should be in a worse position than

> any other litigant in family ancillary relief proceedings and that this issue, which would if it were not the King be heard in private, should because it is he be heard in public. Because if the issue of sovereign immunity is successful from the King's point of view the issues between him and the applicant may or may not reach the public domain and may or may not be taken up by the press, but he does have the initial protection of the agreement in 2001 and I think it would be unjust to the respondent that he should be exposed because of his position when he would not be exposed if he was somebody of less press interest and political importance. I recognise that there is what might be seen as an anomaly that cases at trial level in the family courts are heard in private but in the Court of Appeal are heard in public. That is, of course, a matter upon which I express no view, but it has never been suggested in the family courts before that because it has to be heard in public in the Court of Appeal therefore it follows that it must be heard in public in the High Court or the County Court. In the exercise of my discretion I take the view that this is a case in which it would not be appropriate for it to be heard in public, for all the reasons that most of these cases should not be heard in public, and the only advantage for it to be heard in public is, from the point of view of the applicant, that there would be immediate press interest in it. It is, if I may say so and I do not mean to be impolite to Mr. Turner, disingenuous of him to say that the only issues are the question of the marriage and the question of sovereign immunity because once the press are aware of this they will dig a great deal deeper and there will be a great deal of information which they will be able to put into the public domain and it will not be done at the instance of the applicant who is, of course, at the moment it appears bound by the 2001 deed. I do not believe that this court should be party to the immediacy of the press interest in this case where in other cases it would not be the practice for it to be heard in public, even on the preliminary issue."

26. An analysis of those paragraphs demonstrates the following process of reasoning:

1. The general rule is for open justice.

2. Exceptions include Children Act proceedings and proceedings for ancillary relief.

3. These exceptions are not incompatible with rights guaranteed by Article 6 of the ECHR.

4. To deny the King a chambers hearing would be to put him in a worse position than ordinary litigants who would be entitled to a chambers hearing.

5. The issues were not confined to the marriage and to sovereign immunity: once the press were alerted to those issues there would be a great deal of information which they would be able to put into the public domain.

27. In my judgment, despite the recognition of the possibility of severing the preliminary issue in the penultimate sentence of paragraph 8, there is throughout an elision of the claim to immunity with the Section 27 application which would only be activated by the dismissal of the claim to immunity. Comparisons with the ordinary litigant are impossible in the context of the trial of the preliminary issue. Those comparisons only become apt if the plea of immunity failed and the King had to plead to or concede the originating application. On the preliminary issue there was no evidence, since evidence had been rendered unnecessary by the agreed recitals to the order of March 2nd. There was therefore nothing that the press would have been able to put into the public domain that was not in the judgment deciding the preliminary issue. When she came to give that judgment on the 15th December the President doctored the recital to the order of the 2nd March to remove any reference to the Kingdom of Saudi Arabia. Thus, had the judgment been permitted to be reported in the law reports, the reader would not have discerned more than that it concerned an unidentified "Head of State".

28. For all those reasons I conclude that the President misdirected herself in the exercise of her discretion. Revisiting that exercise I would add to the considerations above that it is not the issue but the pursuit of proceedings that is prevented by an entitlement to immunity. The King did not have to raise the plea. He might have compromised the application at the outset or he might have gone straight to a merits hearing in chambers. In my judgment a claim to State immunity is essentially a public claim that demands open litigation. I would say the same of a claim to sovereign immunity particularly in relation to private rather than governmental acts. In relation to private acts the boundaries of immunity are not forever fixed as absolute and the issue is in my judgment one of legitimate public interest and debate. In approaching the exercise of the discretion I would exclude the contents of the affidavit of the 15th January in their entirety. I recognise that the issue of the originating summons is founded on the assertion of an existing marriage, but mere assertion proves nothing and it is not necessary for the King to respond to the assertion unless and until his claim to State immunity fails. If Mrs Harb's apparent entitlement to a merits hearing is to be defeated by the King's immunity from suit, that deprivation should be declared by open and not by secret justice.

29. Of course there is no practical reversal of what I conclude was a wrongful exercise of discretion but the effect is achieved by the publication of this judgment which records the whole story of the preliminary issue from its inception to its decision on the 15th December.

30. That leaves Mr Moylan's last ditch application under Order 39.2(4) and Mr Turner's appeal against paragraphs 4-6 of the order of 15th December.

31. As to the first I see no legitimate ground for imposing reporting restrictions that would thinly disguise the identity of the sovereign. The identity of the sovereign seems to me to be relevant to any public debate of the issues raised by the plea of immunity. The King is some eighty-two years of age and it is well known that he suffered a debilitating stroke a decade ago. It seems unlikely that he will be directly

affected by any decision that we take. The Family Justice system needs to be cautious of adopting fictions such as *Maple v Maple* that its critics can label as deceitful or designed to shield its workings from public scrutiny. Particularly in the light of the current practice of the court I would restore the heading and title of these proceedings as they were at the date of issue, on 16th January 2004.

32. Mr Turner's appeal against paragraphs 4-6 of the order of the 15th December received no specific reference in either the grounds of appeal or his skeleton argument. I suspect that they were overshadowed by the more important issues. Mr Turner does not object to the continuation of paragraph 6(b). It follows from all that I have said above that paragraphs 4, 5 and 6(a) must be deleted from that order.

33. Mr Moylan did oppose the application for extension of time. I see some merit in Mr Turner's response that he was entitled to hold his hand until he knew the outcome of the trial of the preliminary issue. I would extend time, grant permission, and allow the appeals against the President's ruling on Mr Turners' application for a public hearing and against the privacy provisions of the order of the 15th December.

LADY JUSTICE SMITH:

34. I agree.

LORD JUSTICE WALL:

35. I have had the advantage of reading Thorpe LJ's judgment in draft. I fully agree with it, and with the order he proposes at paragraph 33. I add a short judgment of my own because we are over-ruling a discretionary decision made by the President. I wish to underline only two of the points made by Thorpe LJ.

36. The first is that, in my judgment, the only conclusion which can be drawn from the passage from the President's judgment which Thorpe LJ has cited in paragraph 25 above is that she has elided the claim to sovereign immunity with the claim for ancillary relief. This has led her to apply to the former the rules and practice relating to hearings in private which properly apply only to the latter. The point is easily demonstrated. Were the King to fail in his claim for sovereign immunity, he would be entitled, like everyone else, to a hearing of the section 27 claim in private. He would not be "in a worse position than any other litigant in family ancillary relief proceedings". On the other hand, whether or not he is able to defeat the section 27 claim by a plea of sovereign immunity is, in my judgment, a matter of public interest, and for all the reasons Thorpe LJ gives should have been heard in public.

37. My second observation goes to Mr. Moylan's reliance on Article 29 of the Vienna Convention as contained in Schedule 1 to the Diplomatic Privileges Act 1964 in support of his argument that this court should hear Mrs Harb's appeal in private. Article 29 reads: -

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

38. Mr Moylan pointed out that Article 29 applied to a head of state: - see section 20(1) of the State Immunity Act 1978. He submitted that it would be contrary to the specific provisions of Article 29 if this court's process was used as or was a vehicle for publicity and for an attack on the Respondent. He should not, Mr. Moylan submitted, be exposed to this publicity because the court has no jurisdiction over him and, importantly, when the factual allegations being made against him were untested. This would be contrary to comity and would constitute a clear attack on his dignity.

39. I am unable to accept this argument for a number of reasons. Firstly, the underlying substance of the appeal is a pure point of jurisdiction. Mrs. Harb asserts the bare facts required to invoke the court's jurisdiction under section 27 of the Matrimonial Causes Act 1973, namely a marriage to the Respondent and the assertion that he has failed to provide reasonable maintenance for her. As recorded in District Judge Maple's order of 2 March 2004, she accepts that the Kingdom of Saudi Arabia is a state for the purposes of the State Immunity Act 1978 and that the Respondent is the Sovereign and Head of that State. On those highly limited facts, the question is: does the court have jurisdiction to entertain the claim? Any allegations which Mrs. Harb makes against the King in her affidavit of 15 January 2004 are immaterial for the purposes of the claim to sovereign immunity, which is a pure issue of law.

40. In my judgment, Article 29 is not breached either by the court hearing the issue relating to sovereign immunity in open court, or by this court hearing an appeal in public against the President's decision to hear the sovereign immunity issue in private. The prevention of any attack on the Respondent's person, freedom or dignity seems to me a concept which goes to the substance of the Respondent's argument that he is entitled to immunity from suit because enforced engagement in litigation relating to his private life is an attack on his dignity: it does not seem to me an argument which – certainly on the facts of this case - can properly be raised to protect the Respondent from publicity arising from the deployment of his plea of sovereign immunity in open court.

41. I therefore see no breach of Article 29 in the Respondent being required to respond to the appeal in open court.