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Can governmental action shield otherwise commercial activity under the Foreign Sovereign Immunities Act?

by Michael P. Waxman

Saudi Arabia, King Faisal Specialist Hospital, Royspec
v.
Scott Nelson and Vivian Nelson
(Docket No. 91-522)

Argument Date: November 30, 1992

ISSUE

Does the Foreign Sovereign Immunities Act confer jurisdiction over a suit by a United States citizen against a foreign state alleging that the foreign state recruited him in this country for overseas employment and then imprisoned and tortured him on account of his employment-related activity in the foreign state?

FACTS

[There were no findings of fact in this case because the Complaint was dismissed by the United States District Court for the Southern District of Florida for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA) (28 USC §§ 1330, 1601-1611). Therefore, all facts alleged by the Nelsons, as well as those agreed to by the parties, must be accepted as true by the Court for the purposes of this appeal.]

Petitioners are three governmental entities of the Kingdom of Saudi Arabia (the Kingdom of Saudi Arabia, its wholly owned and controlled King Faisal Specialist Hospital (Hospital), and Royspec Purchasing Services (Royspec), a wholly owned agent of the Hospital with offices in the United States for purchasing and other purposes). Both parties have agreed that Saudi Arabia is a "foreign state" and that the Hospital and Royspec are each an "agency or instrumentality of a foreign state" as defined in the FSIA (28 USC §§ 1603 (a) and (b)).

Since 1973, Hospital Corporation of America (HCA) has contracted with Saudi Arabia and the Hospital to recruit expatriate personnel from the United States to work for the Hospital. The Hospital has all of its facilities solely within Saudi Arabia. In 1983, HCA announced a job opening at the Hospital for a "monitoring systems engineer." While in the United States, Scott Nelson, an American citizen, answered the advertisement and traveled to Saudi Arabia, where he was interviewed by two Hospital officials. He returned to the United States, where he concluded negotiations and signed an employment contract with the Hospital in Miami, Florida, in late November. He completed a short training and examination program in Tennessee and began work in Saudi Arabia within a few weeks after signing the contract.

The following March, Nelson, as part of his job, discovered alleged safety hazards. During the period from March to August, 1984, he repeatedly reported these safety hazards to Hospital officials. He was consistently told to ignore the problem. He eventually reported them to an investigative commission of the Saudi government. Nelson alleges that due to his reports he was subjected to continuing harassment by Hospital authorities. He requested to resign. They refused to accept his resignation. In September, he was summoned by Hospital employees to the Hospital's security office. Mr. Nelson was taken to a jail cell where he alleges he was "shackled, tortured and beaten" by Saudi agents and employees. He further alleges that he was imprisoned incommunicado, sometimes with little or no food, for 39 days without being advised of the reasons he was taken and held. Further, he alleges that a Saudi agent sought to extort "sexual favors" form his wife, Vivian Nelson, to secure her husband's release from jail. He was finally released, apparently without ever being charged with any offense. Upon receiving their passports a week later, the Nelsons returned to the United States. Nelson claims that his injuries from the treatment while in prison were so serious that he has been adjudged to be permanently and totally disabled.

Saudi Arabia, without discussing the alleged arrest, torture, and resultant pain and suffering endured by the Nelsons, claims that whatever actions it took resulted from Scott Nelson's submission of a false diploma during the employment application process.

On August 11, 1989, the United States District Court for the Southern District of Florida dismissed the Nelsons' Complaint for lack of subject matter jurisdiction under the FSIA. Because Saudi Arabia's Motion to Dismiss was an immediate challenge to the court's jurisdiction, the court held no evidentiary hearing and did not purport to resolve any factual issues related to the asserted basis of jurisdiction. The court held that neither the recruitment activities nor the execution of the employment agreement in the United States would "qualify as substantial contact" as required under the FSIA "commercial activity" exception to foreign sovereign immunity. Further, even if these commercial activities did

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constitute substantial contact with the United States, the "nexus" between the causes of action alleged and those commercial activities was "too tenuous to support jurisdiction over a foreign sovereign." Similarly, there was "no nexus between Royspec's business and the torts alleged."

The United States Court of Appeals for the Eleventh Circuit unanimously reversed the lower court decision. *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991). Accepting the allegations in the Complaint as true for the purposes of resolving the appeal, including the allegations that the three petitioners are alter egos, the Eleventh Circuit drew no distinctions among the hospital, its agents, and the Kingdom of Saudi Arabia, and referred to them "collectively" as "Saudi Arabia." The Eleventh Circuit held that the link with the United States, through employment recruitment in this country, was substantial enough to warrant jurisdiction. "[T]he detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." The court of appeals also found a sufficient "jurisdictional nexus" between Royspec's commercial activity in the United States and the Nelsons' claims.

Following the decision of the court of appeals, Saudi Arabia requested a rehearing. The Eleventh Circuit denied this request.

BACKGROUND AND SIGNIFICANCE

The decision in this case may be extremely important for Americans working, or contemplating working, overseas. It may also significantly affect foreign relations. The globalization of business, and the need for highly qualified personnel by the broad arms of foreign governments, is stimulating an inexorable growth in transnational employment. This army of expatriates includes many Americans who are often solicited and employed in the United States, directly or indirectly by foreign sovereigns, to work for the foreign sovereign in its country. The practices of these foreign sovereigns regularly blur or disregard the traditional demarcation line between commercial endeavors and the exercise of sovereign powers. The Court will consider, and perhaps address, whether these expatriate Americans can obtain independent review and, if appropriate, redress for injuries incurred due to the arbitrary and sometimes violent practices of the host government in its commercial endeavors.

Prior to 1952, the United States followed a policy exempting absolutely a foreign sovereign from the jurisdiction of courts of the United States. Conversely, many other sovereign states distinguished between the public and commercial acts of a foreign state in determining whether the courts of the sovereign could have jurisdiction over a foreign sovereign. The former was called the "absolute theory" and the latter the "restrictive theory."

In an attempt to conform U.S. policy with that of many of its trading partners, the U.S. Department of State, through its legal advisor, Mr. Jack B. Tate, advocated in a letter ("Tate Letter") sent on behalf of the State Department to the Attorney General of the United States in a 1952 case, that the United States revise its policy and adopt the "restrictive theory" to foreign sovereign immunities cases before the courts of the United States. Since the Constitution reserves matters dealing with foreign relations to the executive branch of the federal government, it was not surprising that the courts adopted the views expressed in the Tate Letter. For 24 years, United States courts generally followed the "restrictive theory." Of course, exceptions were made in cases where the executive branch communicated that foreign sovereign immunity should be applied, or waived, whatever the fact situation.

Finally, in 1976, in order to avoid the potential political embarrassment when the executive branch selectively chose not to intervene on behalf of a foreign sovereign who might otherwise not be protected under the restrictive theory, and the possible threat to the constitutionally mandated separation of powers by the courts taking orders from the executive branch, Congress enacted the Foreign Sovereign Immunities Act (FSIA) 28 USC §§ 1330, 1602-11. The FSIA exempts absolutely from the jurisdiction of the courts of the United States foreign sovereigns, their political subdivisions, agencies or instrumentalities (28 USC § 1604). One of the few exceptions from this immunity are claims relating to commercial activities by the foreign sovereign (28 USC § 1605).

The relevant part of Section 1605 of the Foreign Sovereign Immunities Act provides:

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(2) *in which the action is based upon a commercial activity carried on in the United States by the foreign state*; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." (Emphasis added).

Definitional assistance in the reading of Section 1605(a)(2) is provided in Sections 1603(d) and (e). Section 1603(d) of the Foreign Sovereign Immunities Act provides:

"(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

Section 1603(e) of the Foreign Sovereign Immunities Act provides:

"(e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."

Not surprisingly, Saudi Arabia, while implicitly conceding that the Hospital was a commercial enterprise, argues that the alleged violations flowed not from actions taking

place in the United States, i.e., the conclusion of negotiations and the execution of the contract and the limited training, but happened, if at all, in Saudi Arabia and occurred as part of the "police power" of the state. Saudi Arabia emphasized that, in order to apply the commercial exception, "the action" must be "based upon a commercial activity carried on in the United States ..." (Section 1605(a)(2)), with the commercial character of the activity determined by its nature (Section 1603(d)), and have "substantial contact with the United States" (Section 1603(e)).

Saudi Arabia declares that the nature of the alleged harmful actions were solely governmental, rather than commercial, and thus are absolutely immune from the jurisdiction of the courts of the United States. Further, even if they were found to be commercial, since all the alleged harmful acts took place in Saudi Arabia, the action cannot be based upon a commercial activity carried on in the United States. Ultimately, Saudi Arabia argues that the commercial activity carried on in the United States was in effect, *de minimus*, involving formalistic contracting with Scott Nelson and minor paper processing, and therefore falls far short of the necessary "substantial contact with the United States." Thus, the commercial activity exception does not apply. See, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991). Finally, Saudi Arabia asserts that Royspec took virtually no part, at any time, in the interactions with Scott Nelson, especially in the acts complained of by the Nelsons, and therefore should be removed as a party to the proceedings.

In a more dispassionate manner, the United States basically supports the piecemeal pleadings of Saudi Arabia. The amicus brief did segregate the alleged failure-to-warn claim, but declined to provide counsel as to its sovereign immunity thinking on this point.

The Nelsons assert that the Eleventh Circuit rightfully treated Saudi Arabia (through its actions as the owner of a hospital), the Hospital and Royspec as one entity. They argue that this entity carried on a commercial activity through a regular course of commercial conduct—soliciting, hiring, and training American citizens to be employed as expatriates working for the Hospital in Saudi Arabia. Further, they assert that this commercial activity by its regularity and pervasiveness, over many years, clearly constituted substantial contact with the United States. The Nelsons ask the Court to eschew the piecemeal pleading of Saudi Arabia as to the nature of the specific harmful acts and where they occurred as the commercial activity, and instead to examine their alleged injuries as part of the nature of the regular course of commercial conduct.

So examined, the action is based upon the employment process, with the nature of its commercial conduct measured as a whole rather than a piece at a time. It is within this context that the Nelsons assert that Saudi Arabia's failure to disclose the possibility of these harmful actions in Saudi Arabia, at or around the time of Scott Nelson's hiring in the United States, breached an employer's duty to prevent employee injury and warn of job-related dangers. Finally, the Nelsons argue that since most of the harmful activities of which they complain are in blatant violation of international minimum human rights standards, and are condemned by all nations, including Saudi Arabia, one cannot presume that the actions taken against Scott Nelson were intended to be within the governmental police powers of Saudi Arabia. See, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (an "act of state" doctrine case). Ultimately, the Nelsons assert, that since it is for the courts of the United States to determine the breadth of its own law, the characterization of these acts as governmental by Saudi Arabia is self-serving and should not be determinative of their treatment by the Court.

Despite the heavy judicial and political drama that surrounds this case, and Saudi Arabia's not very veiled threats about retaliation for a judgment finding commercial activity, the real legal issues are matters of classic statutory interpretation. Unfortunately, due to a paucity of factually related cases, the Court must review the legislative history and commentaries to find support, much less guidance, for its analysis. The difficulty courts have had in determining where "nature" ends and "purpose" begins has been duly noted. *Segni v. Comm'l Office of Spain*, 835 F.2d. 160 (7th Cir. 1987). While an important inquiry as to the nature of a foreign state's action is whether the particular actions are of the type a private person would have engaged in, *Republic of Argentina v. Weltover*, 60 U.S.L.W. 450 (6/9/92), this analysis fails where commercial acts have already begun and the acts complained of could have been part of either a governmental or a commercial response. Oddly enough, the few factually related cases, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (a foreign hotel was commercial activity for a torture case), and *Berkovitz v. Islamic Republic of Iran*, 735 F.2d. 329 (9th Cir. 1983), *cert. denied*, 469 U.S. 1035 (1984), are not discussed by the parties (*Berkovitz* was cited by the Nelsons in their Brief in Opposition to certiorari). The *Berkovitz* court said, in dicta, "If we assume by analogy that Berkovitz's employment, through his company's contract with Iran, meets the requirements of commercial activity, the act of murder might then become the "act" mentioned in § 1605(a)(2)."

Thus, unless the Court wants to return to the days of executive branch communiques and signals of approval or disapproval, it is compelled in this case to draw a line as to the kinds of activities (including ones otherwise treated as public acts of a sovereign that may have been recast as commercial by the plaintiff or the sovereign) that may develop from the commercial actions of the sovereign. With all due deference to the attempts by the parties, and the United States in its amicus brief, to avoid a direct statement of the issue, the key question is whether the sovereign may use means that might otherwise be treated as an exercise of sovereign governmental power to address commercially created problems and thereby avoid what would otherwise be under the jurisdiction of the United States courts. Of course, if the Court finds, as it is invited to do by Saudi Arabia and the United States, that the commercial activity standard has not been met, it can successfully delay this question until another

day. The U.S. State Department, the courts of the United States, and foreign sovereigns will breathe easier knowing that numerous potential plaintiffs might be deterred.

ARGUMENTS

For Saudi Arabia, King Faisal Specialist Hospital, Royspec *(Counsel of Record, Everett C. Johnson, Jr.; Latham & Watkins, 1001 Pennsylvania Avenue, NW, STE 1300, Washington, DC 20004; telephone (202) 637-2200):*

1. The Eleventh Circuit's holding contravenes the plain meaning and structure of the FSIA's "commercial activity" exception.
2. The legislative history of the FSIA confirms petitioners' reading of the plain language of the "commercial activity" exception.
3. The court of appeals' statutory construction conflicts with the FSIA's underlying purpose of immunizing foreign states from suits concerning the propriety of their public acts.
4. Respondents' "duty to warn" negligence claims do not fall within the "commercial activity" exception.
5. Respondents' claims do not have the required factual or legal nexus with petitioners' activity in the United States.
6. Even if arguably relevant to respondents' claims, the activities of Saudi Arabia and the Hospital did not have "substantial contact" with the United States.
7. Royspec cannot be subjected to jurisdiction under the "commercial activity" exception because it is a veritable stranger to respondents' claims.

For Scott Nelson and Vivian Nelson *(Counsel of Record, Leonard Garment; Dickstein, Shapiro & Morin, 2101 L Street, NW, Washington, DC 20037; telephone (202) 785-9700):*

1. The FSIA confers jurisdiction over actions based upon commercial activities of foreign states that have substantial U.S. contact.
2. Nelson's intentional-tort claims are based upon the commercial activities of the Hospital.
3. Nelson's negligence claims likewise are based upon the commercial activities of the Hospital.
4. The commercial activities of the Hospital have substantial contact with the United States.

AMICUS BRIEFS

In Support of Saudi Arabia, et al.

The United States *(Counsel of Record, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 514-2217).*