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Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. Australia

HIGH COURT OF AUSTRALIA

(*a*) Simsek v. Minister for Immigration and Ethnic Affairs and Another: Decision of 10 March 1982[1]

Applicant sought an order designed to ensure that he was not deported from Australia before his status as a refugee had been determined—1951 Convention relating to the Status of Refugees and the 1967 Protocol to it—Interpretation of article 32 of the Convention.

The applicant, a Turkish national, claimed that he was entitled to status as a refugee under the 1951 Geneva Convention relating to the Status of Refugees and the associated Protocol of 1967. Australia is a party to both the Convention and the Protocol. The applicant only made the claim after overstaying the period specified in an entry permit and being arrested as a prohibited immigrant.

His application for refugee status was, at the time of the judgement, being considered by the Committee for Determination of Refugee Status. The committee had been set up by the Australian Government to make recommendations to the Minister for Immigration and Ethnic Affairs concerning the implementation of the Convention and Protocol.

The applicant sought an order designed to ensure that he was not deported from Australia before his status as a refugee under the Convention and Protocol had been determined. During the course of his judgement Justice Stephen relied upon the interpretation given to article 32 of the Convention by the United Nations High Commissioner for Refugees. He observed:

> "The operation of Article 32 of the Convention, which alone contains that reference to representation upon which the applicant relies, is confined to the case where a person who has been recognized as a refugee by a contracting State is threatened with expulsion from its territory. Its provisions do not bear at all upon the determination of refugee status. Moreover, article 32 speaks only of refugees 'lawfully' in the territory of contracting States. The applicant made no application for refugee status during the initial three months, when his presence in Australia was lawful; it was only after his arrest as a prohibited immigrant that his application was made. It would appear from an article by Frank in *International Lawyer*, vol. 11, p. 291, "Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States", that the United Nations High Commissioner for Refugees treats article 32 as applicable only to persons whose presence in the territory of a contracting State is lawful, those who overstay a period of temporary lawful presence in the territory being regarded as thereafter unlawfully present (*ibid.*, at p. 298). Courts in the United States have regarded article 32 in the same light (*ibid.*, at pp. 302-304). Thus even were he to be accorded refugee status he could not rely upon that article as according him any rights. It is article 31 which provides for those cases where a

refugee is unlawfully in the country of refuge and it bestows no right of representation" (*ibid.*, at pp. 68 and 69).

(*b*) Koowarta v. Bjelke-Petersen and Others
Queensland v. Commonwealth: Decision of 11 May 1982[a]

Racial discrimination Act of 1975—Obligations of States Members of the United Nations with respect to racial discrimination

The plaintiff, an Aboriginal, alleged that the Government of the State of Queensland was in breach of sections 9 and 12 of the Racial Discrimination Act of 1975 in refusing to consent to the transfer of a lease of land to the Aboriginal Land Fund Commission. The Racial Discrimination Act had been passed by the Australian Parliament to give effect to the Convention on the Elimination of All Forms of Racial Discrimination.

Queensland filed a defence and demurrer and commenced an action against the Commonwealth of Australia challenging the validity of the Racial Discrimination Act. The High Court (in a majority decision) upheld the validity of the Act. The following comments on the obligations of Members of the United Nations with respect to racial discrimination were made during the course of the judgements:

GIBBS, C. J.

> The Charter of the United Nations reveals the importance which the Members of that body attach to respect for and observance of human rights and fundamental freedoms, without distinction as to race, language or religion. The Members of the United Nations pledge themselves to take joint and separate action to achieve that purpose amongst others: see especially Articles 1 (3), 13, 55 (c), 56 and 62 of the Charter . . . The preponderance of opinion appears to favour the view that the obligation upon Members of the United Nations to protect human rights and fundamental freedoms is of a legal character, although the machinery for enforcement is imperfect and the rights and freedoms protected are not clearly defined.
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> ". . . Professor Brownlie, in *Principles of Public International Law* (3rd ed., 1979), at pages 596 and 597, stated the position as follows: 'There is indeed a considerable support for the view that there is in international law today a legal principle of nondiscrimination which at the least applies in matters of race. This principle is based, in part, upon the United Nations Charter, especially Articles 55 and 56, the practice of organs of the United Nations, in particular resolutions of the General Assembly condemning *apartheid*, the Universal Declaration of Human Rights, the International Covenants on Human Rights and the European Convention on Human Rights. An alternative view is that there is no legal principle of racial non-discrimination as such but the international practice supports instead such a standard or criterion as an aid to interpretation of treaties including the Mandate agreement in issue in the *South West Africa* cases.'
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> "The acceptance of the view first mentioned by Professor Brownlie does not mean that at international law a Member of the United Nations is under a legal duty to prevent any act of racial discrimination, however trivial it may be, and whether or not it was done mistakenly or even with good intentions (as, for example, in the case of what is called reverse discrimination). It can readily be understood that international law should treat a violation of human rights as not merely a matter of domestic jurisdiction but as a breach of international obligation, if the violation 'threatens the international peace and security' . . . or if there are 'gross violations or consistent patterns of violations' . . . Genocide, torture, imprisonment without trial and wholesale deprivations of the right to vote, to work or to be educated provide examples of violations of that kind. The act of discrimination alleged in the present case—the exercise, in a discriminatory way, of a discretionary power to refuse consent to the transfer of a Crown lease—stands on an entirely different

plane. It could not, in my opinion, be said that the refusal of the Minister to grant his consent was a gross violation of a human right or fundamental freedom."

STEPHEN, J.

"This growth reflects the new global concern for human rights and the international acknowledgement of the need for universally recognized norms of conduct, particularly in relation to the suppression of racial discrimination.

"The post-war history of this new concern is illuminating. The present international régime for the protection of human rights finds its origin in the Charter of the United Nations. Prominent in the opening recitals of the Charter is a reaffirmation of 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'. One of the purposes of the United Nations expressed in its Charter is the achieving of international co-operation in promoting and encouraging 'respect for human rights and for fundamental freedoms for all without distinction as to race . . .' (Chapter I, Article 1 (3); see also Chapter IX, Article 55 (*c*)). By Chapter IX, Article 56, all Member nations pledge themselves to take action with the Organization to achieve its purposes. The emphasis which the Charter thus places upon international recognition of human rights and fundamental freedoms is in striking contrast to the terms of the Covenant of the League of Nations, which was silent on these subjects.

"The effect of these provisions has in international law been seen as restricting the right of Member States of the United Nations to treat due observance of human rights as an exclusively domestic matter. Instead the human rights obligations of Member States have become a 'legitimate subject of international concern' . . .

"These matters having, by virtue of the Charter of the United Nations, become in international law a proper subject for international action, there followed, in 1958, the Universal Declaration of Human Rights and thereafter many General Assembly resolutions on human rights and racial discrimination. A full catalogue of the various international instruments in this area can be found in the United Nations publication *Human Rights: A Compilation of International Instruments (1978).*"[3]

2. Italy

(*a*) The Supreme Court of Cassation

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS *v.* ISTITUTO NAZIONALE DI PREVIDENZE PER I DIRIGENTI DI AZIENDE INDUSTRIALI (INPDAI): JUDGEMENT NO. 5399 OF 18 OCTOBER 1982

Legal actions brought against FAO by the landlords of certain premises that the organization had rented—FAO pleaded its immunity from legal process—Decision of the Tribunale Civile di Roma holding that FAO did not enjoy immunity from the jurisdiction of the Italian courts in that particular case—FAO's application to the Supreme Court of Cassation for a determination on the issue of its immunity

By contract dated 14 February 1969, FAO, which has its headquarters seat in Rome, at Via delle Terme di Caracalla, leased premises situated in Rome at Via Cristoforo Colombo No. 402, for use as offices for itself and other organizations associated with it and for related services.

In addition to the usual clauses, it was stipulated that nothing in the contract or relating thereto could be construed as constituting a waiver of any privilege or immunity enjoyed by FAO or as conferring any privilege or immunity on the lessor. Provision was further made for the settlement of any dispute by arbitration in accordance with the rules of the International Chamber of Commerce.

On 18 July 1978, the lessor (INPDAI) brought an action against FAO before the Pretore di Roma claiming entitlement to certain rent increases on the basis of a clause in the contract which provided for amendments in the rent as a result of changes in increases in the cost of living as shown by the official Italian Government consumer index.

Having put in an appearance, FAO entered an objection to the effect that on the basis of the Treaty of Washington of 31 October 1950, ratified by Law No. 11 of 9 January 1951, the Italian courts lacked jurisdiction. FAO therefore moved that the question of jurisdiction be decided.

In its action for a determination on the question of jurisdiction, FAO asserted that, pursuant to article XV (now XVI) of the Quebec Convention, ratified by Italy by Law No. 546 of 16 May 1947 (containing the instrument establishing FAO and the latter's Constitution), the organization had the legal capacity to perform any act appropriate to its purpose which was not beyond the powers granted to it by its Constitution; and that each member nation undertook to accord to the organization all the immunities and facilities which it accorded to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemptions from taxation. FAO further contended that, pursuant to article VIII of the Washington Agreement of 31 October 1950, ratified by Italy by Law No. 11 of 9 January 1951, the organization and its property, wherever located and by whomsoever held, should enjoy immunity from every form of legal process except in so far as in any particular case FAO should have expressly waived its immunity, no such waiver of immunity extending to any measure of execution. The organization also pointed out that, in accordance with the Convention on the Privileges and Immunities of the Specialized Agencies, to which Italy had subscribed, the lease provided for arbitration, which condition was accepted by both parties.

Summary of reasons for the decisions as set out by the Court

The Court held that FAO's case was not well founded and observed that:

(*a*) Article XV of the Quebec Convention, which contains the FAO Constitution, defines the legal status of the organization as that of a legal person with the capacity to perform any act appropriate to its purpose which is not beyond the powers granted to it by the Constitution and, in respect of such legal status, requires that each member nation undertake, in so far as it may be possible under its own constitutional procedure, to accord to the organization the immunities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemptions from taxation. In the case of the Italian State, its Constitution is in line with generally accepted provisions of international law (Constitution, article 10, first paragraph), but requires that such immunity from jurisdiction as may be granted to States or international organizations should take into account the principle laid down in article 24 of the Constitution that the legitimate interests of citizens should be afforded judicial protection;

(*b*) FAO could not derive a general immunity from legal process from article VIII of the Agreement concluded between the Government of the Italian Republic and FAO, done at Washington on 31 October 1950 and ratified by Law No. 11 of 9 January 1951, since the subject-matter of the said Agreement was the seat of FAO with respect to which the scope of its immunity from the jurisdiction of the Italian courts cannot be extended beyond the limits of the usual diplomatic immunity which, precisely, applies to the seat and to the persons who perform diplomatic and consular functions therein. This is confirmed by article VII, section 14, of the same Agreement in which the Italian Government recognizes the legal personality of FAO and, in particular, its capacity (i) to contract, (ii) to acquire and dispose of movable and immovable property and (iii) to institute legal proceedings ("di stare in giudizio"); the last-mentioned provision *ex hypothesi* affirming the possibility of FAO being subject to the jurisdiction of the Italian courts and negating any general and unlimited immunity;

(*c*) FAO cannot maintain that the possibility of being subject to jurisdiction is precluded by the Convention on the Privileges and Immunities of the Specialized Agencies which, according to the text, would require the latter to provide for modes of settling disputes of a private law nature, since, as we have seen, FAO made sure that its capacity to institute legal proceedings was recognized by the Italian State.

With respect to the problem of the extent of the immunity from legal process enjoyed by FAO, the Court recalled that in a considerable number of decisions it had held that, irrespective of their public or private character, whenever they acted in the private law domain, they placed themselves on the same footing as private persons with whom they had entered into contracts, and thus forewent the right to act as sovereign bodies that were not subject to the sovereignty of others. It recalled that on other occasions it had upheld the immunity of foreign States (and their public agencies) in connection with activities designed to achieve their public aims, while such immunity had been denied with respect to activities of a merely private law nature. Rather than underlining the nature (public or private) of the activity itself, the Court had placed emphasis on the nature of the aims that such activities were destined to achieve, and whether or not they were directly related to the institutional aims pursued by the foreign entity.

The Court in its deliberations posed the question of jurisdiction in the traditional terms of the dichotomy of sovereign acts and private law transactions and, considering the private nature of the contract, concluded that there could be no doubt as to the jurisdiction of the Italian courts. In this respect, it rejected FAO's argument which it considers was based on the existence in every instance of a nexus between any of its activities and the aims of the organization. This could lead one to accept an unrestricted concept of immunity. It concluded, however, that that concept would be inconsistent with the clauses of the International Conventions which provide for FAO's immunity.

(*b*) Pretore di Roma, Sezione Controversie di Lavoro

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS *v.* ENTE NAZIONALE DI PREVIDENZA E DI ASSISTENZA PER I LAVORATORI DELLO SPETTACOLO (ENPALS): JUDGEMENT OF 20 OCTOBER 1982

ENPALS claimed that social security contributions were due to it by FAO on behalf of a person who had provided services to FAO as a film editor—Services of the person in question were carried out under a series of contracts which established a relationship of employment, thus obliging FAO to provide for social security insurance—Question of receivability of the complaint under the Headquarters Agreement

Having been advised on 12 June 1979 by one of its subscribers to the effect that he worked for FAO as a film editor receiving a specific compensation for carrying out various detailed duties, ENPALS, by a complaint of 30 March 1981, summoned FAO to appear before the Pretore di Roma with respect to ENPALS' right to obtain contributions for a total amount of 2,416,140 Italian lire together with interest for disability and old-age benefits on the basis of earnings received by the person in question during the period from 17 May 1971 to 31 December 1974. FAO did not appear and the sentence was issued in default.

The court ruled that the complaint was receivable in that article III, section 6, subparagraph (*b*), of the agreement between the Government of Italy and FAO provides that in the absence of any provision to the contrary the laws of the Republic of Italy are in force within the FAO headquarters. The court further noted that none of the recognized privileges and exemptions provide for the exclusion of employees from social security coverage for disability and old age and the payment of the contributions for the same. The court noted that from the documentation presented it was clear from the various fixed-term contracts, including the terms and conditions of the contract including work-hours, the amount of compensation and other modalities which would establish a relationship of employment and oblige FAO to provide for social security insurance for the person in question which on the basis of the category of the

work carried out by him and the applicable laws requires the employer to make payment of contribution for such social security. The court concluded that an amount of Lit 2,416,140, together with legal interest, was due to ENPALS by FAO.

3. United States of America

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DECISION IN THE MATTER OF THE ARBITRATION BETWEEN MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT *v.* THE REPUBLIC OF GUINEA AND THE UNITED STATES OF AMERICA OF 12 NOVEMBER 1982[4]

Appellant's immunity under the Foreign Sovereign Immunities Act—Arbitration of the International Centre for Settlement of Investment Disputes—Appellant claimed that the District Court lacked subject-matter jurisdiction to confirm the arbitration award

Maritime International Nominees Establishment (MINE) v. *Republic of Guinea*[5] involved an action brought in the United States courts by MINE (a Liechtenstein company considered by the parties for the purpose of the ICSID clause as being a Swiss company) against Guinea. MINE and Guinea had agreed to submit investment disputes to ICSID arbitration. Notwithstanding their submission to ICSID, the District Court for the District of Columbia (Washington, D.C.) had held that consent to ICSID arbitration constituted a waiver of immunity for the purposes of the United States Foreign Sovereign Immunities Act (FSIA)[6] on the basis of which jurisdiction could be retained. This decision was reversed on appeal on 12 November 1982. However, the decision of the Court of Appeals simply holds that consent to ICSID does not constitute a waiver of immunity within the meaning of the Foreign Sovereign Immunities Act. Because of this, the Court did not consider it necessary (as it was urged by the United States Government in an *amicus curiae* brief) to rule on the question whether a court should, when an alleged ICSID clause is brought to the attention of the court, stay the proceedings and refer the parties to ICSID so that the Secretary-General or an ICSID arbitral tribunal can determine whether the clause satisfies the requirements of the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965.[7] Clearly, the answer to this question must be in the affirmative. Since ICSID arbitration is exclusive of any other remedy (article 26 of the Convention), the courts in Contracting Staes must refrain from taking any action which might interfere with ICSID arbitration. If a court becomes aware of the fact that a claim before it might call for adjudication under ICSID, the court ought to stay the proceedings pending proper determination of the issue by ICSID.

NOTES

[1] Reprinted in *Australian Law Report*, vol. 40, p. 61.

[2] Reprinted in *Australian Law Report*, vol. 33, p. 417.

[3] First rev. ed. (United Nations publication, Sales No. 78.XIV.2); the third rev. ed. was published in 1988 (Sales No. 88.XIV.2).

[4] *International Legal Materials*, vol. 21, p. 1355 (1982).

[5] *Ibid.*, vol. 20, p. 666 (1981).

[6] Public Law No. 94-583, 90 Stat. 2891.

[7] United Nations, *Treaty Series*, vol. 575, p. 159.