

Crime brief

Equality before the law: **David Walbank KC** examines a case which tested the limits of this most fundamental legal doctrine

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From day one of their legal studies, it is drummed into students that 'all are equal before the law'. But does that actually mean anything? In the next two 'Crime brief' pieces, we will look at two very different cases, each of which demonstrates that it is very much more than a highfalutin phrase.

Harassment allegations

Zu Sayn-Wittgenstein-Sayn v De Borbon y Borbon [2022] EWHC 668 (QB) concerned a civil action in harassment brought by the estranged lover of an ex-king and prompted consideration of the doctrine of state immunity.

Corinna zu-Sayn-Wittgenstein-Sayn (pictured) is a German-born Danish entrepreneur with homes in Monaco, Switzerland, London and Shropshire. In the mid-2000s, she became the mistress of Juan Carlos I, the King of Spain, but five years later, their relationship ended in acrimony. When, after four decades on the throne, the king found himself mired in scandal, he abdicated in favour of his son, who became Felipe VI. Juan Carlos later withdrew from public life and now lives in self-imposed exile in Abu Dhabi.

In October 2020, Ms zu-Sayn-Wittgenstein-Sayn issued proceedings against her former lover in the High Court in London, seeking damages and an injunction. She alleged that, when she refused to rekindle the relationship and spurned his offer of marriage, he pursued a campaign of harassment against her. It was said that he had arranged for his ex-mistress to be placed under surveillance by agents of the Spanish National Intelligence Agency, for her communications to be intercepted and monitored, and even for her home to be broken into. In one particularly lurid allegation, she recounted how she had arrived at her Swiss apartment to find that papers had been disturbed, a book entitled *The Hidden Evidence, How MI6 and the CIA were involved in the death of Princess Diana* had been left, apparently deliberately, on her coffee table, and that evening she received



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an anonymous phone call from a Spanish speaker, saying: 'There are many tunnels between Monaco and Nice'. She also claimed that Juan Carlos had deliberately spread defamatory allegations about her and leaked false stories to the media. It was pleaded that, as a result of this alleged harassment, she had 'suffered great mental pain, alarm, anxiety, distress, loss of well-being, humiliation and moral stigma'.

Juan Carlos in turn issued a separate application in the High Court, seeking a declaration that he enjoyed personal immunity from the jurisdiction of the English courts under the State Immunity Act 1978 either as 'sovereign' or as a member of the sovereign's family 'forming part of his household' or, alternatively, that he was entitled to so-called 'functional immunity' in respect of pre-abdication acts done in his public capacity.

The limits of state immunity

Nicklin J, sitting in the King's Bench Division, reasoned as follows with regard to the three separate heads of claim to state immunity.

Personal immunity is conferred only upon the serving head of state of a foreign country and does not apply to a former head of state, however much he or she may retain a special place in their country. When determining whether an individual is a member of the sovereign's family forming part of their household, the crucial question is whether that individual is a

dependent of the head of state. The fact that that individual may have closely assisted the sovereign in the discharge of their responsibilities does not of itself bring them within this immunity.

In considering whether the actions of a head of state were public acts for the purpose of attracting functional immunity, the question is whether those acts can fairly be regarded as having been undertaken within the sphere of governmental or sovereign activity, or were they in reality acts of a private law character? Here the alleged campaign of harassment was not even arguably within the sphere of governmental or sovereign activity. The mere fact that the alleged actions were said to have been carried out by a high-ranking state official, such as the head of the National Intelligence Agency, did not, without more, make them acts of state.

Accordingly, if the alleged conduct was in due course proved to the requisite standard of proof, the pre-abdication activities alleged against the defendant could not be said by him to have been carried out as a 'sovereign ... in his public capacity' and he would not be entitled to functional immunity in respect of those actions.

For all those reasons, Nicklin J ruled that none of the grounds on which state immunity was claimed had been made out and the High Court action would, therefore, continue.

Next time...

In the next 'Crime brief', we shall be taking a look at another hard case, which tested the limits of the principle of equality before the law. A man who had attacked his wife with a knife and who was convicted of her attempted murder brought a civil action in clinical negligence against the NHS trust which supplied medical services to the prison where he was being held. His claim related to the subsequent medical treatment of the injuries he had sustained in the course of the knife attack. When he then lied in court documents about the circumstances in which he was injured, and when he also tried to hide from the court the fact of his conviction for attempted murder, did the trust's reliance upon the statutory defence of fundamental dishonesty under s 57 of the Criminal Justice and Courts Act 2015 deprive the claimant of his civil remedies?

NLJ

David Walbank KC is a member of Red Lion Chambers and the founder of the updating website www.crimecast.law on which he presents video case reviews of recent judgments. The site currently hosts more than 200 free-to-view videos.