

DIPLOMATIC IMMUNITY IN A CRIMINAL CAUSE

Reg. v. Madan

In its Draft Articles on Diplomatic Intercourse and Immunities,¹ the International Law Commission declared in Article 29 that 'a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.' The Commentary to this Article points out that, unlike the immunity from civil and administrative jurisdiction, 'the immunity from criminal jurisdiction is complete.' Article 30 allows for waiver of immunity, 'by the sending State.' While, in civil or administrative proceedings, this waiver may be express or implied, 'in criminal proceedings waiver must always be express.' The Commentary indicates that the words 'by the sending State' are equivalent to 'by the Government of the sending State' as used in an earlier draft.² As was pointed out, however, the head of the mission is the representative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission.³ By insisting on express waiver, the Draft appears to go beyond current governmental practice, for in his summary of observations received from Governments the Special Rapporteur of the Commission pointed out 'that most of the Governments which have commented on [waiver] maintain that an express waiver by the Government is in no case necessary. Only the United States Government maintains that an express waiver by the Government is necessary in each case. The majority opinion seems to reflect correctly what is at present the general practice, but a Government is of course always free to instruct its head of mission that it reserves the right to make a waiver by express act.'³

The interesting feature of *Reg. v. Madan*⁴ is that it constitutes the first English decision clearly recognising the immunity of a junior member of a diplomatic mission when charged with criminal offence. It further postulates, in the most precise fashion possible, that there is no duty upon an accused to claim his immunity, and indicates that a purported waiver may in fact be no waiver.

M. was a clerk in the Passport Division at India House, London, and was convicted at the London Sessions on August 9, 1960, of obtaining from the London Transport Executive, with intent to defraud, a duplicate railway season ticket by falsely pretending that he had lost the original, and, with intent to defraud, attempting to obtain 8s. 9d. from the Executive. He was found guilty on each count. At the committal proceedings a police witness stated that the accused was on the staff of the High Commissioner for India, but the accused's solicitor purported to waive any immunity. That he was in fact so employed became clear when the accused gave evidence and when the probation officer stated that that a representative of India House had told him that he was under the impression that M. was entitled to diplomatic immunity. Counsel for the prosecution told the deputy-chairman that he thought M. was entitled to diplomatic immunity, but that he had expressly waived it before the magistrate either by himself or by his solicitor. The attitude of the deputy-chairman was that, so far as he was concerned, M. must, if he had thought about the matter at all, have waived his immunity. In any case, 'It's a bit late to claim it now.'

1. Report of the International Law Commission covering its Tenth Session, 1958 (General Assembly. Official Records, 13th Session, Supp. No. 9 (A/3859), (1958), p. 11.

2. *Ibid.*, p. 21.

3. UN Doc. A/CN.4/116. May 2, 1958, p. 61.

4. [1961] 2 W.L.R. 231.

In fact, M. was entitled to diplomatic immunity, his name being on the list kept by the Secretary of State under the Diplomatic Immunities (Commonwealth and Republic of Ireland) Act, 1952,⁵ and on November 21, 1960, the Deputy High Commissioner for India wrote to the Commonwealth Relations Office, as follows: 'The High Commissioner desires me to say that Mr. Madan is and was entitled to diplomatic immunity in accordance with the Diplomatic Immunities (Commonwealth and Republic of Ireland) Act, 1952. I am further directed to say that in order not to impede the course of justice and as a very special case, the High Commissioner is prepared to waive the immunity in the present instance without any prejudice to the interest of the High Commission and on the clear understanding that it will not be treated as a precedent in the future.'

Among the grounds of appeal put forward by the appellant was that the deputy-chairman was wrong in law in holding that appearance before him amounted to waiver of the diplomatic immunity to which the appellant was entitled. He contended that waiver could only operate if exercised by the High Commissioner and that anything purporting to be such by himself or his solicitor was a nullity, as were the proceedings before the committing magistrate and the court of trial, since they had taken place before November 21, 1961.

Speaking for the Court of Criminal Appeal, Lord Parker C.J. said 'it is not for someone who is entitled to diplomatic immunity to claim it in the courts.' He pointed out that proceedings, 'certainly civil proceedings,' brought against a person entitled to immunity are null and void 'unless and until there is a valid waiver.' Not only must the person waiving immunity be fully aware of his rights, but it must be a waiver by or on behalf of the chief representative of the State concerned. This is fully in keeping with the statement by Lord Hewart C.J. in *Dickinson v. Del Solar*:⁶ 'The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent.' Further, it is expressly stated in section 1(5) of the 1952 Act that '(a) a chief representative may waive any immunity conferred by or under this section on himself or on a member of his staff, ... or on a person in the service of the Government of the country which he represents; (b) a state representative may waive any immunity conferred under this section on himself or on a member of his staff.'

While this section does not say that a junior member is unable to waive his own immunity, the implication is that it should be waived by the head of mission or on his behalf. What is clear is that, regardless of the views of the member concerned, the head of mission is able to waive the immunity belonging to any member of his staff. This is what happened in *R. v. A.B.*,⁷ the nearest that an English court had come to dealing with the problem of diplomatic immunity in a criminal cause. In that case, however, the United States ambassador expressly waived immunity, as well as dismissing the accused from the diplomatic service, so that Lord Caldecote C.J. was able to say 'I find it unnecessary to decide whether or not the diplomatic privilege . . . can be claimed by a member of a diplomatic staff in connection with a criminal charge.'⁸

A criminal case in which immunity was claimed is *Rose v. The King*,⁹ which came before the Quebec Court of King's Bench. The accused was not a diplomatic agent, but a Canadian Member of Parliament. He contended, however, that the court was precluded from hearing evidence against him by a diplomatic agent or

5. 15 & 16 Geo. 6 & 1 Eliz. 2, c.18, s.1(4).

6. [1930] 1 K.B. 376. 380.

7. [1941] 1 K.B. 454; *sub nom. R. v. Kent* 57 T.L.R. 307.

8. At p. 457.

9. [1947] 3 D.L.R. 618.

from taking cognizance of documents offered in evidence by such an agent, without the consent of the State that the agent represents. The Court, *per Bissonnette J.*, who spoke for his brethren on the international law issues involved, clearly recognized that immunity extended to criminal jurisdiction and went on to say that such immunity could not be renounced.¹⁰ The learned judge conceded that documents coming from the Soviet Embassy were *prima facie* protected, but pointed out that if the diplomatic corps performed acts which threatened the security of the local State any such protection would disappear. Further, the documents in question had been handed to the court by the Canadian Government and the judge considered that they had become the property of that Government, and that it would be wrong for the court to contradict the executive on a matter of security or foreign affairs. *In fine*, he held 'that the privilege of taking advantage of the immunity of a foreign State cannot be admitted to a Canadian citizen in litigation between his Government and himself, when he is not part of a foreign diplomatic corps; to impose, through a judicial decision, immunity upon a State which does not claim any, would be casting a slur upon its dignity, its sovereignty, and, through a gesture as ungracious as unexpected, would elevate a simple suit to a degree of international importance and create, at least in theory, a diplomatic conflict contrary to the will of the executive power itself. I have too much respect for public international law to sanction such a theory.'¹¹

In view of the comments made by Bissonnette J. about the relative immunity of documents, it is perhaps as well to point out that Article 22 of the International Law Commission's Draft Articles provides that 'the archives and documents of the mission shall be inviolable,' and in its Commentary the Commission, while it could not share the view that archives and documents were inviolable regardless of the premises where they might be, considered that 'the mission's documents, even though separated from the archives, and whether belonging to the archives or not' — one of the points made in the Canadian judgment was that the documents were part of a secret espionage organisation using the Embassy building and not really belonging to the archives at all — 'must, like the archives themselves, be inviolable, irrespective of their physical whereabouts.'¹²

Rose is clearly distinguishable from *Madan*, for in the latter it is the diplomat himself who is accused. Lord Parker pointed out that Halsbury¹³ recognises the immunity of a foreign State's representative from criminal jurisdiction, but states that judicial statements suggest that this immunity is complete only so far as a public minister himself is concerned. The Lord Chief Justice, however, accepted the view of the Attorney-General that there was nothing in the cases to support any such distinction between the head of mission and his staff. He also ruled that, where diplomats are concerned, and when dealing with something which is *mala prohibita*, 'there is no distinction between the principles of law applicable in the case of civil proceedings and criminal charges.'¹⁴

As regards the suggestion that the High Commissioner's waiver acted retrospectively, Lord Parker was of opinion 'that on its face it does not purport to do so,' and this was sufficient to dispose of the argument. It is submitted, with respect, that, although the High Commissioner's message did not expressly refer back to the date

10. At pp. 642, 643.

11. At p. 648.

12. *Op. cit.*, n.l above, p. 18.

13. *Laws of England*, vol. 7, p. 269. Hurst, however, does not afford the statement in Halsbury the same respect as was given it by the Lord Chief Justice, see 'Exemption from the Criminal Jurisdiction,' *Collected Papers*, 1950, p. 225.

14. At p. 236.

of the offence or of the trial, the statement 'that in order not to impede the course of justice and as a very special case, the High Commissioner is prepared to waive the immunity in the present instance' may well be interpreted as meaning that if the interests of justice required a waiver to be exercised, then the High Commissioner accepted the jurisdiction of the court to whatever extent might have been necessary to support that jurisdiction. The reservation of the High Commissioner's rights for the future, and the rejection of any suggestion that the present action was to constitute a precedent lend support to this interpretation. In these circumstances, it would not have been stretching the point to have given the declaration retrospective effect.

As a result of the *Madan* decision it is clearly established that, from the point of view of the English courts, silence in the face of the court does not amount to a waiver of immunity and an acceptance of the jurisdiction; that there must be a clear waiver by the head of the mission or someone acting on his behalf; and that diplomats are immune from criminal suit. In other words, English law on this subject is fully in accordance with the Draft Articles drawn up by the International Law Commission for consideration at the Vienna Conference in 1961.