



25 June 2021

PRESS SUMMARY

General Dynamics United Kingdom Ltd (Respondent) v State of Libya (Appellant)
[2021] UKSC 22
On appeal from [2019] EWCA Civ 1110

JUSTICES: Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Burrows, Lord Stephens

BACKGROUND TO THE APPEAL

Section 12(1) of the State Immunity Act 1978 (“**SIA**”) governs the process for instituting court proceedings against a foreign State. It provides that “any writ or other document required to be served for instituting proceedings against a State” shall be transmitted through the Foreign, Commonwealth and Development Office (“**FCDO**”) to the relevant State’s Ministry of Foreign Affairs. In this appeal, the Supreme Court is asked to decide whether this requirement applies to an order permitting enforcement of an arbitration award against a foreign State.

The respondent, General Dynamics United Kingdom Ltd (“**General Dynamics**”), seeks to enforce an arbitration award of over £16 million plus interest and costs (“**the Award**”) made in 2016 by an International Chamber of Commerce arbitral tribunal against the appellant, the State of Libya (“**Libya**”). Libya has not paid any of the sums due to General Dynamics under the Award. Accordingly, on 21 June 2018, General Dynamics issued proceedings to enforce the Award in England and Wales, where it believes Libya to hold relevant assets.

On 20 July 2018, the High Court made an order (“**the enforcement order**”) which granted General Dynamics permission to enforce the Award in the same way as a judgment or court order pursuant to section 101(2) and (3) of the Arbitration Act 1996 (“**the 1996 Act**”). In light of evidence of civil unrest and political instability in Libya, the Court exercised its discretion under rules 6.16 and 6.28 of the Civil Procedure Rules (“**CPR**”) to dispense with formal service of the arbitration claim form and enforcement order on Libya (“**the service dispensation**”).

Libya applied to vary the enforcement order so as to set aside the service dispensation and to require formal service through the FCDO, in accordance with section 12(1) of the SIA. Its application was successful at first instance, but, on General Dynamics’ appeal, the Court of Appeal decided that formal service through the FCDO was not required and that the service dispensation should therefore be restored. Libya now appeals to the Supreme Court.

JUDGMENT

By a majority, the Supreme Court allows the appeal. Lord Lloyd-Jones gives the first judgment, with which Lord Burrows agrees. Lady Arden gives a concurring judgment. Lord Stephens gives a dissenting judgment, with which Lord Briggs agrees.

REASONS FOR THE JUDGMENT

Issue 1: In proceedings to enforce an arbitration award against a foreign State under section 101 of the 1996 Act, does section 12(1) of the SIA require the arbitration claim form or the enforcement order to be served through the FCDO to the State’s Ministry of Foreign Affairs?

The majority of the Court (Lord Lloyd-Jones, Lady Arden and Lord Burrows) allow Libya’s appeal on the first issue. They consider that a broad reading of section 12(1) of the SIA is appropriate, on account of the considerations of international law and comity which are in play [43], [58], [76(5)]. The words “other document required to be served for instituting proceedings against a State” in section 12(1) are wide enough to apply to all documents by which notice of proceedings in this jurisdiction is given to a defendant State [43]. In the particular context of enforcement of arbitration awards against a State, the relevant document will be the arbitration claim form where the court requires one to be served, or otherwise will be the order granting permission to enforce the award [44], [76(3)]. In cases to which section 12(1) applies, the procedure which it establishes for service on a defendant State through the FCDO is mandatory and exclusive, subject only to the possibility of service in accordance with section 12(6) in a manner agreed by the defendant State [37], [76(2)].

The minority (Lord Stephens and Lord Briggs) would have dismissed Libya’s appeal on the first issue [231]. They consider that that Parliament intended the applicability of section 12(1) of the SIA to depend on what was required by the relevant court rules. If, as in this case, the operation of the relevant rules does not require service of the document instituting proceedings, then that document will fall outside section 12(1) of the SIA. Documents which do not institute proceedings, such as the enforcement order, fall outside the scope of section 12(1) of the SIA entirely. Where section 12(1) of the SIA does not apply, the status quo of State immunity provided for in section 1 of the SIA must prevail [195], [199]-[200], [217].

Issue 2: Even if section 12(1) applies, in exceptional circumstances, can the court dispense with service of the enforcement order under rules 6.16 and/or 6.28 of the CPR?

The majority’s answer to this question is “No”. Lord Lloyd-Jones explains that section 12(1) of the SIA does not require the court to refer to the CPR to determine whether a document is one which is required to be served. Rule 6.1(a) of the CPR also makes clear that in this instance the CPR do not purport to oust the requirements of section 12(1) of the SIA. The CPR cannot give the court a discretion to dispense with a statutory requirement in any event [81].

The minority’s answer to this question is “Yes”. Lord Stephens considers that, if the court exercises a discretion to dispense with service in exceptional circumstances, then the relevant document is no longer a document that is “required to be served” for the purposes of section 12(1) of the SIA. In his view, this interpretation gives effect to the underlying purpose of the legislation because it facilitates the restrictive doctrine of State immunity [238]-[239].

Issue 3: Must section 12(1) be construed as allowing the court to make alternative directions as to service in exceptional circumstances where the claimant’s right of access to the court would otherwise be infringed?

General Dynamics argues that the service requirements in section 12(1) of the SIA may prevent a claimant from pursuing its claim, which would infringe article 6 of the European Convention on Human Rights (“ECHR”) as well as the constitutional right of access to the court. It therefore contends that section 12(1) should be construed, pursuant to section 3 of the Human Rights Act 1998 (“HRA”) and/or common law principles, as allowing the court to make alternative directions as to service in exceptional circumstances [82].

The majority of the Court reject this argument. They hold that the procedure prescribed by section 12(1) of the SIA is a proportionate means of pursuing the legitimate objective of providing a workable means

of service which conforms with the requirements of international law and comity, in circumstances of considerable international sensitivity. The procedure cannot therefore be considered to infringe article 6 of the ECHR, or to engage the common law principle of legality [84]-[85]. Lady Arden adds that section 3 of the HRA does not, in any case, permit the court to adopt an interpretation which is inconsistent with a fundamental feature of the legislation. The court cannot therefore interpret section 12 of the SIA as (for example) permitting substituted service, given that a fundamental feature of the provisions is their mandatory and exclusive nature [97], [99].

The minority would interpret section 12(1) of the SIA as allowing the court to make alternative directions as to service if the claimant's right of access to the court would otherwise be infringed. They consider that denying access to a court in circumstances where diplomatic service is impossible or unduly difficult would not be proportionate to the legitimate aim of complying with international law to promote comity and good relations between States [243].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>