

07-2579-cv
Matar v. Dichter

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: January 16, 2009 Decided: April 16, 2009)

Docket No. 07-2579-cv

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Ra'ed Ibrahim Mohamad Matar, on behalf of himself and his
deceased wife Eman Ibrahim Hassan Matar, and their deceased
children Ayman, Mohamad and Dalia, Mahmoud Subhai Al
Huweiti, on behalf of himself and his deceased wife Muna
Fahmi Al Huweiti, their deceased sons Subhai and Mohammed
and their injured children, Jihad, Tariq, Khamis, and Eman
and Marwan Zeino, on his own behalf,

Plaintiffs-Appellants,

- v.-

Avraham Dichter, former Director of Israel's General
Security Service,

Defendant-Appellee.

- - - - -x

Before: JACOBS, Chief Judge, KEARSE, HALL,
 Circuit Judges.

Appellants, survivors of an Israeli military attack on
a suspected terrorist housed in a residential apartment
building in Gaza City, sued defendant Avraham Dichter,
former head of the Israeli Security Agency, alleging war

1 crimes and violations of international law, and seeking
2 damages pursuant to the Alien Tort Statute and the Torture
3 Victim Protection Act, 28 U.S.C. § 1350 & note. The United
4 States District Court for the Southern District of New York
5 (Pauley, J.) dismissed the complaint on the grounds that
6 Dichter is immune from suit under the Foreign Sovereign
7 Immunities Act of 1976, 28 U.S.C. §§ 1602-1611, and that (in
8 the alternative) the suit presents a non-justiciable
9 political question. We affirm on the ground that Dichter
10 is immune from suit under common law for the acts alleged.

11 MARIA C. LAHOOD, Katherine
12 Gallagher, Jennifer M. Green, on
13 the brief, Center for
14 Constitutional Rights, New York,
15 NY, for Appellants.

16
17 ROBERT WEINER, Jean E. Kalicki,
18 Matthew A. Eisenstein, on the
19 brief, Arnold & Porter, LLP,
20 Washington, D.C., Kent A.
21 Yalowitz, on the brief, Arnold &
22 Porter, LLP, New York, NY, for
23 Appellee.

24
25 SERRIN TURNER, David S. Jones,
26 on the brief, Assistant United
27 States Attorneys, for Michael J.
28 Garcia, United States Attorney
29 for the Southern District of New
30 York, John B. Bellinger, III, on
31 the brief, United States
32 Department of State, Jeffrey S.
33 Bucholtz, Acting United States
34 Assistant Attorney General,

1 Douglas N. Letter, Lewis S.
2 Yelin, on the brief, United
3 States Department of Justice,
4 for Amicus Curiae United States
5 of America.
6

7 DENNIS JACOBS, Chief Judge:
8

9 Appellants allege that they were injured or lost family
10 members in the 2002 aerial bombing of a Gaza apartment
11 complex by the Israeli Defense Force, and they allege that
12 appellee Avraham Dichter, former head of the Israeli
13 Security Agency, personally participated in the decision to
14 bomb. The United States District Court for the Southern
15 District of New York (Pauley, J.) dismissed appellants'
16 complaint, ruling (1) that Dichter is immune from suit under
17 the Foreign Sovereign Immunities Act of 1976 (FSIA), 28
18 U.S.C. §§ 1602-1611, or (2) that in the alternative, the
19 complaint states a non-justiciable political question. On
20 appeal, appellants argue that the FSIA does not extend to
21 former foreign officials such as Dichter; that the FSIA does
22 not immunize certain violations of domestic, foreign, and
23 international law; and that the complaint is justiciable.
24 We conclude that even if the FSIA does not apply, Dichter
25 would nonetheless be immune under common law. We therefore
26 affirm the judgment of the district court.

1 **BACKGROUND**

2 On July 22, 2002, an Israeli Defense Force aircraft
3 bombed an apartment complex in Gaza City in the Gaza Strip,
4 a Palestinian territory then occupied by Israel. The attack
5 was designed to kill Saleh Mustafah Shehadeh, an alleged
6 leader of the terrorist organization Hamas, and it
7 succeeded.¹ Collateral damage included the deaths of
8 fourteen people, as well as the destruction of the apartment
9 building and surrounding structures. Appellants were
10 injured in the attack, or represent others who were killed
11 or injured.

12 At the time of the attack, defendant Avraham Dichter
13 was director of the Israeli Security Agency (the "Agency"),
14 one of that country's main security and intelligence
15 services.² Plaintiffs allege that the Agency developed and
16 participated in a "practice" of "'targeted assassinations,'"
17 selecting and locating targets and exercising final say over

¹ Hamas has been designated a Foreign Terrorist Organization pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1189. See United States Department of State, Foreign Terrorist Organizations Fact Sheet, April 8, 2008, <http://www.state.gov/s/ct/rls/fs/08/103392.htm>.

² The complaint refers to the Agency as the General Security Service, a direct translation of the organization's Hebrew name.

1 the attacks, and that Dichter "participated in the specific
2 decision to authorize" the July 2002 attack.

3 The complaint, filed in December 2005, alleges that by
4 committing war crimes and other violations of international
5 law, Dichter is liable for damages pursuant to the Alien
6 Tort Statute (ATS) and the Torture Victim Protection Act
7 (TVPA), 28 U.S.C. § 1350 & note. At the time that suit was
8 filed, Dichter had left the Agency and was no longer an
9 official of the State of Israel.³

10 In February 2006, Dichter moved to dismiss, arguing (1)
11 that he was immune under the FSIA; (2) that the suit
12 presented a non-justiciable political question; and (3) that
13 the suit implicated the act of state doctrine. At about the
14 same time, Israel's Ambassador to the United States, Daniel
15 Ayalon, wrote the United States State Department declaring
16 that "anything Mr. Dichter did . . . in connection with the
17 events at issue . . . was in the course of [his] official
18 duties, and in furtherance of official policies of the State
19 of Israel." The district court invited the State Department

³ Dichter subsequently became the Israeli Minister of Public Security. See State of Israel Ministry of Public Security, <http://www.mops.gov.il/BPEng/About+MOPS/TheMinister/> (last visited Feb. 11, 2009).

1 to "state its views, if any" on the issues raised in the
2 motion to dismiss, or other issues it deemed relevant to the
3 case. The State Department's statement of interest, filed
4 in November 2006, opined that the FSIA afforded immunity for
5 countries, not for individuals, but urged the court to
6 dismiss the suit nevertheless on the ground that Dichter was
7 entitled to immunity under common law as an official of a
8 foreign state.

9 The district court granted Dichter's motion to dismiss.
10 Rejecting the government's argument that the FSIA did not
11 apply to individual foreign officials, the district court
12 ruled that Dichter was an "agency or instrumentality of a
13 foreign state" as defined in 28 U.S.C. § 1603. The court
14 further rejected appellants' arguments that FSIA immunity
15 does not extend to acts taken outside the scope of lawful
16 authority and that FSIA immunity is trumped by liability
17 under the TVPA. In the alternative, the district court
18 ruled that appellants' suit raised a non-justiciable
19 political question. The court declined to reach Dichter's
20 argument that the suit was barred by the act of state
21 doctrine. This appeal followed.

1 **DISCUSSION**

2 **I.**

3 The threshold question is whether Dichter enjoys
4 immunity from suit, either under the FSIA or under common
5 law. If Dichter is immune, we need not determine whether
6 the appellants' complaint presents a non-justiciable
7 political question.

8 The FSIA "provides the sole basis for obtaining
9 jurisdiction over a foreign state in federal court."
10 Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S.
11 428, 439 (1989). "Under the Act, a foreign state is
12 presumptively immune from the jurisdiction of United States
13 courts; unless a specified exception applies, a federal
14 court lacks subject-matter jurisdiction over a claim against
15 a foreign state." Saudi Arabia v. Nelson, 507 U.S. 349, 355
16 (1993). A defendant seeking dismissal for lack of subject
17 matter jurisdiction under the FSIA must make a prima facie
18 showing that it is a foreign sovereign. Virtual Countries,
19 Inc. v. Republic of South Africa, 300 F.3d 230, 241 (2d Cir.
20 2002). The burden then shifts to the plaintiff to present
21 evidence showing that an exception to the FSIA applies.
22 Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016

1 (2d Cir. 1993). We review a district court's decision
2 regarding subject matter jurisdiction under the FSIA for
3 clear error as to factual findings, and de novo as to legal
4 conclusions. Robinson v. Government of Malaysia, 269 F.3d
5 133, 138 (2d Cir. 2001).

6 The briefs on appeal join issue on whether the FSIA
7 applies to individual foreign government officials, an open
8 question at the time. See Kensington Int'l Ltd. v. Itoua,
9 505 F.3d 147, 160 (2d Cir. 2007). After the briefs were
10 filed, but before oral argument, we had occasion to decide
11 this question directly, and we concluded that "an individual
12 official of a foreign state acting in his official capacity
13 is the 'agency or instrumentality' of the state, and is
14 thereby protected by the FSIA." In re Terrorist Attacks on
15 September 11, 2001, 538 F.3d 71, 81 (2d Cir. 2008). The
16 district court thus arrived first at the same conclusion.

17 Appellants would distinguish In re Terrorist Attacks on
18 the ground that the FSIA does not immunize former foreign
19 government officials, and that Dichter--unlike the
20 individual defendants in that case--was no longer an
21 official of a foreign government when suit was filed.
22 Appellants rely on Dole Food Co. v. Patrickson, 538 U.S. 468

1 (2003), which considered whether a corporation's status as
2 an instrumentality of a foreign state is defined "as of the
3 time an alleged tort or other actionable wrong occurred or,
4 on the other hand, at the time suit is filed." Id. at 471.
5 The Dole Food Court looked to the second clause of 28 U.S.C.
6 § 1603(b)(2), which defines an instrumentality to be, inter
7 alia, a corporation "a majority of whose shares or other
8 ownership interest is owned by a foreign state or political
9 subdivision thereof." Noting that the provision "is
10 expressed in the present tense," the Supreme Court concluded
11 that "instrumentality status [is] determined at the time
12 suit is filed." Dole Food, 538 U.S. at 478. Appellants
13 argue that the agency status of an individual, like the
14 instrumentality status of a corporation, should be
15 determined at the time suit is filed.

16 Appellants did not raise this argument in the district
17 court, and Dichter urges that we decline to consider it on
18 that ground. We could decide the question nevertheless.⁴

⁴ The general rule is "that an appellate court will not consider an issue raised for the first time on appeal," Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994); but the rule is relaxed to avoid manifest injustice or to consider an issue of law when there is no need for additional fact-finding. Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 302 (2d Cir. 1996). Here, the issue is

1 Two of our sister circuits have written on the applicability
2 of Dole Food to individual foreign officials, and they have
3 reached contrary conclusions--albeit in dicta.⁵ But we
4 decline to decide this close question because, whether the
5 FSIA applies to former officials or not, they continue to
6 enjoy immunity under common law.

8 II.

9 Before the FSIA, courts determined the immunity of
10 foreign sovereigns pursuant to principles announced by Chief
11 Justice John Marshall in The Schooner Exchange v. McFaddon,
12 11 U.S. (7 Cranch) 116 (1812). Summarizing Marshall's
13 ruling that foreign sovereigns have no absolute right to
14 immunity in American courts, the Supreme Court has explained

purely legal and there is no need for additional fact-
finding.

⁵ In Belhas v. Ya'alon, 515 F.3d 1279, 1284-86 (D.C. Cir. 2008), the D.C. Circuit commented (in dicta) that Dole Food was not applicable to claims of immunity by individual officials, noting that international law had long recognized individual immunity based on an officer's official actions. On the other hand, the Fourth Circuit in Yousuf v. Samantar, 552 F.3d 371, 381-83 (4th Cir. 2009) commented (also in dicta) that Dole Food was directly applicable to claims of immunity by individual officials, noting that the present-tense statutory language cited by the Dole Food court applied to individuals as well as corporations.

1 that "as a matter of comity, members of the international
2 community had implicitly agreed to waive the exercise of
3 jurisdiction over other sovereigns in certain classes of
4 cases" Republic of Austria v. Altmann, 541 U.S.
5 677, 688 (2004) (citing Schooner Exchange, 11 U.S. at 136).
6 And because these cases typically raised "questions of
7 policy [rather] than of law," Marshall suggested that they
8 were "for diplomatic, rather than legal discussion."
9 Schooner Exchange, 11 U.S. at 146. Accordingly, courts have
10 generally "deferred to the decisions of the political
11 branches--in particular, those of the Executive Branch--on
12 whether to take jurisdiction over actions against foreign
13 sovereigns and their instrumentalities." Verlinden B.V. v.
14 Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

15 From Schooner Exchange until 1952, the Executive
16 routinely called for immunity in all cases against friendly
17 foreign sovereigns. Id. In 1952 the State Department
18 adopted a "restrictive" theory of foreign sovereign immunity
19 under which invocations of immunity were confined to a
20 foreign sovereign's public acts, but did not extend to its
21 strictly commercial acts. Id. at 486-87. In practice, this
22 approach proved troublesome. In 1976, Congress enacted the

1 FSIA in an effort to codify the rules governing foreign
2 sovereign immunity, removing the immunity determination from
3 the political branches by setting out a legal framework,
4 including certain substantive standards and procedural
5 rules, within which issues of immunity are to be decided by
6 the judiciary. Altmann, 541 U.S. at 691; see Foreign
7 Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 4,
8 90 Stat. 2891, 2891-97 (1976).

9 If (as may be) the FSIA does not apply to former
10 foreign officials, it does not follow that these officials
11 lack immunity. The FSIA is a statute that "invade[d] the
12 common law" and accordingly must be "read with a presumption
13 favoring the retention of long-established and familiar
14 principles, except when a statutory purpose to the contrary
15 is evident," Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783
16 (1952); see also Attorney General of Canada v. R.J. Reynolds
17 Tobacco Holdings, Inc., 268 F.3d 103, 127 (2d Cir. 2001).
18 "In order to abrogate a common-law principle, the statute
19 must 'speak directly' to the question addressed by the
20 common law." United States v. Texas, 507 U.S. 529, 534
21 (1993) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S.
22 618, 625 (1978)). And "[a] party contending that

1 legislative action changed settled law has the burden of
2 showing that the legislature intended such a change." Green
3 v. Bock Laundry Machine Co., 490 U.S. 504, 521 (1989).

4 The FSIA is silent with regard to former foreign
5 government officials. Appellants argue that Congress
6 therefore must have intended to strip former officials of
7 the immunity they enjoyed under the Schooner Exchange
8 scheme. But silence does not suffice; and appellants have
9 identified no provision or feature of the FSIA that bespeaks
10 intent to abrogate that common-law scheme with respect to
11 former officials. It follows that if, as appellants
12 contend, the FSIA does not apply to former government
13 officials, we must look to common law to determine (a)
14 whether former officials are entitled to immunity under the
15 common-law Schooner Exchange scheme, and (b) if so, whether
16 Dichter is entitled to immunity "in conformity to the
17 principles accepted by the department of the government
18 charged with the conduct of our foreign relations."
19 Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

20 Common law recognizes the immunity of former foreign
21 officials. At the time the FSIA was enacted, the common law
22 of foreign sovereign immunity recognized an individual

1 official's entitlement to immunity for "acts performed in
2 his official capacity." Restatement (Second) of Foreign
3 Relations Law of the United States § 66(f) (1965); see also
4 Heaney v. Gov't of Spain, 445 F.2d 501, 504 (2d Cir. 1971)
5 (plaintiff's concession that defendant was "at all relevant
6 times 'an employee and agent of the defendant Spanish
7 Government'" sufficed to dispose of the claim against the
8 individual defendant). An immunity based on acts--rather
9 than status--does not depend on tenure in office.

10 Is Dichter entitled to common-law immunity? Prior to
11 the enactment of the FSIA, we "deferred to the decisions of
12 the political branches--in particular, those of the
13 Executive Branch--on whether to take jurisdiction over
14 actions against foreign sovereigns and their
15 instrumentalities." Verlinden, 461 U.S. at 486. The United
16 States--through the State Department and the Department of
17 Justice--filed a Statement of Interest in the district court
18 specifically recognizing Dichter's entitlement to immunity
19 and urging that appellants' suit "be dismissed on immunity
20 grounds." Accordingly, even if Dichter, as a former foreign
21 official, is not categorically eligible for immunity under
22 the FSIA (a question we need not decide here), he is

1 nevertheless immune from suit under common-law principles
2 that pre-date, and survive, the enactment of that statute.

3
4 **III.**

5 Appellants' two remaining arguments, raised in the FSIA
6 context, are equally applicable in the common-law context.
7 First, they argue that there can be no immunity--statutory
8 or otherwise--for violations of jus cogens (international
9 law norms). But we have previously held that there is no
10 general jus cogens exception to FSIA immunity. See Smith v.
11 Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239,
12 242-45 (2d Cir. 1996) (considering, and rejecting, the
13 argument that "a foreign state should be deemed to have
14 forfeited its sovereign immunity whenever it engages in
15 conduct that violates fundamental humanitarian standards . .
16 . ."). And in the common-law context, we defer to the
17 Executive's determination of the scope of immunity. As the
18 Seventh Circuit has explained,

19 Just as the FSIA is the Legislative
20 Branch's determination that a nation
21 should be immune from suit in the courts
22 of this country, the immunity of foreign
23 leaders remains the province of the
24 Executive Branch. The Executive Branch's
25 determination that a foreign leader
26 should be immune from suit even where the

1 leader is accused of acts that violate
2 jus cogens norms is established by a
3 suggestion of immunity.
4

5 Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004). A claim
6 premised on the violation of jus cogens does not withstand
7 foreign sovereign immunity.

8 Appellants also argue that any immunity Dichter might
9 enjoy is overridden by his alleged violations of the TVPA,
10 which makes liable "[any] individual who, under actual or
11 apparent authority, or color of law, of any foreign nation .
12 . . subjects an individual to extrajudicial killing." 28
13 U.S.C. § 1350 note sec 2(a). Because the TVPA only applies
14 to individuals acting under actual or apparent governmental
15 authority, appellants argue that a grant of immunity to a
16 former official such as Dichter would essentially write the
17 TVPA out of existence.

18 This is incorrect. As to statutory immunity, the TVPA
19 applies to individual officials who fall into one of the
20 enumerated exceptions listed in 28 U.S.C. § 1605. See
21 Belhas, 515 F.3d at 1288; see also H.R. Rep. No. 102-367, at
22 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88 ("The TVPA
23 is subject to restrictions in the Foreign Sovereign
24 Immunities Act of 1976."); S. Rep. No. 102-249, at 7 (1991)

1 ("[T]he TVPA is not meant to override the Foreign Sovereign
2 Immunities Act of 1976."). And because the extension of
3 common-law immunity is discretionary, the TVPA will apply to
4 any individual official whom the Executive declines to
5 immunize.

6
7 In summary, we need not decide whether the FSIA applies
8 to a former official of a foreign government (a close and
9 interesting question), because if the FSIA does not apply, a
10 former official may still be immune under common-law
11 principles that pre-date, and survive, the enactment of the
12 FSIA. Here, the Executive Branch has urged the courts to
13 decline jurisdiction over appellants' suit, and under our
14 traditional rule of deference to such Executive
15 determinations, we do so. We therefore affirm the judgment
16 of the district court dismissing appellants' complaint for
17 lack of jurisdiction; and because we decide the appeal on
18 immunity grounds, we need not reach the district court's
19 alternative holding that the case raises a non-justiciable
20 political question.