10.b.21

(16)

CS:wp
ERSHAD.mlw

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

MARIEUM MUMTAZ, :

Plaintiff, : Index No. 74258/89

- v.- : IAS Part 17

GENERAL H.M. ERSHAD, : JUSTICE SCHACKMAN

Defendant. :

- - - - - - - - - - - - - - - - - - -x

MEMORANDUM OF LAW IN SUPPORT OF THE SUGGESTION OF IMMUNITY FILED ON BEHALF OF THE DEFENDANT BY THE UNITED STATES

Preliminary Statement

The United States of America submits this Memorandum of Law in support of the Suggestion of Immunity filed by the United States on behalf of the defendant General H.M. Ershad, pursuant to 28 U.S.C. § 518.

STATEMENT OF THE CASE

A. Prior Proceedings

Plaintiff Mareium Mumtaz brought this suit against General H.M. Ershad, President of the People's Republic of Bangladesh, seeking dissolution of a marriage that allegedly occurred in Dhaka, Bangladesh in 1982. Verified Complaint at ¶ 1. Alleging that defendant abandoned her in 1985, plaintiff now asks for, inter alia, an award of spousal maintenance and

equitable distribution of marital property. Verified Complaint at ¶ 8.

The Government of the People's Republic of Bangladesh requested that the United States suggest immunity for President Ershad. See Affirmation of Abraham D. Sofaer ("Sofaer Aff."), Legal Adviser, United States Department of State, dated May 29, 1990, at ¶ 3. Upon consideration of the request, the State Department recognized that General Ershad, as Head of State of the People's Republic of Bangladesh, is entitled in this action to the immunity customarily granted to Heads of State. Id. at ¶ 4. See id. at ¶ 2. Accordingly, the State Department made a formal request to the Department of Justice to file a suggestion of immunity with this Court. Suggestion of Immunity, Exhibit A (Letter dated April 17, 1990 from Abraham Sofaer to the Honorable Richard Thornburgh). Thereafter, pursuant to 28 U.S.C. § 517,*

---

* 28 U.S.C. § 517 provides,

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any state or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States. [Emphasis supplied.]

the United States filed a Suggestion of Immunity with this Court on May 30, 1990.

B. The Suggestion of Immunity

The Suggestion of Immunity filed in this case pointed out that the "the United States of America has an interest and concern in the subject matter of this action insofar as it involves the question of immunity from the Court's jurisdiction of the head of state of a friendly foreign state." Suggestion of Immunity at ¶ 1. See Sofaer Aff. at ¶¶ 5, 6. This interest derives from the foreign policy implications of such a lawsuit against the Head of State of a friendly foreign country. The United States has an interest in maintaining "friendly intercourse with other nations and [in] avoiding reprisals by them." International Products Corp. v. Koons, 325 F.2d 403, 408 (2d Cir. 1963)(discussing interest of United States in suits relating to the property of foreign sovereigns). See Sofaer Aff., at ¶¶ 5, 6; Suggestion of Immunity at ¶¶ 3, 4 (and authorities cited to therein). In this vein, the Suggestion of Immunity stated that the Executive Branch has determined that "permitting this suit to go forward against General H.M. Ershad would be incompatible with this country's foreign policy interests." Suggestion of Immunity at ¶ 1.

The Suggestion of Immunity further stated that according immunity to foreign heads of state is customary under

rules of international law. Id. at ¶ 3 citing Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988), aff'd in relevant part, No. 89-5051 (D.C. Cir. Sept. 29, 1989)(per curiam), cert. denied, ___ U.S. ___, 109 L. Ed. 2d 501 (1990); Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303 (Sup. Ct. 1988), aff'd mem., sub nom. Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (1st Dep't 1989). The Suggestion of Immunity further noted the holdings of a number of cases to the effect that "the courts of the United States are bound by suggestions of immunity, such as this, which are submitted to the courts by the Executive Branch." Suggestion of Immunity at ¶ 3 citing Ex Parte Peru, 318 U.S. 578, 588-89 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945). See also Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303.

C. Plaintiff's Response To The Suggestion Of Immunity

Plaintiff contends that this Court is not bound by the Suggestion of Immunity because the claim here concerns "personal acts" of defendant, none of which concern his official status. Plaintiff, however, cites not one case in which a court has disregarded a suggestion of immunity submitted by the Executive Branch. Instead, plaintiff seeks to distinguish on various factual grounds the cases referenced in the Suggestion of Immunity and cites holdings based upon different legal grounds, particularly the Act of State doctrine and consular immunity. As set forth below, the Suggestion of Immunity filed by the United

States does bind this Court. Consequently, the Court should dismiss the complaint as to defendant.

ARGUMENT

I. THE SUGGESTION OF IMMUNITY IS BINDING ON THIS COURT

It has long been settled that suggestions made by the United States that immunity be granted or denied are conclusive on the courts. See United States v. Lee, 106 U.S. 196, 209 (1882). As the Supreme Court has observed, courts must follow "the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." Id. See also Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); Ex Parte Peru, 318 U.S. 578, 588-89 (1943); Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303 (Sup. Ct. N.Y. Co. 1988), aff'd mem., sub nom. Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (1st Dep't 1989). As pointed out in the Suggestion of Immunity, in Ex Parte Peru, the Supreme Court, without reviewing the merits of the Executive's determination, found that a suggestion of immunity must be accepted by the judiciary as a "conclusive determination by the political arm of the Government" that the continued retention of jurisdiction would jeopardize the conduct of foreign relations and that jurisdiction therefore must be relinquished. 318 U.S. at 589. See also Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974).

New York courts have recognized the conclusive nature of the State Department's determinations on immunity. In Matter of United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944), the Court of Appeals expressly recognized that a court must follow the view of the Department of State on whether immunity should be extended to foreign sovereigns regardless of whether the court agrees with the grant of immunity. The Court explained:

> It is immaterial whether upon a judicial inquiry a court might have found in the decree creating Petroleos Mexicanos an intention by the Mexican Government to create an autonomous corporation which should not share the immunity of the sovereign. That ceased to be a judicial question when the Department of State had authoritatively recognized the claim of immunity. The assertion by a foreign sovereign of immunity from suit here might in some case cause hardship to domestic suitors, but we may not assume that the Government of Mexico would assert its sovereign immunity to evade a just claim, and our recognized public policy is that "our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." (Ex Parte Peru, supra, 589.).

293 N.Y. at 272, 56 N.E.2d at 580-81.

More recently, in Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303, this Court appropriately relied on the

reasoning of the Supreme Court in Ex parte Peru and of the New York Court of Appeals in United States of Mexico v. Schmuck: "logic mandates that courts be bound by the State Department's recommendation." Id. at 788, 535 N.Y.S.2d at 304.

Against this overwhelming weight of authority plaintiff urges this Court to become the first to hold that a suggestion of immunity filed by the Executive Branch is not binding on the judiciary. Plaintiff purports to distinguish cases cited in the Suggestion of Immunity on the ground that they concerned "claims of sovereign immunity by foreign governments." Plaintiff's Supplemental Memorandum of Law ("Plf. Supp. Mem.") at 1 (emphasis in original). Plaintiff's attempt to distinguish factually the cases cited in the Suggestion of Immunity is unavailing. None of those decisions contains the faintest hint that the court's decision to adhere to the suggestion of immunity depended on the nature of the conduct before the court. Indeed, in Ex Parte Peru, the Supreme Court couched its decision in broad terms holding that upon filing of a suggestion of immunity, it becomes the "court's duty" to surrender the jurisdiction for which immunity has been conferred. Using similarly broad language, the New York Court of Appeals held that the question of whether sovereign immunity should obtain "ceased to be a judicial question when the Department of State [] authoritatively recognized the claim of immunity." United States of Mexico v.

Schmuck, 293 N.Y. at 272, 56 N.E.2d at 580-81. Then, too, the complaint dismissed in Kline alleged purely personal acts by the defendant.*

Additional support for the binding character of the Suggestion of Immunity comes from the Foreign Sovereign Immunities Act, ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391, 1441, and 1602-11. Prior to enactment of the FSIA, the United States suggested the immunity of both heads of state and of foreign states themselves. The FSIA transferred only the determination of the immunity of foreign states from the Executive to the Judicial branch. See House Rep. No. 94-1487, 94th Cong., 2d Sess., U.S. Code Cong. and Ad. News 6604, 6610. As noted in Kline, 141 Misc. 2d at 789, 535 N.Y.S.2d at 305, Gerritsen v. De la Madrid, No. CV 85-5020 (C.D. Cal. 1986), at 7-9, (copy annexed in Appendix to Suggestion of Immunity) and Domingo v. Marcos, No. C82-1055V (W.D. Wash. 1982), at 3-4 (copy annexed in Appendix to Suggestion of Immunity), however, the FSIA had no effect on the

---

* Plaintiff is flatly mistaken that "the allegations against the president's wife [in Kline] were based upon her activities as the wife of a head of state, and not -- as here -- purely personal actions." Plf. Supp. Mem. at 5. As the United States District Court for the Southern District of New York observed in remanding Kline to this Court, "the parties agree that defendant Cordero de De la Madrid has no official role or duties within the government of Mexico and her alleged involvement was solely in her personal capacity." Kline v. Kaneko, 685 F. Supp. 386, 392 (S.D.N.Y. 1988).

binding nature of the Executive's suggestions of head of state immunity.

Thus, this Court need not and should not analyze whether this action arises out of defendant's "official acts as head of the government." Plf. Supp. Mem. at 1, 3-4. As plaintiff concedes by her silence, no other domestic court confronted with a suggestion of immunity filed at the behest of the Federal Government has done so. The cases cited by plaintiff for the proposition that heads of state are subject to suit for private acts, Plf. Supp. Mem. at 4, all involved either the "Act of State" doctrine,* or consular immunity.** Those doctrines involve different considerations and different distributions of authority between the Executive and Judicial branches. Plaintiff has cited no case involving any consideration of the merits of a suggestion of immunity. Indeed, as noted, in Kline, a suit for "wrongful arrest" against the wife of the President of Mexico alleging acts done "solely in her personal capacity," 695 F. Supp. at 392, this Court found the defendant immune based upon a suggestion of immunity filed by the United States. See 141 Misc.

---

* Republic of Philippines v. Marcos, 818 F.2d 1473, (9th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1933 (1989); Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); DeRoburt v. Gannett Co., 733 F.2d 701 (9th Cir. 1984), cert. denied, 469 U.S. 1224 (1985).

** Cocron v. Cocron, 375 N.Y.S.2d 797 (Sup. Ct. Kings Co. 1975).

2d at 788, 535 N.Y.S.2d at 304-05. In short, there is no legal precedent in this or any other domestic jurisdiction for creating an exception to the general rule that the filing of a suggestion of immunity is binding.

Giving an executive suggestion of immunity conclusive effect is warranted because the claim of a foreign sovereign of immunity from suit presents a political rather than a judicial question. See New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 686 (S.D.N.Y. 1955); Et Ve Balik Kurumu v. B.N.S. International Sales Corp., 25 Misc. 2d 299, 204 N.Y.S. 971, aff'd without op., 17 A.D.2d 927, 233 N.Y.S.2d 1013 (1st Dep't 1960). Under such circumstances a court's proper function is to enforce the "political decisions" of the State Department to grant or deny immunity. New York & Cuba Mail S.S. Co., 132 F. Supp. at 656. The political determination of immunity binds the courts and has the effect of withdrawing the cause from the sphere of litigation. Wolchok v. Statni Banka Ceskoslovenska, 15 A.D.2d 103, 104, 222 N.Y.S.2d 140 (1st Dep't 1961); see Peru, 318 U.S. at 588; Matter of United States of Mexico v. Schmuck, 293 N.Y. 262, 272, 56 N.E.2d 577 (1944).

As noted in the Suggestion of Immunity (¶ 5), this deference of the judiciary to Executive Branch suggestions of immunity also rests on considerations arising out of the conduct

of this country's foreign relations. Spacil v. Crowe, 489 F.2d at 619. As noted by the Fifth Circuit,

> Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nations's primary organ of international policy.

Id., citing United States v. Lee, 106 U.S. at 209; Ex parte Peru, 318 U.S. at 588. In a related vein, in contrast to the institutional resources of the Executive Branch and the extensive experience of the Executive in administering this country's foreign affairs, the judiciary is "ill-equipped to second-guess" Department of State determinations concerning those interests. Spacil, 489 F.2d at 619. See Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). In short, the practice of the courts to follow the executive determination does not entail an abdication of judicial power; rather, "it is a self-imposed restraint to avoid embarrassment of the executive branch in the conduct of foreign affairs." New York & Cuba Mail S. S. Co., 132 F. Supp. at 686.

Finally, to the extent that plaintiff suggests that recognition of the binding effect of the Suggestion of Immunity denies her due process by denying her a forum for dissolution of her alleged marriage, see Plf. Supp. Mem. at 3, 9, that

suggestion is without merit. Although the United States does not know whether plaintiff in fact would have no alternative forum in which to adjudicate this case, this question is not relevant. As in other settings where a defendant is entitled to immunity, the assertion of this immunity may leave an allegedly wronged plaintiff without civil redress. See Gregoire v. Biddle, 177 F.2d 579, 580-81 (2d Cir. 1949)(L. Hand, J.), cert. denied, 339 U.S. 949 (1950); United States of Mexico v. Schmuck, 293 N.Y. at 272.

In this connection, denying spouses of foreign government officials access to U.S. courts to resolve family relations matters is supported by precedent; courts have held that diplomatic immunity bars suits for divorce. See Tsiang v. Tsaing, 194 Misc. 259, 260, 86 N.Y.S.2d 556 (1949)(dismissing action for marital separation on ground of diplomatic immunity); Carrera v. Carrera, 174 F.2d 496, 498 (D.C. Cir. 1949) (same). See also Shaw v. Shaw, 3 All E.R. 1, 3, 3 W.L.R. 24 (1979) (construing Vienna convention Diplomatic Relations to bar divorce proceedings against an accredited diplomat)(copy annexed to memorandum). More recently, the Supreme Court of Connecticut noted that actions for marital dissolution "are normally barred by a diplomat's immunity from the 'civil' process of the receiving state." Fernandez v. Fernandez, 208 Conn. 329, 339, 545 A.2d 1036 (1988), cert. denied, ___ U.S., 110 S. Ct. 376

(1989) quoting the Vienna Convention on Diplomatic Relations.* This Court, then, should reject any implication that plaintiff's divorce action justifies creating a "due process exception" to the immunity conferred on heads of state by the filing of a suggestion of immunity.

To conclude, because the United States has an interest in this lawsuit and because the State Department has recognized defendant Ershad's immunity, this Court should find the United States' Suggestion of Immunity conclusive and should dismiss the claims against defendant Ershad.

II. THE COURT SHOULD DISREGARD PLAINTIFF'S WAIVER AND ESTOPPEL ARGUMENTS

Plaintiff contends that even if the "defendant were entitled to assert immunity," defendant waived that defense (or should be estopped from asserting it.) Plf. Supp. Mem. at 6-11. The Court should disregard these arguments, which focus on defendant's conduct in this lawsuit, and are, therefore, completely irrelevant to the decision of the Executive Branch to file a suggestion of immunity on defendant's behalf. Plaintiff

---

* Although the law of head of state immunity is not codified in the United States, the immunity statutes of some countries expressly grant heads of state the same immunity as diplomats. In the United Kingdom, for example, "the Diplomatic Privileges Act of 1964 [which adopted the Vienna Convention on Diplomatic Relations] shall apply to ... a sovereign or other head of state ... as it applies to the head of a diplomatic mission ..." State Immunity Act of 1978, section 20(1)(copy annexed to memorandum).

cites no authority for the proposition that a head of state's immunity may be waived implicitly (or through estoppel) and the United States is not aware of any such support. Cf. Vienna Convention on Diplomatic Relations, art. 32, 23 U.S.T. 3227 T.I.A.S. 7502 (entered into force April 24, 1964) ("Waiver [of diplomatic immunity] must always be express."); State Immunity Act of 1978 (United Kingdom), section 20(1)(applying to heads of state the immunities of ambassadors under the Vienna Convention)(copy annexed to memorandum). However, even assuming arguendo that those were pertinent considerations in the determination of immunity, as discussed above, the fact is that in this case the Executive Branch has determined that President Ershad is entitled to immunity, and under decisions of both the United States Supreme Court and New York courts that decision is binding on this Court.

CS:wp
ERSHAD.mlw

CONCLUSION

For the reasons set forth in the Suggestion of Immunity and the Affirmation of Abraham D. Sofaer, and discussed above, the United States respectfully requests that the Court grant immunity to defendant General H.M. Ershad and dismiss all claims in the complaint against him.

Dated: New York, New York

June 15, 1990

Respectfully submitted,

OTTO G. OBERMAIER
United States Attorney for the
Southern District of New York
By: Craig A. Stewart
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Tel. No.: (212) 791-9173

Of Counsel:

David A. Jones, Jr.
Attorney
United States Department of State
Office of Legal Adviser
Washington, D.C. 20520