REPUBLIC OF SOMALIA v. WOODHOUSE DRAKE & CAREY (SUISSE) S.A. AND OTHERS

1992 Feb. 26; March 9; 13

Hobhouse J.

International Law—Recognition—Effect—Proceeds of goods belonging to Republic of Somalia in court—Somali government overthrown—Interim government set up by nominee of international conference—No administrative control over territory of Somalia—Solicitors instructed by interim government to obtain payment out—Whether authority to act on behalf of Republic of Somalia—Whether proceeds to be paid out

Ships' Names—Mary

In January 1991 the Republic of Somalia bought a cargo of rice to be discharged at Mogadishu. On arrival the cargo could not be discharged there on account of fighting taking place following the overthrow of the Somali Government. In July 1991 an agreement reached by a conference of 17 states and international bodies nominated M. as provisional President of the Republic of Somalia, but M.'s interim government was unable to operate in Mogadishu, and various factions continued to control different areas of Somalia. A dispute arose as to what should be done with the cargo, and in January 1992 the shipowners issued an originating summons for directions. The court ordered the original bills of lading, which were in the hands of B., the ambassador of the Republic of Somalia appointed to the United Nations Organisation by the former government, to be placed in court to facilitate the sale of the cargo and for the net proceeds of sale to be paid into court. On a summons issued by solicitors for the interim government of Somalia, the Republic of Somalia was substituted as the plaintiff in the proceedings and directions were given for payment out of the money paid into court to the solicitors instructed by the interim government, unless cause was shown why it should not be so paid out.

On an application by B. to be joined as a party and for an order that the money in court should not be paid out to the solicitors for the interim government:—

Held, (1) refusing to join B. as a party, that, since B. claimed no personal interest in the money in court and it was not suggested that the money belonged to the ousted regime, her only locus standi would be as a person entitled to represent the Republic of Somalia; but that, on the evidence, B. had no recognition as a representative of the Republic in the United Kingdom (post, p. 60C–F).

(2) Directing that the money remain in court, that, where solicitors sought payment out to them of money belonging to a foreign state, if the court was not satisfied that the solicitors had authority to act on behalf of that state, it should, of its own motion if necessary, require them to obtain that authority and ensure that the money remained under the court's control meanwhile; that the factors to be taken into account in deciding whether a regime existed as the government of a state were whether it was the constitutional government of the state, the

degree, nature and stability of administrative control that it exercised over the territory of the state, whether Her Majesty's Government had any dealings with it and the nature of any such dealings and, in marginal cases, the extent of its international recognition as the government of the state; that on the evidence, M.'s interim government did not become the constitutional successor of the former government and was unable to show that if it was exercising any administrative control over the territory of the Republic of Somalia; and, accordingly, the instructions and authority the solicitors had received from the interim government were not from the Government of the Republic of Somalia, and no part of the proceeds in court should be paid out to the solicitors without further order of the court (post, pp. 61B–D, 67C–D, 68D–G).

The following cases are referred to in the judgment:

Adams v. Adams (Attorney-General intervening) [1971] P. 188; [1970] 3 W.L.R. 934; [1970] 3 All E.R. 572

Arantzazu Mendi, The [1939] A.C. 256; [1939] 1 All E.R. 719, H.L.(E.)

Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.)

Ford-Hunt v. Raghbir Singh [1973] 1 W.L.R. 738; [1973] 2 All E.R. 700

Gur Corporation v. Trust Bank of Africa Ltd. [1987] Q.B. 599; [1986] 3 W.L.R. 583; [1986] 3 All E.R. 449, C.A.

The following additional cases, supplied by courtesy of counsel, were cited in argument:

Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. [1921] 3 K.B. 532, C.A.

Gdynia-Ameryka Linie v. Boguslawski [1953] A.C. 11; [1952] 2 All E.R. 470, H.L.(E.)

Haile Selassie v. Cable and Wireless Ltd. (No. 2) [1939] 1 Ch. 182, C.A.

Scowby, In re [1897] 1 Ch. 741, C.A.

United States of America v. Wagner (1867) L.R. 2 Ch.App. 582

APPLICATION

By an originating summons issued on 12 March 1991 the original plaintiffs, Aleko Maritime Co. Ltd., sought determination by the court of questions arising out of a charterparty made between themselves and the defendants, Woodhouse Drake & Carey (Suisse) S.A., relating to a cargo of rice on board the vessel *Mary*. On 12 March 1991 Hirst J. ordered that, unless persons claiming an interest in the cargo could show cause otherwise, the cargo should be discharged and sold by both parties at the best price they could reasonably obtain and the proceeds of sale paid into court. He further ordered the original bills of lading dated 29 January 1991 relating to the cargo to be deposited with the court.

By a summons dated 16 January 1992 solicitors acting for the interim government of the Republic of Somalia applied, pursuant to R.S.C., Ord. 15, r. 6(2), for the Republic of Somalia to be joined as plaintiff in substitution for Aleko Maritime Co. Ltd. or to be joined as defendants, and for directions as to the future conduct of the action. On 7 February 1992 Saville J. ordered, inter alia, (1) that the Republic of Somalia be

substituted as plaintiff; (2) that Aleko Maritime Co. Ltd. and Madigan Associates S.A. be joined as second and third defendants; and (3) the U.S.$2m. in court be paid out to the solicitors instructed by the interim government of the Republic of Somalia, unless any party showed cause why it should not be so paid out.

On 26 February 1992 solicitors instructed by Madame Fatuma Isaak Bihi, Ambassador of the Republic of Somalia to the United Nations, applied for an order, inter alia, (i) joining Mme. Bihi as a party; (ii) directing that paragraph (3) of Saville J.'s order should not be brought into effect; and (iii) requesting the Attorney-General to appoint an amicus curiae. On 26 February 1992 Hobhouse J. adjourned the application and invited the Attorney-General to appoint an amicus curiae. On 9 March 1992 hearing of the application was resumed in chambers. Judgment was delivered in open court.

The facts are stated in the judgment.

Gavin Kealey for Madame Bihi.
Geraldine Andrews for the plaintiff.
Stephen Richards as amicus curiae.

Cur. adv. vult.

13 March. The following judgment was handed down.

Hobhouse J. In January 1991 the Republic of Somalia bought and paid for a cargo of rice which was shipped on the *Mary* to be discharged at Mogadishu. When the *Mary* arrived off Mogadishu, the master refused to enter the port because he considered it unsafe on account of the fighting that was going on there. The bills of lading covering the cargo were in the hands of a Madame Bihi who was the accredited Ambassador of the Republic of Somalia to the United Nations Organisations in Geneva. Disputes arose as to what should be done with the cargo and the shipowners issued an originating summons on 12 March 1991 in this court naming as the defendants the charterers of the vessel. On the same day Hirst J. ordered that the cargo be sold and that the net proceeds of sale be paid into court. He ordered that the proceeds of sale be treated as if they were the cargo for all purposes. He ordered Madame Bihi, through her solicitors, More Fisher Brown, to place the original bills of lading at the disposal of the court in order to facilitate the carrying out of the order. The order recited that the court had heard "counsel for the plaintiffs and for the defendants and . . . Messrs. More Fisher Brown and Lloyd & Co. for the competing interests in the cargo."

The background to the situation which I have described is that in December 1990 and January 1991 there had been an uprising in Somalia in the course of which the President, Siad Barre, had been overthrown. Somalia consists of a number of areas each of which is dominated by a different tribal group or clan. Following the uprising and the overthrow of the legitimate government, whatever common interest there had been between these groups ceased and they began to fight each other. The

central government ceased to exist. Various groups put themselves forward as entitled to control or govern either parts or the whole of Somalia. In the north west the Somali National Movement ("S.N.M.") attempted to set up a separate state. The north east was under the control of the Somali Salvation Democratic Front ("S.S.D.F.") group. The area around and to the north of the capital, Mogadishu, was controlled by the United Somali Congress ("U.S.C."); but this soon split into two factions, one led by General Aidid and the other by Mr. Ali Mahdi Mohammed. Some of the bitterest fighting during the last nine months has been taking place between these two factions in and around Mogadishu, particularly since November 1991, with neither yet gaining control. Further south, different areas were under the control of the Somali Democratic Movement ("S.D.M.") and Somalia Patriotic Movement ("S.P.M.") and the followers of Siad Barre. No one group has established control over the country. The capital has remained an area of open fighting between armed bands under the control of no one faction. The U.S.C. remains split.

Madame Bihi was a longstanding diplomatic representative who had been appointed by the government of President Barre. Initially she was supportive of the continuing claim to office of President Barre whose overthrow she did not at that stage recognise. More recently, it appears, she has accepted that his government has ceased to exist but she remains deeply hostile to the U.S.C., and in particular Mr. Mahdi, who are equally hostile to her, and contends that there is at present no government of the Republic of Somalia.

Lloyd & Co. had received their instructions from a member of Mr. Mahdi's group who apparently described himself as the "foreign minister" of the Somali Republic. In about February 1991 Mr. Mahdi had been proclaimed President of Somalia by the U.S.C. It was not clear on what basis such an assumption of office could be made and it was not accepted by the other clans. It appears that he appointed as his prime minister, Mr. Omer Arteh Qalib. In July 1991 after a continuous period of widespread fighting between the various groups including the two U.S.C. factions, a conference was called at Djibouti under the chairmanship of the President of the Republic of Djibouti. It was attended by the Presidents of Kenya and Uganda and representatives of the Governments of Germany, the United States of America, France, Italy, Saudi Arabia, Egypt, Libya, Yemen, Nigeria, Ethiopia, Sudan, Oman, the Union of Soviet Socialist Republics, and China and of the Arab League, the Organisation of African Unity and the European Economic Community. From within Somalia six of the groupings were represented. The S.N.M. declined to attend and it seems that General Aidid did not do so either. After a number of days the conference was able to reach an agreement which was set out in a communique dated 21 July 1991. It included:

> "Organisation of the state. (A) The conference had decided to adopt the 1960 constitution for a period of not more than two years from the date of signature of the present agreement, the formation of the government shall be agreed between the various movements. (B) The conference had decided to set up a national assembly

> composed of 123 members based on the number of constituencies existing before 1969 with a speaker and two deputy speakers. (C) The conference had agreed to introduce regional autonomy in the country which entails an amendment to the constitution . . . (E) The conference nominates his excellency, Ali Mahdi Mohammed, as provisional President of the Somali Republic for a period of two years from the day on which he takes the oath. (F) Two vice presidents of the Republic shall be nominated, the first put forward by the S.D.M. and the second by the S.S.D.F. and S.P.F."—The S.D.M., S.S.D.F. and S.P.F. were three of the groupings—"(G) The prime minister shall be a native of the north west of the country. . . . (J) The provisional government is charged with preparing a draft electoral law for the organisation of [a] free and democratic election of the president of the national assembly, with forwarding a policy of respect for human rights and public liberties on the basis of the universal declaration of human rights and to introduce into the country an organisation based on regional autonomy . . ."

The agreement was signed by representatives of the six groups attending who also undertook to carry out the resolutions of the conference.

Accordingly, under the Djibouti Agreement Mr. Mahdi became the interim President and on 6 August 1991 he appointed Mr. Qalib as his prime minister, apparently, in the absence of a nomination by the S.N.M. Mr. Qalib then appointed ministers to serve under him. I will refer to these persons as the "interim government." It appears that in practice the interim government has been unable to operate in Mogadishu and Mr. Qalib has based himself in a hotel in Riyadh in Saudi Arabia.

Prior to the Djibouti Agreement, on 12 May 1991 Mr. Qalib, describing himself as the "Prime Minister of the Somali Republic" and writing from Riyadh, instructed Crossman Block to act on behalf of "the Interim Government of the Somali Republic." By a further letter, also sent from Riyadh, dated 14 January 1992, Mr. Qalib reconfirmed his earlier instructions on behalf of "my Government" and gave his written consent, pursuant to R.S.C., Ord. 15, r. 6(4), for "the Interim Government of the Republic of Somalia" to be joined as the plaintiff in these proceedings. Crossman Block have wholly taken over from Lloyd & Co. and are now the sole solicitors instructed by the interim government.

Following the sale of the cargo and the payment of the net proceeds, U.S.$2,353,991·95, into court, nothing further was done in the action until 16 January 1992 when Crossman Block issued a summons as "solicitors for the Republic of Somalia" applying that the Republic of Somalia be joined as a party to the action, that the buyers of the cargo be also joined, presumably so that they could be bound by any decision of the court, and that

> "directions be given in respect of the future proceedings of this action particularly concerning the trial of the claims of all concerned parties to the moneys paid into court pursuant to the order herein of Hirst J. dated 13 March 1991."

A Notice of this summons was given by Crossman Block to More Fisher Brown who, seeing that they were content that directions should be given and, perhaps surprisingly, did not wish to oppose the joinder of the additional parties, did not consider it necessary to attend the hearing which took place before Saville J. on Friday 7 February 1992. Mr. Clements, a partner in Crossman Block, swore two affidavits, dated respectively 16 January and 6 February 1992, which set out the case of B their clients.

The summons was heard as an ordinary Friday summons in the Commercial Court and occupied about 20 minutes. Crossman Block were represented by counsel, Miss Andrews, and solicitors appeared on behalf of the shipowners, the charterers and the buyers of the cargo. Saville J. ordered the joinder of the Republic of Somalia as plaintiff in C substitution for the shipowners who, together with the buyers of the cargo, were joined as additional defendants. He further ordered:

> "(3) Unless any party appears before this court on or before Wednesday 19 February 1992 and shows cause why the sum of U.S.$2m. should not be paid out of the fund which was paid into court pursuant to the order of Hirst J. herein dated 13 March 1991 D ('the fund') to the solicitors for the Republic of Somalia (Messrs. Crossman Block), the said sum shall be paid out of the fund to Messrs. Crossman Block on 20 February 1992 or forthwith thereafter."

The reason for selecting the figure U.S.$2m. was that by the end of E January 1992 the sum in court together with accrued interest had grown to U.S.$2½m. and U.S.$½m. would be fully sufficient to satisfy any claims of the shipowners, charterers and other commercial parties. He gave directions for the resolution of any dispute as to how the balance of the fund should be dealt with. He reserved the costs and gave liberty to apply. He also took an undertaking from

F > "the Republic of Somalia by their counsel . . . to give notice of this order to all the existing and intended parties to this action and to Messrs. More Fisher Brown the former representatives of Madame Fatuma-Isaak Bihi."

More Fisher Brown, on the instructions of Madame Bihi, took G advantage of the liberty to apply. They swore affidavits and put further material before the court. Their application eventually came on before the court on the afternoon of 26 February 1992. The initial application was for: (i) Madame Bihi to be joined as a party to the proceedings as a representative of the Democratic Republic of Somalia; (ii) paragraph 3 of the order of Saville J. not to be brought into effect, (iii) the court to direct letters to be written to the Foreign and Commonwealth Office H asking what state in Somalia was recognised by Her Majesty's Government as a foreign sovereign state and with what entity, if any, therein Her Majesty's Government had any dealings of a governmental nature; and (iv) the court to request the Attorney-General to appoint an

amicus curiae. In a further affidavit they put her case more clearly in the following terms: A

> "Mrs. Bihi and the party she represents do not call for payment out to them of the sum presently in court. They say that the court should appoint or direct the appointment of an amicus curiae to assist the court when, as here, there is a serious problem of locus standi in view of the confusion that exists in their native Somalia. B They also say that, until the court is able to determine what, if any, is the Government of Somalia with which Her Majesty's Government has appropriate dealings of a governmental nature, the money in court should remain there."

I have not acceded to the application of Madame Bihi to be joined as a representative or other party in this action but I have acceded to her C application that I should invite the Attorney-General to appoint an amicus curiae and Mr. Richards has appeared instructed by the Treasury Solicitor. The court is grateful for his assistance.

Madame Bihi claims no personal interest in the money in court and accordingly the only locus standi that she can have is as a person who is entitled to represent the Republic of Somalia in this court. It is not D suggested that the money belongs to the former regime of Siad Barre, nor that it is the property of a government or governmental agency rather than state property belonging to the Republic. It is clear from the evidence that both More Fisher Brown and Crossman Block have placed before the court that Madame Bihi has no right to represent the Republic in this court. Her evidence is that there is currently no government of Somalia. The former government of President Siad Barre E has ceased to exist and she has received no accreditation or authority from any other government. It is not clear that she currently has any diplomatic status, though there is some evidence that the United Nations may still for some purposes recognise her ambassadorship. But it is clear that she has no diplomatic status in the United Kingdom and has no recognition from Her Majesty's Government as a representative of the Republic of Somalia in this country. Accordingly, I refuse her application F to be joined as a party to this action.

The essential matter which has been argued before me is whether or not the order for payment out to Crossman Block should now be confirmed. At one stage I felt some doubt whether it was open to the court to make any further order which would postpone the payment out of the U.S.$2m. Indeed, Miss Andrews argued that that matter was G concluded by the order of Saville J. and there was no party properly before the court on whose application the court could make any different order. Madame Bihi had no locus standi and the Attorney-General had not sought to intervene: cf. *Adams v. Adams (Attorney-General intervening)* [1971] P. 188.

However, having heard argument, I am satisfied that the order of H Saville J. was provisional only and was subject to any further order that might be made on further material being placed before the court. The summons on which he made the order was merely a summons which asked for directions and the form in which his order was couched was

A that of an order nisi which, subject to the time limits laid down in the order, gave an unqualified liberty to apply. His order was not seeking to determine the rights of those represented by Crossman Block should there be any challenge to them. Further, it is always open to a court, on proof of new facts, to make an order supplemental to an original order: see *Ford-Hunt v. Raghbir Singh* [1973] 1 W.L.R. 738, 740, *per* Brightman J. The affidavit evidence before Saville J. gave him an B incomplete picture of the actual situation in Somalia and the current attitude of Her Majesty's Government; there is now additional relevant evidence before the court. It is said that assumptions on which he was apparently prepared to proceed have now been shown to be unsound.

In a case involving a sum of money the property of a foreign state and whether it is proper that it should be paid to a firm of solicitors C whose authority to act on behalf of that state is in question, the court should, with the assistance of an amicus if necessary, decline to make an order for the payment out of a sum in court to a firm of solicitors without being satisfied of the authority of that firm of solicitors. This is not a case of competing claims to the U.S.$2m.; there is no dispute that it is the property of the Republic of Somalia. The question is one of confirming that the legal agent on the record has a properly constituted D authority to receive the sum on behalf of the Republic. A solicitor is an officer of the court and under the control of the court. If the court comes to the conclusion for any reason that the solicitor does not have the requisite authority, it should, of its own motion if necessary, require the solicitor to obtain that authority and ensure that the relevant fund remains under the control of the court meanwhile. That is the position E here if I come to the conclusion that those presently instructing Crossman Block are not entitled to act as the government of the Republic. Miss Andrews did not invite me to order that the sum should be paid out to Crossman Block on terms that they should not part with it without a further order of the court; in such an event she accepted that it would be better that the sum should remain in court. No criticism whatsoever of Crossman Block is involved. Their authority is contained F in the letter of 14 January 1992 which is expressly the consent of the "interim government" to being joined as plaintiff. It can be questioned whether this consent is sufficient to comply with R.S.C., Ord. 15, r. 6(4). The case of the interim government has been succinctly summarised in one of the affidavits sworn by Mr. Clements of Crossman Block:

G > "The Republic can only pursue legal action through its duly appointed executive, namely the interim government which instructs me. . . . The fund in court represents assets belonging to the Republic of Somalia. Somalia is for the time being represented by its interim government. That government is the only institution now in a position to take possession of the funds and employ the money as it thinks fit for the best interest of the state. The money is H urgently required to combat the effects of famine in the country."

The question therefore is whether the interim government is the Government of the Republic of Somalia. If it is not then Crossman

Block do not have the authority to act on behalf of the Republic: see the similar question of the authority of a solicitor in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853.

Mr. Richards supports the argument of counsel for Madame Bihi on this question. He has submitted that the money in court should not be paid out unless the court is satisfied that the interim government are indeed the Government of Somalia and that, as the court should not be satisfied that this is the case, the money should meanwhile be left in court.

The policy of the United Kingdom is now not to confer recognition on governments as opposed to on states. The new policy of Her Majesty's Government was stated in two Parliamentary answers in April and May 1980 (see H.L. Debates, vol. 48, cols. 1121–1122, 28 April 1980; H.C. Debates, vol. 983, Written Answers, cols. 277–279, 25 April 1980 and H.C. Debates, vol. 985, Written Answers, col. 385, 23 May 1980):

> "We have conducted a re-examination of British policy and practice concerning the recognition of governments. This has included a comparison with the practice of our partners and allies. On the basis of this review, we have decided that we shall no longer accord recognition to governments. The British Government recognises states in accordance with common international doctrine.
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> "Where an unconstitutional change of regime takes place in a recognised state, governments of other states must necessarily consider what dealings, if any, they should have with the new regime, and whether and to what extent it qualifies to be treated as the government of the state concerned. Many of our partners and allies take the position that they do not recognise governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and annouce a decision formally 'recognising' the new government.
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> "This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there may be legitimate public concern about the violation of human rights by the new regime, or the manner in which it achieved power, it has not sufficed to say that the announcement of 'recognition' is simply a neutral formality.
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> "We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to governments. Like them, we shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.
>
> "In future cases where a new regime comes to power unconstitutionally our attitude on the question of whether it qualifies to be treated as a government, will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on

A whether we are dealing with it on a normal government to government basis."

The position in English law before 1980 is conveniently set out in *Halsbury's Laws of England*, 4th ed., vol. 18 (1977), p. 735, para. 1431:

> "A foreign government which has not been recognised by the United Kingdom Government as either de jure or de facto
B government has no locus standi in the English courts. Thus it cannot institute an action in the courts . . . The English courts will not give effect to the acts of an unrecognised government . . ."

Thus, recognition by Her Majesty's Government was the decisive matter and the courts had no role save to inquire of the executive whether or not it had recognised the government in question.

C Some writers appear still to feel that the criterion remains one of recognition by the government of this country, the difference being that, whereas before 1980 the government would say expressly whether it recognised the foreign government, now it is to be left to be ascertained as a matter of inference: see Professor J. Crawford "Decisions of British Courts during 1985–86 involving questions of Public or Private
D International Law" (1986) 57 B.Y. 405, and the continuing references in *Brownlie, Principles of Public International Law*, 4th ed. (1990) and in "Recognition in Theory and Practice" (1982) 53 B.Y. 197, 209, to the recognition of governments. Mr. Richards did not seek to support that view and it is clearly contrary to or not adopted in other writings: see, for example, *Francis Mann, Foreign Affairs in English Courts* (1986); C. Warbrick, "The New British Policy on Recognition of Governments"
E (1981) 30 I.C.L.Q. 568; and indeed the general tenor of Professor Brownlie's work itself. The impracticality of the "inferred recognition" theory as a legal concept for forensic use is obvious and it cannot be thought that that was the intention of Her Majesty's Government in giving the Parliamentary answers. The use of the phrase "left to be inferred" is designed to fulfil a need for information in an international
F or political, not a judicial, context.

If recognition by Her Majesty's Government is no longer the criterion of the locus standi of a foreign "government" in the English courts and the possession of a legal persona in English law, what criteria is the court to apply? The answers do confirm one applicable criterion, namely, whether the relevant regime is able of itself to "exercise effective control of the territory of the state concerned" and is "likely to continue to do
G so;" and the statement as to what is to be the evidence of the attitude of Her Majesty's Government provides another—to be inferred from the nature of the dealings, if any, that Her Majesty's Government has with it and whether they are on a normal government to government basis. The non-existence of such dealings cannot however be conclusive because their absence may be explained by some extraneous consideration, for example, lack of occasion, the attitude of the regime to human rights,
H its relationship to another state. As the answers themselves acknowledge, the conduct of governments in their relations with each other may be affected by considerations of policy as well as by considerations of legal characterisation. The courts of this country are now only concerned with

the latter consideration. How much weight in this connection the courts should give to the attitude of Her Majesty's Government was one of the issues before me.

In relation to Somalia and the present litigation, the Foreign and Commonwealth Office has on three occasions responded to inquiries by solicitors and Mr. Richards has also conveyed to the court a further communication. In the first letter, dated 4 March 1991, reference was made to the fluid and confused situation that had followed upon the successful coup:

> "Now that opposition forces have overthrown Siad Barre, the single objective which united them has gone. Each movement has its own clan objectives to champion. The United Somali Congress, drawn from the Hawiye Clan and its sub clans, was responsible for the fighting in Mogadishu. It is they who have appointed a new caretaker president and a Government which they claim are interim measures. A separate U.S.C. faction under General Mohamed Farrah Hassan 'Aidid,' who have the support of the Somali National Movement, do not recognise the new president or government. Neither do the Somali Patriotic Movement or the S.N.M. They argue that the appointments run counter to the U.S.C., S.N.M. and S.P.M. agreement of 2 October 1990. But the faction now in control in Mogadishu was not a party to that agreement."

They also referred to the different factions in control in different parts of the country and said: "The general situation in Somalia continues to be insecure and confused."

On 5 August 1991, the Foreign and Commonwealth Office wrote to Crossman Block confirming that the practice of Her Majesty's Government was to recognise states not governments and that, accordingly, "The question of whether to recognise the purported 'interim government' in Mogadishu thus does not arise for us." They also confirmed that the purported secession of the north western part of the country had not been recognised. They commented: "The 'interim government' does not command nationwide acceptance. We support efforts to establish one that does." They concluded: "In these circumstances, it is very difficult to judge, for the purposes of your case, who is the Government of Somalia." This letter was written after the Djibouti Conference and notwithstanding the communique that had been issued at the conclusion of that conference. It is clear that the writer of that letter did not consider that the conference had changed the situation or that any legitimate or other recognisable government had come into existence as a result. This letter was the only letter which was before Saville J.

On 20 February 1992 the Foreign and Commonwealth Office wrote again to More Fisher Brown. It reconfirmed that Her Majesty's Government was not concerned with the recognition of governments and had not recognised the purported secession. It continued:

> "The comment in [the letter of 5 August 1991] has been somewhat overtaken by subsequent events, in particular fighting between rival elements of the United Somalia Congress which broke out in

November 1991 and in which thousands of people have been killed and injured. On 23 January the United Nations Security Council adopted Resolution 733 requesting the Secretary-General to increase U.N. humanitarian assistance to Somalia and to co-operate with regional organisations (Organisation of African Unity and Arab League named; Organisation of the Islamic Conference later co-opted) in seeking the Mogadishu factions' agreement to a ceasefire, the distribution of humanitarian aid and the promotion of a political settlement. The U.N. and regional organisations met representatives of the Somali factions in New York on 14 February. The cessation of hostilities was agreed in principle. A further round of talks is due in Mogadishu later in February to conclude the ceasefire, and to discuss the means to achieve national reconciliation. All factions have been invited. However fighting in Mogadishu has continued since the New York meeting. The United Kingdom maintains formal contact with all the factions involved, but there have been no dealings on a government to government basis."

It is clear from this letter that Her Majesty's Government does not consider that there is at present any effective government in Somalia. It refers to "factions" and treats the interim government as merely one among a number of factions. The further letter, dated 9 March 1992, adds little to that of 20 February. It confirms that the attitude of Her Majesty's Government has not changed and that there is still no single body exercising administrative authority in Somalia.

Accordingly, if the question before the court is to be decided on the basis of the attitude adopted by Her Majesty's Government, an order cannot be made in favour of the interim government or Crossman Block. The basis for its attitude is clearly not any disapproval of an established regime but rather that there is no regime which has control, let alone any administrative control which has the requisite element of stable continuity.

Mr. Richards submitted that particular weight should be given to these communications. I have difficulty in accepting that submission without some qualification. Once the question for the court becomes one of making its own assessment of the evidence, making findings of fact on all the relevant evidence placed before it and drawing the appropriate legal conclusion, and is no longer a question of simply reflecting government policy, letters from the Foreign and Commonwealth Office become merely part of the evidence in the case. In the present case no problem of admissibility of evidence arises. In so far as the letters make statements about what is happening in the territory of some foreign state, such letters may not be the best evidence; but as regards the question whether Her Majesty's Government has dealings with the foreign government it will almost certainly be the best and only conclusive evidence of that fact. Where Her Majesty's Government is dealing with the foreign government on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that the inference that the foreign government is the government of that state will be capable of being rebutted and

questions of public policy and considerations of the interrelationship of the judicial and executive arms of government may be paramount: see *The Arantzazu Mendi* [1939] A.C. 256, 264 and *Gur Corporation v. Trust Bank of Africa Ltd.* [1987] Q.B. 599, 625. But now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist.

There is no decided English authority on the effect of the 1980 answers. *Gur Corporation v. Trust Bank of Africa Ltd.* was concerned with a question of the recognition of a state and the competence of a subordinate body within the recognised territory of that state under the laws of that state. The 1980 answers were referred to, at p. 619, but were not the basis of the decision. Here no question of the recognition of a state is involved. Nor does this case involve any accredited representative of a foreign state in this country. Different considerations would arise if it did, since it would be contrary to public policy for the court not to recognise as a qualified representative of the head of state of the foreign state the diplomatic representative recognised by Her Majesty's Government. There is no recognised diplomatic representative of the Republic of Somalia to the United Kingdom.

The statements of fact in the letters from the Foreign and Commonwealth Office are confirmed by the other evidence that is before the court concerning the actual situation in Somalia. The interim government is not governing that country and does not exercise administrative or any control over its territory and population. In Situation Report No. 7 of the Agency for International Development in Washington, the position as at 30 January 1992 and previously, was said to be:

> "At present, there is no functioning government in Somalia and the political future of the country remains uncertain. Although various clan-based rebel groups collaborated in an effort to oust Siad Barre, they have since been unable to agree on national leadership. There is still tremendous distrust and infighting between and even among clans, with each claiming hold over a particular region of the country. . . . Heavy intra-clan fighting erupted in Mogadishu on 17 November 1991 between two rival factions of the U.S.C. and control of the city is still being contested."

This report, like the letter from the Foreign and Commonwealth Office, refers to the various "factions."

The criteria of effective control referred to in the Parliamentary answers are clearly not satisfied. In *The Arantzazu Mendi* [1939] A.C. 256, 264–265, Lord Atkin said:

> "By 'exercising de facto administrative control' or 'exercising effective administrative control,' I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government."

The interim government clearly does not satisfy these criteria; the Republic of Somalia currently has no government. However, there are

A two other aspects on which counsel for the interim government has relied. These are the recognition of the interim government by some other states and international bodies, and the fact that the interim government was set up by the Djibouti Agreement which resulted from an international conference attended by many international states and bodies.

In evaluating these arguments it is relevant to distinguish between B regimes that have been the constitutional and established government of a state and a regime which is seeking to achieve that position either displacing a former government or to fill a vacuum. Since the question is now whether a government *exists*, there is no room for more than one government at a time nor for separate de jure and de facto governments in respect of the same state. But a loss of control by a constitutional C government may not immediately deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government.

The argument based on the Djibouti Agreement does not assist the interim government. The Djibouti Agreement was not constitutional. It did not create a de jure status for the interim government in Somalia. The interim government was not and did not become the constitutional D successor of the Government of President Siad Barre. Accordingly, if the interim government is to be treated as the Government of Somalia, it must be able to show that it is exercising administrative control over the territory of the Republic. That it is not able to do. Accordingly, that argument must fail.

As regards the argument of international recognition and recognition E by the United Nations, though this does not as such involve control of territory or a population, it does correspond to one aspect of statehood. A classic definition of a state is that contained in article 1 of the Montevideo Convention of 1933 as having: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states." Whilst illustrating that it is difficult to separate the recognition of a state from the recognition of a government F of that state, this definition also shows that part of the function of a government of a state is to have relations with other states. This is also implicit in the reference in the 1980 Parliamentary answers to dealings on a government to government basis.

Accordingly I consider that the degree of international recognition of an alleged government is a relevant factor in assessing whether it exists G as the government of a state. But where, as here, the regime exercises virtually no administrative control at all in the territory of the state, international recognition of an unconstitutional regime should not suffice and would, indeed, have to be accounted for by policy considerations rather than legal characterisation; and it is, of course, possible for states to have relations with bodies which are not states or governments of states.

There is evidence from which it appears that the United Nations H Organisation considers that there are persons whom it may treat as the representatives of the Republic of Somalia. Resolution 733 started with the words: "Considering the request by Somalia for the Security Council to consider the situation in Somalia." It appears that this request was

contained in a letter from Mr. Qalib dated 15 December 1991 addressed to the Secretary General to the United Nations and the President of the Security Council. Mr. Qalib signed himself as the "Prime Minister of Somalia." That letter was forwarded to the President of the Security Council by Mr. Fattoun Mohammed Hassan "Chargé d'affaire a.i." Mr. Hassan's letter included the sentence:

> "As you know Mr. Arteh [Qalib] was appointed as the interim Prime Minister for Somalia within the context of arrangements agreed upon by all the Somali political parties that participated in the Somali National Reconciliation Conference held at Djibouti in July 1991."

The text of Resolution 733 was apparently communicated to Mr. Mahdi by the Secretary General of the United Nations describing Mr. Mahdi as "His Excellency Mr. Ali Mahdi Interim President of Somalia."

This evidence is not wholly satisfactory. The attitude of the United Nations to the interim government could be established in a more direct fashion and more authoritatively. The letter of Mr. Hassan suggests something less than a fully recognised status. In any event, membership of an international organisation does not amount to recognition nor does a vote on credentials and representation issues: see Warbrick, 30 I.C.L.Q., 568, 583 citing 1950 UN Doc S/1466. But any apparent acceptance of the interim government by the United Nations and other international organisations and states does not suffice in the present case to demonstrate that the interim government is the Government of the Republic of Somalia. The evidence the other way is too strong.

Accordingly, the factors to be taken into account in deciding whether a government exists as the government of a state are: (a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's Government has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.

On the evidence before the court the interim government certainly does not qualify having regard to any of the three important factors. Accordingly the court must conclude that Crossman Block does not at present have the authority of the Republic of Somalia to receive and deal with the property of the Republic. The instructions and authority they have received from the interim government are not instructions and authority from the Government of the Republic. I direct that no part of the sum in court should be paid out to Crossman Block without a further order of the court.

I will consider in chambers what consequential and other directions and orders I should make.

Order accordingly.

Solicitors: More Fisher Brown; Crossman Block; Treasury Solicitor.

[Reported by Mrs. Gurinder Gosal, Barrister]