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Recent Developments in United Kingdom Practice Concerning the Recognition of States and Governments

Traditionally, the courts of the United Kingdom have been reluctant to accept the validity of legislative, executive, and judicial acts of foreign states or governments that are not recognized as such by the United Kingdom. The rationale behind this substantive rule, which also extends to a denial of *locus standi*, is that it is the duty of the judiciary not to compromise the executive in matters of foreign policy by accepting the validity of acts of a body from which Her Majesty’s Government has withheld diplomatic recognition. In order not to impair the proper conduct of foreign affairs, the executive and the judiciary must speak with “one voice.” Therefore, the opinion of the UK Government as to whether a particular body or group “exists” as a state or government is conclusive. This process then determines, as a necessary consequence, whether leg-

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islative and administrative acts are to be respected in matters arising before the courts of the United Kingdom.\(^5\)

In recent years, however, the United Kingdom has made certain refinements—if not strictly exceptions\(^6\)—both to this rule and to UK practice. As to the rule itself, the House of Lords in *Carl Zieiss Stiftung v. Rayner & Keeler*\(^7\) decided that legislative and executive acts of the "German Democratic Republic"—then unrecognized by the United Kingdom\(^8\)—were to be regarded as valid for the purposes of an action commenced in the High Court. British courts were instructed to take cognizance of acts flowing from the authorities in this territory as acts of delegated legislation, duly authorized by the USSR.\(^9\) The latter, according to the Foreign Office certificate requested by the court, was "de jure entitled to exercise governing authority in respect of that zone."\(^10\) In other words, even though the United Kingdom did not recognize either the state or government of the "German Democratic Republic," its legislation was deemed effective under the imprimatur of a recognized sovereign state. Evidence that, in fact, the USSR exercised no control or authority in this territory was inadmissible because it was contrary to the terms of the Foreign Office statement.\(^11\)

Furthermore, in 1980, the UK Government announced that it would no longer issue certificates indicating formal recognition of governments of foreign states.\(^12\) In future, the question whether a regime qualified, in the eyes of the United Kingdom, as a government, "will be left to be inferred from the nature of the dealings, if any, which [the UK Government] may have with it, and in particular on whether [the UK Government] are dealing with it on a normal Government to Government basis."

The effect of this change in practice is of the first importance. In future cases, whether recognition will be accorded to the legislative and admin-
administrative acts of a body alleged to be a "sovereign government" will be more a matter of evidence and interpretation for the court and less a matter of executive direction. In the absence of authoritative guidance, however, there was some uncertainty as to how the court's interpretation would, in fact, affect the operation of the traditional rule concerning the consequences of nonrecognition.

In the recent case of Gur Corporation v. Trust Bank of South Africa the Court of Appeal faced this issue when considering the locus standi of the "Republic of Ciskei." The material issue before the court was whether Gur Corporation or the Department of Public Works of the State of Ciskei were entitled to monies deposited with Trust Bank by way of guarantee under a construction contract between the department and the corporation. All three parties agreed that it was essential that Ciskei be joined to the proceedings. When this was attempted at first instance, however, Mr. Justice Steyn, of his own motion, raised the preliminary question of locus standi. Accordingly, a letter was directed to the Foreign Office in the following terms: "What recognition, if any, does Her Majesty's Government accord to (1) the 'Government of the Republic of Ciskei' and/or (2) the 'Department of Public Works, Republic of Ciskei'?

In reply, the Foreign Office certified that the UK did not recognize "de jure or de facto [the] Republic of Ciskei." With regard to governments, however, and consistently with the new UK practice, the Foreign Office stated that "the attitude of Her Majesty's Government is to be inferred from the nature of its dealings with the regime concerned and in particular whether [the UK] deals with it on a normal government to government basis," and further, that Her Majesty's Government "does not have any dealings with the 'Government of the Republic of Ciskei' or the 'Department of Public Works, Republic of Ciskei.'" In the light of these

14. This practice, founded upon the Estrada Doctrine, has been adopted by several states. In the United Kingdom certificates will still be issued when the recognition of a state, as opposed to a government, is in issue. In the Carl Zeiss and Gur Corporation cases, the court was concerned with questions of statehood and "governing authority." In both cases, the court took the view that to deny statehood did not necessarily mean there was no sovereign government or "governing authority" over the territories. It was rather, that the ostensible authorities could not be so characterized in the light of Foreign Office statements about statehood.
16. This territory is one of the black homelands granted independence by the South African government in pursuance of its policy of apartheid. See also Transkei, Venda, Bophuthatswana.
17. Mr. Justice Steyn was originally a member of the South African Bar before his successful migration to the United Kingdom.
18. This practice was specifically approved of in Gur Corporation, [1986] 3 W.L.R. at 585.
19. Id. at 588; see supra note 13.
answers, the Foreign Office stated that it was for the court to determine the *locus standi* of Ciskei. Nevertheless, with an eye, as it seems, on the decision in *Carl Zeiss*, a second letter was sent by Trust Bank’s solicitors inquiring, "Which State, if any, does Her Majesty’s Government recognize as (a) entitled to exercise or (b) exercising, governing authority in respect of the territory in Southern Africa known as Ciskei. Has such recognition been de jure or de facto?"

In its second reply, the Foreign Office repeated that it was not current practice to accord recognition to governments, and that, consequently, the United Kingdom “has not taken and does not have a formal position as regards the exercise of governing authority over the territory of Ciskei.” At the same time, while confirming that the United Kingdom had no dealings with either the “Department of Public Works” or “Government” of Ciskei, the Foreign Office informed the court that representations had been made to the South African Government in relation to certain matters affecting the territory, but that these representations had generally received no response.

In deciding that “Ciskei” had no *locus standi*, Mr. Justice Steyn noted, quite rightly, that the basis for their Lordships’ decision in *Carl Zeiss* was that the USSR had been expressly recognized “as de jure entitled to exercise governing authority.” Given no such recognition of South African entitlement over Ciskei in this case, nor any likelihood thereof in view of the change in UK practice, the question of “governing authority” was left to be determined on other evidence. This evidence, notably the Status of Ciskei Act, in fact established that South Africa did not claim to be entitled to exercise governing authority over Ciskei. Furthermore, such evidence was admissible as it did not conflict with the Foreign Office letters, which did not address this point. On this evidence, Mr. Justice Steyn held that the “Government of the Republic of Ciskei” had no *locus standi*—it was neither a recognized government nor under the governing authority of a recognized government.

20. The Foreign Office reply is consistent with the 1980 practice statement in that it supplies information concerning the dealings that the United Kingdom has with the alleged government. On a strict interpretation, however, the Foreign Office need not have refused specific information concerning the alleged government of Ciskei. This was not a case where “a new regime comes to power unconstitutionally,” Written Answer, *supra* note 3, or of “an unconstitutional change of regime . . . in a recognized state,” Statement, *supra* note 12. Indeed, different considerations may apply to a constitutionally valid transfer of sovereignty, as in the *Gur* case, than to the unconstitutional transfers envisaged by the 1980 practice statement.


22. *Id.* at 590; *see also infra* note 33.

The matter did not rest there. On appeal by the Trust Bank and Ciskei, the Court of Appeal reversed Mr. Justice Steyn\(^{24}\) and held that the Government of Ciskei had *locus standi* as a subordinate body set up by the Republic of South Africa to act on its behalf. The court found the case indistinguishable from *Carl Zeiss Stiftung v. Rayner & Keeler*.

The Master of the Rolls, Sir John Donaldson, noted that the court was precluded by the Foreign Office statements from finding that the "state" or "government" of Ciskei was an independent sovereign. Therefore, the only question the court faced involved whether the authorities in Ciskei were established and enabled by a superior sovereign, recognized as such by the United Kingdom.\(^{25}\) In this case, unlike *Carl Zeiss*, there was no express statement concerning entitlement to exercise governing authority, and so the court would turn to other evidence. Moreover, the fact that the UK Government "does not have a formal position as regards the exercise of governing authority over the territory of Ciskei" would not preclude the court from deciding that South Africa was entitled to exercise this authority. The issue was not as to actual exercise of authority but as to entitlement to do so.\(^{26}\) Master of the Rolls Donaldson then looked to the Status of Ciskei Act, but unlike Mr. Justice Steyn, he disregarded any declarations therein confirming the independence of Ciskei as this would, he thought, conflict with the Foreign Office letters. Ignoring the "independence" sections of this Act, it became a "straightforward delegation of power which could be revoked in the same way as it had been conferred."\(^{27}\) Ciskei could be a party to legal proceedings in its own name, being a subordinate body established by a recognized sovereign state.

In the result then, the court's interpretation of the Status of Ciskei Act gave it a meaning in direct contradiction to that which South Africa intended it to bear. Yet, to rewrite the legislation of a foreign sovereign state in this way is itself contrary to the principles that the court was purporting to apply: principles that demand that the legislative acts of a recognized sovereign state shall not be impugned in the courts of the United Kingdom.\(^{28}\) Moreover, the court's action was not done in order to deny the *locus standi* of Ciskei in conformity with the United Kingdom's international obligations, but rather to avoid the consequences of non-recognition and to facilitate the appearance of that body before a domestic tribunal.

\(^{24}\) *Gur Corporation*, [1986] 3 W.L.R. at 594.

\(^{25}\) Id. at 601–02.

\(^{26}\) Id; see infra note 34.


\(^{28}\) According to the principle of state immunity, the governmental acts of a foreign sovereign may not be challenged in United Kingdom courts without its consent. See United Kingdom State Immunity Act 1978.

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The Court of Appeal’s approach is all the more surprising given that they could have achieved the same result without any manipulation of the “superior” sovereign’s legislative acts. The judgment of Lord Justice Nourse hints at this result. He regards the Foreign Office letters as conclusive without need to resort to a reinterpretation of South African legislation.\textsuperscript{29} That the United Kingdom had made representations to South Africa concerning certain matters in Ciskei was enough to infer that Her Majesty’s Government recognized South Africa as de jure entitled to exercise governing authority in the territory.\textsuperscript{30}

Indeed, such an approach is entirely consistent with the UK practice statement of 1980. Surprisingly, therefore, neither of the reported judgments registers this fact.\textsuperscript{31} It is precisely because the United Kingdom no longer formally recognizes governments, that British courts may infer South African sovereignty from the dealings that Her Majesty’s Government has with that country. Paradoxically, Lord Justice Nourse, ignoring the repeated emphasis of the Foreign Office replies, doubts whether the change in practice does preclude an answer to these questions.\textsuperscript{32} Furthermore, like Master of the Rolls Donaldson, he draws the unhelpful distinction between “entitlement to exercise” and “actual exercise” of governing authority in order to explain the relevance, or rather irrelevance, of the fact that the UK Government has no formal position in this regard with respect to the territory of Ciskei.\textsuperscript{33} Yet, the lack of a formal position regarding Ciskei must necessarily be the case in light of the change in UK practice. Clearly from the Foreign Office letters, it was as a result of this change—and not because of any supposed distinction—that the United Kingdom had no formal position.\textsuperscript{34} If the court had paid due regard to the change in UK practice, the decision in \textit{Gur} could have been reached

\textsuperscript{29} He does, however, express his agreement with the judgment of Master of the Rolls Donaldson. Lord Justice Glidwell agrees with both.

\textsuperscript{30} \textit{Gur Corporation}, [1986] 3 W.L.R. at 604.

\textsuperscript{31} Master of the Rolls Donaldson did recite the 1980 Statement in full in explanation of the Foreign Office replies. However, he does not acknowledge that this influenced his decision in any way. \textit{Id.} at 598.

\textsuperscript{32} He regarded the issue as one recognition of a state. The amicus curiae, provided by the Foreign Office, had reservations on this point. \textit{Id.} at 603. He may also have realized that this case did not directly fall within the ambit of the 1980 statement. \textit{See supra} note 20.

\textsuperscript{33} 3 W.L.R. at 604.

\textsuperscript{34} In the \textit{Carl Zeiss} case, Lord Reid rejected any distinction between \textit{de jure} recognition (entitlement to exercise) and \textit{de facto} recognition (actual exercise of governing authority) except in those cases where the new government have usurped power against the will of the de jure sovereign. [1967] 1 App. Cas. 853, 906. Such is not the case with the Ciskei authorities. \textit{Id.} at 957-58 (Lord Wilberforce). In \textit{Gur Corporation}, the Foreign Office replies could have been interpreted with reference to the 1980 practice statement, as was intended, thus achieving the same result by simpler and surer reasoning. [1986] 3 W.L.R. at 588.
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solely on the ground South Africa was de jure entitled to exercise governing authority in Ciskei as inferred from the nature of Her Majesty’s Government’s dealings in respect of that territory. To adopt this line of reasoning would at least have the merit of avoiding illusory distinctions and explicit absurdity.

However, even this reasoning does not alleviate the underlying problem facing United Kingdom courts: the inconvenient and unnecessary consequences that flow from current legal doctrine on nonrecognition. Resorting to legal fictions of the Carl Zeiss variety makes a mockery of the “one voice” principle, for the court thereby allows to be done covertly that which cannot be done openly. Moreover, while expediency may be invoked to justify the back door admission of the laws and decrees of an unrecognized state or government, employing the same device to grant locus standi is an entirely different matter. By allowing the unrecognized body to be a party to legal proceedings in its own name, the court openly flouts the “one voice” principle and all that it is intended to achieve. For this reason alone, the Court of Appeal should have upheld Mr. Justice Steyn.

In the Carl Zeiss case Lord Wilberforce suggested a solution that might ensure the supremacy of national policy, but not at the total expense of private rights. When private rights or acts of perfunctory administration are concerned (there being no considerations of public policy to the contrary), courts might give effect to the acts of an unrecognized yet effective government. On the facts of this case, such a development would not assist Ciskei, yet Master of the Rolls Donaldson could see great force in this reservation, since it is one thing to treat a state or government as being “without the law,” but quite another to treat the inhabitants of its territory as “outlaws” who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences.

In the light of these and other similar dicta, it is to be hoped that such a course will be adopted in an appropriate case. The deregulation of

35. On this view, the essential difference between Gur Corporation and Carl Zeiss is the change in United Kingdom practice.
36. That is, a uniformity in foreign affairs, a matter within the prerogative of the Crown.
37. There is some evidence to suggest that the decision in Carl Zeiss was not in accordance with the United Kingdom’s Government’s view of the state of East Germany. On April 4, 1967, the responsible Minister indicated that East German passports were not acceptable as they emanated from an unrecognized regime. 744 PARL. DEB. H.C. Written Answers 19 (5th ser.) (1967).
38. All acts of the Rhodesian authorities, after the illegal declaration of independence, could have been held null and void on this ground. See also Adams v. Adams [1971] P. 188.
40. Carl Zeiss, 1 App. Cas. at 907 (per Lord Reid), 941 per Lord Upjohn. Hesperides Hotel, Ltd. v. Aegean Turkish Holidays Ltd., [1978] Q.B. 205 (per Lord Denning). For other
recognition forced by the change in UK practice may well facilitate this development, but only if the courts are prepared to "infer" recognition in doubtful cases. A better solution would involve severing, once and for all, the link between recognition and invalidity in the class of cases identified by Lord Wilberforce.

The real irony is that even if the above approach had been adopted by the Court of Appeal, it would not have aided Ciskei on the facts of this recent case. If ever there was a situation where the full rigor of the nonrecognition rule was justified, in terms of legal principle and of political necessity, surely *Gur Corporation v. Trust Bank of South Africa* was such a case.

For the moment, UK courts are clearly unsure in their application of the UK's new practice in regard to the recognition of foreign governments. They are willing to avoid the consequences of nonrecognition where they feel it appropriate to do so. Yet while this may be tolerable in the short term for certain types of cases, the extension of British practice favored by the Court of Appeal in *Gur Corporation v. Trust Bank of South Africa*, and the reasoning employed to get there, are not welcomed.

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41. This would require the court to receive additional evidence concerning the actual effectiveness of an unrecognized regime upon which to base their own assessment.