CITATION: Arsalani v. Islamic Republic of Iran, 2020 ONSC 6843
COURT FILE NO.: (Arsalani v. Islamic Republic of Iran) CV-20-00634770-00CP
(Doe v. Islamic Republic of Iran) CV-20-00635078-00CP
DATE: 20201109

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: OMID ARSALANI, Plaintiff

AND:

ISLAMIC REPUBLIC OF IRAN, ISLAMIC REVOLUTIONARY GUARD CORPS, UKRAINE INTERNATIONAL AIRLINES PJSC, and JOHN DOE MISSILE OPERATOR, Defendants

AND BETWEEN:

JOHN DOE, Plaintiff

AND:

ISLAMIC REPUBLIC OF IRAN, ISLAMIC REVOLUTIONARY GUARD CORPS also known as ARMY OF THE GUARDIANS OF THE ISLAMIC REVOLUTION also known as IRANIAN REVOLUTIONARY GUARD CORPS, IRANIAN ARMED FORCES also known as ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, ALI KHAMENEI also known as SUPREME LEADER OF IRAN, MOHAMMAD BAGHERI also known as MOHAMMAD-HOSSEIN AFSHORDI, HOSSEIN SALAMI, SEYYED ABDOLRAHIM MOUSAVI and AMIR ALI HAJIZADEH, Defendants

BEFORE: Justice Glustein

COUNSEL: *Tom Arndt and John Adair*, for the plaintiff in Court File No. CV-20-00634770-00CP

Mark H. Arnold and Jonah Arnold, for the plaintiff in Court File No. CV-20-00635078-00CP

HEARD: October 27, 2020

REASONS FOR DECISION

Nature of issue and overview

[1] The court is asked to determine which of the plaintiffs shall have carriage of the class action brought in relation to the downing of Ukraine International Airlines Flight PS752 on

January 8, 2020 (the Crash) and the resulting death of all passengers and crew. The two actions seeking carriage are (i) the action brought by the plaintiff Omid Arsalani (Arsalani) in Court File No. 20-00634770-00CP (the Arsalani Action) and (ii) the action brought by the plaintiff Ali Ashgar Gorji (Gorji) in Court File No. 20-00635078-00CP (the Gorji Action).

[2] Each party seeks a stay of the action brought by the other party, without prejudice to the plaintiff whose action is stayed seeking leave to commence his action as an individual action.

[3] Arsalani also seeks a stay of the action commenced on October 21, 2020 by the plaintiffs Mehrzad Zarei (Zarei) and Shahin Moghaddam (Moghaddam) in Court File No. CV-20-00649885-00CP (the Zarei Action). The plaintiffs in the Zarei Action intend on seeking an order to consolidate their action with the Gorji Action.

[4] Each party also seeks an order directing that no other proposed class actions shall be commenced in Ontario in respect of the subject matter of the action without leave of the court.

[5] The non-exhaustive list of factors to be considered on a carriage motion are set out by Justice Perell in *Rogers v. Aphria*, 2019 ONSC 3698, at para. 17 (footnotes omitted):

> Courts generally consider a list of overlapping and non-exhaustive factors in determining which action should proceed; including: (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Relative Priority of Commencement of the Action; (7) Preparation and Readiness of the Action; (8) Preparation and Performance on Carriage Motion; (9) Case Theory; (10) Scope of Causes of Action; (11) Selection of Defendants; (12) Correlation of Plaintiffs and Defendants; (13) Class Definition; (14) Class Period; (15) Prospect of Success: (Leave and) Certification; (16) Prospect of Success against the Defendants; and (17) Interrelationship of Class Actions in more than one Jurisdiction.

[6] The court should not adopt a "tick the boxes approach" to the above factors. The court must consider "the best interests of the class and fairness to the defendants, having regard to access to justice, judicial economy and behaviour modification": *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571, 131 O.R. (3d) 497, at para. 22.

[7] For the reasons that follow, I award carriage of the action to Arsalani, since it is in the best interests of the class. I stay the Gorji and Zarei Actions, without prejudice to the plaintiffs in those actions seeking leave to commence their actions as individual actions. I also order that no other proposed class actions be commenced in Ontario in respect of the subject matter of the action without leave of the court.

Pleadings

The Arsalani Pleadings

[8] Arsalani issued his statement of claim on January 20, 2020. The Arsalani Action is brought against (i) the defendants Islamic Republic of Iran (Iran) and Islamic Revolutionary Guard Corps (IRGC) (collectively, the Iran Defendants) and (ii) Ukraine International Airlines PJSC (UIA).

[9] Arsalani is an Ontario resident, and is the brother, brother-in-law and uncle of Flight PS752 deceased passengers Evin Arsalani, Hiva Molani and Kurdia Molani. Arsalani has the consent of the surviving next of kin to be appointed executor of the estate of the deceased passengers and is in the process of obtaining that appointment.

[10] Arsalani proposes to amend his statement of claim (the Amended Claim) to add the plaintiff Fatholla (Vahid) Hezarkhani (Hezarkhani) in his capacity as administrator of the estates of Naser Pourshabanoshibi and Firouzeh Madani (both deceased passengers on Flight PS752), and to make further claims as against UIA and the Iran Defendants.

[11] Hezarkhani is a British Columbia resident and has been granted administration of the estate of the two deceased passengers Naser Pourshabanoshibi and Firouzeh Madani.

[12] In these reasons, I refer to Arsalani and Hezarkhani collectively as the Arsalani Plaintiffs, and refer to the pleadings in the Amended Claim.

[13] Counsel for the Arsalani Plaintiffs are a team of individual lawyers comprised of Tom Arndt, John Adair and Marni Whitaker (the Arndt Group).

The Gorji Pleadings

[14] In the Gorji Action, Gorji issued a statement of claim on January 24, 2020 against the Iran Defendants. UIA was not named as a defendant.

[15] Gorji also named as defendants the Iranian Armed Forces (IAF) and the following personal defendants:

(i) Ali Khamenei (the Supreme Leader of Iran),

(ii) Mohammad Bagheri (also known as Mohammad-Hossein Afshordi, the Chief of Staff for the IAF),

(iii) Hossein Salami (Commander-in-Chief of the IRGC),

(iv) Seyyed Abdolrahim Mousavi (Commander-in-Chief of the Islamic Republic of Iran Army, which is part of the IAF, and Commander of Khatam al-Anbiya Air Defense Base), and

(v) Amir Ali Hajizadeh (Commander of Aerospace Force of the IRGC).

[16] Gorji is a Quebec resident. While he pleaded that he was an "immediate family member of Jack Doe, who was killed in [the Crash]", that does not appear to be accurate since Gorji was the uncle of a passenger who died (along with her husband) in the Crash. His niece and her husband (no relation to Gorji) were residents of Alberta.

[17] In the Gorji Action, Gorji is named as "John Doe", but advised the court at an earlier funding motion brought in the Arsalani Action that he is prepared to identify himself as the plaintiff in his action.

[18] On October 21, 2020, Zarei and Moghaddam issued the Zarei Action against only UIA. Those plaintiffs intend to bring a motion to consolidate the Zarei Action with the Gorji Action.

[19] Zarei is an Ontario resident whose son was a passenger killed in the Crash. Moghaddam filed no evidence on the motion but alleges that he is an Ontario resident whose son and wife were passengers killed in the Crash.

[20] Counsel for the plaintiffs in the Gorji and Zarei Actions are Mark Arnold of Gardiner Miller Arnold LLP (GMA) and Jonah Arnold of Weinman Arnold LLP (collectively, the Arnold Group).

[21] In these reasons, I refer to Gorji, Zarei, and Moghaddam collectively as the Gorji Plaintiffs.

Background facts

[22] I rely on the facts as pleaded in the respective claims. I make no finding but accept them as true to set out the background of the litigation.

[23] On January 8, 2020, Flight PS752 travelling from Tehran Imam Khomeini International Airport to Kiev, Ukraine was shot down shortly after takeoff. All 176 passengers and crew were killed.

[24] IRGC admitted that it shot down the aircraft by a missile launched from its air defence systems, and mistook Flight PS752 for a US cruise missile.

[25] The Crash occurred hours after Iran and/or IRGC fired missiles at and struck US military bases in Iraq.

[26] In response to the missile attacks against the US military bases and before the Crash, the US Federal Aviation Administration (FAA) issued a ban that all American civilian aircraft avoid Iranian airspace. The FAA ban was followed by several other countries, including Ukraine.

[27] Iran did not close its airspace after it launched missiles on the US military bases in Iraq. A request was made for a no-fly zone in the area before the Crash and that all commercial flights

in Iran be grounded until tensions with the US cooled off but for reasons that are unclear this request was rejected.

[28] At the time of the Crash, Iran was on the highest state of defensive alert and the IRGC was "totally prepared for a full-fledged war".

[29] Flight PS752 took off despite the flight ban. UIA did not change the flight route to avoid sensitive Iranian ballistic missile facilities, and failed to notify Iranian authorities that it was departing later than scheduled.

Analysis

The applicable law on a carriage motion

[30] The applicable law on a carriage motion is not in dispute. Both parties rely on the non-exhaustive *Rogers* factors and agree that the court should not adopt a "tick the boxes approach", but instead consider "the best interests of the class and fairness to the defendants, having regard to access for justice, judicial economy, and behaviour modification": *Mancinelli*, at para. 22.

[31] Adopting the above approach, I review the relevant *Rogers* factors in this case.

[32] I first review the case theory factor, as it is the principal basis for the position of the Gorji Plaintiffs that they should be awarded carriage. The Gorji Plaintiffs submit that the claim of the Arsalani Plaintiffs to lift state immunity against the Iran Defendants is "untenable". Consequently, the Gorji Plaintiffs submit that carriage cannot be awarded to the Arsalani Plaintiffs, regardless of any other *Rogers* factors.

[33] While the Arsalani Plaintiffs do not submit that the case theory of the Gorji Plaintiffs is untenable or "fanciful or frivolous" (as that test is discussed below), they do raise concerns about the case theory which I also address under that factor.

[34] I then review those *Rogers* factors which I find favour carriage to the Arsalani Plaintiffs, in order of their importance to the best interests of the class. There are no factors which favour carriage to the Gorji Plaintiffs.

[35] Finally, I review the other factors which I find to be neutral, on the evidence before the court.

Case theory (factor 9 in *Rogers*)

(i) Overview

[36] The Gorji Plaintiffs rely on this factor as the primary reason to seek carriage. It was the predominant issue raised at the hearing.

[37] The Arsalani Plaintiffs base their claim on the alleged negligence of the Iran Defendants in operating and controlling the airport, aircraft, and airspace, resulting in the missile striking Flight PS752. The Arsalani Plaintiffs submit that state immunity of the Iran Defendants can be lifted because the alleged negligence of the Iran Defendants took place in the context of a commercial activity, and as such rely on s. 5 of the *State Immunity Act*, R.S.C., 1985, c. S-18 (*SIA*).

[38] The Gorji Plaintiffs submit that settled law rejects the application of the commercial activity exception to state immunity on the pleaded facts in the Amended Claim. Consequently, the Gorji Plaintiffs submit that regardless of any other factors under the *Rogers* analysis, they should have carriage of the action because it cannot be in the best interests of the class to pursue a claim which is (as submitted by counsel for the Gorji Plaintiffs) "untenable".

[39] The Arsalani Plaintiffs submit that the commercial activity pleading is supported by both the *SIA* and case law.

[40] The Gorji Plaintiffs seek to lift state immunity against the Iran Defendants under s. 6.1(1) of the *SIA*, by submitting that the shooting down of Flight PS752 was a "terrorist activity" under s. 83.01 of the *Criminal Code*, R.S.C., 1985, c. C-46, and as such can be the basis of a civil action under s. 4 of the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2 (*JVTA*).

[41] The Arsalani Plaintiffs do not submit that the pleading by the Gorji Plaintiffs is untenable, fanciful or frivolous, but do raise concerns about its validity based on the applicable legislation.

[42] All references to the pleadings in the Arsalani Action are to the Amended Claim. The only claim by the Gorji Plaintiffs against the Iran Defendants is in the Gorji Action (the Zarei Action is only against UIA), so I refer to the statement of claim in the Gorji Action.

[43] In my analysis below. I first review the applicable test on a carriage motion to assess the merits of the underlying action. I then consider the pleadings at issue in both actions. Finally, I apply the relevant statutes and case law relied upon by the parties to their respective pleadings, under the applicable carriage motion test.

(ii) The applicable test on a carriage motion to assess the merits of the underlying action

[44] In *Agnew-Americano*, 2018 ONSC 275, at paras. 123-29, I reviewed the applicable test on a carriage motion to assess the merits of the underlying action. I summarize those principles below:

(i) A carriage motion is not a Rule 21 motion. The defendants in the class action can later challenge the pleadings either directly or by submitting that the first requirement for certification under s. 5(1)(a) of the *Class Proceedings Act 1992,* S.O. 1992, c. 6 (*CPA*), has not been met;

(ii) Otherwise, as Perell J. noted in *Kowalyshyn v. Valeant Pharmaceuticals International Inc.*, 2016 ONSC 3819, at para. 147, a carriage motion "may ultimately be detrimental to the interests of the putative Class Members" if competing plaintiff's counsel "did not hold back in pointing out allegedly very serious weaknesses and supposedly fatal flaws in the quality of their rival's legal, procedural, and evidentiary plans ... to the delight of the Defendants who were standing gauging on the sidelines";

(iii) Consequently, the court has applied a "glaring deficiency" or "fanciful or frivolous" test in assessing the nature and scope of a claim, rather than engaging in a Rule 21 review. Apart from this limited test, "it is inappropriate for the court to embark on an analysis of which claim is most likely to succeed" or to consider the underlying merits of the claim: *Mancinelli*, at paras. 42 and 45; and

(iv) The court must still consider the nature and scope of the claim and the theories advanced by counsel "as legal theories applicable to pleaded facts assumed to be true": *Kowalyshyn*, at para. 167.

(ii) The pleadings of the parties

1. The Arsalani Action

[45] In the Amended Claim, the Arsalani Plaintiffs plead that the Iran Defendants were engaged in a commercial activity by operating and controlling the airport, aircraft, and airspace for commercial gain. On that basis, the Arsalani Plaintiffs submit that the alleged negligence of the Iran Defendants falls within the "commercial activity" exception under s. 5 of the *SIA* which ousts state immunity.

[46] In particular, the Arsalani Plaintiffs plead that:

(i) Iran did not close its airspace after it launched missiles on the US military bases in Iraq;

(ii) Iran refused a request for (a) a no-fly zone in the area and (b) all commercial flights to be grounded until tensions with the US cooled off;

(iii) In August 2020, Iran removed the head of the Civil Aviation Organization of Iran after reports surfaced asserting that he had falsified his academic credentials;

(iv) The Iran Defendants (a) permitted Flight PS752 to take off despite flight bans in place for the region, (b) failed to provide adequate training to aviation officials and airport employees, (c) failed to provide adequate training to IRGC members to enable them to distinguish the aircraft from enemy aircraft or enemy missiles, (d) failed to change the flight route, (e) failed to properly assess the risk of permitting the aircraft to depart, (f) failed to notify proper authorities of Flight

PS752's late departure, and (g) authorized the operation of the aircraft when they knew or ought to have known of the risk; and

(v) The Iran Defendants (and the unknown "John Doe" missile operator) intentionally and/or negligently launched the missile which struck Flight PS752.

2. The Gorji Action

[47] The Gorji Action addresses the liability of the Iran Defendants, naming the Iran Defendants, the IAF, and the personal defendants. The Zarei Action only names UIA as a defendant. Consequently, I review the state immunity issue based on the Gorji Action.

[48] Gorji pleads that "in shooting down the aircraft, the defendants and each of them, conduct[ed] themselves recklessly, wantonly and in a high-handed manner and that this conduct amounted to a terrorist act under the *JVPA*, whether the defendants intended to conduct themselves in that manner or were negligent in that conduct".

[49] Consequently, the Gorji Action pleads that the shooting down of Flight PS752 is a terrorist activity, which would lift state immunity under s. 6.1(1) of the *SIA*.

[50] Gorji pleads an alternative claim in negligence, but pleads no factual basis for that claim other than the shooting down of Flight PS752.

(iii) Analysis

[51] The Gorji Plaintiffs submit that under the "glaring deficiency" or "fanciful or frivolous" tests, the negligence claim advanced by the Arsalani Plaintiffs based on commercial activity is "untenable", and, as such, carriage must go to the Gorji Plaintiffs regardless of any other *Rogers* factors. The Arsalani Plaintiffs strongly disagree.

[52] The Arsalani Plaintiffs did not submit that the terrorist activity claim advanced by the Gorji Plaintiffs is fanciful or frivolous. However, they raised some concerns about the potential applicability of the terrorist activity exception under s. 6.1(1) of the *SIA*, which I address below.

[53] I review the commercial activity claim, and then consider the terrorist activity claim.

1. The commercial activity claim

[54] I review the applicable statutes and authorities relied upon by the Arsalani Plaintiffs. I then consider whether the commercial activity claim is fanciful or frivolous.

a. The applicable statutes and authorities

[55] The Arsalani Plaintiffs rely on s. 5 of the *SIA*, which provides that:

> A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

[56] A "commercial activity" is defined under s. 2 of the *SIA* as:

> any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.

[57] Under s. 3(2) of the *SIA*, the court is required to "give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings".

[58] In *Re Canada Labour Code*, [1992] 2 S.C.R. 50, the Public Service Alliance of Canada (PSAC) sought certification for Canadian civilian tradespeople working for the US Navy at a US base in Newfoundland. The US asserted state immunity. PSAC sought to rely on the exception under s. 5 of the *SIA* and submitted that the tradespeople were engaged in a commercial activity.

[59] The court held that commercial nature of employment contracts between tradespeople and the US base had to be examined in the context of the activity which took place at the base. The court held that since work was structured by the base commander and related to sensitive communications which were the heart of base operations, the base was engaged in a "sovereign" rather than a "commercial" activity and the hiring of tradespeople was only incidental to the sovereign activity.

[60] La Forest J. set out a two-part test that requires the court to determine (i) whether the acts in question constitute commercial activity and (ii) whether the proceedings are related to that activity. La Forest J. held, at pp. 69-70:

> ... [Section 5 of the *SIA*] is the provision by which the Board seeks to assert jurisdiction over labour relations at the base. **The section, in combination with the definition of "commercial activity" in s. 2, raises two basic questions. First, what is the "nature" of the activity in question—i.e., does employment at the base constitute commercial activity? Second, are the proceedings in this case—a union certification application—"related" to that activity?** The two questions are, of course, interrelated, and neither can be answered in absolute terms. Certain aspects of employment at the base are commercial, but in other respects the employment relationship is infused with sovereign attributes. Accordingly, the certification proceeding affects both the commercial and sovereign aspects of employment at the base. **The issue then becomes whether the effect on the commercial realm is sufficiently strong as to form a "nexus" so that it can truly be said that the proceedings "relate" to commercial activity.** In my view, a nexus exists only between the certification proceedings and the sovereign attributes of labour relations at the base. **The effect on commercial activity is merely incidental and cannot trigger the application of s. 5 of the *State Immunity Act*.** [Emphasis added.]

[61] The court held that the proposed certification related primarily to management and operation of the military base, which was a sovereign matter for the commander of the base, and not a commercial activity. The court contrasted the management and operation of the base with

an action by a tradesperson for payment under their employment contract, which would be a commercial activity that would allow a tradesperson to bring an action against the US under s. 5 of the *SIA*: *Re Canada Labour Code*, at pp. 76-77.

[62] Consequently, under *Re Canada Labour Code*, the court is required to examine the nature of the activity which forms the basis of the claim, "after appreciating its entire context": at p. 70.

[63] In *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571, the Supreme Court applied the approach in *Re Canada Labour Code* and held that Iraq was liable under the commercial activity exception in s. 5 of the *SIA*.

[64] The Court enforced a United Kingdom judgment against Iraq for its control of legal proceedings conducted by the Iraqi Airways Corporation (IAC). The litigation arose when Kuwait Airways Corporation (KAC) brought an action for damages against IAC for IAC's retention and use of KAC's aircraft which were seized by Iraq during the Iraqi invasion and occupation of Kuwait in 1990. KAC was successful in that litigation against IAC and IAC was ordered to pay over one billion dollars.

[65] After the judgment, KAC sought to join Iraq as a defendant to claim its costs of approximately $84 million. KAC obtained default judgment based on Iraq's funding and supervision of the IAC defence, which was marked by perjury and tactics on the part of IAC that were intended to deceive the British courts: at para. 2.

[66] The lower courts held that the alleged conduct fell outside the commercial activity exception: at paras. 4 and 5. The Supreme Court relied on *Re Canada Labour Code* and reversed the decisions of the lower courts, on the basis that the acts took place in the context of a commercial activity.

[67] The court considered various factors which could establish that the acts were of a commercial nature. The court reviewed United Kingdom law, in which "the courts ask whether the act in question could be performed by an individual", if the foreign state "acts 'in the manner of a private player within' the market": at para. 29.

[68] The court held that it is "not sufficient to ask whether the act in question was the result of a state decision and whether it was performed to protect a state interest or attain a public policy objective": at para. 30. Rather, "the Canadian commercial activity exception requires a court to consider the entire context, which includes not only the nature of the act, but also its purpose": at para. 31.

[69] The court held that the acts which founded the basis of KAC's claims were not Iraq's acts of seizing the KAC aircraft, but rather Iraq's role in the litigation which concerned IAC's retention and use of the KAC aircraft. Consequently, the court held that the commercial activity exception applied: at para. 35.

[70] The Court of Appeal considered the commercial activity exception in *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.), and *Steen v. Islamic Republic of Iran*, 2013 ONCA 30, 114 O.R. (3d) 206, both relied upon by the Gorji Plaintiffs.

[71] In *Bouzari*, the plaintiff was an oil industry consultant who was imprisoned and tortured for six months because he refused to pay a bribe. He was released when his family paid a ransom of over $3 million. The plaintiff brought an action against Iran and noted Iran in default.

[72] The judge who heard the motion for default judgment applied s. 3(2) of the *SIA*. She upheld state immunity (on the undefended motion) and found that the nature of the acts that were the basis of the claim were "acts of torture" and not a commercial activity, even though they arose out of the plaintiff's business dealings in Iran.

[73] The Court of Appeal dismissed the appeal. The court applied the test in *Re Canada Labour Code* and rejected the appellant's submission that "this exception applies because the acts of torture on which his claim is based are related to the appellant's commercial activity in connection with the South Pars oil and gas field": at para. 50.

[74] The court held, at para. 53, that:

(i) "the acts of torture underpinning the appellant's action cannot be said to have anything to do with commerce. They are nothing more than unilaterally imposed acts of brutality"; and

(ii) "an intention to affect the commercial activity of Iran … is not enough to turn the acts of torture themselves into the commercial activity of Iran".

[75] In *Steen*, the Court of Appeal upheld the motion judge's refusal to enforce a United States judgment for damages arising out of kidnapping for a ransom of weapons and money. The court relied on *Bouzari* and held that "the exchange of human beings for weapons and money [does not fall] within the ordinary meaning of commercial activity in s. 5 of the [*SIA*]": at para. 22.

[76] The court held that "[a] mere nexus to commercial activity is insufficient to invoke the exception. Rather, the nature of the acts for which relief is sought — in this case kidnapping, detention and torture — must be commercial": at para. 22.

[77] With respect to the role of a government who chooses to engage in operating and controlling the airport, aircraft, and airspace, the Arsalani Plaintiffs rely on the International Air Transportation Association's (IATA) *Airport Ownership and Regulation Booklet* (June 2018) (the IATA Booklet) which states that airport and air navigation services can be, and are frequently, performed by private citizens. IATA comments that the historical model for airport ownership and operations has "faded out" into a commercial model. IATA states, at p. 13:

> Historically, a government Department or Ministry was the typical model for airport ownership and operation, whereby all functions are retained by

> government within a specific Department or Ministry often the Ministry of Transport.
>
> This model has progressively faded out over the past 50 years … Today there are few airports operated under this model. It is now broadly accepted within the industry that "where airports and air navigation services are operated by autonomous entities, their overall financial situation and managerial efficiency have generally improved."

b. Analysis of whether the commercial activity claim is fanciful or frivolous

[78] The Arsalani Plaintiffs plead that the Iran Defendants conducted a "commercial activity" by operating and controlling the airport, aircraft, and airspace, which generated more than $140 million in overflight fees, particularly when, as alleged, (i) those fees were "a lucrative source of foreign currency for the Iran Defendants in light of the international sanctions and embargos on Iran"; and (ii) "[h]ad the Aircraft been grounded, the Iran Defendants would not have received the overflight fees for Flight PS752".

[79] Based on the above law, I do not find that the pleading of the commercial activity exception contains a "glaring deficiency" or is "fanciful or frivolous". That threshold is even lower than the s. 5(1)(a) test of whether a claim is untenable, which is not appropriate for the court to address on a carriage motion since the defendants can challenge that issue on certification.

[80] The court in *Kuwait Airways* held that it is not the seizure of planes which was the impugned act, but rather Iraq's involvement in the litigation arising from IAC's retention and use of the seized KAC aircraft. Similarly, it may be possible for the Arsalani Plaintiffs to base its claim on the conduct of the Iran Defendants in operating and controlling the airport, aircraft, and airspace operation such that the shooting down of the plane by the missile took place in the context of a commercial activity.

[81] The Arsalani Plaintiffs could further rely on the IATA Booklet to support its submission that Iran was engaging in a commercial activity, particularly as it is the type of activity that can be (and often is) performed by a private individual and generated more than $140 million in overflight fees between March 2018 and March 2019.

[82] On that basis, the Arsalani Plaintiffs could distinguish the decisions in *Bouzari* and *Steen* since in both of those cases, the court held that the context of the impugned acts (torture, kidnapping, and ransom) were not commercial in nature, even though they arose because the plaintiff in *Bouzari* was engaged in business in Iran, while the ransom sought in *Steen* would have generated financial gain.

[83] In the present case, the Arsalani Plaintiffs can submit that the impugned conduct of operating and controlling the airport, aircraft, and airspace arguably arose as the "nexus" of the commercial activity, and not as an "incidental" effect to commercial activity, unlike in *Bouzari*

when the plaintiff was involved in business in Iran or in *Steen* when the plaintiff was kidnapped for ransom.

[84] The Gorji Plaintiffs submit in their factum that:

> The proposed amended *Arsalani* claim that purports to plead that the shooting down of the aircraft was in its nature a commercial activity is an untenable pleading.

[85] However, that is not the position taken by the Arsalani Plaintiffs.

[86] The Arsalani Plaintiffs do not plead that any time a foreign state shoots down an aircraft, it is necessarily a commercial activity, even if an airline operates in the country. That argument was not accepted in *Bouzari* when the plaintiff's imprisonment arose because he was conducting business in Iran.

[87] In the present case, if there had been no negligence in airport operations or airspace control, but Iran simply shot down the aircraft, then the decisions in *Bouzari* and *Steen* could apply, as the nature of the act would not be related to a commercial activity, even if the Iran Defendants operated the airport and controlled the airspace.

[88] However, the alleged negligence in the present case arises from the Iran Defendants' operating and controlling the airport, aircraft, and airspace operation. Consequently, it is not "fanciful or frivolous" that a court could find that the nature of those acts arose in the context of a commercial activity, and resulted in damage to the passengers and crew as a result of that negligence. It is not fanciful or frivolous that the Arsalani Plaintiffs can rely on *Kuwait Airways*, *Re Canada Labour Code*, and the IATA Booklet to lift state immunity under the commercial activity exception.

2. The terrorist activity claim

[89] As I note above, I refer to this claim only to review the alleged weaknesses raised by the Arsalani Plaintiffs, which may arise if this exception was relied upon by the Gorji Plaintiffs to lift state immunity.

[90] The Arsalani Plaintiffs do not submit that the claim is fanciful or frivolous, but note the significant hurdles which may need to be overcome for the claim to succeed.

[91] I review the relevant statutory provisions and then assess the claim.

a. The applicable statutes and case law

[92] The terrorism claim by the Gorji Plaintiffs is based on the following statutes:

(i) Section 6.1(1) of the *SIA* provides that a foreign state designated by Canada as a foreign state supporter of terrorism "is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985";

(ii) Iran is one of the two countries on the "list of foreign state supporters of terrorism" as set out in the *Order Establishing a List of Foreign State Supporters of Terrorism*, SOR/2012-170; and

(iii) Section 4(1) of the *JVTA* provides that "any person that has suffered loss or damage in or outside Canada on or after January 1, 1985 as a result of an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the *Criminal Code*" may bring an action for damages if the immunity of the foreign state is lifted under s. 6.1 of the *SIA*.

[93] The above statutory framework requires the court to consider whether the act of shooting down Flight PS752 constitutes a "terrorist activity" as defined under Part II.1 of the *Criminal Code*, pursuant to s. 83.01 of the *Criminal Code*.

[94] The Gorji Plaintiffs rely on s. 83.01(1)(a)(ii), which includes as a terrorist activity, "the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971".

[95] Under s. 7(2)(b) of the *Criminal Code*, it is an offence if a person "in relation to an aircraft in service, commits an act or omission outside Canada that if committed in Canada would be an offence against any of paragraphs 77(c), (d) or (g)".

[96] Finally, under s. 77(c) of the *Criminal Code*, it is an offence if a person "causes damage to an aircraft in service that renders the aircraft incapable of flight or that is likely to endanger the safety of the aircraft in flight".

[97] The Gorji Plaintiffs rely on the above analysis to submit that the shooting down of Flight PS752 is a terrorist activity.

[98] The Gorji Plaintiffs also rely on the decision in *Tracy v. Iranian Ministry of Information and Security*, 2017 ONCA 549, 415 D.L.R. (4th) 314, in which the court upheld the decision of the motion judge not to set aside default judgment to enforce a US judgment for damages for acts of terrorism. In *Tracy*, the acts at issue were uncontested terrorist activities for which Iran was held to have provided material support: at paras. 9-14.

[99] The concerns raised by Arsalani Plaintiffs relate to the concluding paragraph of s. 83.01 of the *Criminal Code*, which provides that a terrorist activity:

> includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, **does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of**

> **its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law** (activité terroriste) [Emphasis added.]

[100] Consequently, the Arsalani Plaintiffs note that while shooting down a plane could be a terrorist activity under s. 83.01(1)(a)(ii) of the *Criminal Code* (applying ss. 7(2) and 77(c) of the *Criminal Code*), the concluding paragraph of s. 83.01 could require the Gorji Plaintiffs to establish not only that Flight PS752 was shot down by a missile launched by the Iranian Defendants, but also to lead evidence to establish that the exceptions under s. 83.01 did not apply, *i.e.*:

(i) The shooting down of Flight PS752 was not "an act or omission that is committed during an armed conflict";

(ii) "[A]t the time and in the place of its commission", the shooting down of Flight PS752 was not "in accordance with customary international law or conventional international law applicable to the conflict"; and

(iii) The shooting down of Flight PS752 was not part of "activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law".

[101] The Arsalani Plaintiffs further submit that if the concluding paragraph of s. 83.01(1) could apply to vitiate a finding of terrorist activity, then the decision in *Tracy* would not assist the Gorji Plaintiffs, since there would be no terrorist activity to ground a claim for damages.

[102] I address these concerns briefly below.

b. Analysis of the terrorist activity exception

[103] It is clear from *Mancinelli* that it is not the role of the court on a carriage motion to comment on the merits of a claim, or to conduct statutory interpretation, other than to address if the claim has a glaring deficiency or is frivolous or fanciful. Given that the Arsalani Plaintiffs do not take that position, there is little scope for any comment by the court on the applicability of the terrorism activity exception in the present case.

[104] Consequently, I limit my comments to adopting the submissions of the Arsalani Plaintiffs as to potential concerns about the applicability of the terrorist activity exception. There may be some risk that the Gorji Plaintiffs may not succeed on lifting state immunity, depending on the evidence before the court, whether on default judgment or at a common issues trial.

[105] I also make no finding as to whether the concluding paragraph of s. 83.01(1) applies only to subsection 83.01(1)(b), as submitted by the Gorji Plaintiffs, or to both subsections 83.01(1)(a)

and (b), which is the basis for the concerns expressed by the Arsalani Plaintiffs, if that interpretation is accepted by the court.

[106] With no case law on the issue, and given the significant concerns from *Mancinelli* about the danger of a court's comments on the merits during a carriage motion, I find only that the terrorism activity claim, while not frivolous or fanciful, is not risk-free as a cause of action.

(iv) Conclusion on the case theory factor

[107] The case theory factor was the predominant issue at the hearing. For the reasons I discuss above, I do not find that the claim of the Arsalani Plaintiffs to lift state immunity under the commercial activity exception is fanciful or frivolous. Consequently, this factor does not favour the Gorji Plaintiffs, let alone predominate over all other factors to award carriage to the Gorji Plaintiffs.

Factors which favour carriage for the Arsalani Plaintiffs

[108] I now review the *Rogers* factors which support carriage in favour of the Arsalani Plaintiffs. There are no factors in favour of carriage to the Gorji Plaintiffs.

[109] I review these factors in order of their importance to my decision to grant carriage to the Arsalani Plaintiffs.

(i) Funding and indemnity (factor 2 in *Rogers*)

1. Overview

[110] There is no funding in place in the Gorji Action, with an extremely limited undertaking by Mark Arnold and his law firm GMA,[1] neither of whom provided financial disclosure, to indemnify the Gorji Plaintiffs for adverse costs or security for costs only if the Iran Defendants are noted in default.

[111] Consequently, the Gorji Plaintiffs face significant costs exposure which puts the success of the proposed class action at serious risk.

[112] In contrast, the Arsalani Plaintiffs are fully protected for adverse costs, security and disbursements under the funding agreement previously approved by the court.

[113] In the present case, this is the most important factor favouring carriage to the Arsalani Plaintiffs.

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[1] Neither Jonah Arnold nor Weinman Arnold LLP offered any undertaking.

[114] I review the relevant facts and law below, and then assess the funding factor.

2. The funding and indemnity provided to the proposed representative plaintiffs

[115] The Arsalani Action has a funding agreement in place which I approved by endorsement on September 21, 2020 (the Funding Agreement). The relevant terms of the Funding Agreement are:

(i) The total combined return shared between the funder [Galactic PS752] and the Arndt Group ranges between 24% and 29% of proceeds, for all steps in the action, including enforcement and appeals. Galactic PS752 will pay legal fees, disbursements and adverse costs awards pursuant to a budget which I reviewed and found to be reasonable;

(ii) No repayment of legal fees, disbursements or adverse costs is required. Those payments are made by Galactic PS752 on a non-recourse basis;

(iii) Galactic PS752 will post security for costs, if required;

(iv) Galactic PS752 will attorn to the jurisdiction of the court and comply with any protective orders made by the court;

(v) Arsalani[2] has the sole right to direct and settle the proceedings;

(vi) Galactic PS752 is bound by the deemed undertaking rule;

(vii) Confidentiality of any communications or documents that may pass between counsel, Arsalani, and Galactic PS752 is protected and subject to all legal privileges of Arsalani; and

(viii) Termination of the Funding Agreement is only with approval of the court.

[116] The Gorji Plaintiffs have no funding agreement. The indemnity is provided only by Mark Arnold and his law firm GMA, and is limited (i) only to the Gorji Action and (ii) to any adverse costs award or security for costs only if the Iran Defendants are noted in default. Otherwise, no indemnification is assured and counsel may try to seek funding from other sources.

[117] The funding and indemnity position of the Gorji Plaintiffs is summarized at paragraphs 51 and 52 of the Gorji factum:

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[2] (Hezarkhani has not yet been added as a plaintiff under the Amended Claim)

> Gardiner Miller Arnold LLP and Mark Arnold, in *Doe*, have undertaken to indemnify the lead plaintiff for any adverse costs award or security for costs order if the Iran defendants are noted in default. If the defendants deliver a defence and if there is a risk to the lead plaintiff of any adverse costs award or security for costs order counsel reserves the right to reconsider their indemnification undertaking and to seek funding from the Law Foundation of Ontario or any other funder if instructed by the lead plaintiff.
>
> The claim in *Doe* is supported by the Toronto-based human rights advocacy group, International Centre for Human Rights. That organization has offered its financial support and is prepared to undertake a public funding campaign to assist in the litigation. The claim in Doe is also supported by Houshang Bouzari who was the lead plaintiff in the leading case, *Bouzari v. Iran*.

3. The applicable law

[118] The failure to provide an indemnity to a representative plaintiff can be a "deal breaker" on a carriage motion: *Winder v. Marriott International Inc.*, 2019 ONSC 5766, at para. 89.

[119] In *Winder*, Justice Perell set out the importance of ensuring that the interests of the class and representative plaintiff are protected by an indemnity either through a funding agreement or by an indemnity from counsel. He held, at paras. 91-92:

> … In my opinion, if proposed Class Counsel wishes to make their commitment to a class action contingent upon a private funder or the Class Proceedings Fund granting funding and, in particular, a cost indemnity to the clients, then Class Counsel should not file a notice of action or a statement of claim or participate in a carriage motion until that third-party funding or the participation of the Class Proceedings Fund is secured. They ought not to hedge.
>
> In my opinion, it is indeed a deal breaker on a carriage motion to commence a proposed class action and reserve the right to seek to discontinue the action if third-party funding is not obtained or an indemnity for the payment of costs is not obtained. As it is, Class Counsel has the right to select whether they will take on the risks associated with a class action, but Class Counsel cannot hedge their bets with a right to seek a bail-out by applying to discontinue the class action on the sole ground that third-party funding or an adverse costs indemnity for their client proved unavailable after they had already issued a statement of claim. This is to play red-light green light with the access to justice that Class Counsel control. It is a deal breaker as far as obtaining carriage is concerned.

4. Analysis

[120] The lack of funding and the extremely limited undertaking by the Arnold Group are inadequate to protect the interests of the Gorji Plaintiffs and the class.

[121] There is no evidence before the court as to any funding or indemnity for Zarei or Moghadden in the Zarei Action. The above passages from the Gorji factum relate only to the "*Doe*" (*i.e.* Gorji) Action. The lack of any protection in the Zarei Action against the significant risks of adverse costs and substantial disbursements arising from UIA's involvement is a significant factor favouring carriage to the Arsalani Plaintiffs.

[122] Further, there is no evidence that either Zarei or Moghadden are prepared to assume such costs, let alone have the financial means to do so.

[123] Even if the limited undertaking provided by Mark Arnold and GMA (*i.e.* the undertaking only applies (i) in the Gorji Action and (ii) if the Iran Defendants are noted in default) were extended to the consolidated claim, it would be deficient.

[124] UIA is represented by counsel, and almost certainly will obtain expert reports to address its standard of care as a defendant in a negligence claim. Further, significant adverse costs may be awarded to UIA on contested motions throughout the certification process. Consequently, even if the limited undertaking were applied to the consolidated action, the refusal to indemnify disbursements or adverse costs awards related to UIA would lead to a serious risk that the class could not pursue its action.

[125] The proposed indemnity in the Gorji Action is also not sufficient to protect the interest of Gorji or the class in their claim against the Iran Defendants, the IAF, and the personal Iranian defendants.

[126] The Gorji Action proceeds on the basis that the Iran Defendants will not defend the action, and then be noted in default. In such circumstances, the Gorji Plaintiffs submit that there is no concern about security for costs or adverse costs.

[127] However, even on default judgment, s. 3(2) of the *SIA* requires the court to "give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceeding". Consequently, evidence could be required to set out the factors in the concluding paragraph of s. 83.01(1) of the *Criminal Code*, which may include expert evidence as to (i) "customary international law or conventional international law applicable to the conflict" or (ii) whether the shooting down of Flight PS752 was "undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law".

[128] In any event, the limited indemnity for an adverse costs award or security for costs applies only if the Iran Defendants are noted in default. If the Iran Defendants deliver a defence, Mark Arnold and GMA's attempt to "hedge" by "reserv[ing] the right to reconsider their indemnification undertaking and to seek funding from the Law Foundation of Ontario or any other funder if instructed by the lead plaintiff" is not permitted, as set out in *Winder*, at para. 91.

[129] Neither the offer by the International Centre for Human Rights "to undertake a public funding campaign to assist in the [Gorji] litigation", nor the statement that "[t]he claim in [the

Gorji Action] is also supported by Houshang Bouzari who was the lead plaintiff in the leading case, *Bouzari v. Iran*", provide any protection to the representative plaintiffs or the class.

[130] Also, should the actions be consolidated, as requested by the Gorji Plaintiffs, then Gorji would face all of the adverse costs risks and disbursements required to address the defence of UIA, for which there is no funding or indemnity provided.

[131] For the above reasons, this factor is critical in supporting carriage to the Arsalani Plaintiffs.

(ii) Fee and consortium agreements (factor 3 in *Rogers*)

[132] I first review the applicable retainer arrangements and then review this carriage factor.

1. The applicable retainer agreements

[133] As I discuss above, the combined funder and lawyer fees arising from the Funding Agreement range from 24-29% of litigation proceeds, including all disbursements and costs of enforcement and appeals, all subject to court approval. That fee is certain, and within the range of reasonable fees generally approved by the court.

[134] The contingency fee retainer agreements signed by Gorji and Zarei do not provide any certainty about the fee to be charged to the representative plaintiffs.

[135] There is no definite amount for fees in any of the Gorji, Zarei, or Moghaddam retainer agreements. Gorji agrees that the "expected fees [will] be approximately 20% of any monies recovered in this proceeding subject to court approval". In their retainer agreements, both Zarei and Moghaddam agree that "[t]he lawyers estimate the expected fees to be **20%** of any monies recovered in this proceeding subject to court approval" [emphasis in original text].

[136] Further, in the Zarei and Moghaddam retainer agreements before the court, each plaintiff agrees only to be a plaintiff in a joint retainer in the Gorji Action. There is no retainer agreement before the court for the Zarei Action.

[137] In addition, in all of the retainer agreements signed by Gorji, Zarei, and Moghaddam, the costs of appeal and enforcement are expressly excluded, and require the Gorji Plaintiffs "to sign another contract" if they want such services.

2. Analysis

[138] The retainer agreements in the Gorji Action are not in the best interests of the class, and there is no evidence at all as to the retainer structure in the Zarei Action.

[139] Enforcement is likely to be a significant issue against the Iran Defendants, regardless of whether they are noted in default or defend the action. In *Bennett Estate v. Iran (Islamic Republic of)*, 2013 ONCA 623, 117 O.R. (3d) 716, the court referred to evidence setting out the

appellant's concern that Iran's limited assets in Canada could be eliminated through enforcement of a large US judgment: at para. 15.

[140] Enforcement proceedings could also take place outside of Canada without oversight by this court of fees charged for such enforcement.

[141] Appeals are also a reasonable concern for fees. The claim against UIA raises important issues of negligence and could well result in review by appellate courts. Similarly, the Iran Defendants could appeal any final judgment against them given the significant issues of state immunity raised in the claims. Those fees would be substantial.

[142] Consequently, it is not in the best interests of the class to proceed under the retainer agreements proposed by the Arnold Group. This is an important factor favouring carriage to the Arsalani Plaintiffs.

(iii) The quality of proposed counsel (factor 4 in *Rogers*)

[143] In *Agnew-Americano*, I reviewed the law on the role of the court to consider this factor: at paras. 194-210. I rely on my analysis in that case.

[144] In the present case, there is a difference in the experience of counsel which is relevant. While the Arnold Group has significant experience in litigation against Iran, the Arndt Group has senior counsel (John Adair) to address that issue, but also has significant experience in class action and aviation law. The Arnold Group led no evidence of expertise in those important additional legal areas

[145] The Arndt Group has established a team of lawyers, each with significant expertise on the various issues raised by this litigation. I summarize the relevant experience below:

(i) Tom Arndt is a leading class action lawyer, having argued class action matters at a specialized class action law firm and now at his own firm, for both plaintiffs and defendants;

(ii) John Adair was lead plaintiff's counsel in the *Tracy* and *Bennett* matters with significant experience in litigation against Iran. He also has considerable class action experience; and

(iii) Marni Whitiker is a senior estates lawyer with expertise in appointments as estate trustee, and acted for over 60 families in the Air India crash litigation

[146] I accept the uncontested evidence of a paralegal in Mr. Arndt's office that:

> The lawyers at TWA Law and the legal team have experience in complex large-scale litigation, class actions and pursuing and defending claims against large corporations (including airlines) and domestic and foreign government entities (including Iran). They have demonstrated experience in dealing with the

> complexities of this type of litigation and have the resources to dedicate to prosecuting this action to resolution.

[147] It is not disputed that Mark Arnold is senior litigation counsel, with considerable experience pursuing claims against Iran. I accept the following submission in the Gorji factum:

> Lead counsel in *Doe*, Mark Arnold, has a lengthy and significant 35 year history of reported and unreported cases covering a broad range of issues including condominium law, construction law, employment law, dental malpractice, employment law [*sic*], etc. He is a Certified Specialist in Civil Litigation by the Law Society of Ontario.

[148] In their factum, the Gorji Plaintiffs also refer to Mark Arnold's "history of forming teams of lawyers, academics, students and others that have assisted and participated in prior cases brought against the Iranian defendants".

[149] The evidence of Jonah Arnold is that he was called to the bar in Ontario in 2008 and that "[h]is practice primarily focuses on administrative law and regulated health professions".

[150] It is not disputed that the Arnold Group are highly competent lawyers. However, there is a difference in experience in important areas related to the proposed class action. The Arnold Group led no evidence as to class action or aviation law experience. This is particularly important since the Zarei Action is now brought against UIA, which will raise both of these legal areas. Neither class action nor aviation law are straightforward legal matters; the significantly greater experience of the Arndt Group in these areas is another factor in favour of carriage to the Arsalani Plaintiffs.

(iv) Relative priority of commencing the action (factor 6 in *Rogers*)

[151] At first glance, there would seem to be no practical distinction between the priority of the commencement of the action. The Arsalani Action was commenced on January 20, 2020 and the Gorji Action was commenced on January 24, 2020. The factor would have been neutral on that basis.

[152] However, the Gorji Action did not name UIA. Instead, on October 21, 2020, less than one week before the carriage motion hearing and nine months after the Arsalani and Gorji Actions, Zarei and Moghaddam brought the separate Zarei Action against UIA. This very late addition of a claim raises significant procedural hurdles and transitional issues under the recent amendments to the *CPA*.

[153] Under the recent amendments to the *CPA*, which came into effect on October 1, 2020, there are some important differences to the certification process. For example, the certification test under s. 5 has been amended to include minimum statutory requirements for a class action to be the preferable procedure to resolve the common issues (s. 5(1.1)).

[154] Further, under s. 13.1(8), the Zarei Action cannot be commenced without leave since it is more than 90 days from the date of the Arsalani Action.

[155] Under s. 39 of the *CPA*, the amendments only apply to those actions commenced after October 1, 2020, which would include the Zarei Action, but not the Gorji Action.

[156] Consequently, even if the court granted leave under s. 13.1(8) to bring the Zarei Action, the consolidated action would possibly operate under different statutory requirements. UIA would seek the benefit of the new regime. The Iran Defendants and the other named defendants in the Gorji Action could be subject to the prior regime, or perhaps seek to have the new rules apply as a consolidated action. In any of these situations, this transitory process would not be in the best interests of the class.

[157] For the above reasons, the relative priority of the Arsalani Action as compared to the late addition of the Zarei Action and its proposed consolidation with the Gorji Action favours carriage to the Arsalani Plaintiffs.

(v) Preparation and readiness of the action (factor 7 in *Rogers*)

[158] The Gorji Plaintiffs submit that this factor favours carriage to them because of the steps they have taken to serve the Iran Defendants.

[159] The Arsalani Plaintiffs submit that they have been just as successful in serving the Iran Defendants. Further, the Arsalani Plaintiffs submit that since they named UIA from the outset, they are more prepared and ready to address the liability of UIA.

[160] For the reasons that follow, I agree with the Arsalani Plaintiffs.

[161] The Gorji Plaintiffs submit that they made "herculean" efforts to serve the claim in the Gorji Action against the Iran Defendants, including personal service on various Iranian embassies, service by e-mail, service by registered mail, service on Iran's prior Canadian lawyers, service by fax and service by Twitter. The Gorji Plaintiffs also sought an order from Master McGraw for validation of service against Iran.

[162] However, I do not find, on the evidence before the court, that the steps taken by Gorji to serve the Iran Defendants demonstrate a higher level of preparation or readiness.

[163] The Arsalani Plaintiffs sought and obtained a certificate from Global Affairs Canada (GAC) for transmission of the claim under s. 9(5) of the *SIA*, which is the method of service on a foreign state permitted under s. 9(2) of the *SIA*. Gorji received a similar certificate for service of his claim.

[164] Gorji submits that it was because of his efforts of service and appearances before Master McGraw that GAC took steps to transmit the claim. However, there is no evidence to that effect and it could just as easily be the case that GAC took the steps required based on the requests

from both plaintiffs who brought the actions, such that none of Gorji's service efforts were required.

[165] In any event, neither party is more "ready" on the service issues.

[166] Also, counsel in both actions have met with families of the deceased passengers and created case specific websites.

[167] However, as a result of the very recent Zarei Action, there is no evidence before the court as to any readiness by the Gorji Plaintiffs to pursue the claim against UIA. On the other hand, the evidence is uncontested that the Arsalani Plaintiffs (i) "have and continue to consult experts in aviation incidents in Canada and abroad", and (ii) "have retained an aviation expert to address standard of care issues". This evidence favours carriage to the Arsalani Plaintiffs.

(vi) Scope of cause of action and selection of defendants (factors 10 and 11 in *Rogers*)

[168] UIA is a significant defendant. It is capable of paying damages if liable. It is an international airline with strict liability obligations. Further, UIA will be subject to documentary and oral discovery. Matters of access to justice, behavior modification and judicial economy are triggered.

[169] UIA was not a defendant in the Gorji Action. In their factum, the Arsalani Plaintiffs properly raised this issue in relation to both the "scope of cause of action" and "selection of defendants" factors, since the Zarei Action had not been commenced at that time.

[170] Now that the Zarei Action has been commenced, the lack of UIA as a defendant is not significantly different, although it would be necessary for the Gorji Plaintiffs to obtain an order for consolidation of the Gorji and Zarei Actions.

[171] However, I find the claims by Gorji against the personal defendants in the Gorji Action to raise concerns as to the scope of action and selection of defendants.

[172] In *Mancinelli*, Justice Strathy held, at para. 47:

> While some cases have given preference to "lean" actions over more comprehensive ones, I would reject any firm rule that "less is more" or, indeed, that "more is better". The ultimate question is whether the proposed strategy is reasonable and defensible.

[173] In the present case, on the basis of the pleadings, I find that "less is more".

[174] The Gorji Action raised no allegations against any of the personal defendants, other than the general allegation that all defendants intentionally shot down Flight PS752. Consequently, a claim for personal liability is questionable against individuals serving as (i) Supreme Leader of Iran (Ali Khamenei), (ii) Chief of Staff for the IAF (Mohammad Bagheri), (iii) Commander-in-Chief of the IRGC (Hossein Salami), (iv) Commander-in-Chief of the Islamic Republic of Iran

Army and Commander of Khatam al-Anbiya Air Defense Base (Seyyed Abdolrahim Mousavi) or (v) Commander of Aerospace Force of the IRGC (Amir Ali Hajizadeh).

[175] Further, any claims of personal liability will create unnecessarily complicated proceedings. There is no apparent need to engage personal liability given the existing pleadings against the Iran Defendants. Under s. 3(2) of the *SIA*, even on default judgment, the court must still apply state immunity unless an exception applies. A finding of terrorist activity would engage liability of the Iran Defendants so personal liability would be superfluous.

(vii) The quality of the proposed representative plaintiffs and correlation of plaintiffs and defendants (factors 1 and 12 in *Rogers*)

[176] At the carriage motion, all that is required is that the proposed representative plaintiff personally be able to lead a claim against the defendant and have retained counsel to do so: *Winder*, at para. 85

[177] Gorji is a Quebec resident, and not a "member of the passenger's family" and as such would seem to have no standing to pursue a claim against UIA under section 2, paragraph 1, of Schedule II to the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

[178] Gorji's niece and her husband were residents of Alberta, not Ontario, and as such he has no standing under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F. 3.

[179] In effect, Gorji was a "placeholder". He alleged that he was an "immediate family member of Jack Doe, who was killed in the crash". However, the loss of his niece does not make Gorji an "immediate family member" of a passenger killed in the Crash.

[180] In their motion records filed for this carriage motion, the Gorji Plaintiffs acknowledged that they intended to add Zarei and Moghaddam as representative plaintiffs, but only "after the time expires for Iran to defend the claim".

[181] Zarei and Moghaddam are now proposed representative plaintiffs in the Zarei Action. They assert claims under the *Family Law Act*, but not in an estate or representative capacity for the passengers killed in the Crash. Further, the Zarei Action is currently only against UIA, and consolidation would be required to ensure that the class action is against all defendants.

[182] On the other hand, Arsalani and Hezarkhani are not placeholders.

[183] Arsalani is an Ontario resident. He is on the enumerated list in s. 61 of the *Family Law Act* and is a member of the passenger's family under Schedule II of the *Carriage by Air Act*. He also has the consent of all surviving kin of a deceased passenger to be appointed executor of the estate and is in the process of doing so.

[184] Hezarkhani is a British Columbia resident and has administration of the estates of two deceased passengers (his extended family members).

[185] The Gorji Action currently seeks to be litigated by a Quebec resident as the proposed representative plaintiff with uncertain legal authority to pursue claims on behalf of the estates of two deceased residents of Alberta. Even with the addition of Zarei and Moghaddam through proposed consolidation, the Arsalani Plaintiffs still have a more direct correlation to the claims against the defendants collectively.

[186] Consequently, while "in most cases ... the quality of the proposed representative plaintiffs will be a neutral factor": *Winder*, at para. 85, in the present case this factor supports carriage to the Arsalani Plaintiffs.

(viii) Class definition (factor 13 in *Rogers*)

[187] In the Arsalani Action, the class members are defined as "... the passengers who were aboard Flight PS752" and "the spouse, children, grandchildren, grandparents, brothers and sisters of ..." the passengers. These definitions are grounded in the language of the *Carriage by Air Act*, in particular the definition of "member of the passenger's family".

[188] The Gorji Action class is defined as "the estates or representatives of the estate [*sic*] of all of the victims of the Ukrainian International Airlines Flight PS752 plane crash regardless of nationality." The Gorji Action asserts claims under Ontario's *Family Law Act*, but omits a definition of that class.

[189] The Zarei Action class is defined as "the spouses, children, grandchildren, parents, grandparents, brothers and sisters of persons killed in the crash of UIA Flight PS752".

[190] While a consolidated action could combine the two different class definitions in the Gorji and Zarei Actions, at present, the only class members seeking damages from the Iran Defendants are the "estates or representatives of the estate of all of the victims" of the Crash, while the only class members seeing damages against UIA are family members.

[191] While this factor is not significant as any deficiencies could be addressed upon consolidation and amendment, the present class definition in the Arsalani Action includes all potential class members and is preferable.

Neutral factors

[192] All of the remaining factors are neutral. None of the remaining factors favour carriage to the Gorji Plaintiffs.

[193] In brief, I find that:

(i) There is no evidence of any circumstances in this case which give rise to real or potential conflict of interest that would result in the disqualification of either counsel (factor 5 in *Rogers*);

(ii) Both parties prepared thorough carriage materials and assisted the court with thorough written and oral submissions (factor 8 in *Rogers*);

(iii) The class period is the same in both actions, as it relates to those passengers on board Flight PS752 and family members of those passengers (factor 14 in *Rogers*);

(iv) There is no basis to find that a consolidated Gorji and Zarei Action would be less amenable to certification than the Arsalani Action (factor 15 in *Rogers*);

(v) While I have commented as to the case theory of the various parties, there is not sufficient evidence or any basis on the pleading to make a definitive finding that one action is more likely to succeed than the other (a factor which would have been relevant if UIA had not been subsequently named in a separate action by Zarei with a proposed consolidated action) (factor 16 in *Rogers*); and

(vii) There is no evidence before the court as to class actions in another jurisdiction (factor 17 in *Rogers*).

Order and costs

[194] For the above reasons, I order that carriage of the proposed class action is granted to the plaintiffs in the Arsalani Action. I find that based on the factors above, carriage to the Arsalani Plaintiffs is in the best interests of the class, having regard to access to justice, judicial economy, and behaviour modification.

[195] I order the Gorji and Zarei Actions to be stayed without prejudice to the plaintiffs in those actions seeking leave to commence their actions as individual (or consolidated) actions.

[196] Finally, I direct that no other proposed class actions shall be commenced in Ontario in respect of the subject matter of the action without leave of the court.

[197] Neither party sought costs of the motion and I make no order as to costs.

GLUSTEIN J.

Date: 20201109

CITATION: Arsalani v. Islamic Republic of Iran, 2020 ONSC 6843
COURT FILE NO.: (Arsalani v. Islamic Republic of Iran) CV-19-00632601-00CP
(Doe v. Islamic Republic of Iran) CV-20-00635078-00CP
DATE: 20201109

ONTARIO

SUPERIOR COURT OF JUSTICE

OMID ARSALANI

Plaintiff

AND:

ISLAMIC REPUBLIC OF IRAN, ISLAMIC REVOLUTIONARY GUARD CORPS, UKRAINE INTERNATIONAL AIRLINES PJSC, and JOHN DOE MISSILE OPERATOR

Defendants

AND BETWEEN:

JOHN DOE

Plaintiff

AND:

ISLAMIC REPUBLIC OF IRAN, ISLAMIC REVOLUTIONARY GUARD CORPS also known as ARMY OF THE GUARDIANS OF THE ISLAMIC REVOLUTION also known as IRANIAN REVOLUTIONARY GUARD CORPS, IRANIAN ARMED FORCES also known as ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, ALI KHAMENEI also known as SUPREME LEADER OF IRAN, MOHAMMAD BAGHERI also known as MOHAMMAD-HOSSEIN AFSHORDI, HOSSEIN SALAMI, SEYYED ABDOLRAHIM MOUSAVI and AMIR ALI HAJIZADEH,

Defendants

REASONS FOR DECISION

Glustein J.

Released: November 9, 2020