

2nd Circ. Revives Sudan Refugees' Case Against BNP Paribas

By Jon Hill

Law360 (May 22, 2019, 10:01 PM EDT) -- A Second Circuit panel revived a proposed class action against BNP Paribas by nearly two dozen Sudanese refugees who say the French banking giant helped to finance atrocities committed against them by the Sudanese government, ruling Wednesday that a legal doctrine against second-guessing foreign state actions isn't an obstacle to the case.

In a 23-page decision penned by U.S. Circuit Judge Barrington D. Parker, the three-judge panel said that the act of state doctrine, which prohibits U.S. courts from ruling that an official act of a foreign government is invalid, had been misapplied last year when a New York district court judge cited it as the basis for her dismissal of the refugee plaintiffs' case against BNP Paribas SA and two U.S. subsidiaries.

"The doctrine applies only when the relief sought or the defense raised would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory," Judge Parker wrote. "Adjudicating the claims in this action involves no such requirement."

BNP Paribas admitted in 2014 to having helped Sudanese, Iranian and Cuban clients evade U.S. sanctions in the 2000s and paid a record \$9 billion in penalties to federal and New York authorities.

The refugee plaintiffs — a group that now includes 21 current and former Sudanese nationals living in the U.S. — filed suit in 2016, alleging that the bank's sanction-dodging work allowed the Sudanese government to raise billions of dollars that were then used to fund a campaign of genocide that brutalized them and others like them through torture, rape, murder and other atrocities.

The case was dismissed in March 2018, however, after U.S. District Judge Alison Nathan concluded that the act of state doctrine prevented her from ruling on the refugee plaintiffs' claims against BNP because she would have to "pass judgment on the acts of the government of Sudan" in order to do so.

"Under the act of state doctrine, claims against private entities may be barred when the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government," the judge wrote.

But the three-judge panel said Wednesday that the doctrine doesn't bar the case in this circumstance because the validity of the Sudanese government's alleged actions against the refugee plaintiffs isn't the issue.

"By BNPP's own concession, the acts of Sudan to which BNPP asks us to defer are the atrocities committed against innocent civilians," Judge Parker wrote. "No one here — the parties, the U.S. government, Sudan (in its own Constitution), or the international community — contends that genocide, mass rape, and ethnic cleansing are 'valid.' Instead, the issue is simply whether the atrocities occurred."

For that matter, it hadn't been shown that the alleged atrocities actually qualified as official acts of the Sudanese government that a U.S. court wouldn't be permitted to review, the panel found.

"Considering the lack of evidence introduced by BNPP that genocide is the official policy of Sudan, and the countervailing evidence that genocide blatantly violates Sudan's own laws, we conclude that there is simply no 'official act' that a court would be required to 'declare invalid' in order to adjudicate plaintiffs' claims," Judge Parker wrote.

And even if the alleged atrocities were official acts, the panel said that they still violated internationally held norms and could never legitimately be upheld by a U.S. court, but dismissing the case based on the act of state doctrine would be tantamount to deeming them valid.

"We conclude that the atrocities to which BNPP asks us to defer can never be the basis of a rule of decision capable of triggering the act of state doctrine," Judge Parker wrote.

Judge Nathan had also thrown out certain claims brought by adult refugee plaintiffs as untimely, but the panel disagreed and found that the claims had been brought within a one-year statute of limitations based on when BNP's judgment of conviction was entered in its criminal sanctions case.

In a statement to Law360, Tobias Barrington Wolff, a University of Pennsylvania Law School professor and counsel to the refugee plaintiffs, said the panel had "upheld clearly established principles of U.S. law."

"U.S. courts should never give deference to human rights atrocities such as mass rape and ethnic cleansing, and we are gratified that the federal appeals court rejected BNPP's arguments," Wolff said.

A representative for BNP did not immediately return a request for comment late Wednesday.

Sitting for the Second Circuit panel were U.S. Circuit Judges Parker, Robert D. Sack and Denny Chin.

The refugees are represented by Tobias Barrington Wolff of the University of Pennsylvania Law School and Kathryn Lee Boyd and Thomas B. Watson of McKool Smith PC.

BNP is represented by Carmine D. Boccuzzi Jr., Jonathan I. Blackman and Avram E. Luft of Cleary Gottlieb Steen & Hamilton LLP.

The case is *Kashef et al. v. BNP Paribas SA et al.*, case number 18-1304, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Michael Watanabe.