

No. 09-1376

**In The
United States Court of Appeals
For The Fourth Circuit**

JUAN MANUEL RIVERA RONDON,

Appellant,

v.

TEÓFILA OCHOA LIZARBE
AND CIRILA PULIDO BALDEON,

Appellees.

**On Appeal from the United States District Court
For the District of Maryland, No. 8:07-CV-01809
Peter J. Messitte, United States District Judge**

**SUPPLEMENTAL BRIEF OF APPELLANT
JUAN MANUEL RIVERA RONDON**

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STATEMENT OF THE ISSUE

The effect on this appeal of the Supreme Court's decision in *Samantar v. Yousuf*, ___ U.S. ___, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010).

PRELIMINARY STATEMENT

On July 11, 2007, Appellees Teófila Ochoa Lizarbe and Cirila Pulido Baldeon filed this action in the United States District Court for the District of Maryland against Appellant Juan Manuel Rivera Rondon based upon events alleged to have occurred 22 years earlier, in August 1985, when he was a low-ranking officer in the Peruvian military acting in his official capacity. (*See* Apx 12, 20-21.)

On November 21, 2007, Rivera Rondon moved to dismiss the complaint on nine grounds.¹ One of the grounds for the motion was that Rivera Rondon is immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). (Apx 4.) After a hearing on April 14, 2008 (*See* Apx 46-129), the Court denied Rivera Rondon's motion on February 26, 2009 (Apx 222-256). In so doing, the

¹Rivera Rondon's motion was based on the following grounds: (1) the claims asserted are barred by the statute of limitations; (2) Rivera Rondon is immune from suit under the Foreign Sovereign Immunities Act of 1976; (3) Lizarbe and Baldeon failed to exhaust their remedies in Peru; (4) the case should be dismissed under the political question doctrine; (5) Lizarbe's and Baldeon's claims are barred by the Act of State doctrine; (6) the Complaint fails to state a claim upon which relief can be granted; (7) the Alien Tort Claims Act does not provide the Court with jurisdiction; (8) improper venue; and (9) the decedents failed to allege that they

District Court held that Rivera Rondon is not immune from suit under the FSIA.² Rivera Rondon noted this interlocutory appeal under the collateral order doctrine. *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006).

On June 1, 2010—after the briefs were filed in this case, but before oral argument—the Supreme Court of the United States announced its decision in *Samantar v. Yousuf*, ___ U.S. ___, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010), affirming this Court’s decision that the FSIA does not apply to individual foreign government officials. On June 10, 2010, this Court ordered that the parties file supplemental briefs addressing the effect of *Samantar* on this case.

SUMMARY OF ARGUMENT

The District Court erred in denying Rivera Rondon’s motion to dismiss for several reasons. First, the District Court should have dismissed the complaint because Lizarbe and Baldeon failed to exhaust their remedies in Peru, as required

appeared before the Court through duly-appointed personal representatives on behalf of the open estates. (Apx 4.)

² The District Court held that Rivera Rondon does not enjoy FSIA immunity for three reasons. First, relying solely on this Court’s decision in *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), the Court held that the FSIA does not apply to individual foreign government agents, and therefore Rivera Rondon does not have immunity. (Apx. 234-35.) Second, the Court found that Rivera Rondon was acting outside the scope of his official duties and, therefore, the FSIA would not apply in any event. (Apx 235-36.) In reaching that conclusion, the Court relied solely on a letter from the Ambassador of Peru asserting that Rivera Rondon had acted outside the scope of his official duties. Third, the Court held, again relying on *Yousuf*, that the FSIA does not apply to *former* government officials. (Apx 235.)

by statute. Second, the District Court should have dismissed the complaint because it was filed well beyond the applicable statute of limitations. Third, the District Court should have dismissed the complaint because, as a former official of a foreign sovereign, Rivera Rondon is immune from suit for acts taken in his official capacity.

The Supreme Court's decision in *Samantar* should have no effect on this Court's review of the above issues. Patently, *Samantar* has no effect on Rivera Rondon's arguments with respect to exhaustion of remedies and the statute of limitations. The Court should consider those issues under its pendent appellate jurisdiction and reverse the judgment of the District Court.

As for Rivera Rondon's right to official immunity, the Supreme Court in *Samantar* expressly stated that—although it held that the FSIA does not apply to individual foreign officials—such individuals may nevertheless enjoy official immunity under the common law. As explained below, under well-established precedent, Rivera Rondon is entitled to common law official immunity. Despite the fact that the Supreme Court in *Samantar* expressly invited this alternative analysis, Lizarbe and Baldeon completely ignore the merits of this issue. Instead, they argue only that Rivera Rondon “waived” the issue by not arguing it to the District Court. As explained in detail below, Rivera Rondon raised the issue adequately to permit this Court's review. Furthermore, even assuming for the sake of argument that he

did not, the Court should exercise its considerable discretion to decide the issue as a matter of judicial economy and because no party would be unfairly prejudiced by the Court's doing so.

ARGUMENT

I. Samantar has no effect on the non-FSIA issues in this case.

A. The Court should exercise its pendent jurisdiction to consider the non-FSIA issues.

As noted above, Rivera Rondon exercised his right under the collateral order doctrine to an interlocutory appeal of the District Court's decision regarding his immunity under the FSIA. *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006). The other issues addressed below are reviewable by the Court in the exercise of its pendent appellate jurisdiction. Under that exception to the final judgment rule, this Court "retain[s] the discretion to review issues that are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review." *Rux*, 461 F.3d at 475. This Court will exercise pendent appellate jurisdiction under two circumstances: "(1) when an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is 'necessary to ensure meaningful review' of an immediately appealable issue." *Rux*, 461 F.3d at 475 (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)).

As set forth in Rivera Rondon's motion to dismiss, for numerous reasons, he should not be subjected to this civil action in the District Court. Before the District Court, he maintained that he is entitled to immunity under the FSIA.³ Even if he is not entitled to immunity, however, this case should have been preliminarily dismissed for at least two other reasons. First, Lizarbe and Baldeon failed to exhaust their remedies in Peru, as required by statute. Second, this action was brought nearly 22 years after the events in question, well beyond the applicable statute of limitations under the TVPA.

The Court should consider these additional issues because they are inextricably intertwined with the issue of official immunity and because they present alternative grounds for dismissal. Furthermore, considering them together with the immunity issue furthers the interests of judicial economy. Even if this Court is not inclined to reverse the District Court on the basis of Rivera Rondon's immunity, these alternative issues warrant reversal, which would avoid the need for full litigation. The Court should therefore exercise its broad discretion to consider the following issues concurrently with the issue of official immunity.

³ As explained below, irrespective of the Supreme Court's decision in *Samantar*, Rivera Rondon is nonetheless entitled to official immunity under the common law.

B. Appellees failed to exhaust their remedies in Peru.

The Torture Victims Protection Act provides that a “court shall decline to hear a claim if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.” 28 U.S.C. § 1350(2)(b). Thus, TVPA claims carry a requirement to exhaust remedies in the local jurisdiction prior to filing suit here. For Lizarbe and Baldeon to avoid this exhaustion requirement, remedies in Peru must be effectively non-existent. A difficult or time-consuming process is insufficient. Instead, the Peruvian process must be followed unless it is “unobtainable, ineffective, inadequate, or obviously futile.” *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass 1995).

Lizarbe and Baldeon admitted in the complaint and their papers that remedies exist in Peru and that they are being pursued there by the very same parties who filed this case. (*See* Apx 30-31.) Furthermore, in their opposition to Rivera Rondon’s motion to dismiss, Lizarbe and Baldeon admitted—for the first time—that they have sued Rivera Rondon in Peru. (*See* Pl. Opp. to Mot. to Dismiss at 38.) Having so admitted, they should not now be heard to contend that there is no process in Peru to address their grievances. Not only is there a process, but they are participating in it (a fact they did not admit in the dozens of pages of their complaint). For the reasons presented in Rivera Rondon’s brief on the merits and in his reply brief—both of which are adopted and incorporated herein by

reference—the District Court erred in denying Rivera Rondon’s motion to dismiss on this ground. The Supreme Court’s decision in *Samantar* has no effect on this issue.

C. The claims asserted are barred by the statute of limitations.

The Torture Victims Protection Act (TVPA) contains a ten-year statute of limitations. *See* 28 U.S.C.A. § 1350, note (stating that “[n]o action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose”). The complaint relies entirely on incidents alleged to have occurred in August of 1985. (*See* Apx 19-23.) The Complaint was filed on July 11, 2007. (Apx 3.) Thus, this lawsuit was filed almost 22 years after the alleged events in question. For the reasons stated in Rivera Rondon’s brief on the merits and reply brief—both of which are adopted and incorporated herein by reference—the District Court erred in denying Rivera Rondon’s motion to dismiss on this ground. The Supreme Court’s decision in *Samantar* has no effect on this issue.

II. Samantar has no effect on Appellant’s entitlement to official immunity under the common law.

A. Appellant is entitled to official immunity under the common law.

In *Samantar*, the Supreme Court held that the FSIA does not provide immunity to individual government officials. *Samantar*, 130 S. Ct. at 2282, 176 L. Ed. 2d at 1057. The Court was careful to note, however, that “[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under

the common law.” *Id.* at 2292, 176 L. Ed. 2d at 1066. Indeed, the Court expressly stated:

We emphasize . . . the narrowness of our holding. Whether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand.

Id. at 2292-93, 176 Ld. Ed. 2d at 1067.

Under well-established principles of common law, Rivera Rondon is undoubtedly entitled to immunity from suit. It is well-settled that “[c]ommon law recognizes the immunity of former foreign officials.” *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009). Indeed, “[a]t the time the FSIA was enacted, the common law of foreign sovereign immunity recognized an individual official’s entitlement to immunity for acts performed in his official capacity.” *Id.* (internal quotation marks omitted). That principle, which pre-dated the FSIA, survived enactment of the statute. *Id.* See also Restatement (Third) Foreign Relations Law of the U.S. § 469(a) (1987) (providing that, “[b]y international agreement, an official of an international organization is immune (a) from the exercise by a state of jurisdiction to prescribe, adjudicate, or enforce its law in respect of acts or omissions in the exercise of his official functions”).

The reason for this longstanding common law principle is that “a suit against an individual acting in his official capacity is the practical equivalent of a suit

against the sovereign directly.” *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990). Indeed, “the immunity of a foreign state extends to any other official or agent of the state with respect to acts performed in his official capacity.” *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (internal quotation marks omitted).

Common law official immunity extends not only to current government officials, but also to former officials with respect to actions they took in their official capacities. *Matar*, 563 F.3d at 14 (noting that “[c]ommon law recognizes the immunity of former foreign officials”). Indeed, “[a]n immunity based on acts—rather than status—does not depend on tenure in office.” *Id.*

As explained in detail in Rivera Rondon’s brief on the merits (which is adopted and incorporated herein by reference), all the acts for which he is being sued in this case were performed in his official capacity and on behalf of the Peruvian government. (*See* App. Br. 26-35.) Indeed, Lizarbe and Baldeon conceded as much in their complaint. (*See* Apx. 16-21.) Accordingly, Rivera Rondon is entitled to official immunity under the common law irrespective of the Supreme Court’s decision in *Samantar*.

B. This issue is properly before the Court.

Despite the fact that the Supreme Court in *Samantar* invited this alternative analysis, Lizarbe and Baldeon completely ignore the merits of Rivera Rondon’s

entitlement to common law immunity. Instead, they weakly argue that Rivera Rondon waived this issue by not raising it below. As an initial matter, Lizarbe and Baldeon are incorrect; they take too narrow a view of what was argued below. In the alternative, even assuming—for the sake of argument—that Rivera Rondon did not properly raise this issue below, the Court should nonetheless exercise its discretion to consider it.

There can be no question that Rivera Rondon raised the issue of official immunity before the District Court. Lizarbe and Baldeon point out that, under Fed. R. Civ. P. 12, a party must raise the issue of lack of personal jurisdiction in a preliminary motion to dismiss, or it is waived. In his motion to dismiss, Rivera Rondon raised not only the broad issue of lack of personal jurisdiction, but also the specific argument that the Court lacked jurisdiction because he enjoys official immunity from suit. (*See* Apx 234-36.) A party is required to preserve the issue for appeal, but need not necessarily present every conceivable argument relevant to that issue to the court below.

Lizarbe and Baldeon attempt to draw a distinction between Rivera Rondon's statutory and common-law immunity arguments. But that is a distinction without a difference. The principal issues are identical under either analysis—whether the acts for which Rivera Rondon is being sued were performed in his official capacity

as an official of a foreign government.⁴ Rivera Rondon is not raising a new issue, or even a new legal theory; he is simply citing different legal authority for the same issue that the parties argued and on which the District Court ruled. This issue was not waived and was properly preserved for appellate review.

In the alternative, assuming—for the sake of argument—that this issue was not properly preserved for appellate review, the Court should nonetheless exercise its discretion to consider the issue. This Court will consider even an unpreserved issue “when there has been an intervening change in the law recognizing an issue that was not previously available.” *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999). “The intervening law exception to the general rule that the failure to raise an issue timely in the district court waives review of that issue on appeal applies when there was strong precedent prior to the change, such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner.” *Id.* at 605-06 (internal quotation marks omitted).

⁴ *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990), is inapposite because it involved an attempt to raise a whole new theory of lack of personal jurisdiction—insufficient contacts with the United States. By contrast, in this case, Rivera Rondon does not attempt to raise a new theory of lack of personal jurisdiction. He presents the same theory that was argued to, and considered by, the District Court—official immunity. In light of *Samantar*, Rivera Rondon simply presents different legal authority—common law, as opposed to statutory—in support of his official-immunity argument.

For example, in *Westchester First Ins. Co. v. Johnson*, 5 Fed. Appx. 111, 114-15 (4th Cir. 2001), this Court considered a new theory in support of the appellant’s unfair trade practices claim—which had been dismissed by the District Court—after the North Carolina Supreme Court overruled “a long line of precedent,” paving the way for the new theory. The Court also pointed out that the appellee was not prejudiced because the appellant had raised the general issue below and because the appellee would be able to address the new theory at oral argument. *Id.* at 115.

Likewise, in this case, Rivera Rondon’s statutory argument before the District Court was supported by a long line of precedent. *See, e.g., In Re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008) (holding that “an individual official of a foreign state acting in his official capacity is the ‘agency or instrumentality’ of the state, and is thereby protected by the FSIA”); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999) (stating that, “[n]ormally, the FSIA extends to protect individuals acting within their official capacity as officers of corporations considered foreign sovereigns”); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990) (concluding that “section 1603(b) can fairly be read to include individuals sued in their official capacity”); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (stating that “[a]n individual can qualify as an ‘agency or

instrumentality of a foreign state”). At the time Rivera Rondon filed his motion to dismiss, even this Court had recognized that “courts have construed foreign sovereign immunity [under the FSIA] to extend to an individual acting in his official capacity on behalf of a foreign state.” *Velasco v. Gov’t of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). Thus, even assuming, for the sake of argument, that Rivera Rondon did not properly raise this issue below, this Court should consider it based on an intervening change in the law.

Even if Rivera Rondon had not properly raised the issue, and this Court elected to consider it on appeal, Lizarbe and Baldeon would not be unfairly prejudiced. They cannot seriously claim surprise. The Supreme Court issued its opinion on June 1, 2010, which expressly invites consideration of the alternative ground of common law official immunity. *See Samantar*, 130 S. Ct. at 2292, 176 L. Ed. 2d at 1066-67. Moreover, Lizarbe and Baldeon obviously considered the issue, as they went to the trouble to argue that Rivera Rondon has “waived” it, yet they neglected to address the merits. In addition, in Rivera Rondon’s brief on the merits in this Court—which was filed more than a year ago on June 15, 2009—he pointed out that FSIA immunity is concurrent with pre-statute common law immunity. (*See App. Br.* 12-14, 40, 43.) Thus, Lizarbe and Baldeon cannot claim any unfair surprise as to this issue. The fact that they failed to address the merits of

this issue in their supplemental brief was not due to lack of notice, but was a matter of strategy.

Furthermore, Lizarbe and Baldeon would suffer no unfair prejudice because this is purely an issue of law that requires no fact-finding. It is well-established that Circuit Courts of Appeal are inclined to consider an issue that was not presented to the District Court “where the issue is purely legal and there is no need for additional factfinding.” *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000). *Accord Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008). This issue presents the Court with a pure question of law, and requires no fact-finding by the District Court. As noted above, the basic issues for consideration of common law official immunity are the same as those that would have applied to FSIA immunity—whether the conduct for which Rivera Rondon has been sued was undertaken in his official capacity as an official of a foreign sovereign. Furthermore, because this case arises from the grant of a motion to dismiss, the relevant facts are limited those pleaded in the complaint.

Although the Court in *Samantar* foreclosed the possibility that Rivera Rondon is immune from suit under the FSIA, it expressly stated that “[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law.” *Samantar*, 130 S. Ct. at 2292, 176 L. Ed. 2d at 1066-67. This is such a case. As explained above, Rivera Rondon is immune from

suit under the common law of official immunity. This issue was properly preserved for appeal. In the alternative, even assuming for the sake of argument that Rivera Rondon did not properly preserve the issue, the Court should exercise its discretion to consider it, and reverse the District Court's denial of Rivera Rondon's motion to dismiss.

CONCLUSION

For the foregoing reasons, and for all the reasons cited in Appellant's brief on the merits and reply brief, Appellant Juan Manuel Rivera Rondon respectfully requests that the Court reverse the District Court's denial of Appellant's motion to dismiss, and remand this case to the District Court with instructions to dismiss the complaint with prejudice.

REQUEST FOR ORAL ARGUMENT

Appellant Juan Manuel Rivera Rondon respectfully requests oral argument because he believes that oral argument will assist this Court in deciding important questions regarding the issues addressed in the briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief for Appellant Juan Manuel Rivera Rondon with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to all parties.

I also certify that eight copies of the foregoing brief were filed with the Court via first-class mail, postage prepaid, to:

Office of the Clerk
United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse
1100 East Main Street
Richmond, Virginia 23219

This 13th day of August, 2010.

/S/
Joseph M. Creed