Human rights — State immunity — Jurisdictional immunity — Civil proceedings against foreign State for unfair dismissal from employment at embassy — Courts of forum State holding defendant State immune — Whether recognition of immunity involving a violation of right of access to courts — European Convention on Human Rights, 1950, Article 6

State immunity — Jurisdictional immunity — Employment — Proceedings for unfair dismissal from employment at embassy barred by State immunity — Whether contrary to human rights

Diplomatic relations — Locally employed staff — Dismissal — Whether sending State entitled to State immunity in proceedings for unfair dismissal from employment at embassy

Cudak *v.* Lithuania[1]

(Application No 15869/02)

European Court of Human Rights (Grand Chamber). 23 *March* 2010

(Costa, *President*; Rozakis, Bratza, Lorenzen, Tulkens, Casadevall, Cabral Barreto, Bîrsan, Zagrebelsky, Thór Björgvinsson, Popović, Ziemele, Villiger, Malinverni, Sajó, Tsotsoria and Karakaş, *Judges*)

Summary:[2] *The facts*:—The applicant, a national of Lithuania, was employed as a secretary and switchboard operator[3] by the Polish embassy in Vilnius, Lithuania. She brought a civil claim before the Lithuanian courts seeking compensation, but not reinstatement, for unfair dismissal following her complaint of sexual harassment. The Minister for Foreign Affairs of the Republic of Poland ("the Minister") claimed immunity from jurisdiction.

On 25 June 2001, the Lithuanian Supreme Court upheld the decision of the lower courts to dismiss the case for lack of jurisdiction. Deciding the case in light of the general principles of international law, in particular the European Convention on State Immunity, 1972 ("the ECSI"),[4] the

[1] The names of the parties' representatives appear at para. 8 of the judgment.
[2] Prepared by Ms Karen Lee, Co-Editor.
[3] Article 1 of the contract of employment provided that the applicant's responsibilities and tasks were limited by the scope of her secretarial and switchboard duties. If the applicant agreed, she could be assigned other tasks, in which case a new contract was to be signed. For further details of the contract, and for a list of the applicant's duties, see paras. 11-12 of the judgment.
[4] For the relevant provisions of the ECSI (also known as the Basle Convention), see paras. 25-6 of the judgment. Neither Lithuania nor Poland was a party to the ECSI.

Supreme Court applied the doctrine of restrictive State immunity, which granted immunity only for acts of sovereign authority (*acta jure imperii*). It found that the applicant had exercised a public service function during her employment and that her duties facilitated the exercise by Poland of its sovereign functions with the result that the doctrine of sovereign immunity applied. It also stated its wish to maintain good bilateral relations and respect the principle of sovereign equality between States.[5]

The applicant lodged an application with the European Court of Human Rights ("the Court") against Lithuania. She claimed a violation of her right of access to a court in contravention of Article 6(1) of the European Convention on Human Rights, 1950 ("the Convention").[6] Having raised the preliminary objection that the applicant could have submitted her complaint about the termination of her employment contract to the Polish courts, the Lithuanian Government submitted that the application was incompatible *ratione materiae* with the Convention. It argued that State immunity was applicable since administrative staff contributed to performance of duties relating to sovereign acts, serving the State's public interests. The applicant asserted that her employment contract and claim for unfair dismissal were private in nature. On 27 January 2009, a Chamber relinquished jurisdiction in favour of the Grand Chamber, neither party having objected to this.

Held (unanimously):—Article 6(1) of the Convention was applicable and had been breached.

(1) The submission of the applicant's complaint to the Polish courts could not be regarded as an accessible or effective remedy. The application had been declared admissible on 2 March 2006; even if the Lithuanian Government had not been estopped from raising its objection, Article 35(1) of the Convention did not cover remedies available in Poland. In any event, the employment contract provided for disputes to be settled in accordance with Lithuanian law. Even if such a remedy were available, it would have encountered practical difficulties incompatible with the right of access to a court which, like other Convention rights, had to be interpreted so as to make it practical and effective. The applicant was Lithuanian, recruited in Lithuania, with Poland having agreed to the contract being governed by Lithuanian law (paras. 35-7).

(2) Article 6(1) of the Convention was applicable to the proceedings before the Lithuanian courts.

(a) A State could exclude its own civil servants from Article 6 protection if it expressly excluded a particular post from access to court in its national law and that exclusion was justified on objective grounds in the State's interest. In this

[5] For further details of the Lithuanian Supreme Court's decision, see paras. 17-18 of the judgment.

[6] Article 6(1) of the Convention provided that: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing . . . by [a] tribunal . . ."

case the applicant, a Lithuanian national, was employed in the Polish embassy on a contract with Poland. In any event, the performance of her particular duties did not give rise to the required objective grounds (paras. 42-4).

(b) Since the applicant's action before the Lithuanian Supreme Court concerned a compensation claim for wrongful dismissal, the dispute concerned a civil right within the meaning of Article 6(1) of the Convention (paras. 45-7).

(3) There had been a violation of Article 6(1) of the Convention.

(a) The right to a fair hearing guaranteed by Article 6 had to be construed in light of the principle of the rule of law; all litigants were entitled to an effective judicial remedy enabling them to assert their civil rights. The right of access was only one aspect of the right to a court. It was not absolute but impliedly subject to limitations. Although Contracting States enjoyed a margin of appreciation, the final decision as to Convention compliance was the responsibility of the Court. Limitations could not restrict access so as to impair the essence of the right. They had to pursue a legitimate aim and the means used to achieve it had to be proportionate (paras. 54-5).

(b) The Convention had to be interpreted in light of the rules in the Vienna Convention on the Law of Treaties, 1969. Pursuant to its Article 31(3)(c), relevant international law rules applicable between the parties had to be taken into account, which included those relating to State immunity. The Convention could not be interpreted in a vacuum; its special human rights character had to be borne in mind (para. 56).

(c) Some restrictions on access to a court were inherent and could not in principle impose a disproportionate restriction on the right of access, such as those generally accepted by the community of nations as part of the doctrine of State immunity (para. 57).

(d) It was particularly important that the right of access to a court was practical and effective given the prominent place of the right to a fair trial in a democratic society. It was not consistent with the rule of law, or with the principle underlying Article 6(1), if a State could remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons without constraint or control by the Convention enforcement bodies (paras. 58-9).

(e) State immunity was developed in international law out of the principle *par in parem non habet imperium*, by which one State could not be subject to another's jurisdiction. Although the grant of immunity to a State in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty, in the present case the restriction on the applicant's right of access was not proportionate to the aim pursued (paras. 60-2 and 74).

(f) There was a trend in international law towards limiting State immunity in respect of employment-related disputes, with the exception of those concerning the recruitment of staff in embassies (para. 63).

(g) The application of absolute State immunity had been eroded for many years. The Convention on Jurisdictional Immunities of States and their Property, which was based on the 1991 Draft Articles of the International Law Commission ("ILC"), was adopted by the United Nations General Assembly in 2004 ("the UN Convention"); Article 11 dealt with contracts of employment.[7] A State's employment contracts with the staff of its diplomatic missions abroad were in principle excepted from the immunity rule subject to exceptions. Immunity still applied to diplomatic and consular staff where (i) the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual; (ii) the employee was a national of the employer State; or (iii) the employer State and employee had otherwise agreed in writing. These rules appeared consistent with State legislative and treaty practice (paras. 64-6).

(h) Even if a State had not ratified a treaty, it could be bound by a provision if it reflected customary international law, either by codifying it or by the formation of a new customary rule. No State had objected to Draft Article 11. Lithuania, while not ratifying the UN Convention, had not voted against its adoption. Article 11 of the Draft Articles, on which the UN Convention was based, thus applied to Lithuania under customary international law. Lithuanian domestic law had also confirmed that State immunity only applied to legal relations governed by public law. No Article 11 exception applied to the applicant. Her switchboard operating duties were not related to the sovereign interests of the Polish Government and she had not been found to have performed any functions related to the exercise of Polish sovereignty. She was not a diplomatic agent or employer State national. The subject matter of the dispute was linked to her dismissal. Neither had it been shown that her duties were important for Poland's security interests pursuant to Article 11(2)(d) of the UN Convention (paras. 66-73).

(i) The Lithuanian courts, by upholding the objection based on State immunity and declining jurisdiction to hear the applicant's claim, had thus failed to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and impaired the very essence of the applicant's right of access to court (paras. 74-5).

(4) Where an individual had been the victim of proceedings that had breached Article 6 of the Convention, a retrial or reopening of the case represented in principle an appropriate way of redressing the violation. An award of just satisfaction could only be based on the absence of benefit from Article 6 guarantees. Since the applicant might have been deprived of a real opportunity, Lithuania was to pay the applicant EUR 10,000 within three months in respect of pecuniary and non-pecuniary damage (plus tax and interest where applicable) pursuant to Article 41 of the Convention. The finding of a violation of the Convention did not suffice. The remainder of the applicant's claim for just satisfaction was dismissed (paras. 76-84).

[7] For the text of Article 11 of the UN Convention, see para. 30 of the judgment.

Concurring Opinion of Judge Cabral Barreto joined by Judge Popović: While agreeing with the majority on all of the operative provisions, the reasoning in paragraphs 66 and 67 was ambiguous. A State could not be bound by a treaty that it had not ratified. It was customary international law that was binding, whether codified or not (paras. 1-5).

Concurring Opinion of Judge Malinverni joined by Judges Casadevall, Cabral Barreto, Zagrebelsky and Popović: (1) The principle of addressing the violation by a retrial or reopening of proceedings was not reflected in the operative part of the judgment. Wherever possible the Court should seek to restore the *status quo ante*. The best way to redress a violation of Article 6 of the Convention was to reopen proceedings if possible and so wished. Since only the operative provisions were binding under Article 46(1) of the Convention, it was important that such measures were restated in the operative part of the judgment. While the Committee of Ministers was responsible for overseeing the execution of judgments, the Court could facilitate this (paras. 1-5).

(2) An award of compensation was not always an appropriate way to redress the damage caused to the victim. While claiming compensation, the applicant was primarily seeking a court decision that her dismissal had been unlawful. The reopening of proceedings would have enabled the applicant to obtain full satisfaction; Lithuanian law provided for this (paras. 6-8).

The following is the text of the judgment of the Grand Chamber:

PROCEDURE

1. The case originated in an application (No 15869/02) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms Alicija Cudak ("the applicant"), on 4 December 2001.

2. The applicant, who had been granted legal aid, was represented by Mr K. Uczkiewicz, a lawyer practising in Wroclaw. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant alleged that there had been a violation of her right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 2 March 2006 it was declared admissible by a Chamber of that Section, composed of Boštjan

M. Zupančič, John Hedigan, Lucius Caflisch, Corneliu Bîrsan, Alvina Gyulumyan, Renate Jaeger and Egbert Myjer, judges, and Vincent Berger, Section Registrar. On 27 January 2009 a Chamber of the Second Section, composed of Françoise Tulkens, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Dragoljub Popović, András Sajó, Işıl Karakaş and Ineta Ziemele, judges, and Sally Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

6. Following the departure of Mr John Hedigan, an elected judge appointed by the Government to sit in respect of Lithuania in the present case, the Government appointed Ms Ineta Ziemele to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

7. The applicant and the Government each filed observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 July 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms E. Baltutytė, Government Agent, *Agent*,
Ms K. Bubnytė-Monvydienė, Head of the Division of the Representation at the European Court of Human Rights, *Counsel*;

(b) *for the applicant*

Mr K. Uczkiewicz, lawyer, *Counsel*,
Ms B. Slupska-Uczkiewicz, lawyer, *Adviser.*

The Court heard addresses by Mr Uczkiewicz and Ms Baltutytė.

THE FACTS

I. The circumstances of the case

9. The applicant was born in 1961 and lives in Vilnius.

10. On 1 November 1997 the applicant was recruited by the embassy of the Republic of Poland in Vilnius ("the embassy" or "the Polish embassy"), to the post of secretary and switchboard operator (*korespondentė-telefonistė*).

11. The contract of employment provided in Article 1 that the applicant's responsibilities and tasks were limited by the scope of her (secretarial and switchboard-related) duties. If the applicant agreed, she could be assigned other tasks not covered by this agreement. In such circumstances, a new contract would have to be signed. According to Article 6 of the contract, the applicant had to comply with Lithuanian laws, was liable for any damage she might cause to her employer and could be subjected to disciplinary action for failing to fulfil her professional obligations or to observe safety regulations at work. In return for extra work, the applicant could receive remuneration, bonuses, discretionary benefits or compensatory leave. Article 8 provided that any disputes arising under the contract were to be settled in accordance with the laws of Lithuania: the Constitution, the Employment Contracts Act, the Labour Remuneration Act, the Leave Act and the Employees' Social Security Act. Lastly, the contract could be terminated in accordance with sections 26, 27, 29 and 30 of the Employment Contracts Act (enacted on 28 November 1991 with a number of subsequent amendments).

12. The applicant's duties—as set out in a schedule to her employment contract—included the following:

1. Operating the switchboard of the embassy and Consulate-General and recording international telephone conversations.
2. Typing texts in Lithuanian and Polish.
3. Operating the fax machine.
4. Providing information in Polish, Lithuanian and Russian.
5. Helping to organise small receptions and cocktail parties.
6. Photocopying documents.
7. Performing other work at the request of the head of the mission.

13. In 1999 the applicant lodged a complaint before the Equal Opportunities Ombudsman, alleging sexual harassment by one of her male colleagues, a member of the diplomatic staff of the embassy. Following an inquiry, the Ombudsman reported that the applicant was indeed a victim of sexual harassment. The applicant alleged that she had fallen ill because of the tension she was experiencing at work.

14. The applicant was on sick leave from 1 September to 29 October 1999. On 29 October 1999 she went to work but was not authorised to enter the embassy building. On 22 November 1999 the applicant was again refused entry when she arrived for work. The same thing occurred again on 23 November 1999.

15. On 26 November 1999 the applicant wrote a letter to the ambassador, informing her about the incidents. On 2 December

1999 the applicant was notified that she had been dismissed on the ground of her failure to come to work from 22 to 29 November 1999.

16. The applicant brought a civil claim, requesting compensation for unlawful dismissal. She did not claim reinstatement. The Polish Minister for Foreign Affairs issued a *note verbale* claiming immunity from the jurisdiction of the Lithuanian courts. On 2 August 2000 the Vilnius Regional Court discontinued the proceedings for lack of jurisdiction. On 14 September 2000 the Court of Appeal upheld the decision. The final decision was taken by the Supreme Court on 25 June 2001.

17. The Supreme Court established, *inter alia*, that the 1993 agreement on legal assistance between Lithuania and Poland had not resolved the question of State immunity, that Lithuania had no laws on the question, and that the domestic case-law in this area was only just being developed. The Supreme Court therefore considered it appropriate to decide the case in the light of the general principles of international law, in particular the 1972 European Convention on State Immunity.

18. The Supreme Court observed that Article 479 of the Lithuanian Code of Civil Procedure, as then in force, established the principle of absolute State immunity, but that that provision had become inapplicable in practice. It noted that the prevailing international practice was to adopt a restrictive interpretation of State immunity, granting such immunity only for acts of sovereign authority (*acta jure imperii*), as opposed to acts of a commercial or private-law nature (*acta jure gestionis*). The Supreme Court further held, in particular, as follows:

> . . . in the Supreme Court's view, it is possible to apply the principle of restrictive immunity to the Republic of Poland. Having regard to the fact that Lithuania recognises that foreign nationals may bring actions in respect of private-law disputes, it must be accepted that, in order to defend their rights, individuals or entities from the Republic of Lithuania are entitled to take proceedings against foreign States.
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> It is thus necessary to establish in the present case whether the relationship between the claimant and the Republic of Poland was one of a public-law nature (*acta jure imperii*) or a private-law nature (*acta jure gestionis*). Besides that, other criteria are applicable and should allow [the court] to determine whether the State concerned enjoys immunity . . . in employment disputes. These criteria include, in particular, the nature of the workplace, the status of the employee, the territorial connection between the country of employment and the country of the court, and the nature of the claim.
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> Regard being had to the plea of immunity by the Ministry of Foreign Affairs of the Republic of Poland . . . it is possible to conclude that there was a public-service relationship governed by public law (*acta jure imperii*) between

the claimant and the embassy of the Republic of Poland, and that the Republic of Poland may lay claim to immunity from the jurisdiction of foreign courts. This conclusion is supported by other criteria. With regard to the nature of the workplace, it should be noted that the main function of the embassy . . . is directly related to the exercise of sovereignty of the Republic of Poland. With respect to the status of [the] employee . . . while the parties had entered into a contract of employment, the very fact that the employee was a switchboard operator implies that the parties developed a relationship akin to that which characterises a public-service function . . . The court was unable to obtain any information allowing it to establish the scope of the claimant's actual duties. Thus, merely from the title of her position, it can be concluded that the duties entrusted to her facilitated, to a certain degree, the exercise by the Republic of Poland of its sovereign functions . . . It must also be established whether the country of employment is the country of the court, since a court in the country of employment is best placed to resolve a dispute that has arisen in that country. In this respect, it is to be recognised that the exercise of the sovereign powers of the forum State is severely restricted with regard to an embassy, even though it is not a foreign territory as such (section 11(2) of the Status of Diplomatic Missions of Foreign States Act). As to the nature of the claim . . . it should be noted that a claim for recognition of unlawful dismissal and for compensation cannot be regarded as violating the sovereignty of [another] State, since such a claim pertains solely to the economic aspect of the impugned legal relationship[;] there is no claim for reinstatement . . . However, by reason of this criterion alone, it cannot be unconditionally asserted that the Republic of Poland cannot invoke State immunity in this case . . . [The claimant] has submitted no [other] evidence to confirm the inability for the Republic of Poland to enjoy State immunity (Article 58 of the Code of Civil Procedure).

Against the background of the above criteria, [in view of] the aspiration of Lithuania and Poland to maintain good bilateral relations . . . and respect the principle of sovereign equality between States . . ., the chamber concludes that the courts [below] properly decided that they had no jurisdiction to entertain this case.

. . .

The Supreme Court notes that both the Regional Court of Vilnius and the Court of Appeal based the decision to apply jurisdictional immunity to the Republic of Poland merely on the fact that the latter had refused to appear in the proceedings. Those courts did not examine the question of the application of restrictive jurisdictional immunity in the light of the criteria developed by the Supreme Court. However, this breach of procedural rules does not constitute, in the Supreme Court's view, a ground for quashing the decisions of the courts below . . .

The application of jurisdictional immunity by the courts of the Republic of Lithuania does not prevent the claimant from taking proceedings before the Polish courts.

II. Relevant domestic law and practice

19. There is no special legislation governing the issue of State immunity in Lithuania. The question is usually resolved by the courts on a case-by-case basis, with reference to the provisions of various bilateral and multilateral treaties.

20. Article 479 § 1 of the 1964 Code of Civil Procedure (applicable at the material time and in force until 1 January 2003) established the rule of absolute State immunity:

> Adjudication of actions against foreign States, and adoption of measures of constraint and execution against the property of a foreign State, shall be allowed only with the consent of the competent institutions of the foreign State.

21. On 5 January 1998 the Supreme Court gave a decision in the case of *Stukonis* v. *United States Embassy*, regarding an action for unlawful dismissal against the United States embassy in Vilnius. Article 479 § 1 of the 1964 Code of Civil Procedure was considered by the court to be inappropriate in the light of the changing reality of international relations and public international law. The Supreme Court noted the trend in international legal opinion to restrict the categories of cases in which a foreign State could invoke immunity from the jurisdiction of forum courts. It held that Lithuanian legal practice should follow the doctrine of restrictive State immunity. It found, *inter alia*, as follows:

> State immunity does not mean immunity from institution of civil proceedings, but immunity from jurisdiction of courts. The Constitution establishes the right to apply to a court (Article 30) . . . However, the ability of a court to defend the rights of a claimant, where the defendant is a foreign State, will depend on whether that foreign State requests the application of the State immunity doctrine . . . In order to determine whether or not the dispute should give rise to immunity . . . it is necessary to determine the nature of the legal relations between the parties . . .

22. On 21 December 2000 the plenary of the Supreme Court adopted a decision regarding "Judicial Practice in the Republic of Lithuania in Applying Rules of Private International Law" (*Teismų Praktika* 2001, No 14). It stated that while Article 479 of the Code of Civil Procedure established a norm whereby "foreign States [and] diplomatic and consular representatives and diplomats of foreign States enjoy[ed] immunity from the jurisdiction of Lithuanian courts", that rule guaranteed State immunity only for "legal relations governed by public law". The Supreme Court pointed out that when deciding