ECtHR 25 October 2016, application nos. 45197/13, 53000/13 and 73404/13, Diplomatic immunity in labour relations

Radunović and Others – v – Montenegro, Montenegronian case

Summary

In cases where the application of the rule of State immunity from jurisdiction restricts the exercise of right of access to a court, Article 11 of the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that Convention, provided it has not actively opposed it. In the case at hand, the applicants did not fall within any of the exceptions provided in Article 11 and therefore there was no State immunity from the domestic proceedings.

Facts

The applicants, Irena Radunović, Veselin Nenezić, and Ivan Gajević are nationals of Montenegro, born in 1982, 1967 and 1978 respectively and living in Podgorica, Montenegro. The case concerned their dismissal from positions at the US embassy, and the courts' refusal to examine their ensuing claims because of sovereign immunity.

Irena Radunović worked as a protocol specialist/translator while Veselin Nenezić, and Ivan Gajević worked as security guards. All the applicants were local staff. Between February 2009 and June 2012, the applicants were informed by the Embassy that they were dismissed.

National proceedings

Between November 2010 and July 2012, the three applicants brought separate civil proceedings against the US Embassy, seeking compensation. Ms Radunović sought non-pecuniary damages, while Mr Nenezić and Mr Gajević sought compensation for loss of earnings. Ms Radunović and Mr Nenezić also sought reinstatement.

Between September 2011 and September 2012, the Court of First Instance in Podgorica declined jurisdiction over all of the applicants' claims (including during a re-trial of Ms Radunović's claim), holding that the respondent in each case was a state and that the State had sovereign immunity from suit. The court held that this outcome was not inconsistent with Article 6 (right to a fair trial) of the European Convention and was supported by the Vienna Convention on Diplomatic Relations (VCDR). Each of the applicants appealed.

Between November 2011 and December 2012, the High Court dismissed the applicants' appeals. It upheld the sovereign immunity defence, noting that the courts' jurisdiction was not established in law or in any international agreement. Further appeals were dismissed by the Supreme Court. Between January and July 2013, the applicants lodged separate constitutional appeals, but on 18 November 2015 the Constitutional Court dismissed those of Ms Radunović and Mr Gajević, holding, in particular, that the sovereign immunity defence was not inconsistent with their rights under Article 6 of the Convention. Mr Nenezić's appeal is still pending.

Relying in particular on Article 6§1 (access to court), Ms Radunović, Mr Nenezić and Mr Gajević complained about the domestic courts' refusal to examine their civil claims on the merits.

ECtHR's findings

The Court reiterates that the right to access to the courts is not absolute, but may be subject to limitations. However, a limitation will not be compatible with Article 6§1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In cases where the application of the rule of State immunity from jurisdictions restricts the exercise of the right of access to a court, the court must ascertain

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whether the circumstances of the case justify the restriction.

The Court first observed that in the *Cudak* and *Sabeh El Leil* cases, both of which concerned the dismissal of members of local staff of embassies, it had found that the restrictions on the right of access to the courts was in pursuit of a legitimate aim.[1] The Court did not find any reason to reach a different conclusion in the present case.

The question then became, the restriction on the applicant's right of access to the courts was proportionate to the aim pursued. Article 11 of the International Law Commission's 1991 Draft Articles, now enshrined in the 2004 Convention, applies under customary international law, even if the state in question has not ratified that Convention, provided it has not opposed it either. For its part, Montenegro has not ratified it and the State Union of Serbia and Montenegro (effective at the time) did not oppose it. Therefore, the provisions of the 2004 Convention applied, under customary international law, and the Court needed to take this into consideration in examining whether the right of access to a court, within the meaning of Article 6§1, had been respected.

Article 11 of the 2004 Convention adopts the rule that a state has no jurisdictional immunity in respect of employment contracts, except in the situations it sets out (which are exhaustive). The exceptions, listed in paragraph 2, read as follows:

a. the employee has been recruited to perform particular functions in the exercise of governmental authority;
b. the employee is:
   i. a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
   ii. a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;
   iii. a member of the diplomatic staff of a permanent mission to an international organisation or of a special mission, or is recruited to represent a State at an international conference; or
   iv. any other person enjoying diplomatic immunity;
c. the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
d. the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;
e. the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or
f. the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Paragraphs (a), (b) and (e) are irrelevant in the present case, as the applicants were not employed to perform any particular duties in the exercise of governmental authority, neither were they diplomatic or consular agents of the US, or nationals of that state. As to paragraph (c), reinstatement, as requested by two of the applicants, falls within an exception that allows for an application of the rule of immunity. However, this does not prevent an employee from bringing action against the employer State in the State of the forum (it is without prejudice to the possible recourse which may still be available in the State of the forum for compensation or damages for 'wrongful dismissal' or for breaches of obligation to recruit or to renew employment) to seek redress for harm caused by unfair dismissal. Therefore, the applicant's claims concerning compensation did not fall under the exception provided in paragraph 2(c).

Paragraph (d) does not apply in the present case, since neither the domestic courts nor the Government had shown how the applicant's duties could objectively have been linked to US security interests. Finally, the Court considered that paragraph (f) did not apply either, given that the applicants' employment contracts did not specify which court would have had jurisdiction in respect of employment-related disputes.

In conclusion, the Court considered that the applicant's claims relating to compensation did not fall within any of the exceptions provided in Article 11 paragraph 2 of the 2004 Convention and therefore, pursuant to paragraph 1 of the Convention, State immunity could not be relied in domestic proceedings. As such, there had been a violation of Article 6§1.

The Court awarded € 19,000 to Mr Nenezić and € 22,000 to Mr Gajević for both pecuniary and non-pecuniary damage; € 3,600 to Ms Radunović for non-pecuniary damage; € 6,051 to Ms Radunović and € 3,572.50 to each of Mr Nenezić and Mr Gajević to cover costs and expenses.

1. *Cudak – v – Lithuania* [GC], no. 15869/02, ECHR 2010 and *Sabeh El Leil – v – France* [GC], no. 34869/05, 29 June 2011.

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