

## EMPLOYMENT LAW

# YOU CAN'T TOUCH THIS: PRINCIPLE OF RESTRICTIVE DOCTRINE OF SOVEREIGN IMMUNITY IN AN EMPLOYMENT DISPUTE

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### Introduction

In *The United States of America v Subramaniam a/l Letchimanan*, the Malaysian Federal Court discussed the doctrine of sovereign immunity and whether the forum to decide the applicability of the doctrine in the context of an employee's claim should be reviewed at the Industrial Court or by way of judicial review proceedings against the Minister of Human Resources' reference, in the High Court.

### Background Facts

The Appellant, The United States of America ("USA"), is a sovereign state which has established a diplomatic mission, the Embassy of the USA in Kuala Lumpur ("Embassy"). The first Respondent was the Minister of Human Resources. The second Respondent, Subramaniam, a Malaysian, was a security guard employed by the Appellant at the Embassy.

Subramaniam was dismissed from service by the Appellant through a phone call with no reasons given. He had served more than 10 years and felt aggrieved that he was terminated without any notice nor reasons. He filed a representation pursuant to Section 20(1) of the Industrial Relations Act 1967 ("IRA") claiming that he was dismissed without just cause and excuse. He also sought to be reinstated to his position as a security guard at the Embassy.

At the material time, Subramaniam's access to the Industrial Court was by way of a reference made by the Minister of HR under Section 20(3) of the IRA (pre-2020 Amendment).

The Minister's reference to the Industrial Court conferred threshold jurisdiction upon the Industrial Court to adjudicate a Section 20 claim.<sup>1</sup> The Minister referred Subramaniam's case to the Industrial Court as the Minister was satisfied that Subramaniam's case had:

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<sup>1</sup> A claim under Section 20 of Industrial Relations Act 1967 is a claim made by an employee who considers that they are dismissed without just cause or excuse, to the Director General for the employee to be reinstated.

- a) raised serious questions of facts and law that require adjudication;
- b) established that the issue regarding claim of immunity by the Embassy, was an issue of law that should be decided by the Industrial Court; and
- c) that Subramaniam's representation was not frivolous and vexatious.

### The USA's Judicial Review Application at the High Court

The Appellant (the USA Embassy) filed an application for judicial review in respect of the Minister's reference. The High Court found in favour of the Appellant, on the grounds that:

- a) Subramaniam's duty as a security guard was integral to the sovereign activity of the Appellant and the Embassy;
- b) The Appellant was exercising its sovereign authority in dismissing Subramaniam.

The High Court held that the **Industrial Court had no jurisdiction** to hear Subramaniam's claim and was of the view that the **Appellant was immune from the jurisdiction of the Industrial Court**. Further, the Minister's reference of Subramaniam's representation to the Industrial Court was an error of law because the representation was frivolous and vexatious.

The Minister of Human Resources and Subramaniam appealed.

### The Court of Appeal Decision

The Court of Appeal allowed the Minister and Subramaniam's appeal on the grounds that:

- a) The nature of Subramaniam's work and his dismissal was a question of fact whether the Industrial Court was the proper forum to decide on such an issue;
- b) The applicability of the doctrine of sovereign immunity can only be determined after fact finding by the court i.e. the Industrial Court;
- c) The Industrial Court, seized with threshold jurisdiction, was empowered to determine whether it had jurisdiction to entertain Subramaniam's claim;
- d) The Minister did not have the power to decide the nature of Subramaniam's job and his dismissal. It could only be determined after due inquiry by the Industrial Court.

The USA Embassy appealed to the Federal Court.

## The Federal Court Decision

The Federal Court had to decide the question on whether the Court of Appeal had erred when it set aside the High Court's decision and ordered that the Industrial Court should decide whether the Appellant and the Embassy were immune from the jurisdiction of the Industrial Court.

The Federal Court held that:

- a) The Minister of Human Resources has a wide and unfettered discretion under Section 20(3) of the IRA to refer representation to the Industrial Court, provided that he has acted *bona fide* and has not taken into account extraneous or irrelevant matters. The Industrial Court is the proper forum to adjudge representations with serious questions of fact or law;
- b) Not all acts of the sovereign foreign state are immune from legal action and jurisdiction. Only primary governmental function or activities which are diplomatic in nature and character are granted immunity. This can only be decided after the Industrial Court have ascertained all relevant facts and whether the action of sovereign foreign state is within or outside that activity.
- c) The applicability of the doctrine of sovereign immunity depends on the findings of facts of the "**precise nature, duties as well as job scope of Subramaniam**". The proper forum to inquire and decide on the issue of nature of job and dismissal should be the Industrial Court, after **complete consideration of both oral and documentary evidence by the Industrial Court**; and
- d) The Federal Court was of the view that precedent cases in other jurisdictions involving Employment Tribunals, showed that the Industrial Court has the duty of fact-finding to determine the applicability of the restrictive doctrine of sovereign immunity and whether the Industrial Court has the jurisdiction over sovereign foreign state.

Thus, the Federal Court found that it is consistent with other jurisdictions that the appropriate and only forum to determine whether the Appellant and its Embassy were immune from the jurisdiction is the Industrial Court.

## Key Takeaways

The Federal Court decision in this case found that the Industrial Court is the proper forum to decide the issue of immunity and unfair dismissal.<sup>2</sup> Through this decision, the Industrial Court can determine whether the doctrine of sovereign immunity applies in private transaction disputes (i.e. employment disputes) involving sovereign States. The Federal Court in its judgement held that the reference by the Minister under section 20(3) of the IRA 1967 does not determine the question of immunity one way or another; it merely **confers a threshold jurisdiction upon the Industrial Court** to look into the representation and the serious issues it involves. The appropriate and only forum to determine the issue of immunity is the Industrial Court as a matter of first instance upon a reference by the Minister.

<sup>2</sup> Para 45 of the Federal Court case of United States of America v Subramaniam a/l Letchimanan

It is pertinent to note that pursuant to the 2020 amendment of the IRA, the Director General of Industrial Relations ("DGIR") can now directly refer representations of unfair dismissals filed by employees to the Industrial Court for an award without having to notify the Minister. This means the situation in Subramaniam's case will not arise again as the DGIR will refer every case that is not settled amicably at the Industrial Relations Department, to the Industrial Court for adjudication.

However, the issue of whether the Industrial Court has extra territorial jurisdiction to decide on an unfair dismissal claim involving sovereign States or foreign entities remains an arguable issue.

In the case of **Davinder Kaur v Mauritius High Commission (Award No. 100 of 2021)**, the Industrial Court dismissed the Claimant's claim as it had **no jurisdiction to hear the unfair dismissal claim** when it involved an employee who was employed by a foreign state. The Industrial Court in the **Mauritius High Commission** case was also of the opinion that denying sovereign immunity could affect the diplomatic relations between the states and it may be an act that violates international law. The Federal Court decision in **USA v Subramaniam** would now be the case to refer to when it comes to the Industrial Court's role in cases involving sovereign states. The Industrial Court has a duty to undertake an inquiry of the facts, including the nature, duties, and job scope of the employee in arriving at its decision on whether the doctrine of sovereign immunity applies to a foreign state.

The Federal Court decision has clarified what the Industrial Court must do in cases of private dispute involving foreign employers or sovereign states. The Industrial Court has the threshold jurisdiction to hear and decide representations referred to it and whether the doctrine of sovereign immunity applies to exclude the sovereign state from its jurisdiction.

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