



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF FOGARTY v. THE UNITED KINGDOM

(Application no. 37112/97)

JUDGMENT

STRASBOURG

21 November 2001

This judgment may be subject to editorial revision.

In the case of Fogarty v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS,
Mr A. KOVLER,

and also of Mr P. MAHONEY, *Registrar*,

Having deliberated in private on 1 March 2000, 15 November 2000, 4 July 2001 and 10 October 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37112/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Irish national, Mary Fogarty (“the applicant”), on 8 July 1997.

2. The applicant alleged, in particular, that she was refused access to a court and discriminated against contrary to Articles 6 § 1 and 14 of the Convention.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 19 October 1999 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The President of the Court decided that in the interests of the proper administration of justice, the case should be assigned to the same Grand Chamber as the cases of *McElhinney v. Ireland and the United Kingdom* (no. 31253/96) and *Al-Adsani v. the United Kingdom* (no. 35763/97) (Rules 24, 43 § 2 and 71).

6. By a decision of 1 March 2000, following a hearing on admissibility and merits (Rule 54 § 4), the Grand Chamber declared the application admissible.

7. The applicant and the Government each filed written observations on the merits. On 13 September 2000 the Grand Chamber decided, exceptionally, to grant the Government's request for a further hearing on the merits.

8. On 3 November 2000 the Irish Government indicated that they did not wish to exercise their right to intervene (Article 36 § 1 of the Convention and Rule 61 § 2).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 November 2000 (Rule 59 § 2), jointly with the case of *Al-Adsani v. the United Kingdom* (no. 35763/97).

There appeared before the Court:

(a) *for the Government*

Ms J. FOAKES, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr D. LLOYD JONES, QC,	
Mr D. ANDERSON, QC,	<i>Counsel;</i>

(b) *for the applicant*

Mr B. EMMERSON, QC,	<i>Counsel,</i>
Mr J. WELCH, Liberty,	<i>Solicitor.</i>

The Court heard addresses by Mr Lloyd Jones, Mr Anderson and Mr Emmerson.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. On 8 November 1993 the applicant commenced employment as an administrative assistant at the United States Embassy in London, in the Foreign Broadcasting Information Service, which is a subsidiary of the Central Intelligence Agency. She was dismissed from her employment in February 1995. Following her dismissal the applicant issued proceedings against the United States Government in the North London Industrial Tribunal, claiming that her dismissal had been the result of sex discrimination contrary to sections 1(1)(a), 4(1)(d) and 6(2)(b) of the Sex Discrimination Act 1975 (see paragraph 15 below). In particular she alleged that she had been the victim of persistent sexual harassment from her supervisor and that working relationships had broken down in consequence. The United States Government defended the claim and did not, at any stage in these proceedings, claim State immunity. On 13 May 1996 the Tribunal upheld the applicant's complaint. A compensation figure of GBP 12,000 was agreed between the parties.

11. In June 1995, whilst her first claim in the Industrial Tribunal was still pending, the applicant applied for and obtained a fixed term 12 month contract as an administrative assistant within the Foreign Building Operations section of the Embassy. The contract was due to expire in June 1996. In June 1996 and August 1996 (after the finding in her favour by the Industrial Tribunal), the applicant applied for at least two of the following posts at the Embassy of the United States: secretary with the Office of Foreign Litigation of the United States Department of Justice, temporary secretary with the above office and temporary secretary with the International Marketing Centre, which is operated by the United States Foreign Commercial Service. On each occasion her application was unsuccessful.

12. On 15 September 1996 the applicant issued a second application before the Industrial Tribunal. She claimed that the refusal of the Embassy to re-employ her in two of the above posts was a consequence of her previous successful sex discrimination claim, and accordingly constituted victimisation and discrimination within the meaning of sections 4 and 6 of the Sex Discrimination Act 1975.

13. By a letter of 10 January 1997, solicitors acting for the United States notified the Regional Secretary to the Industrial Tribunal that the United States Government intended to claim immunity from the jurisdiction of the Tribunal under sections 1 and 16(1)(a) of the State Immunity Act 1978 (“the 1978 Act”: see paragraph 16 below). The letter enclosed an affidavit sworn by the First Secretary at the Embassy, deposing to the fact that each of the posts for which the applicant had applied were part of the administrative and technical staff of the Embassy, and accordingly fell within the ambit of the immunity imposed by section 16(1)(a) of the 1978 Act.

14. On 6 February 1997 the applicant received the advice of counsel, to the effect that the United States Government were entitled to claim immunity under the 1978 Act, and that once immunity was properly asserted there was no means by which a court or tribunal in the United Kingdom could accept jurisdiction to entertain the application. Accordingly, the applicant was advised that she had no remedy in domestic law.

II. RELEVANT LEGAL MATERIALS

A. Sex discrimination

15. The Sex Discrimination Act 1975 (“the 1975 Act”) creates a statutory cause of action which arises when an employer treats an employee or a potential employee less favourably by reason of her sex (“sex discrimination”), or by reason of the fact that she has taken or intends to take proceedings against any person under the 1975 Act (“victimisation”).

Section 1(1) of the Act defines “sex discrimination” as follows:

“A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if:

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man ...”

Section 4(1) of the Act defines “victimisation” as follows:

“A person (‘the discriminator’) discriminates against another person (‘the person victimised’) in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has:

(a) brought proceedings against the discriminator or any other person under this Act, or ...

(d) alleged that the discriminator or any other person has committed an act which ... would amount to a contravention of this Act or give rise to a claim under the Equal Pay Act 1970 ...”

Section 6 of this Act defines the circumstances in which it is unlawful to discriminate against employees and applicants, on the grounds of sex discrimination or victimisation, as follows:

“(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman:

- (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or ...
- (c) by refusing or deliberately omitting to offer her that employment.”

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her ...

- (b) by dismissing her, or subjecting her to any other detriment.”

B. State immunity

16. The United Kingdom’s State Immunity Act 1978 provides, *inter alia*, as follows:

“1(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

...

4(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

4(2) Subject to sub-sections (3) and (4) below, this section does not apply if-

- (a) at the time when the proceedings are brought the individual is a national of the State concerned; or
- (b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or
- (c) the parties to the contract have otherwise agreed in writing.

4(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, sub-section (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

...

16(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and:-

- (a) Section 4 above does not apply to proceedings concerning the employment of the member of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the member of a consular post within the meaning of the Convention scheduled to said Act of 1968. ...”

17. Article 1 of the Vienna Convention on Diplomatic Relations which is scheduled to the Diplomatic Privileges Act 1964 provides the following definitions:

“(b) the ‘members of the mission’ are the head of the mission and the members of staff of the mission;

(c) the ‘members of staff of the mission’ are the members of diplomatic staff or the administrative and technical staff, and of the service staff of the mission. ...

(f) the ‘members of the administrative and technical staff’ are the members of the staff of the mission employed in the administrative and technical service of the mission.”

18. The 1972 European Convention on State Immunity (“the Basle Convention”), entered into force on 11 June 1976 after its ratification by three States. It has now been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and signed by one other State (Portugal). It entered into force in respect of the United Kingdom on 4 October 1979, and provides, *inter alia*:

Article 5

“1. A Contracting State cannot claim immunity from the jurisdiction of a Court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed in the territory of the State of the forum.

2. Paragraph 1 shall not apply where:

(a) the individual is a national of the employing State at the time when the proceedings were brought;

(b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually a resident in that State; or

(c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the Courts of that State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2(a) and (b) of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.”

Article 32

“Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.”

19. The International Law Commission’s Draft Articles on Jurisdictional Immunities of States and Their Property, submitted to the General Assembly of the United Nations ((1991), II(2) YBILC 13), provides at Article 11, paragraph 1, that:

“a State cannot invoke immunity ... in a proceeding which relates to a contract of employment between the State and an individual for work performed in the territory of [the host] State.”

However, this provision is specifically disappplied where “the subject of the proceedings is the recruitment, renewal of employment or reinstatement of the individual” and where “the employee has been recruited to perform functions closely related to the exercise of governmental authority”.

Although there is no explicit reference to employment at diplomatic or consular missions in these provisions, the commentary indicates that the latter exception was intended to apply in such a context and that all employees at such missions would be precluded from bringing suit on the basis of State immunity.

20. The Committee on State Immunity of the International Law Association adopted in 1982 its Draft Convention on State Immunity, Article IIIC of which dealt with contracts of employment and was similar in its terms to Article 5 of the Basle Convention. An amendment was added to Article IIIC at the ILA’s 1994 conference, providing for immunity to be granted where “the employee was appointed under the public (administrative) law of the foreign state such as, *inter alia*, members of the mission, diplomatic, consular or military staff”. In the explanatory commentary on the amendment the Committee stated that it wished “to make clear that the employment relationship of any and all diplomatic and consular staff and other members of the mission should be immune from the jurisdiction of the courts of the forum state”.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. The applicant complained that, as a result of the doctrine of State immunity, she had been denied access to court, contrary to Article 6 § 1 of the Convention, which provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

A. Applicability of Article 6 § 1 of the Convention

1. *The submissions of the parties*

22. The Government contended that Article 6 § 1 of the Convention did not apply, because the applicant had no actionable domestic claim. The principle of sovereign immunity removed the dispute from the competence of the national courts, which could not assert jurisdiction over the internal affairs of foreign diplomatic missions. Secondly, with reference to *Pellegrin v. France*, [GC], no. 28541, §§ 64-67, ECHR 1999, they submitted that there was no “civil” right involved, because questions of employment of members of diplomatic missions fall within the core of sovereign power and thus form part of public law.

23. The applicant argued that there was a “right” under domestic law to be free from sex discrimination, as evidenced by her first successful claim against the Embassy. Sovereign immunity did not extinguish the right but simply prevented the courts from examining disputes thereon. Moreover, the right was “civil”. The posts for which she had applied did not fall within the scope of the Pellegrin exception. They were of a strictly administrative or secretarial character and they would neither have required nor enabled her to wield a portion of the State’s sovereign power.

2. *The Court’s assessment*

24. The Court recalls its constant case-law to the effect that Article 6 § 1 does not itself guarantee any particular content for “civil rights and obligations” in the substantive law of the Contracting States. It extends only to *contestations* (disputes) over “civil rights and obligations” which can be said, at least on arguable grounds, to be recognised under domestic law (see *Z. and Others v. the United Kingdom*, [GC], no. 29392/95, § 87, ECHR 2001, and the authorities cited therein).

25. Whether a person has an actionable domestic claim may depend not only on the content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims must be capable of being submitted to a judge for adjudication - if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole

range of civil claims or confer immunities from civil liability on large groups or categories of persons (see the *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, § 65).

26. Section 6 of the Sex Discrimination Act 1975 (“the 1975 Act”: see paragraph 15 above) creates a statutory right which arises, *inter alia*, when an employer refuses to employ a woman on grounds of sex discrimination or by reason of the fact that she has already taken proceedings under the 1975 Act. Thus, the proceedings which the applicant intended to pursue were for damages for a cause of action well known to English law. The Court does not accept the Government’s plea that because of the operation of State immunity she did not have a substantive right under domestic law. It notes that an action against a State is not barred *in limine*: if the defendant State does not choose to claim immunity, the action will proceed to a hearing and judgment, as occurred with the first discrimination action brought by the applicant (see paragraph 10 above).

The Court is, therefore, satisfied that the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar, preventing the applicant from bringing her claim before the Industrial Tribunal (see, *mutatis mutandis*, *Tinnelly and Sons Ltd and McElduff v. the United Kingdom*, nos. 20390/92 and 21322/93, § 62, ECHR 1998-IV).

27. The Government have also submitted that because the applicant’s claim related to recruitment to the United States’ Embassy, it did not concern a “civil right”.

28. The Court recalls that in the above mentioned *Pellegrin judgment*, it adopted a functional test for the purposes of determining the applicability of Article 6 § 1 to employment disputes involving public servants, based on the nature of the employee’s duties and responsibilities. An employment dispute is excluded from the scope of Article 6 § 1 if it concerns a public servant whose duties typify the specific activities of the public service in so far as he or she acts as the depository of public authority responsible for protecting the general interests of the State. The question therefore arises whether or not the applicant’s case falls within this category. However, for the reasons set out in the following paragraphs, the Court does not find it necessary to determine this issue, and will proceed on the assumption that Article 6 is applicable.

B. Compliance with Article 6 § 1 of the Convention

1. The submissions of the parties

29. The Government argued that if there was any restriction to the right of access to court, it pursued a legitimate aim, namely promoting respect for the independence and equality of other sovereign States in accordance with public international law.

The restriction was, moreover, proportionate, since section 16(1)(a) of the 1978 Act was a justifiable reflection of the principles of public international law that were its source. In this connection, the Government referred to an article by Richard Garnett (“State Immunity in Employment Matters” in *International and Comparative Law Quarterly*, [vol. 46, January 1997], pp. 81 - 124) in which the author noted a variety of approaches by States with regard to according immunity to other States in employment matters. He concluded that the variety of approaches suggested that States had difficulty in agreeing where the line should be drawn. On the specific question of the application of State immunity to claims by employees of embassies and consulates, he noted a division between States which based their policy on the context or place of employment (including the United Kingdom and Germany), and those which advocated a relaxation of the strict exclusion of local jurisdiction in the case of employment at a diplomatic mission (including the United States and most European civil law countries).

30. For the Government, selection of embassy staff was a sovereign act *jure imperii*. Even the service staff of an embassy might be involved in sovereign activities and have access to confidential information. Any adjudication upon the fairness of the dismissal of an embassy employee or a decision whether or not to employ her would involve an investigation into the internal organisation of the embassy which would be an interference with the sovereign functions of the State. Given the difficulty in distinguishing between acts *jure imperii* and acts *jure gestionis*, it was appropriate to allow States a considerable margin of appreciation and the United Kingdom legislation fell within that margin. Article 5 of the Basle Convention, read in the light of its Article 32 (see paragraph 18 above), showed that the drafters of that Convention wanted to exclude from its scope matters in the exercise of the functions of diplomatic missions, including recruitment for employment in embassies. The practice of other Contracting States did not support the applicant’s claims and the practice of the United Kingdom *vis-à-vis* its own embassy personnel was irrelevant.

31. The applicant accepted that section 16(1)(a) of the 1978 Act pursued a legitimate aim. However, she considered that it introduced a disproportionate limitation to the right of access to court for four reasons.

First, she contended that since her claim concerned sex discrimination, freedom from which is one of the core values of a democratic society, it was disproportionate to block her access to court in respect of it. Secondly, she pointed out that there was no alternative means available to her that could have provided a remedy for this complaint, since the United States was clearly not prepared to exercise jurisdiction. Thirdly, in the applicant's submission, the United Kingdom was not obliged under international law to grant immunity in respect of her claim. The tendency towards restricting the scope of State immunity was reflected in Articles 5 and 7 of the Basle Convention (see paragraph 18 above) and the Government's understanding of Article 5 of that Convention was not supported by the general practice of the other members of the Council of Europe or by academic commentators. The appointment of a member of a mission was not covered by Article 32 of the 1972 Convention. In practice, the United Kingdom did not itself claim absolute immunity in respect of disputes between foreign employees and British embassies and the United States did not consider itself obliged under international law to confer an immunity in respect of all embassy employment disputes. It followed that absolute sovereign immunity was not required by considerations of international comity. Moreover, the International Law Commission was of the view that disputes concerning habitual residents of the forum State involving functions not closely connected with sovereign acts of government were not the appropriate subject of a claim to State immunity where the subject matter of the dispute did not involve a court ordering another State to take on an employee. Fourthly, the United States had not claimed immunity in relation to the applicant's first Industrial Tribunal claim. If immunity was not considered necessary in respect of the first claim, it was difficult to see how it could genuinely be necessary to meet the requirements of international co-operation in relation to the second claim.

2. The Court's assessment

32. In the Golder case the Court held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

33. The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, § 59).

34. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

35. The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, the *Loizidou v. Turkey* judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

36. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

37. The Court observes that, on the material before it (see paragraphs 16-20, 29 and 31 above), there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission. Certainly, it cannot be said that the United Kingdom is alone in holding that immunity attaches to suits by employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.

38. The Court further observes that the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, *inter alia*, to the diplomatic and organisational policy of a foreign State. The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions. In this respect, the Court notes that it appears clearly from the materials referred to above (see paragraph 19) that the International Law Commission did not intend to exclude the application of State immunity where the subject of proceedings was recruitment, including recruitment to a diplomatic mission.

39. In these circumstances, the Court considers that, in conferring immunity on the United States in the present case by virtue of the provisions of the 1978 Act, the United Kingdom cannot be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to court.

It follows that there has been no violation of Article 6 § 1 in this case.

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 6 § 1 OF THE CONVENTION

40. The applicant submitted that, since the proceedings she sought to pursue were to enforce an anti-discrimination provision, the restriction of access to court engaged Article 14 in conjunction with Article 6 § 1 of the Convention. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

41. The Government argued that Article 14 did not apply because Article 6 was inapplicable. In the alternative, they reasoned that the applicant was not treated differently from any other person wishing to sue the United States Embassy in respect of employment.

42. The Court recalls that the applicant was prevented from pursuing her claim in the Industrial Tribunal by virtue of sections 1 and 16(1)(a) of the 1978 Act (see paragraph 16 above), which confer an immunity in respect of proceedings concerning employment within the staff, including the administrative and technical staff, of an embassy. This immunity applies in relation to all such employment-related disputes, irrespective of their subject-matter and of the sex, nationality, place of residence or other attributes of the complainant. It cannot therefore be said that the applicant was treated any differently from any other person wishing to bring employment-related proceedings against an embassy, or that the restriction placed on her right to access to court was discriminatory.

43. It follows that there has been no violation of Article 14 in conjunction with Article 6 § 1 of the Convention in this case.

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been no violation of Article 6 § 1 of the Convention;
2. *Holds* unanimously that there has been no violation of Article 14 taken in conjunction with Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 November 2001.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Caflisch, Mr Costa and Mrs Vajić;
- (b) dissenting opinion of Mr Loucaides.

L. W.
P. J. M.

CONCURRING OPINION OF JUDGES CAFLISCH, COSTA AND VAJIĆ

We agree with the general thrust of the judgment, which we base on the following line of reasoning:

The selection of a State's diplomatic and consular staff must be dictated by that State's interests, laws and procedures. It is inconceivable that a State, when appointing those who will represent it abroad – including clerical staff –, would have to submit to the standards set by the laws and procedures of another State, in particular those of their host country. Accordingly, when selecting its foreign service officers, the first State is evidently acting within its public authority, *jure imperii*, and, in so doing, is covered by sovereign immunity.

This view is reflected in the International Law Commission's Draft Articles on the Jurisdictional Immunities of States and their Property, mentioned in § 19 of the judgment, Article 11(1) of which states, authoritatively in our view, that

“a Contracting State cannot claim immunity from the jurisdiction of another Contracting State if the proceedings relate to a contract of employment between the [first] State and an individual where the work has to be performed in the territory of the State of the forum”.

The Article adds, however, with equal authority, that the above exception does **not** apply in situations where “the subject of the proceeding is the recruitment, renewal of employment or reinstatement of the individual” and where the person to be recruited will “perform functions closely related to the exercise of governmental authority”. This exception, according to the Commission's commentary on Article 11 of its Draft, applies to each and every person to be employed by diplomatic missions or consular posts (Yearbook of the International Law Commission 1991, Vol. II/Part 2, 42-43). In other words, while immunity is complete when it comes to **selecting** diplomatic and consular personnel, this may no longer be the case, in certain situations, **once the individual concerned has been hired**.

The immunity just described must apply in the present case: (i) because the present case pertains to the recruitment of diplomatic or consular staff rather than to the application of a contract of employment; (ii) because it does not prevent the application of any provision of the Convention having the value of *jus cogens*; (iii) because, for that reason, the immunity rule will stand, unless (iv) it can be shown that the resulting restriction of the right of access to court is disproportionate from the angle of Article 6 § 1 of the Convention.

As the Court points it out in paragraph 36 of its judgment:

“measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access embodied in Article 6 § 1”.

This is so by reason of the overarching importance, for each and every independent State, freely to conduct its foreign policy by using the services of whosoever it sees fit for that task. Important though it is, the right of access to court cannot prevail over that basic imperative.

DISSENTING OPINION OF JUDGE LOUCAIDES

I am unable to agree with the majority that there has been no violation of Article 6 in this case.

The first question that has to be answered is whether or not the applicant's claim in England involved the determination of a civil right for the purposes of Article 6 § 1. This question was left open by the majority who decided that, even Article 6 was assumed to apply, there had been no violation. However, I have to decide this question because I adopt a different approach to the case.

If the answer to that question is in the negative, the case is inadmissible without it being necessary to proceed further. On the other hand, if the answer is in the affirmative, the next question that I will have to determine is whether there was a valid obstacle blocking access to court in terms of immunity from jurisdiction under the domestic law and/or customary international law. Again, if the answer is in the affirmative I will still have to determine whether such an obstacle is incompatible with Article 6 of the Convention in the circumstances of this case.

With regard to the first question, the position of the parties is briefly as follows:

The Government submit that, in the light of the judgment of this Court in the *Pellegrin* case, the applicant's claim in the domestic courts was not of a civil nature because it related to an employment dispute in respect of a public service post, the nature of the duties and responsibilities of which did not allow the applicability of Article 6. Alternatively the Government argue that the nature of the post for which the applicant applied was such that, again on the basis of the *Pellegrin* test, her claim did not attract the protection of Article 6. According to the Government the posts in question were within the administrative and technical services of the mission and, in spite of the fact that they were not at the level of diplomatic staff, the holders of such posts "[would] often have access to or will work in close proximity to confidential information of considerable importance so that the employing state has a legitimate interest in requiring of them a special 'bond of trust and loyalty'". The posts for which the applicant applied must have entailed at least indirect participation in the exercise of public law power.

The applicant maintained that, bearing in mind the nature of the duties of the posts in question, which were strictly of an administrative/secretarial character, her claims were not excluded from the ambit of Article 6 by virtue of the criterion established in the *Pellegrin* case. The applicant invoked in particular the fact that the holders of such posts do not satisfy the criterion of "direct or indirect participation in the exercise of powers conferred by public law and the carrying out of duties designed to safeguard the general interest of the state or of other public authorities".

On the assumption that the *Pellegrin* judgment is pertinent to the facts of this case, I find that the duties involved in the posts to which the applicant was seeking appointment did not fall within the criterion of “exercise of powers” conferred by public law which was established by that case. Moreover, in my opinion, in order to be considered as exercising such duties, it is not enough to have a special bond of trust and loyalty. This in fact is such a general requirement in respect of practically all kinds of employment that it cannot be considered a decisive feature of the exercise of public power.

However, I do not think that the *Pellegrin* criterion is in any way relevant to the facts of the present case, because this criterion is, as the judgment states, relevant only in order to determine the applicability of Article 6 § 1 to ‘public servants whether established or employed under contract’, in other words, in respect of claims by public servants by virtue of their terms of employment and not in respect of claims by potential public servants. In fact even the respondent Government admits, albeit in a different context, that the applicant was not asserting a cause of action in relation to any act performed during the course of her employment ... but in relation to the selection procedures operated by a potential (not actual) employer (para. 7.22 p. 33 - observations of the Government dated 6 May 1998).

But even if I proceed on the assumption that the *Pellegrin* case applies also to the claims of those seeking employment in the public service and not only to the claims of persons already employed therein (with which I do not agree), it is clear that it cannot extend to claims other than those whose primary aim is the employment or non-employment in a public service post. It is difficult to accept that it extends also to claims where the cause of action is, like the present case, not so much the employment or non-employment element but a complaint for discrimination. This was in fact the only complaint of the applicant for which she sought to have recourse to the courts by virtue of the Sex Discrimination Act 1975, section 2 (a). Such complaint is, in my opinion, within the concept of a “civil right” for the purposes of Article 6 § 1 of the Convention.

I must now proceed to examine the next question, namely whether there was a valid obstacle blocking access to the court in terms of immunity from jurisdiction under the domestic law and or customary international law.

The applicant did not pursue her claim before the domestic courts because of the invocation by the US Government of immunity from the jurisdiction of the courts by virtue of the State Immunities Act 1978. This Act provides for immunity in respect of proceedings concerning the employment of members of a mission, including members of the administrative and technical staff, precisely the type of positions sought by the applicant. The respondent Government argues that the immunity provided by the British Act reflects customary international law.

However I would like to draw attention to the following points:

1) The immunity invoked under the State Immunity Act expressly refers to “proceedings concerning the employment of the member of a mission”. In the present case it is, I think, reasonable to accept that the proceedings in question did not concern the employment of the applicant but her complaint about sex discrimination.

2) The complaint about discrimination is in the nature of an allegation of a violation of a human right, namely the prohibition of discrimination (see Article 26 of the UN Covenant on Civil and Political Rights).

3) Restrictions to the rights under the Convention such as that safeguarded by Article 6 (access to court) should be interpreted strictly and narrowly.

Even if the immunity invoked is considered as applicable to the facts of the present case, I believe that, in so far as it is a blanket immunity which automatically blocks access to court, without any discretion for the court to examine the competing interests by reference to the facts of each case, including those relating to the claim itself, it is incompatible with the right of access to the court guaranteed by Article 6 of the Convention.

In the case of *Osman v. the United Kingdom* (judgment of 28 October 1998, Reports 1998 - VIII, §§ 151-154), the Court recognised that a blanket immunity which pursued the legitimate aim of the maintaining the effectiveness of the police service, but which did not allow further enquiry into the existence of competing public interest considerations, constituted a disproportionate restriction on the right of access to court and thus violated Article 6 § 1. Although that decision has since been reviewed on the basis that, on its facts, what was at issue was not in reality a blanket immunity but rather an application of the principles governing substantive rights of action in domestic law (*Z and Others v. the United Kingdom* [GC], no. 29392/95, § 100, ECHR 2001), I believe that in cases such as the present, where a true blanket or absolute immunity is at stake, the principles set out in *Osman* should still apply. As a result, such an immunity should not be allowed to prevent access to court where, in the circumstances of any given case, it is outweighed by other public interest considerations.

I have also taken into account the fact that it has not been established that there is in actual fact a rule of customary international law in support of the State immunity invoked by the respondent Government. The Government itself conceded that there are currently a variety of approaches regarding the immunity in question. But they add that, in such a situation it is necessary to allow States a considerable “margin of appreciation” (later they use the term “margin of tolerance”) in the evaluation of each State as to what is required by international law and that the UK Act falls within the “margin of

tolerance” that should be shown in this field. In this connection there was a reference to a number of authorities to show that there is a certain practice supporting the view that “in the case of disputes involving employment contracts at embassies and consulates a policy of *de facto* absolute immunity is in existence on the basis that the embassy or consulate is the most sovereign instrumentality of a foreign State”. I think that the position of the Government is unconvincing. They invoke a rule of blanket immunity under customary international law while themselves accepting that it is not anymore a “widespread and consistent practice”. Following their own argument as to an international law obligation to adopt the Act in question they had to prove that such obligation existed under customary international law. They failed to do that. They did not prove a rule of immunity supported by any established rule of customary international law. In their own words this question is, in international law, a “highly controversial issue”.

The majority in their judgment state the following:

“The Court observes that, on the material before it (see paragraphs 16-20, 29 and 31 above), there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission”.

The Government, in support of the correctness of their own practice regarding the enforcement of the immunity in question, argue that, if such practice were not followed, an investigation into the internal management of the embassy would have been carried out by the court; a course which would have amounted to an interference with the sovereign functions of the United States of America. Cases decided by foreign courts were cited to support the position of the Government. The cases included instances of termination of services of employees of diplomatic missions. However, none of the authorities referred to a potential employee, as in the present case, and to a complaint of discrimination. I would also add that the investigation or examination into the internal management of diplomatic missions does not in itself justify the blocking of access to court in respect of any civil action. After all, it is accepted that the commercial and other specified activities of a State are not subject to immunity and the courts, therefore, can enter into examination of such activities in judicial proceedings against the States concerned, although this entails an intrusion into or examination of the internal administration and organisation structures of diplomatic missions of foreign States. Case-law contrary to the position cited by the Government also exists, and this is conceded by the Government. Furthermore, it is, I think, pertinent to note in this respect that

the applicant has in the past issued judicial proceedings against the US Government for her dismissal from the US Embassy in London. In particular she alleged that she had been the victim of persistent sexual harassment by her supervisor and that working relationships had broken down in consequence. The US Government defended the claim and did not at any stage of those proceedings claim State immunity. On 13 May 1996, the competent tribunal upheld the applicant's complaint.

In any event, what really matters is the fact that, in the case under consideration, access to court was blocked without any examination of the nature of the claim and therefore without a balancing of competing interests.

In the light of the above, I conclude with the following question: is the blocking of the way to a judicial examination of a claim for damages for sex discrimination through a plea of a blanket State immunity, which is not even supported by a consistent practice of international law, compatible with Article 6? Is it proportionate to the aim pursued? The answer should be, in my opinion, negative, taking into account:

a) the blanket nature of the immunity (see the relevant points in my dissenting opinion in the *McElhinney v. Ireland* (judgment of 21 November 2001) case which are applicable in this case *mutatis mutandis*);

b) the absence of an established international rule supporting the immunity;

c) the fact that the claim of the applicant was in the nature of an allegation of a violation of a human right; and

d) the fact that there was no alternative means of redress in respect of the applicant's complaint.