CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 15869/02
by Alicija ČUDAK
against Lithuania

The European Court of Human Rights (Third Section), sitting on 2 March 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs A. GYULUMYAN,
Mrs R. JAEGER,
Mr E. MYJER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 4 December 2001,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Alicija Čudak, is a Lithuanian national, who was born in 1961 and lives in Vilnius.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 1 November 1997 the applicant was recruited by the Embassy of the Republic of Poland in Vilnius ("the embassy"), to the post of a receptionist

at the call desk (*korespondentė-telefonistė*). The contract of employment included a clause stating that a dispute arising therefrom was to be resolved in accordance with the Lithuanian law.

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 had indeed been a victim of sexual harassment. The applicant alleged that because of the tension at work she fell ill.

The applicant was on sick leave from 1 September to 29 October 1999. On 29 October 1999 she came to work, but was not authorised to enter the embassy building. On 22 November 1999 the applicant came to work, but was again refused entry. She was once more turned away upon her arrival at work on 23 November 1999.

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 on 22-29 November 1999.

The applicant brought a civil claim, requesting compensation for unlawful dismissal. She did not claim re-instatement. The Polish Ministry of Foreign Affairs issued a *note verbale*, claiming immunity from 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.

The Supreme Court established *inter alia* that the agreement between Lithuania and Poland on legal assistance of 1993 did not resolve the question of application of the doctrine of State immunity, that Lithuania had no laws on the question, and that the domestic case-law was only developing. It was therefore considered appropriate to decide the case in the light of the general principles of international law, including the 1972 European Convention on State Immunity.

The Supreme Court observed that Article 479 of the 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 further noted the prevailing international practice to apply the restrictive interpretation of the doctrine of State immunity, according such immunity only for acts performed in the exercise of sovereign power (*acta jure imperii*), as opposed to acts of commercial or private-law nature (*acta jure gestionis*). The Supreme Court went on to state that the Lithuanian law permitted application of limited State immunity. It also specified a number of criteria to be assessed in order to decide the question of jurisdiction in such cases:

> "It is necessary to establish in the present case whether the relationship between the plaintiff and the Republic of Poland was of the public-law nature (*acta jure imperii*) or the private-law nature (*acta jure gestionis*). Besides that criterion, other criteria are applicable, which should allow [the court] to determine whether the State enjoys

immunity ... in employment disputes. In particular, these criteria are: the nature of the workplace, the status of the employee, the territorial link between the country of workplace and the country of court, and the nature of the claim.

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 civil-service relationship governed by public law (*acta jure imperii*) between [the applicant] and the Embassy of the Republic of Poland, and that the Republic of Poland has the right to enjoy State immunity from the jurisdiction of the 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 criterion of the status of employee, ... while the parties had concluded a contract of employment, the very notion of the post of a call-receptionist implies that the parties developed a relationship akin to that in the civil-service ... The court was unable to obtain any information allowing it to establish the scope of the applicant's actual duties. Hence, by reference to the title of her position, it can be concluded that the duties deposited upon her facilitated, to a certain degree, the exercise by the Republic of Poland of its sovereign functions. ... It is also to be established whether the country of employment is the country of court, since a local court is better placed to resolve the dispute that arose on the territory of the same State. In this respect, it is to be recognised that the execution of the sovereign powers of the forum state is severely restricted with regard to an embassy, albeit it is not a foreign territory as such (Section 11 § 2 of the Status of the Diplomatic Representations of the Foreign States Act). As to the nature of the claim ... it has to be noted that a claim to recognise unlawfulness of dismissal and award compensation cannot be considered 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 applicant] 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 [lower] courts properly decided that they had no jurisdiction to entertain this case."

The Supreme Court noted that the lower courts had not examined the question of applying the doctrine of limited State immunity. However, that question was now properly examined at cassation instance. The Supreme Court also held that its decision did not prevent the applicant from bringing an action before the Polish courts.

B. Relevant domestic and international law

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

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

"Adjudication of actions against foreign States, adoption of measures of constraint and enforcement vis-à-vis the property of a foreign State shall be allowed only upon the consent of the competent institutions of [that] foreign State."

On 5 January 1998 the Supreme Court adopted a decision in the case of *Stukonis v. the U.S. Embassy*, regarding the action for unlawful dismissal from the US Embassy in Vilnius. Article 479 § 1 of the 1964 Code of Civil Procedure was considered by the Supreme Court to be inadequate in the light of the changing reality of international relations and law. The Supreme Court noted the trend in the doctrine of international law to restrict a number of categories of cases where a foreign State can invoke immunity from jurisdiction of forum courts. The Supreme Court ruled that the Lithuanian legal practice should follow the doctrine of limited State immunity. It held *inter alia*:

"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 court to defend the rights of a plaintiff –where respondent is a foreign State - will depend on whether that foreign State requires application of the doctrine of State immunity ... In order to determine whether [or not] dispute involves immunity ... it is necessary to determine the nature of legal relations between the parties ..."

The relevant provisions of the 1972 European Convention on State Immunity ("the Basle Convention"):

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 on 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 are 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 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. ... "

The explanatory report of the Convention indicates that, "as regards contracts of employment with diplomatic missions or consular posts, Article 32 shall also be taken into account."

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."

Neither Lithuania nor Poland are parties to the Basle Convention.

At the material time, Article 11 § 1 of Draft Articles on Jurisdictional Immunities of States and Their Property, submitted to the General Assembly of the United Nations ((1991), II(2) YBILC 13), provided that:

> "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 did not apply 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".

In December 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property. The Convention became open for signature from 17 January 2005**.** One of the major issues during the codification work by the International Law Commission related to the exception from State immunity in so far as it related to employment contracts. The final provision is dealt with by Article 11 of the Convention, which reads as follows:

"Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(*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 organization 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."

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

"(a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) the "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(e) a "diplomatic agent" is the head of the mission or a member of the diplomatic 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;

... "

COMPLAINT

The applicant complains under Article 6 of the Convention that she was denied access to a court in Lithuania to decide her action against the Polish embassy in Vilnius.

THE LAW

The applicant complained about the denial of access to a court by granting of State immunity to the defendant. She invoked Article 6 of the Convention, which provides, in so far as relevant, as follows:

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

The Government stated that the dispute in question did not relate to the "civil" rights of the applicant, and that the facts of the case did not fall within the ambit of Article 6 of the Convention. In this respect, the Government stated, by reference to the *Pellegrin v. France* case ([GC], no. 28541/95, ECHR 1999-VIII) that the employment dispute concerned the predominantly public-law links between the defendant – the official representation of a foreign State – and the applicant, who had been vested as a depositary of the sovereign powers of that State. In any event, according to the Government, the Convention did not oblige the Lithuanian State to provide a remedy against a breach of the applicant's rights by the Polish authorities. The bar on the applicant's access to a court pursued the legitimate aim of promoting good relations and the principle of sovereign equality between States. The application of State immunity in the present case could not be regarded as disproportionate. According to the Government, there was no trend in the international law of restricting State immunity in employment-related cases. In this respect the Government also expressed their doubt whether any eventual judgment in favour of the applicant would have been enforceable against Poland, given the refusal of the latter to recognise the jurisdiction of the Lithuanian courts. Finally, the applicant was able to apply to the Polish courts. In sum, the applicant's right of access to a court had not been violated.

The applicant reiterated that, by bringing an action before the Lithuanian courts, she sought to challenge the legal basis for her dismissal and obtain compensation in this respect. The nature of her former employment contract as well as of her claim for wrongful dismissal was of a predominantly private-law nature. She also argued that the option of her applying to the Polish courts was unrealistic, given in particular that her employment contract had included a clause for such a dispute to be determined under Lithuanian Law.

Having regard to the parties' observations, the Court considers that the application raises complex issues of fact and law, the determination of which should depend on the examination of the merits. It cannot therefore be regarded as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President