THE UNITED STATES OF AMERICA

v.

MENTERI SUMBER MANUSIA & ORS AND ANOTHER APPEAL

Federal Court, Putrajaya
Azahar Mohamed CJM, Zabariah Mohd Yusof, Hasnah Mohammed Hashim FCJJ
[Civil Appeal Nos: 01(f)-18-10-2021(W) & 01(f)-19-10-2021(W)]
20 June 2022

Administrative Law: *Exercise of administrative powers — Judicial review — Reference by Minister of Human Resources of employment dispute to Industrial Court — Restrictive doctrine of sovereign immunity, whether applicable – Whether Industrial Court proper forum to decide on issue of immunity — Whether Minister had not erred in referring dispute to Industrial Court*

Constitutional Law: *Sovereign immunity — Restrictive doctrine of sovereign immunity — Whether applicable in employment dispute — Reference by Minister of Human Resources to Industrial Court — Whether Industrial Court proper forum to decide on issue of immunity — Whether Minister had not erred in referring dispute to Industrial Court*

Labour Law: *Industrial Court — Reference by Minister — Reference by Minister of Human Resources of employment dispute to Industrial Court — Restrictive doctrine of sovereign immunity, whether applicable — Whether Industrial Court proper forum to decide on issue of immunity — Whether Minister had not erred in referring dispute to Industrial Court*

The present two related appeals raised an important issue in relation to the principle of restrictive doctrine of sovereign immunity in an employment dispute. The appellant was the United States of America, a sovereign state which had established a diplomatic mission, the Embassy of the United States of America in Kuala Lumpur ("Embassy"). The dispute in the present case arose when the 2nd respondent, a Malaysian employed as a security guard at the Embassy, was dismissed from his employment by the appellant. Aggrieved, he filed a representation under s 20(1) of the Industrial Relations Act 1967 ("IRA 1967") claiming his dismissal by the Embassy was without just cause and excuse and seeking reinstatement to his position as a security guard at the Embassy. Subsequently, the Minister of Human Resources, ie the 1st respondent decided to refer the 2nd respondent's representation to the Industrial Court for adjudication. The appellant, however, filed an *ex parte* application to the High Court for leave to commence judicial review proceedings in respect of the 1st respondent's reference. The High Court found

in favour of the appellant. The 1st and 2nd respondents appealed, and the Court of Appeal allowed both appeals and set aside the decision and orders of the High Court. Hence, the present appeals by the appellant in which the following questions of law were raised: (1) whether under common law, the restrictive doctrine of sovereign immunity applied to a claim pursued under s 20 of the IRA 1967 by a staff of a diplomatic mission who was dismissed on the ground of misconduct in the course of the diplomatic mission's internal disciplinary management of its staff ("s 20 Claim") with the result that the Industrial Court would have no jurisdiction over the said claim; (2) whether the common law restrictive doctrine of sovereign immunity applied to a s 20 Claim of a staff of a diplomatic mission employed in a security capacity whose duties pertained to the protection of its diplomatic staff and the maintenance of the inviolability of its diplomatic mission's premises with the result that the Industrial Court would have no jurisdiction over the said claim; and (3) whether the Court of Appeal had erred in setting aside the decision and orders of the High Court, which was properly exercising its plenary judicial powers, its statutory judicial review powers and in accordance with the law laid down by the apex Supreme Court in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd*, to decide whether the appellant and her Embassy were immune from the jurisdiction of the Industrial Court in respect of the employee's s 20 Claim.

Held (dismissing both appeals):

(1) In considering Question 3 first, it was clear that whether the restrictive doctrine of sovereign immunity applied in the present case would to a great extent depend on the determination and findings of facts of the precise nature, duties as well as job scope of the 2nd respondent. The proper forum to decide on this as well as the dismissal of the 2nd respondent should be the Industrial Court. What was meant by this was that it could only be decided upon proper and complete consideration of both oral and documentary evidence by the Industrial Court. The relevant evidence could only be more appropriately given at the Industrial Court, where the matter would be heard and parties might cross-examine each other on the true nature of the 2nd respondent's employment and the act of dismissal. The designation of the 2nd respondent's job as a security guard at the Embassy alone was not sufficient and the appellant ought to lead evidence as to whether what the 2nd respondent performed had anything to do with functions related to the exercise of sovereignty of the appellant. The reference by the Minister under s 20(3) of the IRA 1967 did not determine the question of immunity one way or another; it merely conferred a threshold jurisdiction upon the Industrial Court to look into the representation and the serious issues it involved. The appropriate and only forum to determine the issue of immunity was the Industrial Court as a matter of first instance upon a reference by the 1st respondent. (paras 36 & 39)

(2) Therefore, Question 3 must be answered in the negative. In the circumstances, it was unnecessary to answer Questions 1 and 2. Accordingly, the Court of Appeal correctly held that the decision of the 1st respondent could

not be said to be tainted with illegality, irrationality or procedural impropriety. The 1st respondent had not erred in referring the dispute to the Industrial Court in exercising his discretion under s 20(3) of the IRA 1967, as the only question to be considered by him was whether the representation raised a serious issue of fact and/or law to be adjudicated by the Industrial Court. There was no appealable error on the part of the Court of Appeal in setting aside the decision and orders of the High Court. (paras 47-48)

Case(s) referred to:

Ashraf-Hassan v. Embassy of France 40 F Supp 3d 94; 2014 US Dist LEXIS 53293 (refd)

Ashraf-Hassan v. Embassy of France 610 Fed Appx 3; 2015 US App LEXIS 9001 (refd)

Benkharbouche v. Embassy of Republic of Sudan [2019] AC 777 (folld)

British High Commission v. Jansen [2015] 3 LRC 565 (folld)

Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor [1990] 1 MLRA 364 (refd)

Council of Civil Service Union & Ors v. Minister of Civil Service [1985] AC 374 (refd)

Doe v. Holy See 434 F Supp 2d 925; 2006 US Dist LEXIS 39998 (refd)

El-Hadad v. Embassy of the UAE 69 F Supp 26 69; 1999 US Dist LEXIS 15948 (refd)

El-Hadad v. United Arab Emirates 496 F 3d 658; 378 US App DC 67; 2007 US App LEXIS 17904 (refd)

Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia Malaysia & Ors [2005] 1 MELR 52; [2005] 2 MLRA 771 (refd)

Hii Yii Ann v. Deputy Commissioner Of Taxation Of The Commonwealth Of Australia & Ors [2017] MLRHU 864 (refd)

Holden v. Canadian Consulate 92 F, 3D 918; 1996 US App LEXIS 20064 (refd)

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1996] 1 MELR 142; [1996] 2 MLRA 286 (refd)

Hyunhuy Nam v. Permanent Mission of the Republic of Korea 2022 US Dist Lexis 11896; 2022 WL 204619 (refd)

Hyunhuy Nam v. Permanent Mission of the Republic of Korea 2022 US Dist Lexis 11896; 2022 WL 204619 (refd)

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 1 MELR 10; [1997] 1 MLRA 372 (distd)

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 1 MLRA 336 (refd)

Menteri Sumber Manusia v. John Hancock Life Insurance (Malaysia) Bhd & Another Appeal [2006] 1 MELR 86; [2006] 2 MLRA 479 (refd)

Merlini v. Canada 926 F 3d 21; 2019 US App LEXIS 17313 (refd)

Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 MELR 10; [1990] 1 MLRA 246 (refd)

Mohammad v. General Consulate of the State of Kuwait et al 2020 US Dist LEXIS 244092; 2020 WL 7315345 (refd)

Park v. Shin 313 F 3d 1138; 2002 U S App LEXIS 25889 (refd)

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1996] 1 MELR 71; [1996] 1 MLRA 725 (refd)

Rahimtoola v. HEH The Nizam of Hyderabad and Others [1958] AC 379 (refd)

Tei Yan Sun v. Taiwan 201 F 3d 1105- 2000 US App LEXIS 1326 (refd)

The Government of Canada v. The Employment Appeals Tribunal and Burke 95 ILR 467 (folld)

The 'I Congreso Del Partido [1981] 2 All ER 1 1064 (refd)

The Minister For Human Resources v. Thong Chin Yoong & Another Appeal [2001] 1 MELR 27; [2001] 1 MLRA 486 (refd)

United States of America v Zakhary [2015] F.C J. No.295 (folld)

Zveiter v. Brazilian National Superintendency of Merchant Marine 833 F Supp 1089; 1993 US Dist LEXIS 14098 (refd)

Legislation referred to:

Industrial Relations Act 1967, s 20(1), (3)

Rules of Court 2012, O 53 r 3(2)

Counsel:

For the appellant: Lim Heng Seng (Chong Yue Han with him); M/s Lee Hishammuddin Allen & Gledhill

For the 1st respondent: Liew Horng Bin; AG's Chambers

For the 2nd respondent: Ragunath Kesavan (Tai Yong Fung & Joshua Tan Jo-Ven with him); M/s Kesavan

JUDGMENT

Azahar Mohamed CJM:

Introduction

[1] The two related appeals before this Court raise an important issue in relation to the principle of restrictive doctrine of sovereignty immunity in an employment dispute.

[2] In essence, under the restrictive doctrine of sovereign immunity, immunity would not be granted if a sovereign state performs certain private acts or transactions which are commercial in nature. If the dispute brings into question for instance executive or governmental policy of the sovereign state, the court or tribunal should grant immunity if asked to do so, because it offends the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts or tribunal of another country (see *Rahimtoola v. HEH*

The Nizam of Hyderabad and Others [1958] AC 379 at p 422, *The 'I Congreso Del Partido* [1981] 2 All ER 1 1064, *Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor* [1990] 1 MLRA 364 SC, *Hii Yii Ann v. Deputy Commissioner Of Taxation Of The Commonwealth Of Australia & Ors* [2017] MLRHU 864 HC).

[3] The very important question this judgment sets out to address is whether, in the context of an employee's claim that he has been dismissed without just cause or reason by a sovereign state, the proper forum to decide the applicability of restrictive doctrine of sovereignty immunity should be at the Industrial Court or by way of judicial review proceedings in the High Court.

Factual Background

[4] The appellant is the United States of America, a sovereign state which has established a diplomatic mission, the Embassy of the United States of America in Kuala Lumpur ("Embassy"). On 29 September 1998, the 2nd Respondent, a Malaysian, was employed as a security guard at the Embassy by the Appellant. The dispute in the present case arose when he was dismissed from his employment by the Appellant on 4 April 2008. It was on that day he received a phone call from an official of the Embassy that his employment had been terminated. No reasons were given.

[5] The 2nd respondent felt aggrieved that after serving for more than 10 years he was terminated without notice and with no reasons given. On 23 May 2008 he filed a representation under s 20(1) of the Industrial Relations Act 1967 ("IRA 1967") claiming his dismissal by the Embassy was without just cause and excuse and seeking for reinstatement to his position as a security guard at the Embassy ("Section 20 Claim"). At the material time, the 2nd respondent as a dismissed employee has no direct access to the Industrial Court. Access was available only upon a reference by the Minister of Human Resources ie the 1st respondent to the Industrial Court. He may make a reference after efforts at conciliation by the Director General of Industrial ("DGIR") failed to arrive at a settlement. The DGIR files a report to the 1st Respondent upon which the latter will decide whether the claim should be referred to the Industrial Court for adjudication on the question whether the dismissal was for just cause or excuse. The 1st Respondent's reference conferred threshold jurisdiction upon the Industrial Court to enter into the adjudication of a Section 20 Claim. Without his reference, the Industrial Court would have no lawful authority to do so.

[6] Reverting to the facts of the present case, a conciliation meeting was held between the Embassy and the 2nd respondent but no settlement was reached thereat.

[7] In point of fact, the 1st respondent then proceeded to consider the representation by the 2nd respondent and was satisfied that:

(a) The 2nd respondent's representation raised serious questions of facts and laws that require adjudication;

(b) The issue concerning the claim of immunity by the Embassy is an issue of law that should be decided by the Industrial Court; and

(c) The 2nd Respondent's representation is not frivolous and vexatious.

[8] Thereafter, vide a letter dated 22 April 2019 from the Industrial Relations Department, the Embassy was informed that the 1st respondent had decided to refer the 2nd respondent's representation to the Industrial Court for adjudication ("1st Respondent's Reference"). This reference granted access to the 2nd respondent and vested threshold jurisdiction upon the Industrial Court to hear his Section 20 Claim.

The High Court Proceedings

[9] However, as it turned out, before the 2nd respondent proceeded to file his Section 20 Claim at the Industrial Court, on 25 July 2019 the appellant filed an *ex parte* application to the High Court for leave to commence judicial review application in respect of the 1st Respondent's Reference seeking the following reliefs:

(i) An order of *certiorari* to quash the 1st Respondent's Reference decision.

(ii) An order of prohibition to prohibit the Industrial Court from adjudicating on the 2nd Respondent's representation.

(iii) A declaration that the appellant and the Embassy are immune from the jurisdiction of the Industrial Court in respect of the 2nd Respondent's Section 20 Claim.

[10] The grounds on which these reliefs were sought were set out in the appellant's statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012. Primarily, the appellant anchored its case on the following grounds:

i. The 1st respondent failed to properly address his mind to the several factual matters of the 2nd respondent's duties as a security staff pertinent to the question as to whether the 2nd respondent's Section 20 Claim relates to activity of the appellant which is protected by sovereign immunity and is consequently not subject to the jurisdiction of the Industrial Court and/or IRA 1967;

ii. The 1st respondent failed to inform himself of and to apply the customary international law pertaining to the question as to whether the assertion of sovereign immunity applies to the 2nd Respondent's Section 20 Claim and had he done so, he would have arrived at the decision that sovereign immunity arose out of the exercise of the appellant's governmental or sovereign acts in the course of the administration of the security affairs of the Embassy.

iii. The 1st respondent had failed to take into account relevant considerations pertaining to the applicability of the doctrine of sovereign immunity to the activity of the Appellant upon which the 2nd Respondent's Section 20 Claim is based and that sovereign immunity arose out of the exercise of the appellant's governmental or sovereign acts in the course of the administration of the security affairs of the Embassy.

Decision Of The High Court Which Is The Subject Matter Of These Two Appeals

[11] On 28 August 2019, the High Court allowed the appellant's leave application to commence judicial review proceedings.

[12] On 8 January 2020 at the hearing of the appellant's judicial review application, the High Court found in favour of the appellant. The High Court held that the core question to be determined in the judicial review application was whether the appellant and its Embassy were immune from the jurisdiction of the Industrial Court in respect of the 2nd Respondent's Section 20 Claim. The High Court made a finding that the 2nd respondent's duty as a security guard is integral to the sovereign activity of the appellant and the Embassy. The dismissal of the 2nd respondent by the appellant was in the exercise of its sovereign authority and as such the doctrine of sovereign immunity is applicable. Consequently, the Industrial Court has no jurisdiction to hear the 2nd Respondent's Section 20 Claim. Further, the High Court held that the 1st respondent committed an error of law in referring the representation to the Industrial Court because the representation is frivolous and vexatious and involves no serious question of facts or law to be tried. More importantly, the High Court decided that the appellant and the Embassy are immune from the jurisdiction of the Industrial Court in respect of the 1st Respondent's Section 20 Claim by virtue of the restrictive doctrine of sovereign immunity.

[13] The High Court proceeded to issue: (a) *certiorari* order to quash the 1st Respondent's Reference; and (b) a prohibition order to prohibit the Industrial Court from adjudicating upon the 2nd Respondent's Section 20 Claim. Furthermore, the High Court granted a declaration that the appellant and its Embassy are immune from the jurisdiction of the Industrial Court in respect of the said claim.

[14] The 1st respondent filed an appeal against the whole of the High Court's order. The 2nd respondent also appealed.

Decision Of The Court Of Appeal

[15] The Court of Appeal took a diametrically opposite view. The Court of Appeal allowed both the appeals by both the 1st and 2nd respondents and set aside the decision and order of the High Court.

[16] The Court of Appeal, *inter alia*, held:

i. The nature of the 2nd respondent's work as well as his dismissal is a question of fact where the proper forum to decide on such issue is in the Industrial Court.

ii. The determination of whether the restrictive doctrine of sovereign immunity applies can only be done after fact finding by the court of first instance ie the Industrial Court. Such issue ought not to be decided by way of judicial review.

iii. The Industrial Court, having seised with threshold jurisdiction, is empowered to determine whether it has jurisdiction to entertain the 2nd Respondent's Section 20 Claim.

iv. The 1st respondent does not make decision on the nature of the 2nd respondent's job and his dismissal. It is a question which can only be determined after due inquiry by the Industrial Court.

[17] Subsequently, the appellant filed two applications for leave to appeal to the Federal Court, which were allowed by the Federal Court on 30 September 2021.

Questions Of Law Raised In These Two Appeals

[18] The Federal Court had allowed eight leave questions. In allowing the questions, the Federal Court directed that the questions be condensed. All parties have agreed that the eight leave questions to be condensed into the following three:

i. Question 1 - Whether under common law, the restrictive doctrine of sovereign Immunity applied to a claim pursued under s 20 of the Industrial Relations Act 1967 by a staff of a diplomatic mission who was dismissed on the ground of misconduct in the course of the diplomatic mission's internal disciplinary management of its staff ("Section 20 Claim") with the result that the Industrial Court will have no jurisdiction over the said claim?

ii. Question 2 - Whether the common law restrictive doctrine of sovereign immunity applies to a Section 20 Claim of a staff of a diplomatic mission employed in a security capacity whose duties pertain to the protection of its diplomatic staff and the maintenance of the inviolability of its diplomatic mission's premises with the result that the Industrial Court will have no jurisdiction over the said claim?

iii. Question 3 - Whether the Court of Appeal had erred in setting aside the Decision and Orders of the High Court, which was properly exercising its plenary judicial powers, its statutory judicial review powers and in accordance with the law laid down by the apex Supreme Court in *Kathiravelu Ganesan & Anor v. Kojasa*

Holdings Bhd [1997] 1 MELR 10; [1997] 1 MLRA 372, to decide whether the Appellant and her Embassy were immune from the jurisdiction of the Industrial Court in respect of the Employee's Section 20 Claim?

[19] Questions 1 and 2 essentially relate to the nature, scope and applicability of the restrictive doctrine of sovereign immunity in the context of the dismissal of an employee, engaged as a security guard in a reference by the 1st respondent to the Industrial Court under s 20 of the IRA 1967 where the employer is a sovereign state.

[20] Question 3 raises a different point. This question in substance concerns whether the judicial review proceedings in the High Court is in fact the proper forum to decide the issue of restrictive doctrine of sovereign immunity.

[21] For convenience, I will first deal with Question 3.

Contentions Of Parties In Respect Of Question 3

[22] The contentions of the Appellant can be summarised as follows. The core question for the High Court to decide is whether or not the Industrial Court had jurisdiction over the 2nd Respondent's Section 20 Claim. The 2nd Respondent was employed to work in a security capacity and his duties were not only to provide security but also to maintain the inviolability of the Embassy's premises. Such was not merely auxiliary but was integral to the core sphere of sovereign activity. The High Court correctly decided in accordance with the law laid down in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 1 MELR 10; [1997] 1 MLRA 372 SC ("*Kathiravelu*"), the threshold jurisdiction question that sovereign immunity applied to the 2nd Respondent's Section 20 Claim. The Industrial Court is not the appropriate and only forum to decide the question of sovereign immunity. The High Court had not committed any appealable error that warranted its decision to be set aside by the Court of Appeal.

[23] The pivotal position of the 1st respondent is this. The scheme of the IRA 1967 makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The 1st respondent cannot assume a function expressly reserved to the Industrial Court. If the representation raises serious questions of fact or law calling for adjudication, it ought to be referred to the Industrial Court since it is the only proper forum to adjudge such questions of fact or law. Whether restrictive doctrine of immunity applies is a question of law and would depend on a myriad of factors, principally on the nature (and not purpose) of employment. The proper forum to decide on such nature of the 2nd respondent's job scope should be in the Industrial Court.

[24] The main contentions of the 2nd respondent are as follows. Before determining whether restrictive doctrine of sovereign immunity applies in an employment dispute, it is imperative to note the distinction between

employees who: (a) occupy positions implementing foreign and defence policies of the state, having contact with sensitive governmental material or performing roles with no private sectors equivalent would perform; and (b) perform largely routine or subordinate tasks where the nature of the work performed may be indistinguishable from that performed in the private sector. This distinction is wholly dependent on the facts and circumstances of each case. The proper forum to decide on the nature of the 2nd respondent's job should be the Industrial Court. This is because the dispute raised in the present case, which constitutes questions of fact and law, can only be decided upon proper and complete consideration of both oral and documentary evidence by the Industrial Court. Hence, the Industrial Court is the appropriate forum to decide on the question of sovereign immunity.

Findings And Analysis

[25] In determining Question 3, a key point to note and appreciate is that the present appeal stems from the decision of the 1st respondent to refer the representation made by the 2nd respondent under s 20 of the IRA 1967 to the Industrial Court for adjudication. At all material times the relevant provision reads:

> "Representations on dismissals
>
> 20. (1)....
>
> (1A)....
>
> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director General under subsection (2) the Minister may, if he thinks fit, refer the representations to the Court for an award."

[26] As can be seen under s 20 of the IRA 1967, the 1st respondent has the "choice" to confer the threshold jurisdiction onto the Industrial Court to determine matters in which he deems fit. It must be noted that the recent amendments introduced by way of the Industrial Relations (Amendment) Act 2020 has effectively removed the element of "choice" in conferring the threshold jurisdiction of the Industrial Court to determine matters referred to it. The present case therefore falls to be decided by reference to the pre-amended s 20 of the IRA 1967.

[27] It is very important now to look at closely how in law the 1st Respondent should exercise his power under the pre-amended s 20 of the IRA 1967. As explained in the case of *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 MELR 10; [1990] 1 MLRA 246 SC, the 1st respondent has a wide and unfettered discretion under s 20(3) of the IRA 1967 whether to

refer or not to refer a dispute to the Industrial Court provided he has acted *bona fide*, that is without any improper motive, and he has not taken into account extraneous or irrelevant matters. The discretion of the 1st Respondent must be exercised in accordance with the intention of the IRA 1967 and must not frustrate the object of the statute. If the representation raises serious questions of fact or law calling for adjudication, it ought to be referred to the Industrial Court since it is the only proper forum to adjudge such questions of fact or law (see *The Minister For Human Resources v. Thong Chin Yoong & Another Appeal* [2001] 1 MELR 27; [2001] 1 MLRA 486 FC). The 1st respondent is limited to ascertaining whether, on the facts and material placed before him, the representations raise serious questions of fact or of law calling for adjudication (see *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1996] 1 MELR 142; [1996] 2 MLRA 286 CA and *Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia Malaysia & Ors* [2005] 1 MELR 52; [2005] 2 MLRA 771 FC). Where there are mixed questions of law or fact arising from the representations the proper forum to decide on such issues would be the Industrial Court and not the 1st respondent (see *Menteri Sumber Manusia v. John Hancock Life Insurance (Malaysia) Bhd & Another Appeal* [2006] 1 MELR 86; [2006] 2 MLRA 479 CA).

[28] The position in law is fairly well settled in that the 1st respondent's decision in relation to the exercise of his executive function under s 20 of the IRA 1967 may be reviewed by the Court on grounds of illegality, irrationality, procedural impropriety or disproportionality (see *Council of Civil Service Union & Ors v. Minister of Civil Service* [1985] AC 374, *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725 FC and *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 1 MLRA 336 FC).

[29] It is with the above principle in mind that brings me to this important question: was the 1st respondent wrong in law to have referred the dispute to the Industrial Court? This question must be approached on the basis of the facts and material placed before him. As I have pointed out earlier at para [9] above, the appellant sought to apply for a judicial review of the decision of the 1st respondent to refer the 2nd respondent's representation to the Industrial Court. The appellant, among others, had sought for a *certiorari* to quash the reference by the 1st respondent to the Industrial Court for adjudication of the 2nd respondent's representation, and for a declaration that the appellant and its embassy are immune from the jurisdiction of the Industrial Court.

[30] In the first place, it is hard to deny that the question as to whether the dismissal of the 2nd respondent as a security guard at the Embassy was a decision of the appellant made in its governmental function as a sovereign state and not a private or commercial matter and as such is entitled to sovereign immunity is in itself a serious and difficult question of law.

[31] Even more to the point, the 2nd respondent averred in his affidavit that his responsibilities as a security guard at the Embassy were mere routine and

menial in nature and were similar to his counterparts in the private sector. It was stated in the 2nd respondent's affidavit that his job at all material times during his employment at the Embassy did not involve diplomatic functions or governmental decision of the appellant. The 2nd respondent also did not have any access to the confidential information or documents relating to the Embassy and/or the appellant. There is also no confidentiality clause in the 2nd respondent's contract of employment. The Embassy had made contributions to the Employee Provident Funds and Social Security Organisations for the benefit of the 2nd respondent. The 2nd respondent averred that the appellant's act of his dismissal was purely that of an employer and nothing more.

[32] As can be seen at para [2] above, what stands out as a matter of substance, in the case of restrictive doctrine of sovereign immunity, it is not all acts of the sovereign foreign state that is immune from legal action but only those acts that are primarily governmental or diplomatic in nature and character, or for example touching as it is on the legislative or international transactions of a foreign government, or the policy of its executive. This can only be decided after all the relevant facts have been ascertained. An inquiry has to be made to ascertain whether or not the action of the sovereign foreign state is within or outside that activity.

[33] In the present context, the learned Senior Federal Counsel ("SFC") in resisting the appeal, emphasised the point that whether restrictive doctrine of immunity applies would depend on a myriad of factors to be decided based on available evidence and that the exercise is best undertaken by the Industrial Court. He has diligently provided a summary of the guiding principles deduced from the United States case law as follows:

i. A state engages in commercial activity where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns;

ii. A foreign sovereign's motives are immaterial to the analysis, the issue is whether the particular action performed, whatever the motive behind it, is the type of actions by which a private party engages in trade or commerce.

iii. A foreign state employer-employee relationship can be commercial depending upon the context; the question courts must ask is whether the activity is typical of a private party engaged in commerce;

iv. If there is nothing quintessentially governmental about the employee's work, the commercial exception applies; a court's inquiry in applying the commercial activity exception turns on the activity's nature as opposed to the purpose of the activity;

v. The employment of American citizens or third country nationals as civil service personnel by foreign state in the US is commercial

> activity and falls under the immunity exception; the only employment relationships of a foreign state that are governmental in nature are relationships with diplomatic, civil service, or military employees who are neither U.S. citizens nor third country nationals employed in the US, the hiring of all other employees is commercial.

[34] Our attention was then drawn by the learned SFC to the following cases to support the above guiding principles: *Hyunhuy Nam v. Permanent Mission of the Republic of Korea* 2022 US Dist Lexis 11896; 2022 WL 204619; *Mourmouni v. Permanent Mission of the Republic of South Sudan to the United Nations* 2021 US Dist Lexis 186217, 2021 WL 4461829; *Mohammad v. General Consulate of the State of Kuwait et al* 2020 US Dist Lexis 244092; 2020 WL 7315345; *Merlini v. Canada* 926 F 3d 21; 2019 US App LEXIS 17313; *El-Hadad v. Embassy of the UAE* 69 F Supp 26 69; 1999 US Dist LEXIS 15948; *El-Hadad v. United Arab Emirates* 496 F 3d 658; 378 US App DC 67; 2007 US App LEXIS 17904; *Ashraf-Hassan v. Embassy of France* 40 F Supp 3d 94; 2014 US Dist LEXIS 53293; *Ashraf-Hassan v. Embassy of France* 610 Fed Appx 3; 2015 US App LEXIS 9001; *Doe v. Holy See* 434 F Supp 2d 925; 2006 US Dist Lexis 39998; *Park v. Shin* 313 F 3d 1138; 2002 US App LEXIS 25889; *Tei Yan Sun v. Taiwan* 201 F 3d 1105-2000 US App LEXIS 1326, *Holden v. Canadian Consulate* 92 F, 3D 918; 1996 US App LEXIS 20064; *Zveiter v. Brazilian National Superintendency of Merchant Marine* 833 F Supp 1089; 1993 US Dist Lexis 14098. The cases cited by the learned SFC do assist us in our deliberation.

[35] It is material to note that in opposing the appellant's judicial review application, the 1st Respondent had stated in its affidavit that the issues raised in the present case relate to questions of fact and law which should be decided by the Industrial Court.

[36] From the foregoing discussion, it is clear that whether the restrictive doctrine of sovereign immunity applies in the present case would to a great extent depend on the determination and findings of facts of the precise nature, duties as well job scope of the 2nd respondent. The proper forum to decide on this as well as the dismissal of the 2nd respondent should be in the Industrial Court. What I mean by this is that it can only be decided upon proper and complete consideration of both oral and documentary evidence by the Industrial Court. The relevant evidence could only be more appropriately given at the Industrial Court where the matter would be heard and parties may cross-examine each other on the true nature of the 2nd respondent's employment and the act of dismissal. The designation of the 2nd respondent's job as a security guard at the Embassy alone is not sufficient and that the appellant ought to lead evidence as to whether what the 2nd respondent performed had anything to do with functions related to the exercise of sovereignty of the appellant.

[37] To put the point differently, as noted earlier, the 2nd respondent contended that he was merely performing auxiliary duties at the Embassy which were not

in any manner connected to the sovereign functions of the appellant and hence immunity should not be granted in this case. Whether that is true or otherwise is a matter eminently within the purview and scope of the Industrial Court's jurisdiction, as it is a mixed question of fact and law.

[38] The point is that, as correctly observed by the Court of Appeal, what we have in the Judicial Review application are averments which are being contradicted by the 2nd respondent with respect to the nature of his employment or even the act of his dismissal as falling within or without the state's sovereign or governmental functions or whether these are more in the nature of a private employment contract and an alleged breach of its terms and the applicability of the IRA 1967 to determine whether the dismissal is for a just cause and excuse. The 1st respondent does not make decision on the nature and job scope of the 2nd respondent and his dismissal.

[39] The reference by the Minister under s 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 1st respondent.

[40] The above approach is consistent with other jurisdictions. Learned counsel for the 2nd respondent has brought to our attention a number of cases where courts of various jurisdictions have taken similar position. I need not go through all the cases here. I would only refer to four cases.

[41] First is the United Kingdom Supreme Court case of *Benkharbouche v. Embassy of Republic of Sudan* [2019] AC 777. The claimants in that case were hired by the domestic embassies in London to cook, clean, do the laundry, shopping and serving at meals. Upon their dismissal from their employment, the claimants filed their claim at the Employment Tribunal for unfair dismissal. The respondents raised state immunity which was upheld by the Employment Tribunal. The claimants appealed to the Employment Appeal Tribunal where the claimants' appeal against the Employment Tribunal's decision was allowed. The matter was further appealed to the Court of Appeal and later the Supreme Court, both of which affirmed the decision of the Employment Appeal Tribunal. The Supreme Court held that the claimants' job scope was "an act of a private law character such as anyone with the necessary resources might do".

[42] The second case is the Canadian case of *United States of America v. Zakhary* [2015] FC J No 295. The respondent in that case had filed an unjust dismissal complaint after the United States consulate ("the Consulate") terminated her employment as a cashier. An inspector of Ministry of Labour sent the complaint to the Consulate by registered mail but did not serve it in accordance with s 9(2) of the State Immunity Act. A human resources officer for the Consulate responded by acknowledging receipt and stating that the Consulate stood

by its decision. Given that the respondent's attempt to mediate the dispute was in vain, the complaint was then referred to an adjudicator. The applicant responded that service was defective, hence it is not a party and would not respond. The adjudicator found that the human recourses officer's response to the complaint constituted waiver of the right to object to service under s 9 of the State Immunity Act, given it was a response that did not raise a claim of immunity. The adjudicator then proceeded with proceeding and found that respondent worked in a purely administrative position so the activity was commercial and outside the scope of state immunity. The applicant applied to set aside the certificate of filing of order in which the Federal Court had allowed the said application. The Federal Court decided that on the facts the respondent's duties as a cashier falls within the financial operation of the consulate which involves elements of trust and confidentiality.

[43] The third case is *British High Commission v. Jansen* [2015] 3 LRC 565 where the Supreme Court of Sri Lanka held that sovereign immunity applied in an unlawful dismissal suit filed against the British High Commission by its former security assistant who had been dismissed after he was found sleeping while on duty. This was because the former employee's duties were not only to provide security but also to maintain the inviolability of the embassy's premises which could not be classified as merely auxiliary but were integral to the core sphere of sovereign activity. However, it must be noted that the matter had come to the Sri Lanka Supreme Court after a finding of fact by the Labour Tribunal and a further appeal to the High Court. The appellant had pleaded immunity from the jurisdiction and took no part in the proceedings. Whilst the Tribunal considered that the application could not proceed the High Court nevertheless held that the express reference to local labour laws in the letters of appointment amounted to waiver of immunity.

[44] The last case is *The Government of Canada v. The Employment Appeals Tribunal and Burke* 95 ILR 467. The case involved an Irish citizen who was employed by Canada as a chauffeur with the Canadian Embassy in Dublin. He was dismissed and he brought a claim against Canada before the Employment Appeals Tribunal under the Unfair Dismissals Act 1977. Canada objected on the ground that the Tribunal did not have jurisdiction to hear the claim. The Tribunal rejected the argument and proceeded with the claim and awarded compensation. Canada then proceeded with a judicial review application in the High Court for a writ of *certiorari* Though Canada failed at the High Court, it succeeded at the Supreme Court. The Supreme Court held that the doctrine of restrictive immunity was applicable. It was further held that as a result of the trust and confidentiality required, a bond was created between the chauffeur and his employers which involved the employer in governmental activity. Thus, Canada was protected from the suit by the doctrine of State immunity. It has to be noted that the matter had come before the High Court by way of a judicial review application after the Employment Appeals Tribunal had decided the matter.

[45] The cases that I have discussed above demonstrated that the respective Employment Tribunals or Adjudicator had the opportunity to consider the facts of the respective cases and the evidence adduced thereat in order to decide on whether such doctrine of "sovereign immunity" applies. Whether restrictive doctrine of immunity applies would depend on the facts and circumstances of the particular case. The Industrial Court, as is the case with Employment Tribunals in other jurisdictions, has the duty to embark on a fact-finding to determine if the restrictive doctrine of sovereign immunity applied to exclude its jurisdiction.

[46] As to the case of *Kathiravelu (supra)*, the factual matrix can be contrasted with the present case. There, the Supreme Court set aside the order of the High Court and remitted the case back to the Industrial Court for it to be heard on its merits. The Industrial Court then did decide on the preliminary issue as it was a mixed question of law and fact before being prevented to do so by the grant of a prohibition order by the High Court pursuant to a judicial review application. It was not a case like the present case where there the High Court and then the Supreme Court, by way of an appeal to it, had heard by way of a judicial review the reference by the 1st respondent. In our present case the Industrial Court had not even commenced any hearing yet let alone made any decision on the preliminary issue regarding the applicability of restrictive doctrine of sovereign immunity. If a party is aggrieved, the proper recourse is to apply for judicial review against the Industrial Court after the Industrial Court has made a determination on that question.

Conclusion

[47] Based on all the above reasoning, Question 3 must be answered in the negative. In the circumstances, it is unnecessary to answer Questions 1 and 2.

[48] Accordingly, I agree with the Court of Appeal that the decision of the 1st respondent cannot be said to be tainted with illegality, irrationality or procedural impropriety. The 1st respondent had not erred in referring the dispute to the Industrial Court in exercising his discretion under s 20(3) of the IRA 1967, as the only question to be considered by him is whether the representation raises a serious issue of fact and/or law to be adjudicated by the Industrial Court. There is no appealable error on the part of the Court of Appeal in setting aside the decision and order of the High Court. Both the appeals are therefore dismissed with no order as to costs.

[49] My learned sisters Zabariah Mohd Yusof, FCJ and Hasnah Mohammed Hashim, FCJ have read this judgment in draft and have agreed that it be the judgment of this Court.

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v. Menteri Sumber Manusia & Ors
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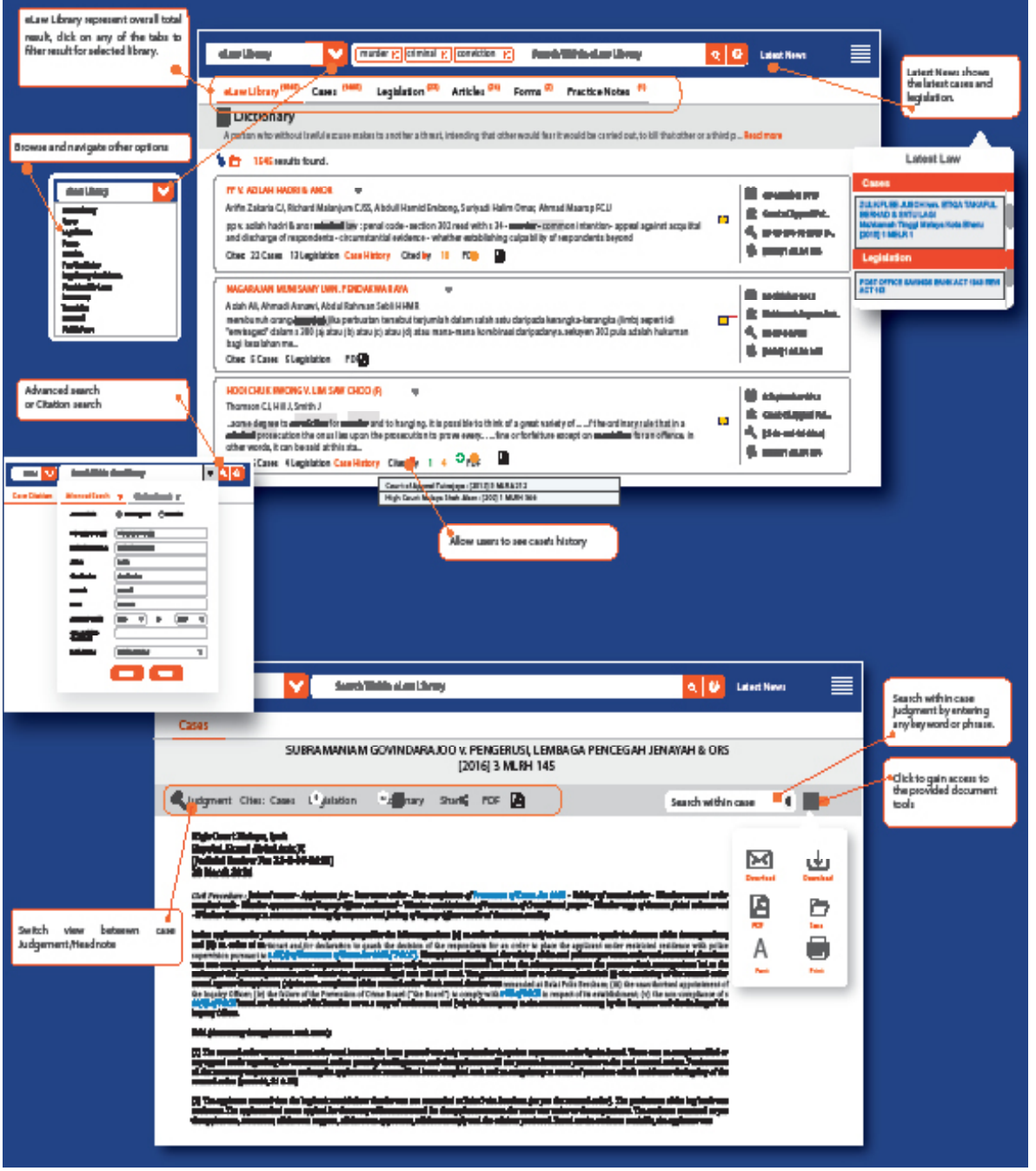

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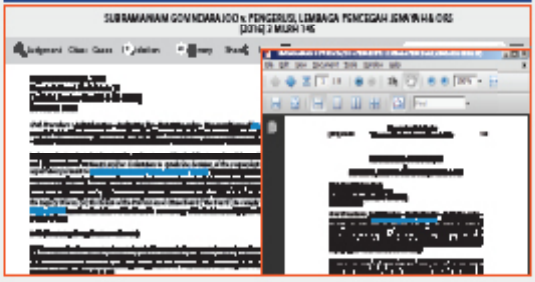

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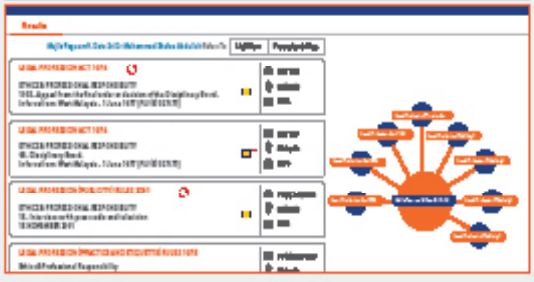

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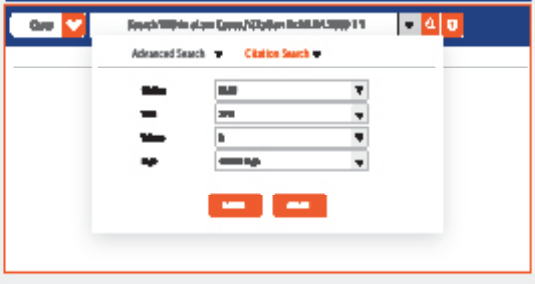

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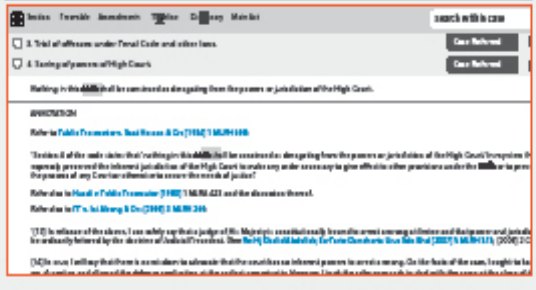

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