DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: 01(f)-18-10/2021(W)

ANTARA

THE UNITED STATES OF AMERICA … PERAYU

DAN

1. MENTERI SUMBER MANUSIA
2. SUBRAMANIAM A/L LETCHIMANAN ... RESPONDEN-
3. MAHKAMAH PERUSAHAAN, MALAYSIA RESPONDEN

Disatukan dengan

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: 01(f)-19-10/2021(W)

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THE UNITED STATES OF AMERICA … PERAYU

DAN

SUBRAMANIAM A/L LETCHIMANAN … RESPONDEN

Coram: Azahar Mohamed, CJM
Zabariah Mohd Yusof, FCJ
Hasnah Mohammed Hashim, FC

SUMMARY OF JUDGMENT

[1] The two (2) 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.

[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.

[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 29th 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 4th 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 23rd May 2008 he filed a representation under section 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")**.

[6] 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 22nd 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 Reference")**. This reference granted access to the 2nd Respondent and vested threshold jurisdiction upon the Industrial Court to hear his Section 20 Claim.

[9] However, as it turned out, before the 2nd Respondent proceeded to file his Section 20 Claim at the Industrial Court, on 25th 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 several reliefs, including an order of certiorari to quash the 1st Respondent's Reference decision.

[10] The grounds on which these reliefs were sought were set out in the Appellant's statement filed pursuant to Order 53 rule 3(2) of the Rules of Court 2012. Primarily, the Appellant anchored its case on the ground that 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.

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

[12] On 8th January 2020 at the hearing of the Appellant's judicial review application, the High Court found in favour of the Appellant. The High Court, among others, 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. 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.

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

[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 that 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.

[17] Subsequently, the Appellant filed two (2) applications for leave to appeal to the Federal Court, which were allowed by the Federal Court on 30th September 2021.

[18] The Federal Court had allowed eight (8) leave questions. In allowing the questions, the Federal Court directed that the questions be condensed. All parties have agreed that the eight (8) leave questions to be condensed into three (3).

[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 section 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 convenient, I will first deal with Question 3.

[22] 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 section 20 of the IRA 1967 to the Industrial Court for adjudication. At all material times, under section 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. The present case therefore falls to be decided by reference to the pre-amended section 20 of the IRA 1967.

[23] It is very important now to look at closely how in law the 1st Respondent should exercise his power under the pre-amended section

20 of the IRA 1967. As explained in the case of **Minister of Labour v Lie Seng Fatt [1990] 2 MLJ 9**; **SC**, the 1st Respondent has a wide and unfettered discretion under section 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. 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. 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.

[24] 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 section 20 of the IRA 1967 may be reviewed by the Court on grounds of illegality, irrationality, procedural impropriety or disproportionality.

[25] 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 paragraph [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.

[26] 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.

[27] 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.

[28] 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.

[29] 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 laws. The cases cited by the learned SFC do assist us in our deliberation.

[30] 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 depends 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.

[31] 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.

[32] 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.

[33] The reference by the Minister under section 20(3) of the IRA 1967 does not determine the question of immunity one way or another; it merely confers a threshold jurisdiction upon the Industrial Court to look into the representation and the serious issues it involves. The appropriate and

only forum to determine the issue of immunity is the Industrial Court as a matter of first instance upon a Reference by the 1st Respondent.

[34] 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. These cases 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.

[35] 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.

[36] 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.

[37] 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 section 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.

[38] 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.

Dated this day 20th June 2022.

(AZAHAR BIN MOHAMED)
Chief Judge of Malaya