

**A RECENT FEDERAL COURT'S DECISION ON THE ISSUE OF RESTRICTIVE DOCTRINE OF  
SOVERIGN IMMUNITY IN AN EMPLOYMENT DISPUTE**

**THE UNITED STATES OF AMERICA v. MENTERI SUMBER MANUSIA & ORS AND ANOTHER  
APPEAL**  
**[2022] 5 MLRA 134**

**Introduction**

1. In the recent Federal Court decision in *The United States Of America V. Menteri Sumber Manusia & Ors And Another Appeal [2022] 5 MLRA 134*, a claim for unfair dismissal brought by a former security guard against the US Government was sent back to the Industrial Court to decide on its merits.
2. The Federal Court held that 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. As the reference to the Industrial Court for unfair dismissal had nothing to do with functions related to the exercise of sovereignty of the state, the appropriate and only forum to determine the issue of immunity was the Industrial Court.

**Background Facts**

3. The Appellant in this case 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 29.9.1998, the 2<sup>nd</sup> Respondent, a Malaysian, was employed as a security guard at the Embassy ("**Security Guard**").
4. The dispute arose when the Security Guard's employment was terminated on 4.4.2008 through a phone call from an official of the Embassy, without giving any reasons.
5. As the Security Guard had served the Embassy for more than 10 years, he felt aggrieved for being dismissed without notice and any reasons given. He then filed a representation under Section 20(1) of the Industrial Relations Act 1967 ("**IRA**") against the Embassy for dismissal without just cause and excuse, and seeking for reinstatement.

6. At that time, the reference to the Industrial Court for determination was not automatic. Upon attempt for conciliation, the Director General of Industrial (“**DGIR**”) referred the matter to the Industrial Court for adjudication on whether the dismissal was for just cause or excuse as the DGIR found that:
  - (a) there were serious questions of facts and laws that require adjudication;
  - (b) the issue concerning the claim for immunity by the Embassy is an issue of law that should be decided by the Industrial Court; and
  - (c) The claim brought by the Security Guard was not frivolous and vexatious.
7. This reference vested threshold jurisdiction upon the Industrial Court to hear a claim under Section 20 of the IRA (“**Reference**”).
8. However, the Embassy filed an ex parte application to the High Court for leave to commence judicial review proceedings to quash the Reference.
9. The High Court granted leave to the Embassy and subsequently quashed the Reference by the DGIR. The High Court also granted a declaration that the Appellant and its Embassy are immune from the jurisdiction of the Industrial Court in respect of the said claim.
10. Aggrieved with the High Court’s Order, both the Minister of Human Resources and the Security Guard appealed to the Court of Appeal. The Court of Appeal allowed both appeals and set aside the High Court’s Order.
11. The Appellant then filed 2 applications for leave to appeal to the Federal Court and they were granted on 30.9.2021.

#### **Issues for the Determination by the Federal Court**

12. There were 8 leave questions allowed by the Federal Court which were subsequently condensed into the following 3:
  - (a) Question 1: Whether under common law, the restrictive doctrine of sovereign immunity applied to a claim pursued under Section 20 of the IRA 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?

- (b) 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? and
- (c) 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 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?
13. Questions 1 and 2 essentially relate to the nature, scope and applicability of the restrictive doctrine of a sovereign immunity in the context of the dismissal of the security guard by the employer which is a sovereign state.
14. Question 3 concerns whether the judicial review proceedings in the High Court is a proper forum to decide the issue of restrictive doctrine of sovereign immunity.

#### **The Appellant's Contentions**

15. The Appellant contended that the Industrial Court is not the proper forum to decide the question of sovereign immunity as the employee was employed in a security capacity and his duties was also to maintain the inviolability of the Embassy's premises. It is not merely auxiliary but was integral to the core sphere of sovereign activity.

#### **The Respondents' Contentions**

16. The Minister of Human Resources contended that the scheme of IRA expressly conferred upon the Industrial Court an adjudicatory function to decide on questions of fact or law. Whether restrictive doctrine of immunity applies is a question of law and would depend on a few factors, principally on the nature of the employment. So, the proper forum to decide on the nature of the job scope of the Security Guard would be in the Industrial Court.
17. Whereas for the Security Guard, he contended that the distinction between the employees whose job scope include implementing foreign and defence policies of the state or that in the private sector is wholly dependent on the facts and circumstances

of each case. So, the proper forum to decide on the nature of the job scope would be in the Industrial Court, after considering both oral and documentary evidence.

### **Decision by the Federal Court**

18. For convenience, the Federal Court first dealt with Question 3.
19. The pre-amended Section 20 (3) of the IRA conferred upon the DGIR a wide and unfettered discretion to refer or not to refer the dispute to the Industrial Court. If the representation raises serious questions of fact or law (or even mixed questions of law or fact) calling for adjudication, it ought to be referred to the Industrial Court since it is the only proper forum to adjudge such questions.
20. The Federal Court recognized that the question as to whether the dismissal of the 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. As such, it is entitled to sovereign immunity and is in itself a serious and difficult question of law.
21. As the Security Guard averred in his affidavit that his job scope were mere routine and menial in nature, did not involve diplomatic functions or governmental decision of the Appellant. He also did not have access to the confidential information or documents relating to the Embassy.
22. 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 on the legislative or international transaction of a foreign government, or the policy of its executive. However, all these can only be decided upon all the relevant facts being ascertained. An inquiry has to be made to ascertain whether the action of the sovereign state is within or outside that activity.
23. The relevant evidence can only be more appropriately given at the Industrial Court where the parties may be cross-examined by each other on the true nature of the employment and the act of dismissal. The designation of the job as a security guard at the Embassy alone is not sufficient and that the Appellant ought to lead evidence as to whether the job performance had anything to do with functions related to the exercise of sovereignty of the Appellant.
24. In the 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.

25. Based on these reasons, the Federal Court answered Question 3 in the negative. As for Questions 1 and 2, it was deemed unnecessary to be answered by the Federal Court in the circumstances.

### **Key Takeaways from the Case**

26. Based on our reading and understanding of this decision by the Federal Court, the Industrial Court is conferred upon a wide threshold jurisdiction to hear and determine employment related disputes, be it questions of law or fact. Even for the issue of sovereign immunity, the appropriate and only forum to determine these issues would be at the Industrial Court as a matter of first instance upon a reference by the Minister of Human Resource.
27. Post-amendment to the IRA, as employees now have direct access to the Industrial Court, any parties who are aggrieved by the reference or would like to raise questions of law in the reference, would have to wait for the Industrial Court to hear and give an award before taking up any judicial review proceedings.

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