International Law Office

August 30 2022

# US embassy employee dismissal case chapter not closed

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In *The United States of America v Menteri Sumber Manusia Malaysia*,[1] the high court judge ruled in favour of the United States, but this decision was set aside by the Court of Appeal (for further details please see "Embassy dismisses employee of jure imperil or act or jure gestionis" and "Court of Appeal sets aside decision in US embassy employee dismissal case"). Recently, the Federal Court affirmed the Court of Appeal's decision.[2]

**Facts**

A security guard formerly employed by the United States embassy filed a representation under section 20(1) of the Industrial Relations Act 1967 claiming that he had been dismissed without just cause and excuse (the claim). When conciliation between the employee and the United States embassy failed, the minister of human resources referred the claim to the Industrial Court for adjudication on whether the dismissal was for just cause and excuse.

Before the claim was heard by the Industrial Court, the United States embassy filed a judicial review application in the high court to quash the minister's reference on the grounds that, among other things, the claim relates to activity of the United States, which is protected by sovereign immunity and, therefore, is not subject to the jurisdiction of the Industrial Court.

The high court ruled in favour of the United States and quashed the minister's reference.

Upon appeal, the Court of Appeal set aside the high court's decision and consequently, the Industrial Court could proceed to hear the claim.

Dissatisfied, the United States appealed to the Federal Court against the Court of Appeal's decision.

**Issues**

The issues can be summarised as follows:

- Does the restrictive doctrine of sovereign immunity apply to the claim with the result that the Industrial Court will have no jurisdiction over the claim, considering that:
- the claim arose from a dismissal of an employee during the diplomatic mission's internal disciplinary management of its staff; and
- the claim was made by an employee 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?
- Is the judicial review proceedings in the high court the proper forum to decide the issue of the restrictive doctrine of sovereign immunity?

**Decision**

The sovereign immunity would only apply if the dismissal of the employee as a security guard was a decision made by the United States in its governmental function as a sovereign state, not a private act, which is commercial in nature. Determining whether it is a governmental or a private commercial act requires an investigation into the nature of the employee's duties and job scope to ascertain whether they were merely auxiliary or integral to the core sphere of sovereign activity.

Thus, a proper fact finding of the precise nature, duties and job scope of the employee was necessary, and this could only be done via a trial with oral and documentary evidence being adduced at the Industrial Court. As such, the Federal Court held that the proper forum to decide on the applicability of the doctrine of sovereign immunity was the Industrial Court.

Given that this was a mixed question of fact and law, a judicial review proceeding by way of affidavits was not appropriate, particularly where the parties disagreed regarding the nature of the employee's employment and whether it was only a private employment contract which was commercial in nature.

Under the circumstances, the Federal Court declined to answer the question of whether the United States and the US embassy are immune from the Industrial Court's jurisdiction in adjudicating an unfair dismissal claim by the embassy's employee. This is a question to be determined by the Industrial Court after having heard and considered the evidence from both parties.

**Comment**

In light of the Federal Court's decision, it remains to be seen whether sovereign immunity would apply to the unfair dismissal claim by the former security guard of the United States embassy.

It is also worth noting that this case was filed before the Industrial Relations Act 1967 was amended. After the amendment, the discretion of the minister to refer has been removed. Under the current provision, the director general of industrial relations must refer a representation for unfair dismissal to the Industrial Court if there is no settlement between the employer and employee during conciliation. Accordingly, the avenue to file a judicial review application against the minister's reference is now closed. Any contention by

parties must therefore be heard and decided by the Industrial Court and any party aggrieved at the decision may then lodge an appeal to the high court.

*For further information on this topic please contact Gan Khong Aik or Lee Sze Ching (Ashley) at Gan Partnership by telephone (+603 7931 7060) or email (khongaik@ganlaw.my or szeching@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.*

**Endnotes**

(1) [2020] 7 CLJ 210.

(2) *The United States of America v Menteri Sumber Manusia & Ors and another appeal* [2022] 4 MLJ 589.