



ISSN 1392–6195 (print)
ISSN 2029–2058 (online)
JURISPRUDENCIJA
JURISPRUDENCE
2010, 2(120), p. 159–175.

CUDAK V. LITHUANIA AND THE EUROPEAN COURT OF HUMAN RIGHTS APPROACH TO THE STATE IMMUNITY DOCTRINE

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Received 7 May, 2010; accepted 20 June, 2010

Abstract. *The application of the state immunity doctrine with regard to the guarantee of access to court in the case-law of the European Court of Human Rights (hereinafter referred to as the ECHR) has been proved to be a complicated issue. In the ECHR's case-law before the case Cudak v. Lithuania, the application of the state immunity doctrine had been considered as a proportionate restriction of the right of access to court even in cases of the realization of the protection of the jus cogens norm which was very much criticized by the scholars of international law. Thus, the referral of the case Cudak v. Lithuania to the Grand Chamber could or should change the ECHR's case-law in this sphere or at least develop certain criteria which would afford ground for a more effective protection to the right of access to court in cases of the application of the state immunity doctrine despite the fact that this right is not absolute. However, the case Cudak v. Lithuania has not fully satisfied these aims. Contrary, the case Cudak v. Lithuania left much obscurity, giving a strong indication that, what regards the realization of the right of access to court, the state immunity doctrine is more a material than a procedural ban, since the argumentation given by the ECHR in this case does not guarantee practical protection of this right. Moreover, the case Cudak v. Lithuania allows, in a way, to cast doubts on its compliance with the rules of international law as it con-*

cerns the retrospective application of the 2004 UN Convention on Jurisdictional Immunities of States and their Property which is not yet in force even today. Therefore, at the end of this article the author presupposes that a better way of ensuring the guarantee of access to court in cases of the application of the state immunity doctrine would be to leave this issue of a clear political shadow to be solved between the two states by means of diplomatic negotiation.

Keywords: state immunity doctrine, the right of access to court, 2004 UN Convention on Jurisdictional Immunities of States and their Property, customary international law.

Introduction

The issue of the application of the state immunity doctrine in the case-law of the European Court of Human Rights has been problematic from the first cases examined by the ECHR¹. Despite the effect of this institution, its universal recognition in international law and the fact that it is regulated by the rules of the customary international law, there still arise discussions as to its application not only in the doctrine level, but also in practice both on national and international levels. However, the analysis of the state immunity institution, as an international law institution, is not the aim of this article, though an episodic analysis of this institution is unavoidable. The present article concentrates on the application of the state immunity doctrine in the case-law of the ECHR as a procedural ban in realizing the right of access to court. With regard to that, the main object of this article is the latest judgement of the ECHR adopted by the Grand Chamber in the case *Cudak v. Lithuania*.²

It should be mentioned that the case-law of the ECHR concerning the application of the state immunity doctrine is rather sparse though quite unclear and much criticized by the scholars of international law.³ Similar is the case-law on the application of the state immunity doctrine concerning employment relations in diplomatic service.

Therefore, the object of the present article is the ECHR's argumentation in the case *Cudak v. Lithuania*; the author presents a critical analysis of the ECHR arguments concerning the application of the state immunity doctrine in cases related to employment contracts with the view to protecting the right of access to court enshrined in Article 6 § 1 of the European Convention on Human Rights (hereinafter referred to as the Convention).

1 *Fogarty v. United Kingdom*, [GC], No. 37112/97, 21 November 2001; *McElhinney v. Ireland*, [GC], No. 31253/96, 21 November 2001; *Al-Adsani v. United Kingdom*, [GC], No. 35763/97, 21 November 2001.

2 *Cudak v. Lithuania*, [GC], No. 15869/02, 23 March 2010.

3 Voyiakis, E. Access to Court v State Immunity. *International and Comparative Law Quarterly*. 2003, 52: 297–332; Cassese, A. *International Law*. 2nd ed. Oxford: Oxford University Press, 2005, p. 99–123; Mowbray, A. European Convention on Human Rights: Report of the Evaluation Group and Recent Cases. *Human Rights Law Review*. 2002, 2: 131–140; Bates, E. The Al-Adsani case, State Immunity and the International Legal Prohibition on Torture. *Human Rights Law Review*. 2003, 3(2); Bröhmer, J. State Immunity and the Violation of Human Rights. *International Studies in Human Rights*. Vol. 47. The Hague: Martinus Nijhoff Publishers, 1997.

1. Application of the Guarantee of Access to Court

Before starting the analysis of the material arguments of the ECHR, it should be mentioned that factual circumstances of the case are very similar to the case *Fogarty v. United Kingdom*⁴. A. Cudak (hereinafter referred to as the applicant) was dismissed from the office of secretary and switchboard operator (Lith. *korespondentė–telefonistė*) of the Embassy of the Republic of Poland in Vilnius. Being not satisfied with the grounds for the dismissal, the applicant brought a civil claim regarding unlawful dismissal and requested compensation without claiming reinstatement. Lithuanian courts, however, refused to examine her claims with regard to the fact that the Embassy of the Republic of Poland issued a verbal note claiming immunity from the jurisdiction of the Lithuanian courts. At the end of 2001, the applicant lodged a complaint to the ECHR concerning the violation of the right of access to court under Article 6(1) of the Convention, while on 23 March 2010 the Grand Chamber adopted the final judgement in this case, recognizing violation of Article 6(1) of the Convention concerning the right of access to court.

Before giving its argumentation on the merits of the case, the ECHR gave its arguments on the applicability issue, i.e. whether the guarantees of Article 6(1) were applicable in the case. It should be mentioned that in 2007 the Grand Chamber of the ECHR adopted a new approach concerning the applicability of the guarantees of Article 6 (the right to a fair trial) in the sphere of civil service.⁵ Applying the criteria developed in the abovementioned case, the ECHR went further on to analyze whether these two criteria were met in the case *Cudak v. Lithuania* in order to decide whether the applicant could have been excluded from the protection of guarantees under Article 6 of the Convention. After an analysis of the two criteria, the ECHR decided that the case should be decided on the merits since none of the criteria was met. Therefore, in the case *Cudak v. Lithuania*, the ECHR once more confirmed that the guarantees of Article 6 were applicable to civil servants.⁶

In addition to that, the author maintains that even if the applicant was a civil servant of the Republic of Lithuania, the first criterion would not be fulfilled, since, according to the requirement of the judgement in the case *Vilho Eskelinen and Others v. Finland*, access to court of a certain category of staff working in the civil service should be expressly excluded from a state's national law. However, the national law did not foresee and does not foresee such an exclusion concerning access to court of civil servants. Besides, Article 790(1) of the Code of Civil Procedure (in force from 1 January 2003) also does not provide for such a conclusion, since this Article establishing the ban for persons who cannot be respondents in the proceedings refers only to respondents;⁷ however, the ECHR's case-law refers not to separate parties to the proceedings, but more generally to the exclusion of the realization of the right of access to court (see, for example, Ar-

4 *Fogarty v. United Kingdom*, [GC], No. 37112/97, 21 November 2001.

5 *Vilho Eskelinen and Others v. Finland*, [GC], No. 63235/00, 19 April 2007, §§ 62-64.

6 *Cudak v. Lithuania*, [GC], No.15869/02, 23 March 2010, § 74.

7 Code of Civil Procedure. *Official Gazette*. 2002, No. 36-1340.

ticle 48(1) of the Law on Organization of the Country Protection System and Military Service, which expressly establishes that courts do not examine the disputes related to admission to and removal from the army and other issues). Finally, the Law on Civil Service neither at the time of examination of the case of the applicant stipulated, nor today stipulates a ban for civil servants to access to court. Thus, the first criterion would not be in any way fulfilled.

To sum up, the ECHR's analysis of the applicability of the fair trial guarantees gives a clear indication that the respondent states should more safely evaluate the functions performed by persons not only working at the embassies of foreign states but more widely—in the civil service. Thus, the practice of the Supreme Court of Lithuania in the cases related to employment relations, namely, the conclusion that '[...] the members of administrative and technical staff as well as the service staff contribute, in one way or another, to the represented state's sovereign rights and the performance of public authority functions implemented through a diplomatic mission, thus, such members are considered to be civil servants of that state'⁸ is not in compliance with the reasoning of the ECHR given in the case under discussion. Moreover, in its practice referring to the case *Cudak v. Embassy of the Republic of Lithuania*, the Supreme Court of Lithuania stated that the applicant had performed technical work; however, even such a type of functions facilitated the exercise of the sovereign rights of Poland, thus serving the public interests of that State.⁹ It can be stated that the Supreme Court of Lithuania interprets the implementation of a state's sovereignty too broadly, which means that the practice of the national courts with this regard has to change.

2. Protection of the Right of Access to Court

2.1. Legitimate Aim of the Limitation

While assessing the guarantee of the right of access to court, the ECHR followed its reasoning adopted in its case-law, namely, in evaluating the aim of the limitation of the access to court and the proportionality principle and making an overall conclusion whether the very essence of the access to court was violated. In evaluating the legitimate aim of the limitation, the ECHR was short and consistent with its earlier practice, stating that the grant of immunity to a State in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty.¹⁰

8 *Cudak v. Embassy of the Republic of Poland*. The Ruling of the Supreme Court of Lithuania of 25 June 2001, No. 3K-3-203/2001 [interactive]. [accessed 15-04-10]. <http://www.lat.lt/3_nutartys/senos/nutartis.aspx?id=11188>; *S.N. v. Embassy of the Kingdom of Sweden*. The Ruling of the Supreme Court of Lithuania of 6 April 2007 June 2001, No. 3K-3-142/2007 [interactive]. [accessed 15-04-10]. <http://www.lat.lt/default.aspx?item=tn_liteko&lang=1>.

9 *S.N. v. Embassy of the Kingdom of Sweden*, *ibid*.

10 *Cudak v. Lithuania*, [GC], No. 15869/02, 23 March 2010, § 60; *Fogarty v. United Kingdom*, [GC], No. 37112/97, 21 November 2001, § 34; *McElhinney v. Ireland*, [GC], No. 31252/96, 21 November 2001, § 35; *Al-Adsani v. United Kingdom*, [GC], No. 35763/97, 21 November 2001, § 54.

2.2. Proportionality Principle

The assessment of the proportionality principle is more complicated and, thus, raises much more discussion than the applicability issue and the legitimate aim. Before proceeding to the reasoning concerning the principle of proportionality, the ECHR made a distinction between the present case and a very similar case concerning the application of the state immunity doctrine to an employment-related dispute with regard to a person working at a foreign embassy, i.e. the case *Fogarty v. United Kingdom* (hereinafter referred to as the *Fogarty* case). In this case, the ECHR acknowledged that the application of the state immunity doctrine in proceedings related to employment at the Embassy of the United States was proportionate to the aim pursued. However, in the case *Cudak v. Lithuania*, the ECHR, providing different arguments than in the *Fogarty* case, acknowledged the failure to preserve the proportionality principle finding a violation of the right of access to court under Article 6(1) of the Convention.

The ECHR gave its reasoning regarding the principle of proportionality with reference to several issues, namely: the nature of dispute, i.e. dismissal and nature of functions performed by the applicant; application of the norms established in 2004 UN Convention on Jurisdictional Immunities of States and Their Property (hereinafter referred to as the 2004 UN Convention); and the alternative way of the protection of the right of access to court, i.e. the possibility to bring a claim to the Polish courts.

2.2.1. The Nature of the Dispute

In the case *Cudak v. Lithuania*, the ECHR, first of all, stated it being different from the *Fogarty* case: contrary to the *Fogarty* case, it concerned not the recruitment, but the dismissal. With regard to that, the ECHR referred to Article 11 of the 2004 UN Convention, which established the exception to the state immunity in proceedings relating to employment contracts. However, this Article itself stipulates exceptional cases in which the doctrine of state immunity still applies. After a detailed analysis of the functions of the applicant performed at the Embassy of the Republic of Poland, the ECHR decided that the applicant's work was not related to the exercise of sovereignty by the Republic of Poland, thus, Article 11(2)(d) of the 2004 UN Convention could not be applied in the case *Cudak v. Lithuania*. The ECHR was not convinced by the arguments given by the Government of the Republic of Lithuania and stated that the fact due to which the Polish Republic requested the application of the state immunity was *inter alia* related to the nature of the dispute, i.e. the applicant's dismissal from the embassy was closely related to the alleged sexual harassment case which involved one of her male colleagues. Such an argument proved the case being not an ordinary employment dispute and, therefore, possible to be related to the execution of the sovereign functions of the Republic of Poland. Therefore, with reference to the reasoning of the ECHR, it could be concluded that, presuming that Article 11 of the 2004 UN Convention established an international custom (and both the Republic of Lithuanian and the Republic of Poland were parties to this Convention), the state immunity doctrine could not be applied in the case under discussion.

2.2.2. Reliance on the 2004 UN Convention on Jurisdictional Immunities of States and their Property

What regards the ECHR's explicit reference to and analysis of Article 11(2)(d) of the 2004 UN Convention, several questions arise. Firstly, one may consider why the ECHR did not refer to other grounds established in the abovementioned Article and also allowing the application of the state immunity doctrine, namely, point (c), which stipulates that state immunity still applies when 'the subject matter of the proceedings is the recruitment, renewal of employment or reinstatement of an individual'¹¹. The author believes that this point could also be analyzed as an appropriate ground for the application of the state immunity doctrine following the International Law Commission's (hereinafter referred to as the ILC) Commentary concerning Article 11(2)(c) (which at the time of drafting the Commentary was Article 11(2)(b)), where the ILC stated that the said paragraph also referred to 'the acts of "dismissal" or "removal"'¹². Thus, taking into account the fact that the ECHR applied point (d) of Article 11 of the 2004 UN Convention *as lex specialis* to the point (c) of the abovementioned Article, the ECHR, after making a conclusion that the ground of point (d) could not be applied, could proceed to the analysis of the exception to point (c); however, this exception was automatically rejected due to the simple fact that the subject of the dispute was not recruitment but dismissal.

The second question concerns a more conceptual issue, namely, it should be considered whether while giving the judgment in the case under discussion in 2010 (namely, by exclusively referring to the norms of 2004 UN Convention, which was in force neither at the time of proceedings at the Lithuanian courts, nor at the time of giving the judgment by the ECHR itself) the ECHR was consistent with the rules of international law. Even if it was presumed that the 2004 UN Convention established international customs which, under the customary international law, must have certain inherent elements in order for a certain practice to be recognized as an international custom,¹³ the ECHR would have had to analyze whether Article 11 of the 2004 UN Convention established an international custom.

Concerning this, a reference to factual issues can be made. It should be emphasized that the applicant was dismissed from the office in 1999, while the proceedings at the national courts regarding her alleged unlawful dismissal took place in 2000-2001 and the final decision was adopted by the Supreme Court of Lithuania on 25 June 2001. The ILC's Draft Articles, including Article 11 concerning employment contracts, were adopted in 1991, and only on 2 December of 2004 the Convention on Jurisdictional

11 2004 UN Convention on Jurisdictional Immunities of States and Their Property [interactive]. [accessed 01-04-10]. <http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf>.

12 See Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries [interactive]. 1991, p. 43 [accessed 15-04-10]. <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf>.

13 *North Sea Continental Shelf cases* (Federal Republic of Germany/Netherlands) ICJ, judgements of 26 April 1969; *Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)* (merits), ICJ, 27 June 1986.

Immunities of States and Their Property was adopted and later opened for signature. It should also be stressed that at the time of the proceedings at Lithuanian courts, and even today, neither the Republic of Lithuania nor the Republic of Poland were (and are) members of the 2004 UN Convention. What is more, both countries were not (and are not) members of the 1972 European Convention on State Immunity adopted by the European Council (1972 Basel Convention), which also established the limited state immunity doctrine concerning employment contracts (Article 5). Besides, issues concerning the state immunity doctrine were not regulated by the bilateral agreement concluded between the Republic of Lithuania and the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters. Therefore, issues concerning the state immunity doctrine were (and are) regulated by the customary international law rules. Thus, taking into account the said facts, at the time of invoking the immunity from jurisdiction of the Republic of Poland, the national courts referred to the international trend as it was in 2001, namely, ILC Draft Articles adopted in 1991 and the practice of other countries. Besides, as another point of critique of the ECHR's decision to exclusively apply the 2004 UN Convention, it should be stressed that Article 11 of the said Convention adopted by the ILC on the basis of the Draft Articles was considerably modified, introducing, *inter alia*, a new point (d), which reads as follows: 'the State immunity could still be applied if the subject-matter of the proceedings was the dismissal or termination of employment of an individual and [...] such a proceeding would interfere with the security interests of that State'¹⁴. Moreover, the ECHR itself maintains the position that the reference of the contracting states of the Convention to the latest developments in their national practice to the situations occurred before these developments are considered by the Court as of the reduced value.¹⁵ Thus, one can hardly agree with the ECHR's position to refer to the latest developments both in practice and theory and to adapt them to events that happened three–four years before.

Therefore, it is doubtful whether the ECHR, without a prior analysis and conclusion that Article 11 establishes a rule of the customary international law, could so explicitly and exclusionary base its judgement on the rules of the 2004 UN Convention, what is not generally allowed under the 1969 Vienna Convention on the Law of Treaties (Article 28. Non-retroactivity of treaties) (hereinafter referred to as the 1969 Vienna Convention). Moreover, the 2004 UN Convention itself prohibits retrospective application of the 2004 UN Convention (Article 4. Non-retroactivity of the present Convention). Moreover, while questioning Article 11 of the 2004 UN Convention as being a norm establishing an international custom, Article 19 of the 1969 Vienna Convention should be taken into consideration (Article 19. Formulation of reservations). This Article includes a basic rule: a state may formulate a reservation unless the reservation is prohibited by the treaty, and the treaty provides that only a specified reservation may be made. Unless the treaty is silent on the clause of reservation, a state party may make a reservation if it is compatible with the object and the purpose of the treaty. Taking into account the 2004

14 2004 UN Convention on Jurisdictional Immunities of States and Their Property [interactive]. [accessed 01-04-10]. <http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf>.

15 *Kontrova v. Slovakia*, No. 7510/04, 31 May 2007, § 44.

UN Convention, which is silent of the reservation clause, it is possible to conclude that a reservation can also be made regarding Article 11, what, in a way, contributes to the doubts about Article 11 as establishing an international custom. All this proves that the ECHR should have been more cautious in making the general conclusion (a presumption) that Article 11 established a rule of international custom, since the above-given reasoning raises many doubts which should have been resolved by the ECHR before making the final conclusion in the *Cudak v. Lithuania* case.

Therefore, from the point of view of international law, the judgment would be more reasonable if based on the customary international law which enables states to dispute over the existence of a particular custom instead of a retrospective application of the norms of the international instrument (though codifying the rules of customary law), which reflects the agreement of the state parties to it on certain international obligations¹⁶ and the obligation to implement the international treaty on the basis of the principle *pacta sunt servanda*. Therefore, if a state does not make a reservation concerning a separate norm of the treaty, the international agreement does not leave space for disputes over the existence of a particular international obligation; moreover, the key feature of a treaty is that it only binds the parties to it which have agreed to be bound by those provisions¹⁷.

Thus, according to the international law practice, in order to rely on Article 11 of the 2004 UN Convention, the ECHR should first have analyzed whether Article 11, establishing the limitation of the state immunity doctrine in relation to employment contracts (with the exceptions stipulated in paragraph 2), was an international custom possessing all its characteristics,¹⁸ as it was done in the cases *Al-Adsani v. United Kingdom* and *McElhinney v. Ireland*¹⁹. The ECHR should have evaluated this issue even though the preamble of the 2004 UN Convention states that ‘the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law’²⁰. Moreover, the fact that the 2004 UN Convention is not yet in force proves the states’ reservation regarding the state immunity issues. Thus, this aspect gives additional grounds to the question whether it is really a long-standing international custom for a state to apply the doctrine of limited immunity from jurisdiction in employment-related disputes or to refer to the exceptions enumerated in paragraph 2 of Article 11 of the 2004 UN Convention.²¹ In this case one can rely on the opinion expressed by Boyle and

16 Aust, A. *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press, 2007, p. 20.

17 Cassese, A., *supra* note 3, p. 170.

18 *Ibid.*, p. 156; Goldsmith, J. L.; Posner, E. A. *The Limits of International Law*. Oxford: Oxford University Press, 2005, p. 23–26.

19 *Al-Adsani v. United Kingdom*, [GC], No. 35763/97, 21 November 2001, § 61–63; *McElhinney v. Ireland*, No. 31253/96, 21 November 2001, § § 27, 30, 38.

20 2004 UN Convention on Jurisdictional Immunities of States and Their Property [interactive]. [accessed 01-04-10]. <http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf>.

21 For more information on states’ practice in applying the restrictive doctrine of state immunity in disputes related to employment contracts see Fox, H. *The Law of State Immunity*. Oxford: Oxford University Press, 2002, p. 260. Moreover, Fox maintains the position that employment exception established in the European Convention on State Immunity has not been accepted as a customary rule of international law (p. 306). See also *McElhinney v. Ireland*, [GC], No. 31253/96, 21 November 2001, § 11.

Chinkin: ‘the more widely the treaty text is supported, the easier will be to establish its law-making effect’²² (out of 192 members of United Nations Organization, today there are 28 states signatories and 9 States that expressed their consent to be bound by this Convention).

Finally, what regards the establishment of Article 11 as rule of the customary international law, the practice of the states concerning the form of the state immunity in disputes related to employment contracts should have been also taken into consideration. Some states consider themselves not being competent in resolving employment disputes involving local employees of foreign missions whose duties are closely related to the exercise of governmental authority. Moreover, such states believe that the duties of a secretary are related to the exercise of governmental authority. Therefore, they relinquish the examination of the case on merits because of the lack of jurisdiction.²³ Such a position was also taken by the courts of Lithuania in the case *Cudak v. the Embassy of the Republic of Poland*. However, there are states in which an opposite opinion is held: employment contracts to which a foreign state is a party do not fall in the ambit of governmental authority. Thus, such states consider having the jurisdiction to examine this type of cases on the merits.²⁴ Last but not least, it should be stressed that the Republic of Poland recognizes the limited state immunity doctrine as well. In the judgement of the Supreme Court given in 2000 in the case of a *Polish citizen v. the Embassy of foreign State*, it stated that in this case the Polish Labour Court had jurisdiction concerning the dispute over the termination of the employment contract; this fact proves that the Republic of Poland applies the doctrine of limited state immunity.²⁵

2.2.3. Immunity from Execution and Alternative Means of Protection of the Right of Access to Court

The analysis of the judgement in the *Cudak v. Lithuania* case raises additional doubts about the reasonableness of the ECHR’s arguments and its final conclusion with regard to the execution of a decision the Lithuanian courts would have adopted in favour of the applicant. Moreover, doubtful is the ECHR’s position that immunity from execution is a proportionate restriction of the right of access to court.²⁶ Under the public

22 Boyle, A.; Chinkin, C. *The Making of International Law*. Oxford: Oxford University Press, 2007, p. 237.

23 See, for example, the case-law of the Supreme Court of Finland in the case *Hanna Heusal v. Republic of Turkey*, the case-law of the Employment Appeal Tribunal of Great Britain in the case *Sengupta v. Republic of India*, the practice of the Republic of Germany in the case *German Citizen v. The Belgian Embassy* [interactive]. [accessed 15-04-10]. <http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/state_immunities/>.

24 See, for example, the case-law of the Supreme Court of the Republic of Austria in the case *R.W. v. Embassy of X State*, the case-law of the Athens Court of Appeals of Greece in the case *I.G. v. the United States* [interactive]. [accessed 15-04-10]. <http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/state_immunities/>.

25 See the decision of the Supreme Court of 11 January 2000 in the case *Polish citizen v. the Embassy of foreign State* [interactive]. [accessed 15-04-10]. <http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/state_immunities/>.

26 *Kalogeropoulou and Others v. Greece and Germany*, (dec.), No. 59021/00, 12 December 2002.

international law, it is accepted as a rule that once the immunity from jurisdiction is invoked, it automatically applies to the immunity from the execution of the decision adopted by the court of the forum state. However, in case of waiver of the immunity from jurisdiction the situation is opposite, as a separate waiver is required. Therefore, the request of the Republic of Poland for the application of immunity from jurisdiction automatically meant immunity from the execution of any decision adopted by the Lithuanian courts. Thus the ECHR's statement that 'as to any difficulties that the Lithuanian authorities may encounter in enforcing against Poland a Lithuanian judgement in favour of the applicant, such considerations cannot frustrate the proper application of the Convention'²⁷ sounds unevaluated and unweighed taking into account the rules of the state immunity law.

Evaluating the ECHR's arguments concerning the possibility to have examined the applicant's claim at the Polish courts, one may refer to the ECHR's case-law: the ECHR, in making a decision on the violation of access to court when the immunity from jurisdiction was invoked as a procedural bar to the realization of the right of access to court, usually takes into consideration the possibility of an alternative means of effective protection of the right of access to court as an important factor.²⁸ Moreover, in the admissibility decision of *McElhinney v. Ireland*, the ECHR established that the mere existence of doubts as to the prospects of success of a remedy does not absolve an applicant from exhausting it.²⁹ While in the judgement of the same case, the ECHR, stating non-violation of the right of access to court, which was restricted as a result of the application of the state immunity doctrine, took into consideration (as an additional factor) the fact that the applicant had the possibility to bring before a court of Northern Ireland an action as an alternative means protecting the applicant's right.³⁰ Therefore, once more it cannot be agreed with the ECHR's simple and unreasoned argument given in the *Cudak v. Lithuania* case stating that 'even supposing that it [submission of the applicant's complaints to the Polish courts] was theoretically available, it was not a particularly realistic one in the circumstances of the case'³¹. Without going into the details of the possibility to apply the substantive law of Lithuania, which was in fact possible following the rules of the private international law, the ECHR's emphasis on the practical realization of the right of access to court in the Polish courts seems to be unreasoned, too. The ECHR did not properly evaluate the applicant's real possibility to realize her right of access to court in the Polish courts, since the applicant had been living for several years in Poland. Thus, it could hardly be said that the applicant could have encountered 'practical difficulties in this way not compatible with the right of access to court'³².

27 *Cudak v. Lithuania*, [GC], No. 15869/02, 23 March 2010, § 73.

28 *McElhinney v. Ireland*, [GC], No. 31253/96, 21 November 2001, § 23; *A v. United Kingdom*, No. 35373/97, 17 December 2002, § 86; *CGIL and Cofferati v. Italy* (No. 2), No. 2/08, 6 April 2010, § 50.

29 *McElhinney v. Ireland*, (dec.), [GC], 9 February 2000; *Van Oosterwijk v. Belgium*, No. 7654/79, 6 November 1980, § 37.

30 *McElhinney v. Ireland*, [GC], No. 31253/96, 21 November 2001, § 23.

31 *Cudak v. Lithuania*, [GC], No. 15869/02, 23 March 2010, § 36.

32 *Ibid.*

Therefore, the applicant could have effectively protected her rights in the Polish courts realizing her right of access to court which was enshrined in the Constitution of the Republic of Poland and which was reasonably proposed by the Supreme Court of Lithuania in its final decision ('the application of the State immunity in the applicant's case did not prevent the applicant of submitting an analogous claim to the court of the Republic of Poland'³³). Besides, it cannot be ignored that the Supreme Court of Lithuania was also bound by the practice formulated by the Senate of the Supreme Court of Lithuania concerning the application of the private international law rules, which put national courts under obligation in deciding whether a case falls within the jurisdiction of the Lithuanian courts to consider the issue of the execution of such a judgment if a case contained an international (foreign) element.³⁴

Thus, the ECHR's arguments in this aspect also seem to be hasty and unevaluated. Moreover, the ECHR itself sometimes sees the realization of the right of access to court to be practical and effective even though this way of realization is not judicial and without a real prospect.³⁵

2.2.4. The Plea of the State Immunity and the Position of National Courts

In the case *Al-Adsani v. United Kingdom*, the ECHR stated that the Convention should be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of state immunity.³⁶ From the *Cudak v. Lithuania* case it can be seen that the ECHR maintains the position that the national courts have the competence to decide on the use of immunity from jurisdiction, i.e. to question the issue of immunity (whether a state used its right under the international law correctly or not). However, there exists an opposite view that once the state invoked the application of the state immunity doctrine, i.e. jurisdiction from the court of the state of forum, the latter cannot question the issue of the application of immunity from jurisdiction.³⁷ Moreover, Article 6(1) of the 2004 UN Convention requires a state 'to ensure that its courts determine on their own initiative that the immunity of that other State under Article 6 of the said Convention is respected'³⁸. Therefore, according to the latter view, the principle of independence of a foreign state means that it is within the state's power to

33 *Cudak v. Embassy of the Republic of Poland*, *supra* note 8.

34 Ruling of the Senate of the Supreme Court of Lithuania 'On the Jurisprudence of the Court of the Republic of Lithuania in Application of International Private Law' of 21 December 2000, No. 28. *Case-law of Courts*. 2001, No. 14.

35 *A v. United Kingdom*, No. 35373/97, 17 December 2002, § 86.

36 *Al-Adsani v. United Kingdom*, [GC], No. 35763/97, 21 November 2001, § 55.

37 With regard to that, Fox expresses a viewpoint that once the state of forum is satisfied that the defendant is a foreign state, the forum court will dismiss the proceedings, unless satisfied that the foreign state has waived its immunity or that the proceedings fall within an exception to state immunity. Besides, in civil law countries a plea of state immunity is, therefore, a signal to the forum court that jurisdiction belongs to another court. See Fox, H., *supra* note 21, p. 13, 30, 28–31, 42.

38 2004 UN Convention on Jurisdictional Immunities of States and Their Property, *supra* note 11.

determine the issues under dispute following its own policy and discretion and the way of adjudication.

The view that national courts have the competence to decide on the use of the immunity from jurisdiction and to decide to proceed the further examination of the case if a foreign state participates in the proceedings as a private law subject (not as exercising sovereign functions), presupposes that the national courts of Lithuania did not properly evaluate the nature of the applicant's functions performed at the Embassy of the Republic of Poland, which felt not into the sphere of the *acta jure imperii*. Besides, the ECHR's conclusion that the applicant's function did not fall into any of the exceptions under Article 11 of the 2004 UN Convention and the conclusion that the Lithuanian courts, by declining its jurisdiction to hear the applicant's case, violated the applicant's right of access to court implicitly allows making the conclusion that the Republic of Poland has not properly used its right of immunity from jurisdiction. If this is the situation, whether it is for the ECHR to make such a conclusion? With regard to that, it should be not forgotten that the mechanism created by the Convention for the collective protection of human rights is of subsidiary character, leaving the states certain margin of appreciation. Moreover, the ECHR is not the fourth instance court, thus, its role is limited to the overall evaluation of the situation concluding whether a particular process at the national level was on the whole in breach of any right under the Convention (but not to deal with the errors of fact or law). Thus, the ECHR's evaluation of the applicant's duties performed at the Embassy of the Republic of Poland and the conclusion regarding the nature of the functions indicates that the ECHR took the responsibility to evaluate facts, which is usually the competence of national courts. Therefore, the case under discussion and the recent developments in the ECHR's case-law³⁹ prove that the ECHR tends to leave less and less margin of appreciation for the contracting states in such sensitive matters as diplomatic relationship. This, in its turn, proves that the Convention loses its subsidiary character. However, one can argue whether it is within the ECHR's jurisdiction, provided under Article 32 of the Convention.

Therefore, what regards the ECHR's reasoning, the case-law of national courts should considerably change. Particular functions of persons involved in disputes with a foreign state should be evaluated more carefully (that would allow to make a conclusion regarding the falling of particular acts within the sphere of *acta jure imperii* or *acta jure gestionis*). Besides, the ECHR's judgment means that less emphasis should be put on the fact of invoking the plea of immunity from jurisdiction, which, in fact, was the main factor in making the conclusion in the case *Cudak v. the Embassy of the Republic of Poland* by the Supreme Court of Lithuania. However, if one follows this approach, there still remain doubts about the future execution of the decision if such would be adopted in favour of the applicant, since, as it was mentioned before, the plea of immunity from jurisdiction automatically means the immunity from the execution of the decision against that state and, most probably, the state invoking immunity from jurisdiction would be reluctant to execute it. However, as the ECHR maintains, access to court without exe-

39 *Lautsi v. Italy*, No. 30814/06, 9 November 2009.

cution of a binding decision is considered to be illusionary.⁴⁰ Thus, one can reasonably raise a question: what is the practical value of such a ECHR's judgment, if the right of access to court cannot be protected?

2.2.5. Alternative Way of Solving the Problem of Access to Court

After an analysis of the arguments given by the ECHR in the *Cudak v. Lithuania* case, there still remain two aspects to be covered. Admitting the fact that immunity does not mean freedom from liability and that invoking immunity from jurisdiction does not mean non-compliance of the rights established in the European Convention of Human Rights by the contracting state, one may suggest that after the decision given in the applicant's case by the Supreme Court of Lithuania in 2001, there still remained three possibilities for the protection of the applicant's rights. Namely, submitting an analogous claim to the courts of Poland, diplomatic protection and bringing an inter-state application to the ECHR. The use of these measures is attributable both to the applicant and the State of Lithuania. As it was mentioned above, the applicant could have applied to the courts of Poland submitting analogous claims as to the Lithuanian courts. The fact that she has not used this right cannot be the responsibility of the Republic of Lithuania.

However, the State of Lithuania could have protected the rights of the applicant using diplomatic protection under the customary international law, as, being an international law subject, it has an exclusive right to exercise the diplomatic protection on behalf of its national. Moreover, it is generally accepted that the diplomatic protection by a state at an inter-state level remains an important remedy for the protection of persons whose human rights have been violated abroad.⁴¹ Taking into account that such a measure is not an obligation under the international law, the use of it remained within the discretion of the State of Lithuania. The fact that the right of access to court, in contrast to the rights that are recognized as *jus cogens* norms, was violated might raise certain doubts about the state's willingness to start a process at an inter-state level. This certainly has a clear political shadow and was in a way proved by the State of Lithuania being silent of the use of this measure. However, one cannot but admit that this measure was an alternative way for the State of Lithuania to exercise its right protecting its nationals, if it was considered to be necessary in this case.

Still, the last possibility for the State of Lithuania was to submit the application under Article 33 of the Convention against the Republic of Poland, as a measure usually taken by the contracting states for the purpose of securing observance of common standards of conduct in the field of human rights.⁴² One cannot argue that the latter measure, in comparison to the former, would seem even less credible taking into account the practice of states of the Convention using their right to inter-state application. Such a

40 *Kalogeropoulou and Others v. Greece and Germany*, (dec.), No. 59021/00, 12 December 2002.

41 See Draft Articles on Diplomatic Protection with commentaries [interactive]. 2006, p. 26 [accessed 15-04-10]. <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf>.

42 Harris, D.; O'Boyle, M.; Warbrick, C. *Law of the European Convention of Human Rights*. 2nd ed. Oxford: Oxford University Press, 2009, p. 760.

practice is characteristic to very rare cases concerning mostly gross violations of human rights; moreover, such an inter-state application would have an impact on further bilateral relations.⁴³ Besides, the fact that the Republic of Poland refused to intervene in the present case as a third-party under Article 36 of the Convention very clearly indicated that the State of Poland did not wish to solve this question at the international level. Still, though the latter way of protecting the applicant's rights seems to be very doubtful, the first two could have been considered more seriously by the ECHR before making the final conclusion with regard to the responsibility of the State of Lithuania.

Conclusions

1. The ECHR's judgment in the case *Cudak v. Lithuania* arises certain doubts about the reasonableness of the ECHR's arguments, especially concerning the application of the rules of international law.

2. The case under discussion proves that neither earlier case-law of the ECHR nor the approach adopted by the ECHR concerning the application of the state immunity doctrine provides a solution regarding the practical protection of the right of access to court. The reopening of the case in the Lithuanian courts and the examination of the claims on the merits does not guarantee the execution of a favourable decision in the territory of the Republic of Poland. Therefore, it is rather unclear whether the adoption of a favourable decision in cases of the application of the doctrine of state immunity is in itself enough.

3. The case *Cudak v. Lithuania* did not formulate any criteria concerning effective and practical protection of the right of access to court when the state immunity doctrine is applied; moreover, it did not reveal any tendencies in this sphere neither in general nor specifically relating to employment contracts. Besides, its argumentation leaves uncertainty, which should have been clarified not only for the purpose of the further observance of the obligations of the members of the Council of Europe but, more generally, taking into account the influence of the ECHR's case-law on the public international law.

4. In the author's view, a more appropriate position of the ECHR in the cases of the application of the state immunity doctrine would be to consider such a restriction not as a procedural ban but as a material ban, in this way leaving the two states to choose the proper way of solving the problem, most probably, by means of diplomatic negotiation. Since today, the ECHR's approach with regard to the right of access to court and argumentation concerning the application of the state immunity doctrine allows to raise a question whether it is within the competence of the ECHR to analyze the application of the institution of the international law—the doctrine of state immunity—which has a very clear political shadow and concerns such sensitive principles as sovereignty and equality of states. If to follow the ECHR's reasoning in the *Cudak v. Lithuania* case, it

43 *Ireland v. United Kingdom*, No. 5310/71, 18 January 1978; *France, Norway, Denmark, Sweden and Netherlands v. Turkey*, No. 9940-9944/82, 6 December 1983; *Cyprus v. Turkey*, No. 25781/94, 10 May 2001.

is possible to doubt whether it is really the responsibility of the state which dismissed a case because of the lack of jurisdiction and, thus, violated Article 6 of the Convention only. Moreover, what is the extent of the responsibility of the state party to the Convention which invoked the state immunity? Could it be said that this state has followed the rules of the Convention, if to hold a position that the application of the state immunity doctrine does not mean freedom from liability?

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CUDAK V. LITHUANIA IR EUROPOS ŽMOGAUS TEISIŲ TEISMO POZICIJA VALSTYBĖS IMUNITETO DOKTRINOS POŽIŪRIU

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Santrauka. *Europos Žmogaus Teisių Teismo (toliau – Teismas) praktika, taikant Valstybės imuniteto doktriną, siekiant garantuoti teisę kreiptis į teismą, yra sudėtinga. Remiantis Teismo praktika iki Cudak v. Lithuania (toliau – Cudak byla) sprendimo buvo laikoma, kad taikyti Valstybės imuniteto doktriną, tai – proporcingai apriboti teisę kreiptis į teismą, netgi siekiant įgyvendinti jus cogens normas apsaugą. Tokia pozicija buvo labai kritikuojama daugelio tarptautinės teisės specialistų. Todėl Cudak bylos perdavimas Didžiajai kolegijai galėjo/turėjo reikšti šios srities Teismo praktikos pasikeitimą arba bent jau išplėtojimą tam tikrų kriterijų, kurie užtikrintų veiksmingesnę teisės kreiptis į teismą apsaugą, taikant Valstybės imuniteto doktriną, nepaisant to, kad ši teisė nėra absoliuti. Tačiau Cudak byla, galima teigti, šių tikslų nebuvo pasiekta. Priešingai, ši byla paliko nemažai neaiškumų, leidžiant labiau suprasti, kad Valstybės imuniteto doktrina įgyvendinant teisę kreiptis į teismą yra daugiau materialinis nei procedūrinis teisės kreiptis į teismą taikymo apribojimas, kadangi pateikta Teismo argumentacija šioje byloje nėra užtikrinama šios teisės apsauga praktikoje. Todėl galima manyti, kad pagal tokią Teismo praktiką tokios teisės nėra nacionalinėje teisėje, o tai reiškia, jog nėra įgyvendinamas vienas iš kriterijų, keliamų civilinio pobūdžio teisės sąvokai, įtvirtintai Europos žmogaus teisių konvencijos (toliau – Konvencija) 6 straipsnio 1 dalyje. Be to, Cudak sprendimas leidžia iš dalies abejoti jo atitiktimi tarptautinės teisės*

normoms, kiek tai susiję su 2004 m. JT konvencijos dėl valstybių ir jų turto imuniteto nuo jurisdikcijos taikymo retrospektyviai, atsižvelgiant į tai, kad ši Konvencija dar nėra iki šiol įsigaliojusi. Todėl šio straipsnio pabaigoje autorė daro prielaidą, kad geresnis būdas užtikrinti teisę kreiptis į teismą, kai yra taikoma Valstybės imuniteto doktrina, būtų tuomet, jei šį klausimą, turintį aiškų politinį atspalvį, spręstų dvi Valstybės diplomatinė derybų būdu.

Reikšminiai žodžiai: *Valstybės imuniteto doktrina, teisė kreiptis į teismą, 2004 m. JT konvencija dėl valstybių ir jų turto imuniteto nuo jurisdikcijos, paprotinė tarptautinė teisė.*

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