EXTRACTS OF THE JUDGMENT OF THE COUNCIL OF STATE, PRESIDENT OF THE JUDICIAL DIVISION

M.K.* v. *State Secretary for Justice

The petitioner instructed a bailiff in The Hague, to attach a bank account of the Republic of Turkey at the Algemene Bank Nederland in Amsterdam, by way of execution of a judgment given against the Republic on 1 August 1985 in which her dismissal by the Turkish Embassy in The Hague was declared void and Turkey was ordered to pay a sum of Dfl. 7,700. By letter dated 3 November 1986 the State Secretary gave notice to the bailiff under Article 13(4) of the Bailiffs' Regulations[1] that he should refuse to serve any notification in connection with the execution of the judgment since this was contrary to the international obligations of the State of the Netherlands.

The Council of State held:

[…] It should be said at the outset that the State and its organs are obliged to refrain from acts or omissions in relation to another State and its organs which are in breach of the obligations to which a State is subject under international law. In this context Article 13(4) of the Bailiffs' Regulations empowers the respondent to intervene if he considers that the service of a notification would be contrary to these obligations. Only in this case may the respondent make use of his power and is he also therefore bound to do so, in view of the obligations to which the Dutch State is subject in this connection.

There is therefore no scope for a weighing of the interests and everything that the petitioner has submitted on this subject, notably her argument that an indemnity should not have been omitted in any weighing of the interests, does not need to be taken into consideration.

The dispute therefore revolves around the question whether the execution of the judgment would be contrary to the obligations of the State under international law. […]

If the respondent means by this that his opinion as to whether he made correct use of his power under the said provision of the Bailiffs' Regulations takes precedence over our opinion or that in any event our opinion can only be of a very marginal character, we cannot agree with him. We hold at the outset that a right of appeal exists under the Administrative Decisions Appeals (AROB) Act, and that neither Article 13a of the General Provisions of Legislation Act nor Article 13(4) of the Bailiffs' Regulations restricts the freedom of assessment given to us and the Division under the AROB Act, and that any such restriction cannot be based solely on the history of legislative provisions. There is also no question of the respondent being left any discretion in policy which could be construed as imposing a certain restriction on our right of assessment, since, as stated previously, the respondent may and indeed must exercise the power if he considers that the execution of a judgment would be contrary to the State's obligations under international law. Finally, whether the respondent was correct in arriving at this opinion is a question which is ideally suited in every respect to be decided in full by the courts.

[1] This article was replaced by article 3a of the Bailiffs' Act from 26 January 2001. See document NL/ 2.

We can, however, concede to the respondent that when interpreting and applying customary international law in particular, the courts should take account of the fact that the Government, as the representative of the State in dealings with other States, also helps to mould the law by disseminating its views on what the law is and by endeavouring to observe in its dealings the practice based on these views. Justice can be done to the Government's special position if the courts hear the Government's advisers on international law to ascertain its views on legal positions, either ex officio or at the Government's request, and accord the deference to this opinion which is due on account of the special position. […]

Although there is no rule of international law that prohibits executions levied on the assets of a foreign State which are in the territory of another State (cf., HR 26 October 1973, NJ (1974), No. 361), it is equally beyond doubt that rules of customary law prescribe immunity from execution in respect of the enforcement of a judgment, even if the court which gave the judgment was competent to do so under these rules (as in the present case) if this execution relates to assets intended for public purposes. […]

The note verbale from the Turkish Embassy in The Hague in which it is stated that all the money in the account which has been attached was transferred by the Turkish Government in order to defray the costs of the Embassy in the performance of its functions must be deemed sufficient proof that these moneys are intended for public purposes of the Republic of Turkey.

It is necessary to take into account in this connection that great importance has traditionally been attached to the efficient performance of the functions of embassies and consulates; confirmation of this is provided in the Vienna Conventions on diplomatic relations (1961) 31 and consular relations (1963). To require the Turkish mission in the Netherlands to give a further and more detailed account of the funds in this account would amount under international law to an unjustified interference in the internal affairs of this mission.