

EXTRACTS OF THE JUDGMENT OF THE SUPREME COURT

M.K.B. van der Hulst v. United States of America

The case concerns immunity in respect of an employment dispute between the United States of America and a Dutch woman, Mrs Van der Hulst, who had been employed as a secretary in the Foreign Commercial Service Department of the United States Embassy in The Hague since 1 July 1984. A final appointment was dependent on the results of a security check. On 29 August 1984 she was dismissed 'for security reasons'.

The Supreme Court held:

[...] 3.3. As regards the question of whether an exception recognised under international law should be allowed to the jurisdiction conferred here in principle, the starting point should be that according to present-day views on international law as evidenced for example by international regulations already in existence or still in the draft stage there is a trend towards limiting the privilege of a sovereign State to claim immunity before the courts of another State and only to allow this immunity if the act of the foreign State which forms the subject of the proceedings instituted against it clearly has the character of a governmental act according to the views of the forum State. As far as employment relations are concerned, reference may be made in this connection to the European Convention on State Immunity and the draft scheme produced in the United Nations for Jurisdictional Immunities of States and their Property of July 1986. Under these international provisions, no immunity is in principle accepted for relations of an employment law nature entered into by a foreign State in the receiving State, although the defence of immunity may not be excluded in all cases.

[...]

3.5 [...] Although it must generally be assumed that if a foreign State enters into a contract of a private law nature in the receiving State it is not entitled to claim immunity in respect of disputes resulting from such contract and that the position is no different if the foreign State wishes to evade the commitment it has accepted under the contract by means of a typically governmental act. However, this general rule is not entirely without exceptions. It must be assumed that an exception of this kind occurs in the present case, even if Van der Hulst could rely in this case on a contract of employment already in existence under private law. In carrying on its diplomatic mission and providing consular services in the receiving State, a foreign State should, for reasons of State security, be given the opportunity to allow the conclusion or continued existence of a contract such as the present one to depend on the result (which is not subject to the assessment of the other party or the courts of the receiving State) of a security check by stipulating a condition such as the present one. It cannot be assumed that a foreign State which enters into such a contract thereby loses its right to rely on immunity when terminating the contract on the ground of a security check of the kind mentioned above, no matter how much the contract itself is of a private law nature.