



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SABEH EL LEIL v. FRANCE

(Application no. 34869/05)

JUDGMENT

STRASBOURG

29 June 2011

This judgment is final but may be subject to editorial revision.

In the case of Sabeh El Leil v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Christos Rozakis,
Peer Lorenzen,
Françoise Tulkens,
Corneliu Bîrsan,
Karel Jungwiert,
Lech Garlicki,
David Thór Björgvinsson,
Mark Villiger,
Isabelle Berro-Lefèvre,
George Nicolaou,
Ann Power,
Zdravka Kalaydjieva,
Mihai Poalelungi,
Angelika Nußberger,
Julia Laffranque, *Judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 19 January and 1st June 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 34869/05) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr Farouk Sabeh El Leil (“the applicant”), on 23 September 2005.

2. The applicant was represented by Ms C. Waquet, of the *Conseil d’Etat* and Court of Cassation Bar. The French Government (“the Government”) were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged that he had been deprived of his right of access to a court as a result of the immunity from jurisdiction upheld by the domestic courts.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 21 October 2008 it was declared admissible by a Chamber of that Section composed of the following judges:

Rait Maruste, *President*, Jean-Paul Costa, Karel Jungwiert, Renate Jaeger, Mark Villiger, Isabelle Berro-Lefèvre and Zdravka Kalaydjieva, and also Claudia Westerdiek, Section Registrar. On 9 December 2008 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

6. The applicant and the Government each filed further written observations (Rule 59 § 1). The Grand Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Under a contract of indefinite duration dated 25 August 1980, the applicant was appointed by the State of Kuwait as accountant in the Kuwaiti embassy in Paris. He became head accountant on 17 April 1985, when a note by the Ambassador entitled "Organisation of Accounts Department at Kuwaiti Embassy in Paris" set out the applicant's duties as follows:

"(a) To oversee all the work of the accounts department.

(b) To supervise the staff working in that department in respect of the tasks assigned to them, and to ensure compliance with the rules governing working hours and the volume and distribution of work.

(c) The above-mentioned accountant must sign all payment orders, accounting invoices and everything connected with that activity.

(d) In addition the accountant is entrusted with the management of administrative tasks.

(e) The accountant shall be accountable to his superiors for any shortcomings in respect of everything connected with the work of his department."

8. On 3 December 1999 some twenty employees of the Embassy signed a statement to the effect that the applicant had, since his appointment, unofficially assumed the role of staff representative, with the result that he had resolved all disputes between the staff and the diplomatic mission for the past nineteen years.

9. A certificate of employment dated 19 January 2000 indicates that the applicant “is employed by the Embassy as Head Accountant”.

10. On 27 March 2000 the applicant’s contract was terminated on the following economic grounds:

“The restructuring of all the Embassy’s departments, in accordance with general instructions from the Ministry of Foreign Affairs of the State of Kuwait.

The Embassy is obliged to abolish your post as a result of the new regulations of the Ministry of Foreign Affairs of the State of Kuwait.”

11. Disagreeing with the reasons given for the termination, the applicant brought proceedings in the Paris Employment Tribunal (*conseil de prud’hommes*) seeking various sums in compensation for dismissal without genuine or serious cause.

12. In a judgment of 29 November 2000, the Employment Tribunal began by refusing to allow the objection to admissibility raised by the State of Kuwait, finding as follows:

“A plea of inadmissibility has been raised on grounds of jurisdictional immunity.

Whilst Article 31 of the Vienna Convention provides that diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State, and also from its civil and administrative jurisdiction, the latter immunity does not cover actions relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

Mr Farouk Sabeh El Leil was recruited and employed in France, under a contract of indefinite duration signed in Paris and performing [*sic*] in French territory.

His pay statements bear a SIRET [registration] number.

The letter summoning him to a preliminary meeting fully satisfies the provisions of Article L.122-14-4 of the Labour Code, indicating that Mr Farouk Sabeh El Leil was entitled to be assisted by a third party from the list kept by the *préfecture*.

In the present case, the duties of head accountant entrusted to Mr Farouk Sabeh El Leil in an internal management context fell within the framework of an expressly private-law activity and the jurisdiction of the ordinary French courts, as the employer has acknowledged through the above-mentioned elements.”

13. On the merits, the Employment Tribunal found that the termination of the applicant’s employment “which was decided abruptly after twenty years of irreproachable work without punishment or criticism”, had not been based on a genuine and serious cause. It awarded the applicant a sum representing twelve months of salary by way of compensation for dismissal without a genuine and serious cause, plus compensation in lieu of notice, together with sums in respect of unpaid overtime, time off in lieu that he had not been able to take, annual leave, and his inability to register with the ASSEDIC (“Association for employment in industry and commerce”) from

which he was entitled to receive unemployment benefit, amounting to a total of 539,358 francs (equivalent to 82,224.60 euros). Moreover, the Employment Tribunal ordered the employer to issue the applicant with a certificate of employment and two pay statements, failing which it would be fined 1,000 francs per day.

14. Disagreeing with the amount of the award, the applicant lodged an appeal against the judgment.

15. In a judgment of 22 October 2002 the Paris Court of Appeal set aside that judgment, finding as follows:

“Admissibility of the claims

The State of Kuwait argued that Mr Sabeh El Leil’s claims were inadmissible on account of its jurisdictional immunity.

Mr Sabeh El Leil challenged the plea of inadmissibility, arguing that such immunity did not extend to proceedings concerning contracts of employment.

He considers that his duties as head accountant fell expressly within the framework of a private-law activity rather than an activity of governmental authority.

Mr Sabeh El Leil’s claims are directed against the State of Kuwait, represented by its embassy and its Ambassador in Paris and not against the embassy’s director himself.

It must therefore be ascertained whether, in the present case, the State of Kuwait enjoys the jurisdictional immunity afforded to foreign States.

Mr Sabeh El Leil’s last post was that of head accountant in the embassy’s accounts department.

He also assumed certain additional responsibilities: responsibility for administrative matters, responsibility for legal affairs, responsibility for the payment and follow-up of financial contributions concerning the Kuwait Boundary Demarcation Commission, and responsibility for supervising the bank accounts of the Council of Arab Embassies [*sic*].

Mr Sabeh El Leil, in view of his level of responsibility and the nature of his duties as a whole, did not perform mere acts of management but enjoyed a certain autonomy which meant that he carried out his activities in the interest of the public diplomatic service.

He thus participated in acts of governmental authority of the State of Kuwait through its diplomatic representation in France.

His claims against the State of Kuwait are thus inadmissible by virtue of the principle of jurisdictional immunity of foreign States.”

16. The applicant appealed against that judgment to the Court of Cassation. In his full pleadings he challenged the finding that his claims against the State of Kuwait were inadmissible. He invoked a breach of

Article 455 of the New Code of Civil Procedure, on the ground that the judgment had not given sufficient reasons, since the inadmissibility had been based:

“on the mere assertion that outside his accounting duties [he] assumed responsibilities in administrative matters, legal affairs ..., leading to the conclusion that in view of his level of responsibility and the nature of his duties as a whole, he did not perform mere acts of management but enjoyed a certain autonomy which meant that he carried out his activities in the interest of the public diplomatic service and participated in acts of governmental authority of the State of Kuwait ...”

He developed his arguments as follows:

“The judgment appealed against purportedly applied the principle whereby ‘foreign States and bodies acting for them or on their behalf enjoy jurisdictional immunity not only for acts of governmental authority but also for acts performed in the interest of a public service’ ...

This principle implies, conversely, that the immunity of the foreign State from jurisdiction does not apply, in matters of employment contracts, where the employee had ‘no particular responsibility in the performance of public service, such that his dismissal constituted an act of administration’ ...

That was precisely the situation of [the applicant], who performed accountancy duties only.”

17. On 23 March 2005 the Court of Cassation, ruling in the context of the preliminary admissibility procedure for appeals on points of law, as provided for by Article L. 131-6 of the Code of Judicial Organisation, held that the ground of appeal was “not such as to warrant admitting the appeal on points of law”.

II. RELEVANT INTERNATIONAL LAW AND DOMESTIC LAW AND PRACTICE

A. State immunity from jurisdiction

1. *International law*

18. State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 (“the 2004 Convention”). The principle is based on the distinction between acts of sovereignty or authority (*acte jure imperii*) and acts of commerce or administration (*acte jure gestionis*).

19. Article 11 (Contracts of employment) of the convention reads as follows:

“1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

(b) the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or

(iv) any other person enjoying diplomatic immunity;

(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

(f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.”

20. In the Draft Articles on Jurisdictional Immunities of States and their Property, adopted by the International Law Commission at its forty-third session in 1991, and submitted to the General Assembly at that session, Article 11 read as follows:

“1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

(b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time when the proceeding is instituted; or

(e) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.”

21. In the commentary on that Article the Commission indicated as follows:

“Paragraph 2 (b) is designed to confirm the existing practice of States in support of the rule of immunity in the exercise of the discretionary power of appointment or non-appointment by the State of an individual to any official post or employment position. ... So also are the acts of ‘dismissal’ or ‘removal’ of a government employee by the State, which normally take place after the conclusion of an inquiry or investigation as part of supervisory or disciplinary jurisdiction exercised by the employer State. This subparagraph also covers cases where the employee seeks the renewal of his employment or reinstatement after untimely termination of his engagement. The rule of immunity applies to proceedings for recruitment, renewal of employment and reinstatement of an individual only. It is without prejudice to the possible recourse which may still be available in the State of the forum for compensation or damages for ‘wrongful dismissal’ or for breaches of obligation to recruit or to renew employment.”

22. The 2004 Convention on Jurisdictional Immunities of States and their Property was signed by France on 17 January 2007. The Bill authorising its ratification is currently being examined by the National Assembly, the Senate having approved the following text at First Reading on 22 December 2010:

“Single Article

The ratification of the United Nations Convention on Jurisdictional Immunities of States and their Property, adopted on 2 December 2004 and signed by France on 17 January 2007 is hereby authorised.”

23. For a more comprehensive overview see *Cudak v. Lithuania* ([GC], no. 15869/02, §§ 25 et seq., ECHR 2010-...).

2. Case-law of the Court of Cassation

24. The Court of Cassation considers that a foreign State only enjoys jurisdictional immunity when the act giving rise to the dispute is an act of governmental authority or has been performed in the exercise of a public

service (Court of Cassation, First Civil Division, 25 February 1969, no. 67-10243, Bull. I, no. 86). In other words it verifies, on a case-by-case basis, whether the act, by its nature or purpose, has contributed to the exercise of the foreign State's sovereignty, as opposed to an act of administration (Court of Cassation, Combined Divisions, 20 June 2003, appeals nos. 00-45629 and 00-45630, Bull. Ch. M. no. 4).

25. Applying this criterion, the Court of Cassation found that jurisdictional immunity could not be granted in a dispute concerning an embassy employee who had no particular responsibility in the exercise of the public diplomatic service (Court of Cassation, First Civil Division, 11 February 1997, appeal no. 94-41871, Bull. I no. 49, for a caretaker; Court of Cassation, Employment Division, 10 November 1998, appeal no. 96-41534, Bull. V no. 479, concerning a nurse-medical secretary; and Court of Cassation, Employment Division, 14 December 2005, appeal no. 03-45973, in respect of a senior clerk in the national section of a consulate). The same principle applies where a State decides to close a consular mission: whilst it enjoys jurisdictional immunity as regards the assessment of the reasons for the closure decision, the French courts retain the power to verify the reality of the closure and to rule on the consequences of any redundancy caused thereby (Court of Cassation, Employment Division, 31 March 2009, appeal no. 07-45618, Bull. V no. 92).

26. The assessment of that criterion, however, falls within the unfettered discretion of the Court of Appeal for the final decision on the facts and evidence (Court of Cassation, Employment Division, 9 October 2001, appeal no. 98-46214, concerning a translator in the passport office).

B. French Code of Civil Procedure

27. The relevant provision of the Code of Civil Procedure reads as follows:

Article 455

“Judgments shall set forth succinctly the respective claims of the parties and their grounds. Such presentation may take the form of a reference to the pleadings of the parties with an indication of their date. Judgments shall be reasoned.

They shall state the decision in an operative paragraph.”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

28. The Government raised a preliminary objection to the effect that domestic remedies had not been exhausted.

A. The Chamber's findings

29. The Chamber declared the application admissible, after rejecting the Government's objection that domestic remedies had not been exhausted, finding that the applicant had raised the complaint under Article 6 of the Convention in substance in his appeal on points of law, since he had challenged the Court of Appeal's findings as to the exact scope of his duties and responsibilities and had argued that the principle of the foreign State's jurisdictional immunity did not apply, in matters of employment contracts, when the employee, like himself, had no particular responsibility in the exercise of the public service.

B. The parties' submissions

1. The Government

30. The Government reiterated their objection as to non-exhaustion of domestic remedies, since the applicant had not raised, in support of his appeal on points of law, the question of his lack of access to a court. They took the view that the single ground of appeal in his written submissions to the Court of Cassation had concerned a breach of the obligation to state reasons, not the actual principle of the State of Kuwait's jurisdictional immunity.

2. The applicant

31. The applicant pointed out that, in his appeal on points of law, he had submitted arguments challenging the application to his case of the principle of jurisdictional immunity of a foreign State, and had thus precisely contested the infringement of his right to a fair hearing. He added that, in his pleadings before the Court of Appeal, he had already raised in substance his complaint about a violation of Article 6 § 1 of the Convention, since he had developed at length the argument that his employer could not be granted such immunity.

C. The Grand Chamber's assessment

32. The Grand Chamber reiterates that the purpose of Article 35 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, for example, *Hentrich v. France*, 22 September 1994, § 33, Series A no. 296-A; *Remli v. France*, 23 April 1996, § 33, *Reports of Judgments and Decisions* 1996-II; and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24, and *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV). Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200, and *Selmouni*, cited above).

33. In the present case the Grand Chamber notes that, in his full pleadings in support of his appeal on points of law, the applicant challenged the findings of the Paris Court of Appeal as to the exact scope of his duties. His single ground of appeal criticised the Court of Appeal's finding that he "enjoyed a certain autonomy which meant that he carried out his activities in the interest of the public diplomatic service and participated in acts of governmental authority of the State of Kuwait". Moreover, his arguments directly and expressly concerned the question of the foreign State's jurisdictional immunity, challenging the application of this principle to his case.

34. In those circumstances, the Grand Chamber takes the view, like the Chamber, that the complaint submitted to it was actually made in substance before the domestic courts. Accordingly, the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

35. The applicant claimed that he had been deprived of his right of access to a court on account of the jurisdictional immunity invoked by his

employer and upheld by the domestic courts. He relied on Article 6 § 1 of the Convention, of which the relevant part reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Applicability of Article 6 § 1

36. As regards the applicability of Article 6 § 1, the Government left the matter to the Court’s discretion.

37. The applicant submitted that he unquestionably possessed a right which was the subject of a dispute (*contestation*), that his claims were civil in nature and that Article 6 was applicable.

38. The Court refers to its finding in *Vilho Eskelinen* that in order for the respondent State to be able to rely before the Court on the applicant’s status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State’s interest (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-IV). It should be pointed out, however, that that judgment concerned relations between the State and its own civil servants, thus differing from the present case.

39. Moreover, it cannot reasonably be argued that the second condition has been fulfilled in the applicant’s situation. It can be seen from the documents before the Court that he was employed as an accountant, then as head accountant from 17 April 1985, in the Kuwaiti embassy. The Court is of the opinion that the performance of such duties cannot, in itself, justify an exclusion based on objective grounds in the State’s interest, within the meaning of the above-cited *Vilho Eskelinen* judgment.

40. It remains to be examined whether the dispute in question concerned a civil right within the meaning of Article 6 § 1. In this connection the Court points out that Article 6 § 1 applies to disputes (*contestations*) concerning civil “rights” which can be said, at least on arguable grounds, to be recognised under domestic law, whether or not they are also protected by the Convention (see, in particular, *Editions Périscope v. France*, 26 March 1992, § 35, Series A no. 234-B, and *Zander v. Sweden*, 25 November 1993, § 22, Series A no. 279-B). The dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question (see *Vilho Eskelinen*, cited above, § 40). The Court has thus previously found Article 6 applicable in respect of a civil servant in the employ of a secondary school who had been appointed as accountant and did not participate in the exercise of powers conferred by

public law (see *Martinie v. France* [GC], no. 58675/00, § 30, ECHR 2006-...). The Court reached the same conclusion as regards a former employee of a foreign embassy who was seeking compensation for unfair dismissal (see *Cudak*, cited above, § 46).

41. The Court finds in the present case that the above-mentioned conditions are fulfilled, as the applicant's action before the French courts concerned compensation for dismissal without genuine and serious cause.

42. Accordingly, Article 6 § 1 of the Convention was applicable in the present case.

B. Compliance with Article 6 § 1

1. The parties' arguments

(a) The applicant

43. The applicant submitted that, according to the Court's case-law, any restrictions on the right to a court based on immunity from jurisdiction must be subject to a strict review of proportionality between the actual interference with that right and the aim pursued. He took the view that his action was admissible under the relevant case-law of the Court of Cassation. In his submission, his application was particularly well-founded in the light of the *Cudak* judgment (cited above), in which the Court had found that Article 11 of the UN Convention on Jurisdictional Immunities of States and their Property was applicable to the respondent State. He understood that this convention, signed by France in 2007, was currently pending ratification by the Senate. He also indicated that the French Court of Cassation did not regard as absolute the international-law principle of jurisdictional immunity of foreign States. He had not performed any particular functions related to the exercise of governmental authority and his duties certainly did not have any bearing on the security interests of the State of Kuwait, within the meaning of Article 11 § 2 (d) of the above-mentioned Convention on Immunities. Lastly, he had been neither a diplomatic or consular agent nor a national of the State of Kuwait, and his dispute concerned labour law.

(b) The Government

44. The Government considered that the restriction on the applicant's right of access to a court had pursued a legitimate aim and was proportionate to that aim, being consistent with the principles laid down in *Fogarty v. the United Kingdom* ([GC], no. 37112/97, ECHR 2001-XI (extracts)), and *Cudak* (cited above). They observed that in its *Cudak* judgment the Court had stated that it was necessary to take account of

customary international law: in that context, it had therefore been for the Court of Appeal to determine whether the applicant's duties were such that he participated in the exercise of the sovereignty of the State of Kuwait and thus whether the principle of immunity from jurisdiction was applicable. That principle had been upheld after an assessment of the facts by reference to the applicant's duties as a whole, according to the realistic approach that must prevail in the implementation of the rules of international law. In view of his level of responsibility and of the nature of all his duties, it could not be considered that, by granting immunity to Kuwait, France had overstepped its margin of appreciation.

45. The Government argued in this connection that there were a number of fundamental differences between the present case and that of *Cudak*: in the latter, the Lithuanian Supreme Court had inferred from the title of the applicant's duties that she participated in the exercise of governmental authority, although that had not been demonstrated; and the applicant's dismissal had originally arisen from her harassment by one of her colleagues, a member of the diplomatic staff. In the present case, by contrast, there had been no reprehensible conduct on the part of an embassy staff member directed against the applicant; he had been employed as head accountant, not as a switchboard operator; and the Court of Appeal had based its judgment on the duties actually performed, not on inferences, in the light of the documents produced. As regards those documents, the Government indicated that they had been returned to the parties following the close of the proceedings and that reference could thus only be made to the judgment of the Court of Appeal.

2. *The Court's assessment*

(a) **General principles**

46. The Court reiterates that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII).

47. However, the right of access to a court secured by Article 6 § 1 is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by

the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V; *Fogarty*, cited above, § 33; and *Cudak*, cited above, § 55).

48. Moreover, the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum (see *Fogarty*, cited above, § 35). The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account, including those relating to the grant of State immunity (see *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports* 1996-VI; *Fogarty*, cited above, § 35; and *Cudak*, cited above, § 56).

49. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the rule of State immunity (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 56, ECHR 2001-XI; *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X; *Fogarty*, cited above, § 36; and *Cudak*, cited above, § 57).

50. Furthermore, it should be remembered that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, 28 October 1998, § 52, *Reports* 1998-VIII). It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts

a whole range of civil claims or confer immunities from civil liability on categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

51. Therefore, in cases where the application of the rule of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court must ascertain whether the circumstances of the case justified such restriction.

52. The Court further reiterates that such limitation must pursue a legitimate aim and that State immunity was developed in international law out of the principle *par in parem non habet imperium*, by virtue of which one State could not be subject to the jurisdiction of another (see *Cudak*, cited above, § 60, and *Al-Adsani*, cited above, § 54). It has taken the view that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty (*ibid.*).

53. In addition, the impugned restriction must also be proportionate to the aim pursued. In this connection, the Court observes that the application of absolute State immunity has, for many years, clearly been eroded, in particular with the adoption of the Convention on Jurisdictional Immunities of States and their Property by the United Nations General Assembly in 2004 (see *Cudak*, cited above, § 64). This convention is based on Draft Articles adopted in 1991, of which Article 11 concerned contracts of employment and created a significant exception in matters of State immunity, the principle being that the immunity rule does not apply to a State's employment contracts with the staff of its diplomatic missions abroad, except in the situations that are exhaustively enumerated in paragraph 2 of Article 11 (*ibid.*, § 65).

54. Furthermore, it is a well-established principle of international law that a treaty provision may, in addition to the obligations it creates for the Contracting Parties, also be binding on States that have not ratified it in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule (*ibid.*, § 66). Consequently, Article 11 of the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either (*ibid.*, §§ 66-67).

(b) Application of these principles to the present case

55. The Court first observes that in the *Cudak* case, which concerned the dismissal of a member of the local staff of an embassy, it found that the restrictions on the right of access to a court pursued a legitimate aim (*ibid.*, § 62). It does not find any reason to reach a different conclusion in the present case.

56. It should therefore now be examined whether the impugned restriction on the applicant's right of access to a court was proportionate to the aim pursued.

57. As the Court has pointed out (see paragraph 54 above), Article 11 of the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either (see *Cudak*, cited above, §§ 66-67). For its part, France has not ratified it but has not opposed it: on the contrary, it signed the convention on 17 January 2007 and the ratification procedure is currently pending before the French Parliament (see paragraph 22 above).

58. Consequently, it is possible to affirm that the provisions of the 2004 Convention apply to the respondent State, under customary international law (see *Cudak*, cited above, § 67), and the Court must take this into consideration in examining whether the right of access to a court, within the meaning of Article 6 § 1, was respected.

59. As was the case in *Cudak* with Lithuanian law, this finding is confirmed by French domestic law. In its case-law, the Court of Cassation refuses to apply jurisdictional immunity in an absolute manner, taking the view that it is not applicable in the context of a dispute concerning an embassy employee who has no particular responsibility in the exercise of the public diplomatic service (see paragraph 25 above). That was the position it took, in particular, in a similar case, not concerning the restructuring of an embassy as in the present case, but the reorganisation by a State of its diplomatic mission. It found in that case that whilst the State enjoyed immunity from jurisdiction as to the assessment of the reasons for a decision to close a mission, the French courts retained the power to verify the reality of the closure and to rule on the consequences of any resulting redundancies (*ibid.*).

60. Furthermore, the Court takes the view that the applicant, who was neither a diplomatic or consular agent of Kuwait, nor a national of that State, did not fall within any of the exceptions enumerated in Article 11 of the 2004 Convention. The Court observes that this Article enshrines the rule that a State has no jurisdictional immunity in respect of employment contracts, except in the situations exhaustively enumerated therein.

61. The Court notes in particular that paragraph 2 (a) of Article 11 is clearly irrelevant to the present case, as the applicant was not employed to perform any particular duties in the exercise of governmental authority. As to paragraph 2 (d), which expressly concerns the dismissal of an employee, it cannot apply in the present case since it has not been established that there was any risk of interference with the security interests of the State: the judgment of the Paris Court of Appeal makes no reference to any claim by the State of Kuwait that the head of State, the head of Government or the

Minister for Foreign Affairs (the authorities enumerated in that provision), were of the opinion that such a risk existed.

62. The Court observes that the applicant, who was recruited in 1980 by the Kuwaiti embassy, performed the duties of accountant, then head accountant, until his dismissal in 2000 on economic grounds. On 17 April 1985, when he was promoted to the post of head accountant, an official note listed his tasks within the embassy's accounts department, without mentioning any other tasks inside or outside that department (see paragraph 7 above). Similarly, a certificate of employment dated 19 January 2000 only indicates his post as head of the accounts department (see paragraph 9 above). Only a statement signed on 3 December 1999 by some twenty employees indicates that the applicant had also assumed another role, that of staff representative on an unofficial basis (see paragraph 8 above). Neither the domestic courts nor the Government, which indicated for their part that they had no choice other than to refer to the findings of the Court of Appeal, as they had not been a party to the proceedings, have shown how these duties could objectively have been linked to the sovereign interests of the State of Kuwait.

63. Admittedly, the Court of Appeal's judgment, enumerating a series of "additional responsibilities" that the applicant had supposedly assumed, infers from this that he did not perform mere acts of administration but had a degree of autonomy which meant that he carried out his activities in the interest of the public diplomatic service and thus participated in acts of governmental authority of the State of Kuwait (see paragraph 15 above).

64. The Court notes, however, that the Court of Appeal merely asserted that such "additional responsibilities" existed, without justifying its decision by explaining on what basis – documents or facts brought to its attention – it had reached that conclusion.

65. The Court of Cassation did not give any more extensive reasoning on that point, which was nevertheless an essential one with regard to the allegation of a breach of the right of access to a court. It confined itself to examining the case not according to the ordinary procedure but in the context of the preliminary admissibility procedure for appeals on points of law, under Article L. 131-6 of the Code of Judicial Organisation. Whilst that procedure is compliant *per se* with the provisions of Article 6 of the Convention (see *Burg and Others v. France* (dec.), no. 34763/02, 28 January 2003, and *Salé v. France*, no. 39765/04, § 17, 21 March 2006), it nevertheless permits a level of legal consideration, concerning the merit of the appeal, that is substantially limited (see *Salé*, cited above, § 19).

66. In addition, the Court notes that the Court of Appeal and the Court of Cassation also failed to take into consideration the provisions of Article 11 of the 2004 Convention, in particular the exceptions enumerated therein that must be strictly interpreted.

67. In conclusion, by upholding in the present case an objection based on State immunity and dismissing the applicant's claim without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, the French courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicant's right of access to a court.

68. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

70. The applicant claimed 82,224.60 euros (EUR) in respect of pecuniary damage, covering the total amount awarded by the employment tribunal. He also sought EUR 2,000 euros in respect of non-pecuniary damage.

71. The Government argued that the pecuniary damage alleged by the applicant was hypothetical and bore no direct causal link with the alleged violation. They took the view that the only possible award would arise from the non-pecuniary damage claimed, for the sum of EUR 2,000.

72. The Court observes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicant as having incurred a loss of real opportunities (see, among other authorities, *Colozza v. Italy*, 12 February 1985, § 38, Series A no. 89, and *Cudak*, cited above, § 79). In addition, the applicant has sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. Ruling on an equitable basis, as required by Article 41, the Court awards the applicant EUR 60,000 for all heads of damage combined.

B. Costs and expenses

73. The applicant indicated that he had been obliged to use the services of a number of lawyers and a translator in the domestic proceedings in order

to seek redress for the breach of his rights under the Convention. He claimed EUR 11,984.73 on that basis, together with EUR 4,784 for the proceedings before the Court, representing a total of EUR 16,768.73, for which he produced all the invoices and fee notes.

74. The Government, which merely referred back to their observations before the Chamber, argued that the applicant had substantiated his claim only by two invoices for EUR 3,588 and EUR 1,196, the remainder not being justified and moreover appearing disproportionate. In their view, any sum that might be awarded to the applicant should not therefore exceed EUR 4,784.

75. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, among many other authorities, *E.B. v. France* [GC], no. 43546/02, § 105, ECHR 2008-...., and *Micallef v. Malta* [GC], no. 17056/06, § 115, ECHR 2009-...). In the present case, regard being had to the above criteria and the documents in its possession, the applicant having substantiated before the Grand Chamber the full amount claimed, the Court finds the sum of EUR 16,768 reasonable and awards it to him.

C. Default interest

76. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objection;
2. *Holds*, unanimously, that Article 6 § 1 of the Convention is applicable in the present case;
3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*, by sixteen votes to one,
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts:
 - (i) EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable, in respect of all heads of damage;

(ii) EUR 16,768 (sixteen thousand seven hundred and sixty-eight euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and notified in writing on 29 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger
Jurisconsult

Nicolas Bratza
President