INDUSTRIAL TRIBUNAL

PRELIMINARY DECISION NUMBER: 2651

Case No: 3643/JD

In the employment issue

between

Alfie maghruf bhala Alfio Borg
(detentur tal-karta ta' l-identita'
bin-numru 368565M)

and

L-Ambaxxata Amerikana f'Malta

subject matter: alleged unfair dismissal

Chairman: Mr Joseph Delia BA(Hons)(Econ), FIPD

Today 30th January, 2020

1. **Petition** [1]

The Tribunal received Mr Alfie, *sive* Alfio, Borg's petition to the law-courts on the 15th May 2018. The petition requested the Tribunal to deliberate that Mr Borg's termination of employment with the United States of America Embassy in Malta was not fair and that therefore for the Tribunal to award to the plaintiff all the appropriate compensatory measures, including the award of a fair compensation in terms of Chapter 452 of the Laws of Malta.

2. **Responsive pleading**[2]

The U.S.A. Embassy in Malta presented its Note of reply to the Tribunal during the Tribunal's sitting of the 31st January 2019. The Note:

a. maintained that the Embassy in Malta has no legal personality in Malta separate from that of the United States government; therefore the Embassy is improperly named as a defendant in this Case; the proceedings should name as defendant "The United States Government";

[1] The Tribunal endorsed the parties' agreement whereby as far as this Case is concerned any decrees, and the judgment are to be delivered in the English language.

[2] The Embassy requested a sixty-day notice of the first Tribunal hearing in accordance with customary international law, for it to submit the Note of reply. The Tribunal acceded to the request. The Embassy also remarked that the Tribunal's documents in respect of service of process should have been made to the Central Authority for the U.S. rather than under cover of a diplomatic note. The U.S. responded to the complaint in the spirit of cooperation. The Tribunal took note of this and was appreciative of the U.S.'s cooperation.

b. submitted that the proceedings be dismissed because the Government of the United States does not submit to the jurisdiction of the Maltese Courts in this Case, and invokes Sovereign Immunity; the Embassy argued that:

i. customary international law provides that when a sovereign State dismisses an employee who performs particular functions in the exercise of governmental authority or on security grounds, the State is immune from the review of the local court concerning the legality of the dismissal; the Vienna Convention on Diplomatic Relations says that a sovereign State has a right to appoint freely the mission staff as it sees fit and archives of the mission are inviolable;

ii. sovereign States maintain their immunity with respect to acts within their scope of sovereignty or authority, ie *Acta jure imperii,* but may be subject to the jurisdiction of foreign courts for acts of commerce or management ie *Acta jure gestionis*;

iii. the plaintiff was a part of Defendant's Local Guard force to, among other major duties, control access to the building and patrolling to prevent thefts, sabotage, and disturbances and to protect government property; he was required to carry a firearm;

iv. the *Employment Appeals Tribunal* in Dublin concluded that, "the provision of security at the Embassy and Ambassador's residence constitutes part of foreign State's exercise of Governmental authority … a first line of defence is an important and integral part of the U.S. Government's security system for the defence of its personnel and property and cannot therefore be considered to be merely functional and low level"; the defendant held that Dublin's opinion was also that of the Courts in Sri Lanka, Bulgaria, Norway, Germany, and Israel;

v. the Vienna Convention considers the premises of the mission to be inviolable; the agents of the receiving State may not enter them except with the consent of the head of the mission; the same Convention provides that the Receiving State shall protect the inviolability of the mission;

vi. according to State immunity scholar Hazel Fox, it has been generally accepted that the manner in which the state administers the questions of loyalty and security is attributable only to its own discretion;

vii. in two cases, the German courts concluded that in considering the dismissal of an employee after the revocation of his security authorisation, "labour court proceedings would mean that the defendant would have to present the defendant's security regulations; the disclosure of such regulations represents interference in internal affairs";

viii. the Tbilisi Appellate Court in Georgia dismissed an appeal by an employee seeking to challenge the revocation of his security certificate; the Court recognised that the issue of studying and discussing the regulations governing the security certification process will be interference in domestic issues, violation of international common law and infringement on sovereignty and immunity of the State to require it to disclose such regulations;

ix. the plaintiff's employment agreement stipulated that criminal, dishonest, or disgraceful conduct could lead to the revocation of the security certificate; hence the defendant revoked the plaintiff's security certificate and therefore the plaintiff could no longer be allowed access to the Embassy and his employment had to be terminated;

x. for the Tribunal to hear the dispute on its merits it would have to order the Defendant to disclose security data relating to the issuance and revocation of security certificates;

xi. the sovereign State had to decide whether the Plaintiff's continued employment at the U.S. Embassy was compatible with the security interests of the U.S.; as a sovereign State the U.S. is absolutely free to decide on the best manner to ensure the security of its mission.

xii. The evaluation of the Embassy's security matters in no way fall within the jurisdiction of the courts of Malta.

3. Counter reply

The Plaintiff submitted a counter reply to the exceptions raised by the Defendant, which reply was received by the Tribunal on the 13th March 2019. The counter reply says that:

a. with regard to the Defendant's plea that the reference to the Defendant in the citation should read "The United States Government", the plaintiff submits that if the Tribunal entertained the Defendant's request, the citation in respect of the Defendant should read "The United States Government represented by the American Embassy in Malta";

b. as regards the plea based on sovereign immunity, it is wrong in the interpretation of the law and in the application of the same public intgernational law principle to the present case; embassies are answerable to the same laws as other employers int he receiving State; the Foreign Sovereign Immunities Act of the United States Code establishes that when a foreign State enters into a commercial activity on U.S. soil it loses its right to claim sovereign immunity; in the U.S. contracts of employment constitute a commercial activity and emphasis is placed upon the private law contract itself rather than its object; since U.S. law does not afford an absolute

immunity to States for disputes over employment contracts performed in the U.S. the Defendant should not plead sovereign immunity before the Maltese courts;

c. in the United States, and in much of Europe, sovereign immunity is recognised only in respect of acts done by a State in the exercise of sovereign authority, as opposed to acts of a private law nature; the classification of the relevant act depends on its juridical character and not on the State's purpose in doing it save in cases where that purpose threw light on its juridical character; employment contracts fall outside the classification of jure imperii; the U.S. District Court for the Southern District of New York, in a 1963 judgment, declared that it would grant immunity only if the activity in question was a political or public act;
d. the Tribunal is to assess whether an employment contract of a low level employee performing random and general security duties of the structure and building of an Embassy and not directly detailed to protect the Ambassador is of itself sovereign (*jure imperii*) or otherwise (*jure gestionis*); the Plaintiff submits that it should be the latter;

e. the Vienna Convention on Diplomatic Relation 1961 excludes diplomatic agents from enjoying immunity from a number of areas, such as professional or commercial activities outside their official funcitons; therefore commercial activites are considered as a special class of actions; so employment contracts, that do not pertain to strictly political or public acts of the Embassy, are not protected by sovereign immunity; Malta's Diplomatic Immunities and Privileges Act limits the immunities accorded to diplomatic agents, on the basis of reciprocity; this shows that the Maltese legal position limits immunities for just cause;

f. the Tribunal heard and determined employment disputes concerning the Defendant; this shows that the Tribunal has jurisdiction to hear and determine employment disputes between private citizens and embassies;

g. while many States assert a special jurisdiction over employment disputes extending to the employees of foreign States, there is considerable diversity in this area; the 1983 Yearbook of the International Law Commission reported that an emerging trend appears to favour the application of local labour law in regard to recruitment of the available labour force within a country, and consequently to encourage the exercise of territorial jurisdiction at the expense of jurisdictional immunities of foreign States;

h. with reference to case law cited by the Defendant in support of its claim that employment contracts between private citizens and the Embassy fall outside the jurisdiction of the Tribunal the Plaintiff refers to Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs, whereby the Supreme Court of the United Kingdom ruled in favour of the employees; also, the Supreme Court referred to Government of Canada v Employment Appeals Tribunal and Burke and criticised the Irish Supreme Court's conclusion that "*prima facie* anything to do with the embassy

is within the public domain of the government in question"; The U.K. Supreme Court held that such judgment amounted to saying that the employment of embassy staff is inherently governmental notwithstanding the non-governmental character of the particular employee's functions.

4. Defendant's Annotations[3]

The Defendant presented annotations[4] to the Plaintiff's counter reply. The gist of the annotations was that:

a. the Foreign Sovereign Immunities Act does not apply in Malta;

b. the sentence of the US District Court for the Southern District of New York was given before the coming into effect of the UN Convention on Jurisdictional Immunities of States and Their Property (2004) and has nothing to do with whether an employee performs a sovereign function;

c. as regards the Plaintiff's maintaining that the Defendant's did not prove that a contract of employment of a low level grade of employment is governed by sovereign immunity, the Defendant referred to the cases that it presented to the Tribunal showing that security guards' job is that of protecting the Embassy, which is inviolable;

d. re Malta's Diplomatic Immunities and Privileges Act, ta' Malta, one has to distinguish between diplomatic immunity and sovereign immunity;

e. as to the fact that the American Embassy in Malta was a party to employment disputes, under U.S. law only the U.S. Department of Justice can represent the United States in the conduct of litigation, and as directed by the Attorney General;

f. whereas the Plaintiff had remarked that embassies of other countries were a party to employment disputes, the Defendant argued that the present case concerns the United States and that other countries are regulated by their own provisions;

g. in the cases decided by non Maltese courts because such courts were of the opinion that they had jurisdiction over contracts of employment, those same courts must not have read Article 11 (2) of the UN Convention on Jurisdictional Immunities of States & their Property, that specifies the instances of the application of immunity in employment disputes;

[3] At first, the Plaintiff objected to the Tribunal's permitting the submission of the annotation since the Tribunal was supposed to decide on the exceptions raised by the Defendant and since prior notice of additional submissions should be given. The Tribunal accepted the Defendant's request for additional submissions because, given the contradictory international jurisprudence, the Tribunal asked for further elucidation on the Defendant's thesis; after all, the Plaintiff was conceded a counter reply to the Defendant's responsive pleading due to the 'fluidity' of international jurisprudence related to the present Case. Both parties eventually agreed that there be a Defendant's annotation and that the Plaintiff present his reply thereto (pages 28-31 of the transcript of the hearing of the 28th March 2019) – and the Tribunal proceeded accordingly.

[4] Doc. AA2

h. the Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs concerned domestic staff, not guards.

The Defendant presented the Tribunal with a list of cases in which the courts of various countries decided in favour of the United States in respect of sovereign immunity in employment disputes.[5]

5. Additional responsive pleading - to the Defendant's annotation

The Plaintiff submitted an additional responsive pleading that was received by the Tribunal on the 25th April 2019.

a. The pleading appealed to the Tribunal not to entertain the Defendant's annotation since the Tribunal was meant to deliver a preliminary decision on the pleas raised by the Defendant, and that prior authorisation from the Tribunal should be obtained for additional submissions.[6] The Defendant was merely repeating itself, possibly as a delaying tactic. The annotations were irrelevant to the facts at hand. Maltese law does not recognise *stare decisis*.

b. The issue of whether the security guard performed tasks that bear a functional correlation to sovereign immunity could be determined only once the Tribunal heard evidence on the merits.

6. The[7] Tribunal will hereby deal with both preliminary exceptions raised by the defendant, viz.

(i) that the *occhio* ought to refer to the United States of America and not to the USA Embassy in Malta; and

(ii) that the Tribunal does not have jurisdiction to deliberate on the trade dispute because the plaintiff was employed by the Embassy in the Security sector and the USA enjoys immunity in matters relating to security.

7. Tribunal's Considerations on (i)

7.1. In its responsive note the American Embassy stated that it does not enjoy a separate legal personality. The Tribunal remarks that Article 2 (1) of Chapter 452 of the Laws of Malta defines "employer" as one who may be "… a partnership, company, association or other body of persons, whether vested with legal personality or not". So the fact that the Embassy does not have a legal personality does not prohibit the Tribunal from dealing with and deciding upon this trade dispute, with the Embassy being one of the parties – in this Case the defendant.

7.2. When an embassy official signs a contract of employment it is the state, in this Case the USA, that assumes the contracting part. So, if one were to be a technical purist one has to agree with the defendant that the *occhio* ought to show the USA as the defendant in

[5] Doc. AA3

[6] See footnote no. 3

[7] The parties agreed that the Tribunal hearings be conducted in Maltese but any decrees/decisions taken by the Tribunal be delivered in the English language.

this trade dispute.

7.3. This notwithstanding, the letter of termination of the plaintiff's employment (Doc. AB6) was issued by the Embassy of the USA. Does this mean that such letter is not valid? Also, the same letter says that (a) the plaintiff had signed a personal service contract with **the Embassy** and (b) the plaintiff's employment was with **the Embassy** of the USA!

8. Considerations on (ii)

8.1. The question of the relationship between State immunity and employment contract issues is dealt with principally in the United Nations Convention on Jurisdictional Immunities of States and their Property (UNJISP), though not yet in force, and in the European Convention on State Immunity.

8.1.1. Article 11 of the UNJISP stipulates that[8]:

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. (The Tribunal has not been advised by the defendant that there exists any agreement between Malta and the United States of America that the USA can invoke immunity from such jurisdiction.)

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority (see 8.15);

(b) the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961 (the submissions of both parties gave no indication whatsoever that the plaintiff is such an agent);

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963 (the submissions of both parties gave no indication whatsoever that the plaintiff is such an officer);

(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 any other person enjoying diplomatic immunity (no such proof was presented to the Tribunal in respect of the plaintiff);

(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual (the proceeding does not involve any of these activities);

[8] The bracketed notes are the Tribunal's.

(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; (the annex to the Convention explains that this Article 11.2.d is directly limited to, "the security interests of the employer state" and further covers sensitive "matters of national security and the security of diplomatic missions …". The defendant did not show the Tribunal that the current proceeding interferes with the security interests of the USA. It is obvious that a balance needs to be struck between the literal reading of the annex's explanation, the employees' right to a fair trial, and the degree of responsibility attached to the post of LGF, contextualised within the proportionality principle.)

(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 (the Tribunal has been given no indication whatsoever that the plaintiff has an American nationality other than that he is Maltese); 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 (the Tribunal has not been given any indication whatsoever that there exists such an agreement; also, Article 75 of the Employment and Industrial Relations Act of the laws of Malta is unequivocal regarding the jurisdiction of the Industrial Tribunal; it states that, "Notwithstanding any other law, the Industrial Tribunal shall have the exclusive jurisdiction to consider and decide **all**[9] cases of alleged dismissals … and the remedy of a worker so dismissed … shall be by way of reference of the complaint to **the Industrial Tribunal and not otherwise**.")

8.1.2. Article 5 of the European Convention on State Immunity stipulates that:

(1) A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.

(2) Paragraph 1 shall not apply where:

(a) the individual is a national of the employing State at the time when the proceedings are brought;

(b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or

(c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

[9] The bold font is the Tribunal's. The Tribunal does not have jurisdiction over dismissals of public officers, and persons to whom the Port Workers Ordinance or the Public Transport (Regulation of Employment) Act applies.

(3) Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2.a and b of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him (in any case, the Tribunal was not given any indication whatsoever that the plaintiff's habitual residence at the time the contract was entered into was anywhere but in Malta).

So, according to (2), and (3) of Article 5 of the European Convention on State Immunity, neither of them applies to the Case under consideration, the defendant is not immune, subject of course to the required evidence, that can be examined by the Tribunal only if it enters into the merits of the Case.

8.2. In cases where the State enters into an employment contract, it is deemed to be acting as a private person[10] (see 8.11). When the State exercises a private function its immunity is restricted[11]. In employment situations such restriction is meant to ensure that the employee concerned does not forfeit the right for a fair trial by an independent tribunal established by law[12].

8.3. Such restriction however is justified so long as:

8.3.1. it does not threaten the employer State's comity with the host country; the application of restrictive immunity to this Case should not result in such a threat because the Foreign Sovereign Immunities Act of 1976 (USA) (FSIA) protects foreign States from being sued in USA courts in cases involving commercial activities; the FSIA considers the nature of commercial activities as one of private law and therefore contracts of employment in the USA between a foreign country and a US national fall under the category of commercial activities;

8.3.2. its application is a customary international rule (see 8.6);

8.3.3. it is proportional to the claim (see 8.13);

8.3.4. the employer State's position in an employment contract is one of a private, rather than public, capacity (see 8.12); and

8.3.5. the claim is made under private law (it is as per Chapter 452 of the laws of Malta).

8.4. According to the plaintiff's statement of case the current dispute is not about security but about the plaintiff's right to express himself on an administrative matter and to a fair hearing. Whether such a claim is correct, and given that the terms and conditions under which the plaintiff was employed[13] provided for the plaintiff to appeal disputes arising out of the Agreement, the Tribunal must enter into the merits of the Case to establish if the plaintiff resorted to such a facility, and if not, the reason/s therefore.

8.5. Article 11 (2) (a) of the UNJISP states that immunity would apply only where the employee has been recruited to perform … functions in the exercise of governmental authority.

[10] The Tribunal has drawn much from Dr Lisa Rodgers' (Leicester University) article, "State Immunity and Employment Relationships before the European Court of Human Rights", that appeared in the Academy of European Law (ERA) Forum, Issue 4, Volume 19, of April 2019. Generic statements on legal positions made in this Decree document are taken from the same article.

[11] The doctrine of restricted State immunity

[12] Article 6 of the European Convention on Human Rights

[13] Paragraph 13 of the Agreement with a Foreign National For Personal Services

So, lower-level staff may benefit from restricted immunity.

The plaintiff was employed by the Embassy as a Local Guard Force (LGF). In the course of his employment he applied for the post of Security Personnel, which was a post at a higher level than LGF. But the actual role of the plaintiff in the Embassy's internal operations can only be determined by the Tribunal if the Tribunal enters into the merits of the Case. That Local Security Guards normally carry a firearm[14] does not in itself denote conclusively the relative level of responsibility within the Embassy.

8.6. The European Court of Human Rights established[15] that Article 11 has become customary international law, and therefore applies also to States that have not ratified the Convention.[16]

8.7. The restrictive approach to immunity is today the accepted legal position as a result of deliberations made by the European Court of Human Rights.[17]

8.8. Recourse to immunity has to be proportionate to the rights of the plaintiff. This is in the context of Article 6 ECHR, and Article 47 Charter of Fundamental Rights of the EU, that enunciates that, "Everyone is entitled to a fair and public hearing … by an independent and impartial tribunal previously established by law …". The employee who is a national of, and resides permanently in, the host country needs to be given special protection, given that he is the weaker party to the employment relationship, with more limited resources. It is unreasonable to expect him/her to sue his/her foreign State employer in the courts of the employer's domicile. Invoking sovereign immunity when faced by a claim by a dismissed exemployee in a relatively low-level category is out of proportion unless such claim is proven to threaten the sovereign security of the employer State.

8.9. There needs to be a special bond of trust and loyalty between the plaintiff and the employer State. But this bond must not sacrifice the contractual rights, explicit and implicit, of the plaintiff's employment.

8.10. At no stage did the defendant claim nor did the plaintiff allege that the contract of the plaintiff's employment makes any reference to the circumstances that govern the application of employer State immunity in case of an employer-employee dispute.

8.11. There exists the contradiction between the protection of the employer State's interests and the protection of the human and contractual rights of embassy employees who are citizens of the forum State. The contradiction has to be resolved by striking a balance between the sovereign and restrictive immunity based on the *de iure imperii*/*iure gestionis* distinction. *Jure gestionis* are activities that are appropriately undertaken by private individuals instead of sovereign states, which in the absence of any evidence to the contrary, is the Case that the Tribunal is dealing with.

8.12. In the Tribunal's opinion the employment of an LGF is more of a private, legal relationship rather than a civil service legal relationship that is regulated by public law. The USA, as the employer State, could be likened to a private individual against whom

[14] Doc. AE3

[15] Radunovic v Montenegro

[16] Malta is a signatory to the Convention albeit with a reciprocity reservation.

[17] Linda Rodgers' finding.

proceedings have been instigated. Thus the recruitment of the plaintiff was an act of ordinary administration.

8.13. State immunity is not a proportional response to the plaintiff's rights. Article 6 of the European Convention on Human Rights establishes the right to a fair and public trial, albeit such a right is not absolute[18].

8.14. From the arguments brought up during the Tribunal hearings, the USA deems that everyone working at its diplomatic mission in Malta is involved in meeting the sovereign goals of the USA. This might impair the very essence of the applicant's right to a fair and public trial. It is for the defendant to prove that the actual duties and responsibilities of the plaintiff are of a public nature and that they had a direct and influential bearing on the sovereignty rights of the USA. This can be established only if the Tribunal hears the merits of the Case. The Tribunal is not comfortable to accept references to cases in other jurisdictions as sufficient justification for the Tribunal not to enter the merits of the Case. The defendant must prove to the Tribunal that the Tribunal's entering into the merits of the Case threatens the security interests of the USA.

8.15. In the absence of a Maltese state immunity act, the Tribunal consulted the relevant legislation adopted in the United Kingdom.

The UK State Immunity Act (SIA) says that a state is not immune as regards proceedings relating to a contract of employment between the foreign State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.[19] In Libya v Janah and Benkharbouche v Sudan the Supreme Court of the UK went as far as holding that the rules on state immunity in the SIA are incompatible with the right to a fair trial because the Act provides that state immunity prevents claims concerning the employment of members of a diplomatic mission.

8.16. A report[20] commissioned by, among others, the European Federation of Public Service Unions states that, "Employees performing menial routine functions related to administration, clerical duties and maintenance, as well as **guards** and chauffeurs, are not covered by this aspect of the immunity rule since they are not tasked with duties inherent to the exercise of governmental authority." "Immunity from jurisdiction of the sending state should be upheld if the embassy employee is engaged in inherently sovereign activities."

8.17. According to the statement of case presented by the plaintiff and received by the Tribunal on the 10th July 2018 the trade dispute revolves around (a) the plaintiff's informally expressing his grievance against the filling of the post of Security Personnel and (b) for having been dismissed for such expression. The defendant's reply did not deal with such a grievance; it merely said that the plaintiff was a member of the Embassy's security staff and that therefore the Tribunal had no jurisdiction, invoking State immunity. The Tribunal does not accept such a reaction because if it did it would mean that it would condone the Embassy's dismissing its security staff without any

[18] ECtHR

[19] Article 4 (1) of the Act; this provision is subject to certain exceptions that do not affect the Case

[20] Diplomatic & State Immunity in respect of claims of embassy employees & domestic workers: Mapping the problems & devising solutions – a report by M. Gogna, S. Hlobil, and M. Podsiedlik, issued by the Amsterdam International Law Clinic (the bold font of "guards" is the Tribunal's)

justification whatsoever, even for reasons other than those that have to do with the security personnel's performance, behaviour or attitude. Indeed, the defendant implied that the reason for the termination of the employment of the plaintiff was due to unbecoming, criminal, dishonest, or disgraceful conduct[21]. This highlights the need for the Tribunal to enter the merits of the Case. Additionally the Tribunal would be going against the principle of proportionality between the invocation of State immunity and the rights of the employee. This said, the Tribunal may not interfere in the Embassy's selection, retention, and promotion within the security operations of the Embassy; at the same time however, the Tribunal retains jurisdiction on wrongful dismissal, including dismissal of security staff.

8.18. There is in international law a tendency to restrict the cases in which a State may claim immunity before foreign Courts.[22]

9. Decree

So, having seen the plaintiff's petition to the lawcourts, the response thereto, the documents submitted by both parties, the parties' notes, the responses and the additional response to the notes, and the transcript of the hearing of the 28th March 2019, and having made the considerations as per 7 to 8.18 the Tribunal decrees that:

Re 6 (i) the plaintiff's employer name in the *occhio* shall continue being shown as "the Embassy of the USA".

Re 6 (ii) the Tribunal has the jurisdiction to deal with the merits of the Case so long as such merits do not enter into details of the Embassy's security policies, security procedures, and security systems, since such policies, procedures, and systems are considered by the Tribunal to be matters of the employer State's sovereignty.

And therefore the Tribunal shall proceed with the hearing of the merits of the Case.

(signed)

Joseph Delia
Chairman

TRUE COPY

Graziella Spiteri
F/Secretary

[21] Page 5 of Doc. A attached to the defendant's Responsive Note of 31.01.19
[22] Linda Rodgers