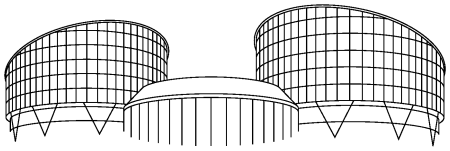

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF NAKU v. LITHUANIA AND SWEDEN

(Application no. 26126/07)

JUDGMENT

STRASBOURG

8 November 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Naku v. Lithuania and Sweden,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

András Sajó, *President,*
Nona Tsotsoria,
Helena Jäderblom,
Egidijus Kūris,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 13 September 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 26126/07) against the Republic of Lithuania and the Kingdom of Sweden, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms Sniegė Naku ("the applicant"), on 18 June 2007.

2. The applicant was represented by Mr J. Södergren, a lawyer practising in Stockholm. The Lithuanian Government ("the Government") were represented by their then Agent, Ms E. Baltutytė. The Swedish Government were represented by their Agent, Mr A. Rönquist.

3. The applicant alleged, in particular, that she had been deprived of her right of access to a court, in breach of Article 6 § 1 of the Convention, as a result of the immunity from jurisdiction upheld by the Lithuanian courts.

4. On 7 December 2010 the application was communicated to the Governments.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and lives in Vilnius.

A. The applicant's employment at the Swedish embassy in Vilnius and her dismissal

6. From 2 March 1992 to 2 January 2006 the applicant worked at the Swedish embassy in Vilnius.

7. She began as a receptionist and translator and was later promoted to be cultural, information and press officer.

8. On 9 February 2001 the applicant wrote a letter to the Swedish ambassador in Vilnius. She stated that since 1998 a major change had been made to her work description – she had started managing cultural affairs, enjoying partial independence in decision-making and a high degree of responsibility for financial matters. She was considered as being responsible for certain categories of business because she had to draft budgets for cultural projects. Unfortunately, up to that point no adjustment in her contract had been made.

9. The contract drawn up by the Swedish embassy in Vilnius on 19 November 2001, which the applicant and the ambassador signed, read as follows:

> "Work description – Sniege Naku – information officer (cultural affairs, social secretary etc.)
>
> Ms Naku's work description is as follows:
>
> - handles cultural and information matters in consultation with the Ambassador and the Cultural Attaché in Riga
>
> - programme-maker for visitors from Swedish Government Offices as well as for other Swedish authorities
>
> - social secretary – mainly to the Ambassador but if needed also to the Counsellor, First and Second secretary's
>
> - replacement for D.Z. and I.N."

10. The applicant submitted several letters of recommendation to the Court which were written between 1994 and 2006 by her Swedish colleagues at the embassy, including the ambassador to Lithuania between 1991 and 1994. The letters attested to her loyalty, dedication, communication skills and good working record.

The applicant also submitted another letter, signed on 30 June 2011 by her former Swedish colleague, Ms G. F. In the letter Ms G. F. stated that between 2003 and 2004 she had been posted as cultural attaché to the Baltic states, stationed in Riga, but also accredited to Vilnius, where she worked approximately one week a month. Ms G. F. stated that during that time she had worked closely with the applicant and that they had planned and carried out various projects. All the major projects had been cleared with the ambassador. The budgets had been relatively modest. Ms G. F. also stated that for the four years she had worked with the applicant she had never felt

that the applicant had made a single payment without asking her, or without clearing them with the ambassador.

11. According to the Swedish Government, in 2003 and 2004 a new routine was introduced at the Vilnius embassy by which diplomatic staff had to take decisions on financial support payments, and the applicant lost her authority to deal with those matters independently. It was around that time that a new ambassador, Mrs M. K., was appointed.

12. The accreditation certificate issued to the applicant by the Lithuanian Foreign Ministry on 6 October 2004 stated that the applicant was "part of the administrative technical staff at the embassy of the Kingdom of Sweden (*Švedijos Karalystės ambasados administracinio techninio personalo narė*)". The other page of the certificate stated that the applicant "did not enjoy any diplomatic immunities or privileges (*asmens imunitetai ir privilegijos: NĖRA*)". It also said that pursuant to Article 38 § 2 of the Vienna Convention jurisdiction over the applicant was to be exercised so that the functioning of the embassy would not be disturbed (see paragraph 53 below).

13. On 3 November 2004 the applicant and the Swedish ambassador M. K. signed a document entitled "Terms and conditions of employment for locally engaged personnel at the Embassy of Sweden in Vilnius". The document read that Lithuanian laws applied to the employment relationship between the applicant and the embassy regarding conditions such as the payment of tax, social security contributions, overtime, sick leave, the right to leaves of absence or severance payments. Pursuant to section 17 of that document, Lithuanian legislation was to be complied with as regards dismissal from work and the employer had to have "objective grounds for dismissal". Under section 18, an employee could be dismissed for committing a criminal act, seriously neglecting his duties, or committing further breaches of the requirements of his duties despite warnings having been given.

14. The applicant was also the chairperson of the trade union for locally employed staff at the embassy, which was registered in 1999. Between October 2004 and June 2005 the trade union made several written complaints to the embassy about working conditions. The letters complained of a deteriorating and oppressive working atmosphere, the confused delegation of tasks, incomplete job descriptions or changes in job descriptions without local employees being consulted, a lack of clear communication, and a lack of trust. The union expressed the view that a collective agreement between the locally employed staff and the embassy could resolve such issues.

15. The applicant's job description of 21 March 2005, although not signed by either the Swedish ambassador or the applicant, gave her title as "Cultural, Information and Press Officer", who worked "in cooperation with and under the guidance of the Counsellor for Political Affairs/Cultural

Attaché or in relevant matters with the Second Secretary". The applicant's functions were described as follows:

> "Operates, coordinates and assists in cultural/information events and general promotion projects;
>
> Coordinates the annual and long-term cultural/information and general promotion planning;
>
> Coordinates the cultural and information budget;
>
> Operates and assists in matters regarding press, TV and radio;
>
> Assists the Second Secretary with the communication strategy;
>
> Handles and prepares correspondence and inquiries related to cultural, information and press matters Responsible for the 'cultural calendar' on the home page;
>
> Prepares and Processes applications for financial and other support;
>
> Processes the annual report on culture and other relevant reports;
>
> Responsible for the Head of Missions newspapers' review and certain translations;
>
> Prepares and makes drafts of speeches on certain occasions;
>
> Acting as interpreter on certain occasions;
>
> Responsible for collecting, filing and translating various cultural and other adequate information;
>
> Handles customs' matters, as well as relevant notes, and setting arrangements for other proceedings including transportations of individuals and exhibitions;
>
> Setting arrangements for cultural events in cooperation with the Counsellor for Political Affairs/Cultural Attaché for lunches, dinners and receptions, including making guests lists writing invitation, bookings and other general assistance;
>
> Responsible for the information material from the Swedish Institute - including ordering, filing and distribution and as well the information room;
>
> Responsible for the 'interpreters' list' and the 'cultural board';
>
> Handles the annual 'book list';
>
> Accepts and performs other duties assigned by the Head of Mission."

16. By a letter of 17 May 2005 the Lithuanian State Civil Servants' Trade Union (*Lietuvos valstybės tarnautojų profesinė sąjunga*) also wrote to the Swedish ambassador to Lithuania. The letter expressed concern that local personnel at the embassy were treated unfairly. The union also considered that diplomatic immunity in labour relations applied only to diplomats and their families. In contrast, labour relations between a diplomatic representation and staff who were permanent residents of Lithuania were regulated by Lithuanian law. This also flowed from the 1961 Vienna Convention, which did not grant diplomatic immunity from the civil jurisdiction.

17. On 14 July 2005 the ambassador replied to the union that the embassy was "very anxious to be a good employer". However, the embassy

"had not signed, and would not sign, collective agreements. The embassy as a diplomatic representation is subordinated by the Vienna Convention and thus does not have to adhere to the Lithuanian Labour Code".

18. On 26 July 2005 Swedish radio announced and other media published articles about a report by the Swedish Labour Inspector that locally employed staff at Swedish embassies received less pay and had worse working conditions than their Swedish colleagues. The Swedish trade unions also stated that although there was no lack of legal regulation, locally employed staff would often not assert their rights for fear of losing their job.

19. According to the Swedish Government, in the autumn of 2005 a new post of counsellor for cultural affairs was established at the embassy, which was taken up by a Swedish diplomat, Mr T. S., who became the applicant's immediate superior. The Swedish Government also stated that according to internal embassy memorandums drafted by T.S. the applicant was a source of conflict at the embassy. There were long but fruitless discussions concerning the applicant's work description. According to T.S., the applicant ignored his decisions and instructions, took decisions on her own on granting financial support, failed to follow agreed plans and lacked skills in a number of areas.

20. On 8 November 2005 the embassy drafted a new job description for the applicant. She was named "Officer for Cultural and Information Affairs", and was to handle "cultural matters in consultation with the Counsellor for Cultural Affairs T.S.". Her functions were essentially identical to those given in the job description of 21 March 2005 (see paragraph 15 above). The same day, the applicant informed the embassy in writing that she did not agree with that job description because it lacked a clear definition of her responsibilities and those of T.S. She expressed a wish to involve a neutral person in negotiations over her working duties.

21. The following day, 9 November 2005, the ambassador presented the applicant with a "Letter of caution". According to the letter, the ambassador saw no future for the applicant at the embassy, due to the applicant's "difficulties to cooperate", "lack of performance", "constant questioning and arguing over duties to be performed" and "inability to cope with changes in [the] Embassy's and/or [the applicant's] own tasks". The applicant was given two days to hand in her resignation, or the embassy would "take other action".

22. According to a statement written by one of the applicant's former Lithuanian colleagues at the embassy, D.K., on 9 November 2005 the applicant was asked to hand over her keys to the embassy and leave the premises immediately. The following day the applicant came to work as usual but was not let into the embassy. According to D.K., he saw the applicant "waiting in terrible cold for around one hour outside until the reception opened for visitors. Then she walked in, sat for a while and then left. The next day she fell seriously ill and never returned [again]".

23. On 11 November 2005 the applicant went on sick leave. The sick leave certificates, issued by the Central Polyclinic (*Centro poliklinika*) in Vilnius, confirm that she was on sick leave as of that date. The leave was prolonged on a weekly basis and without interruption until 2 March 2006. At one point during that time, in January 2006, she was admitted for two weeks to Vilnius University Hospital's neurology unit, where she was diagnosed with reversal ischemic neurological deficit in the vertebrobasilar basin. The applicant was also on sick leave in December 2006 and for some months in 2007.

24. Whilst the applicant was on sick leave, on 21 November 2005, the Lithuanian trade union confederation (*Lietuvos profesinių sąjungų konfederacija*) organised a protest in front of the Swedish embassy building in Vilnius against the applicant's dismissal. The protest was covered by news outlets in Sweden. According to a statement by one of the applicant's former Lithuanian colleagues at the embassy, K.M.P., the local staff of the embassy did not attend the protest for fear of negative repercussions.

25. On 23 November 2005 the Swedish embassy sent a decision to the applicant's home address which stated that a disciplinary sanction would be imposed on the applicant – dismissal from work for gross misconduct. The ambassador stated that she had been informed on 4 and 9 November 2005 that the applicant had accused her Swedish colleague T.S. of being "unbalanced", that on several occasions the applicant had breached security rules at the embassy by opening a window on street level that had no bars, and that she had conducted a private meeting at the embassy, which was an unacceptable use of her working time.

26. In written replies of 5 and 8 December 2005, the applicant noted that she had indeed called T.S. "unbalanced" during an employee meeting at the embassy, but that that had been because he had earlier shouted at her and had never apologised. The applicant also stated that staff at the embassy had never signed any safety or security regulations. Lastly, the meeting referred to by the ambassador had concerned asking a cleaning company to come to the embassy, and that such a practice had been begun by Swedish staff and had been used continually during previous years. The applicant noted that she had never received any prior warning of the accusations against her, which were a pretext to get rid of her because of her trade-union activities.

27. On 20 December 2005 the embassy sent a letter to the applicant's home, stating that the embassy had had confirmation of the applicant's sick leave from the social insurance office (*Sodra*), attesting that the applicant had been ill up to 3 December. The applicant was asked to present a continuous or new doctor's certificate no later than 30 December, including an indication of when she would recover.

28. On 30 December 2005 the Swedish embassy dismissed the applicant from her post, effective as of 2 January 2006. The order referred to Article 136 § 3 (2) of the Lithuanian Labour Code, which permits an

employer to terminate an employment contract without giving prior notice to the employee if the latter has committed an act of gross misconduct. The embassy referred to its decision of 23 November 2005 in order to impose such a sanction on the applicant (see paragraph 25 above). The embassy also stated that on 5 December 2005 it had received a sick leave certificate from the applicant that was valid until 3 December, but that no medical certificates had been presented thereafter, despite a written request. According to the applicant's version of events, and as attested in writing by her former Lithuanian colleague D.K., in November and December 2005 she had kept the Swedish embassy informed of her illness, with her husband also taking sick leave certificates to the embassy in person. An internal embassy memorandum shows that on 5 January 2006 the applicant's husband had taken a sick leave certificate to the embassy for the period up to 2 January 2006.

29. The applicant's dismissal was subsequently mentioned on the internet site of the International Confederation of Free Trade Unions as one of the mistreatments which had taken place in 2005. The report stated:

> "the explanation given by [the ambassador], when interviewed by Swedish radio, was that Ms Naku was dismissed for not doing her job properly, but she declined to give further details. However, before the new ambassador took office, Ms Naku had not received any complaints about her work during her fourteen years of service. Meanwhile, [the ambassador] explained to the *Baltic Times* newspaper ... that, as a diplomatic representation, the embassy did not have to comply with Lithuanian labour legislation, that the tone of trade union letters was rude and that there could not be any collective agreements in a diplomatic mission."

B. Court proceedings in Lithuania regarding the applicant's reinstatement and damages

30. Arguing unlawful dismissal, the applicant brought proceedings against the Swedish embassy in the Vilnius Regional Court. She submitted that "for the last seven years I have been the Head of Culture and information projects at the embassy (*pastaruosius septynis metus esu ambasados Kultūros ir informacios projektų vadovė*)", and asked to be reinstated to her former post. She also sought pecuniary and non-pecuniary damages. The applicant argued that she had been dismissed while on sick leave, which was a clear breach of Lithuanian law (see paragraph 48 below). She also challenged the allegation that she had committed acts of gross misconduct as the grounds for her dismissal, contrary to what had been suggested by the embassy. Lastly, she noted that as a result of her arbitrary dismissal she had suffered loss of reputation and her health had significantly deteriorated. She stated that she had been destroyed, both psychologically and physically.

31. On 19 May 2006, the Kingdom of Sweden claimed immunity from the jurisdiction of the Lithuanian courts:

> "Reply to civil claim – re Mrs Sniege Naku
>
> With reference to the Court's letter/announcement of March 6, 2006, regarding civil case No. 2-1479/41/06, the Swedish Government demands that the plaintiff's case is refused with reference to acknowledged case law of the Republic of Lithuania (V.Stukonis vs. US Embassy and A.Cudak/Senkevic vs. the Embassy of the Republic of Poland).
>
> [M.K.]
>
> Ambassador"

32. By a judgment of 5 June 2006 the Vilnius Regional Court granted the embassy's request for the merits of the applicant's complaints to be left without examination because the embassy had invoked the defence of diplomatic immunity. The court stated:

> "Contemporary international law and doctrine acknowledge the doctrine of limited immunity, whereby immunity from the jurisdiction of foreign state courts is granted only in areas of State activities which are regulated by public law, and eliminates the possibility of applying State immunity in the area of private law, not linked with the implementation of State sovereignty. Accordingly, when trying to establish whether in the present case the respondent can claim State immunity, it is necessary to establish the nature of the relationship between the plaintiff and the respondent, because this relationship determined what kind of immunity – absolute or limited – should be applied to the State. The plaintiff worked at the embassy of the Kingdom of Sweden as Head of Culture and Information Projects. Even though a labour contract had been concluded between the plaintiff and the defendant, the job position of the applicant in itself (*pati ieškovės pareigybė*) pre-supposes (*suponuoja*) that the legal relationship between the parties had a civil service nature (a public-law relationship) rather than that of labour (a private law relationship), because the plaintiff's functions were linked to the implementation of the Kingdom of Sweden's sovereignty. The embassy, as an institution of a foreign diplomatic service, represents a foreign State, maintains international relations, implements foreign policy goals and defends the rights and interests of its citizens and other individuals. Accordingly and also based on the legal practice of the Lithuanian courts, work of such a nature belongs to a relationship regulated by public law (the Supreme Court's decisions in the civil cases of *V. Stukonis vs the USA Embassy* and *A. Cudak/Senkevič vs the Embassy of Poland*). The ability of the court to protect the rights of the plaintiff depends on whether the foreign State has demanded that the doctrine of State immunity be applied. In this case the embassy of the Kingdom of Sweden made such a request on 19 May 2006, relying on Lithuanian case-law. This means that the case must be discontinued."

33. The applicant appealed, arguing that the lower court's conclusion on applying State immunity had been superficial as it had been based solely on a request by the Swedish embassy, whereas the applicant's job at the embassy had had nothing to do with the exercise of the sovereign authority of the Kingdom of Sweden. The applicant emphasised that by itself the fact that she had been the head of culture and information projects did not prove that there had been a State civil service relationship (*valstybės tarnybos*

pobūdžio santykiai) between her and the embassy. She pointed out that the first-instance court had not examined the scope of her functions. She also relied on the 1972 European Convention on State Immunity (see paragraph 54 below). Even though neither Lithuania nor Sweden had acceded to that Convention, it was significant for comparative purposes. In that context the applicant noted that under Articles 4 and 5 of that Convention States could not ask for the application of State immunity in private-law cases, particularly if the proceedings related to a contract of employment between the State and an individual and where the work was performed on the latter's State territory. That was precisely the case of the applicant, who had a work contract with the Swedish embassy, which was regulated by the Lithuanian Labour Code.

34. On 7 September 2007, in written proceedings, the Court of Appeal upheld the lower court's decision by holding the following:

> "The chamber agrees with the first-instance court's legal argumentation that a foreign state has a right to invoke State immunity from foreign jurisdiction (1961 Vienna Convention 'On Diplomatic Relations'). International law and international law doctrine acknowledge the doctrine of limited immunity, when immunity from foreign courts' jurisdiction is granted only to a State's activity in the public-law sphere, and immunity does not apply in the private law sphere, which is not linked to exercising sovereignty. When establishing whether the dispute arose from a relationship covered by absolute State immunity or from a relationship where the State does not have immunity, it is necessary to establish the nature of the dispute. The plaintiff stated that a labour contract (*darbo sutartis*) has been concluded between her and the embassy of the Kingdom of Sweden. Accordingly, it is necessary to establish whether the applicant and the embassy of the Kingdom of Sweden had employment legal relationship (*darbo teisiniai santykiai*), or a State civil service legal relationship (*valstybės tarnybos teisiniai santykiai*). It transpires from the case file that the plaintiff S. Naku worked at the embassy of the Kingdom of Sweden as the head of culture and information projects (*kultūros ir informacijos projektų vadovė*). The chamber holds that even though a labour contract had been concluded between the parties, the very title of the job (*pagal pačios pareigybės pavadinimą*) shows that the duties assigned to the applicant helped the Kingdom of Sweden to a certain extent (*tam tikru aspektu*) to execute its sovereign functions. For that reason the first-instance court correctly held that there was not a labour (private), but a State civil service (public) legal relationship, regulated by public law. Even though the plaintiff in her appeal states that her job functions were not related to implementing the Kingdom of Sweden's sovereignty, she did not provide the court with evidence to prove that.
>
> Taking into account that the embassy of the Kingdom of Sweden notified the court that it does not agree to be a defendant in the proceedings related to the plaintiff's lawsuit, the chamber concludes that the first-instance court was correct in holding that it did not have jurisdiction in this case. The arguments the plaintiff raised in her appeal do not refute that conclusion.
>
> It must be noted that the application of state immunity from the jurisdiction of Lithuanian courts does not prohibit the plaintiff from submitting an analogous lawsuit in a court in the Kingdom of Sweden."

35. The applicant lodged an appeal on points of law, which was drafted by an advocate. She argued that there had been a breach of her right of access to a court in that the lower courts had only applied the principle of State immunity on the basis of the title of her job and without any further examination of the relations between her and her employer or of the nature and the scope of her duties, in order to conclude that her work had related to the sovereignty of the Kingdom of Sweden. If a foreign State did not agree that a case against it should be decided in a court of another State, proper arguments and proof had to be presented. However, it was not clear from the decisions of the lower courts on what grounds the Kingdom of Sweden had asked for immunity and why a request to apply State immunity was of itself deemed to be sufficient for the Lithuanian courts. The applicant reiterated that she and the Swedish embassy had been bound by work relations of a private nature, based on an employment contract concluded under the Lithuanian Labour Code.

36. The applicant also requested that the Supreme Court ask the European Court of Justice for a preliminary ruling and to interpret Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In the applicant's view, the Vilnius Regional Court and the Court of Appeal had in their decisions disregarded point 13 of the preamble to that Regulation as well as Article 19 thereof (see paragraph 61 below).

37. By a ruling of 6 April 2007, in written proceedings, the Supreme Court dismissed the applicant's appeal on points of law. It noted that Lithuania had not ratified the 2004 United Nations Convention on State Immunities. Accordingly, the provisions of that Convention, including Article 11, could be seen only as guidelines (see paragraphs 59 and 60 below).

38. As to the question of State immunity from foreign courts' jurisdiction, the Supreme Court noted the lower courts' conclusion that "from the title of the applicant's job description (head of culture and information projects) it was already possible to conclude that the duties which were assigned to her contributed to a certain extent (*tam tikru aspektu*) to the Kingdom of Sweden's implementation of its sovereign functions. Therefore, the parties were not linked by legal employment relations regulated by private law, but by legal civil service regulations under public law, that is to say relations for which a State may invoke the doctrine of immunity.

The Supreme Court also held:

> "... the chamber also observes that international practice is not consistent as concerns the question of which persons working at a diplomatic representation of another State participate in the public functions of the State they represent and who, as a result, work in the civil service of the represented State, on the one hand, and which persons are engaged in activities that are not related to the performance of State functions, and whose activity consequently falls under private law, on the other.

Given that there are no international legal norms which are obligatory and regulate the above questions, it is for each State to decide which persons who work at a diplomatic representation should be considered as being in State service [of a foreign State]. As can be seen from the limited case-law of the Republic of Lithuania, it is considered that everyone who works in a diplomatic representation of a foreign State, that is to say, the administrative and technical personnel and service personnel of a diplomatic representation, in one way or another contribute to the performance of the sovereign rights of a represented State, carrying out public-law functions, and therefore they are considered to be [employed] in the civil service of that State. For example, in a ruling of 25 June 2001, in the civil case A.Č. (S.) v the Embassy of the Republic of Poland ..., the Supreme Court held that the plaintiff, who worked at the embassy of the Republic of Poland as a receptionist at the front desk, that is to say she had a technical job, was helping Poland in the implementation of its sovereign rights, and that as a result she was in a legal civil service relationship with the Embassy of Poland.

The chamber concludes that in the present case, taking into account the fact that the plaintiff [the applicant] worked at the embassy of the Kingdom of Sweden as the head of cultural and information projects and was thus a member of the administrative-technical staff at the diplomatic representation, the lower courts have correctly established that she and the Kingdom of Sweden were in a legal civil service relationship regulated by public law. It is also noteworthy that Article 3 of the 1961 Vienna Convention on Diplomatic Relations mentions, among the functions of a diplomatic representation, the collection of information about conditions and developments in the receiving State, as well as the promotion of friendly cultural relations. Therefore it is evident that the plaintiff [the applicant], as the head of cultural and information projects, was helping the embassy of the Kingdom of Sweden to perform the functions of the represented State in the receiving State. This also confirms that the plaintiff and the Kingdom of Sweden were in a legal civil service relationship.

The chamber dismisses the [applicant's] arguments that the fact that the defendant, when employing the plaintiff and when dismissing her, relied on the Labour Code of the Republic of Lithuania, shows that the parties were in a legal labour law relationship and not a State civil service legal relationship. The fact that the parties chose an employment contract to formalise the legal relationship between them and that they noted that Lithuanian law is applicable [to that relationship], is not in itself a ground to conclude that the parties were bound by an employment legal relationship, and not by that of the civil service, because, as has been mentioned, all the members of the diplomatic representation's staff who work at the representation are considered to be in the civil service of the [represented] State, irrespective of the nature of the contracts concluded with them.

There are also no grounds for the [applicant] to rely on the definition of a civil servant prescribed in the Lithuanian law on the State Civil Service. It is a universally recognised principle that the legal status of State institutions and thus of civil servants is defined in accordance with the law of that State. In this case the question to be decided is the legal relationship between the [applicant] and the embassy of the Kingdom of Sweden, and not that between the applicant and Lithuanian State institutions.

[The applicant] in her appeal on points of law also argues that an objection by a foreign State against a case being heard in another State's court must be reasoned and based on evidence. For the [applicant] it is not clear from the lower courts' decisions on what basis the Government of the Kingdom of Sweden demanded that State

immunity be applied and why those courts found the embassy's letter alone to be sufficient.

The chamber notes that it is clear from the letter signed by the ambassador of the embassy of the Kingdom of Sweden to Lithuania, which was given to the Lithuanian courts, that the Kingdom of Sweden demands (*reikalauja*) the doctrine of state immunity to be applied in the [applicant's] case. Therefore, as the courts have established that in the present case the dispute arose from a legal relationship regulated by public law, where the Kingdom of Sweden can invoke the doctrine of State immunity, the aforementioned demand is sufficient to conclude that Lithuanian courts have no jurisdiction to decide this dispute."

39. The Supreme Court also dismissed the applicant's request for a referral to the European Court of Justice for a preliminary ruling. For the Supreme Court, a referral would only have been necessary if a domestic court had established that the parties had been in a legal employment relationship regulated by private law, in which case the Kingdom of Sweden could not have claimed immunity. However, given that it had been established that the applicant and the embassy of Sweden had been in a civil service legal relationship, regulated by public law, and that a State or its embassy could thus ask for immunity from a foreign court's jurisdiction, there was no basis to apply the rules of Regulation No. 44/2001. Lastly, the Supreme Court noted that a preliminary ruling was only necessary when a national court had doubts as to the correct application of European Union law, which was not the case.

II. RELEVANT LITHUANIAN LAW AND PRACTICE

A. Right of access to court and State immunity

40. The Lithuanian Constitution provides that a person whose constitutional rights or freedoms have been violated has the right to apply to a court (Article 30).

41. There is no special legislation governing the issue of State immunity in Lithuania. The question is usually resolved by the courts on a case-by-case basis, with reference to the provisions of various bilateral and multilateral treaties (see also *Cudak v. Lithuania* [GC], no. 15869/02, §§ 19-22, ECHR 2010).

B. Domestic court proceedings after the Court's judgment in *Cudak*

42. After the Court's judgment in the case of *Cudak* (cited above), Ms Cudak asked the Lithuanian courts to reopen her case of unlawful dismissal from the Polish embassy. By a ruling of 16 September 2010 the Supreme Court reopened the civil case and remitted it to the Vilnius Regional Court for fresh examination.

43. In February 2011 Ms Cudak resubmitted and revised her civil claim (*pateikė patikslintą ieškinį*) by asking: (1) that her dismissal from her job at the Polish embassy on 22 November 1999 be declared unlawful and that she be returned to her earlier job as secretary and switchboard operator; (2) that she be awarded her salary for forced absence from work (*už priverstinę pravaikštą*) from the Polish embassy from the day of her dismissal to 31 January 2011, which was over 257,000 Lithuanian litai (LTL), as well as interest on that sum; and (3) to award her litigation costs.

44. By a ruling of 13 May 2011 the Vilnius Regional Court dismissed her civil claim. It held that she had not proved that she had been dismissed for reasons related to sexual harassment.

45. On 11 November 2011 the Court of Appeal quashed that decision and partly granted the claim by acknowledging that she had been dismissed unlawfully. However, the appellate court found that in her initial lawsuit of 9 December 1999 she had not asked the court to reinstate her to her former job at the Polish embassy because of unfavourable working conditions there, but to award her compensation instead. Under Article 42 § 3 of the Labour Code that amount was equal to twelve months' salary. It was only in her revised claim of February 2011 that she had changed her demands and asked for reinstatement, under Article 42 §§ 1 and 2 of the Labour Code, and for compensation for the entire period of her forced absence from work.

46. The Court of Appeal then noted that twelve years had passed since she had worked at the Polish embassy. It was only natural that working duties and the structure of jobs at the embassy had changed. Moreover, the embassy had no free posts in which to employ her. For those reasons the Court of Appeal considered it fair to not reinstate the applicant but to award her approximately LTL 23,000, the equivalent of twelve months' salary at the Polish embassy, plus costs for litigating in Lithuania.

47. On 26 June 2012 the Supreme Court upheld the appellate court's decision.

C. The Labour Code

48. The Labour Code, which regulates disputes over employment contracts, provides that while exercising their rights and fulfilling their duties employers and employees are bound to comply with laws, observe the common rules of life and adhere to the principles of reasonableness, justice and honesty. The abuse of one's rights is prohibited. It is prohibited to hinder the formation of trade unions by employees and to interfere with the lawful activities of unions (Article 35). It is also prohibited to give notice of the termination of an employment contract and to dismiss someone from work when an employee is on temporary sick leave (Article 131 § 1). Employees who have temporarily lost their functional capacity owing to sickness are to retain their position and duties if they are absent from work

for no more than 120 days consecutively or for not more than 140 days within the previous 12 months (Article 133 § 2). An employer is entitled to terminate an employment contract without giving the employee any prior notice when the employee commits an act of gross misconduct (Article 136 § 3 (2)). An act of gross misconduct is a breach of discipline at work involving a gross violation of the provisions of laws and other legal acts which directly regulate the employee's work, or any other gross transgression of work duties or work regulations. An act of gross misconduct at work may involve improper conduct with visitors or customers or any other acts which directly or indirectly violate a person's constitutional rights (Article 235).

49. The Labour Code also provides that if an employee has been dismissed from his or her job without proper legal grounds or in breach of the law, the court will reinstate him or her and order the payment of his or her average salary from the time of the unlawful dismissal until the execution of the court's decision (Article 297 § 3). However, should the court establish that the employee may not be reinstated for economic, technological, organisational or similar reasons, or because he may find himself in unfavourable conditions, the court will declare the dismissal unlawful and award the employee his or her average salary from the time of the unlawful dismissal until the execution of the court's decision, as well as severance pay (Article 297 § 4). Severance pay depends on the employee's length of service. If the employee, as the applicant in this case, has worked in a particular job for between 120 and 240 months, severance pay is equal to the sum of five average salaries (Article 140 § 1 (5)).

50. As regards the interpretation and application of Article 297 §§ 3 and 4 of the Labour Code, the Supreme Court summed up its well-established practice in a ruling of 30 March 2010 in a civil case no. 3K-3-139/2010. It observed that once a dismissal had been declared unlawful, it was for the court examining the case to verify whether any unfavourable conditions prevented the return of the employee to his previous job. The court had to examine the existence of such conditions *ex officio*, irrespective of whether the employee had relied on that ground in his claim. Similarly, the court was not bound by the employee's claim. Paragraphs 3 and 4 of Article 297 of the Labour Code were alternative measures to protect the employee's rights and promote social justice. Accordingly, should the court find that the employee could not return to his former job because of unfavourable conditions, it should apply Article 297 § 4 of the Labour Code as a remedy for the breach of the employee's rights. If no such unfavourable conditions had been established, the court should apply Article 297 § 3.

D. The Code of Civil Procedure

51. Article 135 § 1 (2) and (4) of the Code of Civil Procedure at the relevant time provided that a civil claim must contain a description of the factual circumstances on which the claim was based (*aplinkybės, kuriomis ieškovas grindžia savo reikalavimą* (*faktinis ieškinio pagrindas*)), and the plaintiff's claim (*ieškovo reikalavimas* (*ieškinio dalykas*)). The plaintiff could change either the basis of the claim or the claim itself until the judge had decided to hear the case in a court hearing, or later in the proceedings if the respondent or the court did not object (Article 141 § 1).

III. RELEVANT SWEDISH LAW

52. The Public Employment Act (1994:260) of the Kingdom of Sweden sets out that the Act applies to employees of the Swedish Parliament and its authorities and to employees of authorities under Government control. Section 3 of the Act explicitly states that it does not apply to employees who are taken on locally by the Swedish State abroad and who are not Swedish nationals. Labour law issues of such employees are normally regulated by contracts.

IV. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The 1961 Vienna Convention on Diplomatic Relations

53. Article 1 of the 1961 Vienna Convention on Diplomatic Relations, in force in Lithuania as of 14 February 1992, reads as follows:

Article 1

"For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity;

(b) The 'members of the mission' are the head of the mission and the members of the staff of the mission;

(c) The 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) The 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank;

(e) A 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;

(f) The 'members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission;

..."

Article 3

"1. The functions of a diplomatic mission consist, *inter alia*, in:

(a) Representing the sending State in the receiving State; ...

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission."

Article 38

"1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission."

B. The 1972 European Convention on State Immunity

54. The relevant provisions of the 1972 European Convention on State Immunity ("the Basle Convention") read as follows:

Article 4

"1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum.

2. Paragraph 1 shall not apply where:

(a) in the case of a contract concluded between States;

(b) if the parties to the contract have otherwise agreed in writing;

(c) if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law."

Article 5

"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. ... "

55. The Convention's Explanatory Report indicates that "[a]s regards contracts of employment with diplomatic missions or consular posts, Article 32 shall also be taken into account". That Article provides as follows:

Article 32

"Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them."

56. Neither Lithuania nor Sweden is party to the Basle Convention. The Lithuanian Supreme Court has, however, acknowledged the pertinence of general principles of international law, and in particular of that Convention when questions related to State immunity are being examined (see *Cudak*, cited above, § 17).

C. The 2004 United Nations Convention on Jurisdictional Immunities of States and their Property

1. The 1991 Draft Articles and the commentary by the International Law Commission

57. In 1979 the United Nations International Law Commission (ILC) was given the task of codifying and gradually developing international law in matters of jurisdictional immunities of States and their property. It produced a number of drafts that were submitted to States for comment. The Draft Articles that were used as the basis for the text adopted in 2004 dated back to 1991. The relevant part of the text then read as follows:

Article 11 – Contracts of employment

"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."

58. In the commentary on Article 11 of the Draft Articles of 1991, the International Law Commission observed that the rules formulated in that Article appeared to be consistent with the trend in the legislative and treaty practice of a growing number of States. The Commission also held:

(a) Nature and scope of the exception of 'contracts of employment'

"...

(3) With the involvement of two sovereign States, two legal systems compete for application of their respective laws. The employer State has an interest in the application of its law in regard to the selection, recruitment and appointment of an employee by the State or one of its organs, agencies or instrumentalities acting in the exercise of governmental authority. It would also seem justifiable that for the exercise of disciplinary supervision over its own staff or government employees, the employer State has an overriding interest in ensuring compliance with its internal regulations and the prerogative of appointment or dismissal which results from unilateral decisions taken by the State.

(4) On the other hand, the State of the forum appears to retain exclusive jurisdiction if not, indeed, an overriding interest in matters of domestic public policy regarding the protection to be afforded to its local labour force. Questions relating to medical insurance, insurance against certain risks, minimum wages, entitlement to rest and recreation, vacation with pay, compensation to be paid on termination of the contract of employment, and so forth, are of primary concern to the State of the forum, especially if the employees were recruited for work to be performed in that State, or at the time of recruitment were its nationals or habitual or permanent residents there. Beyond that, the State of the forum may have less reason to claim an overriding or preponderant interest in exercising jurisdiction. The basis for jurisdiction is distinctly and unmistakably the closeness of territorial connection between the contracts of employment and the State of the forum, namely performance of work in the territory of the State of forum, as well as the nationality or habitual residence of the employees. Indeed, local staff working, for example, in a foreign embassy would have no realistic way to present a claim other than in a court of the State of forum. Article 11, in this respect, provides an important guarantee to protect their rights. The employees

covered under the present article include both regular employees and short-term independent contractors."

(b) The rule of non-immunity

"(5) Article 11 therefore endeavours to maintain a delicate balance between the competing interests of the employer State with regard to application of its law and the overriding interests of the State of the forum for the application of its labour law and, in certain exceptional cases, also in retaining exclusive jurisdiction over the subject-matter of a proceedings,

(6) Paragraph 1 thus represents an effort to state the rule of non-immunity. In its formulation, the basis for the exercise of jurisdiction by the competent court of the State of the forum is apparent from the place of performance of work under the contract of employment in the territory of the State of the forum. (...)"

(c) Circumstances justifying maintenance of the rule of State immunity

"(8) Paragraph 2 strives to establish and maintain an appropriate balance by introducing important limitations on the application of the rule of non-immunity, by enumerating circumstances where the rule of immunity still prevails.

(9) Paragraph 2 (*a*) enunciates the rule of immunity for the engagement of government employees or rank whose functions are closely related to the exercise of governmental authority. Examples of such employees are private secretaries, code clerks, interpreters, translators and other persons entrusted with functions related to State security or basic interest of the State. Officials of established accreditation are, of course, covered by this subparagraph. Proceedings relating to their contracts of employment will not be allowed to be instituted or entertained before the courts of the State of forum. The Commission on second reading considered that expression 'services associated with the exercise of governmental authority' which had appeared in the text adopted on first reading might lend itself to unduly extensive interpretation, since a contract of employment concluded by a State stood a good chance of being 'associated with the exercise of governmental authority', even very indirectly. It was suggested that the exception provided for in subparagraph (*a*) was justified only if there was a close link between the work to be performed and the exercise of governmental authority. The word 'associated' has therefore been amended to read 'closely related'. (...)

(10) 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. This includes actual appointment which under the law of the employer State is considered to be a unilateral act of governmental authority. 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 or employment and reinstatement of an individual only. It is without prejudice to the possible recourse which may still be available in the State of forum for compensation or damages for 'wrongful dismissal' or for breaches of obligation to recruit or to renew employment. In other words, this subparagraph does not prevent an employee from bringing action against the employer State in the State of the forum to seek redress for damage arising from

recruitment, renewal of the employment or reinstatement of an individual. The Commission on second reading replaced the words 'the proceeding relates to' adopted on first reading by the words 'the subject of the proceeding is' to clarify this particular point. (...)"

2. The 2004 United Nations Convention

59. In December 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property (hereinafter – 'the 2004 United Nations Convention'). It was opened for signature on 17 January 2005, and has not yet entered into force. One of the major issues that had arisen during the codification work by the ILC related to the exception from State immunity in so far as it related to employment contracts. The Convention, in so far as relevant, reads as follows:

Article 5 – State immunity

"A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."

Article 6 – Modalities for giving effect to State immunity

"1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or;

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State."

Article 11 – Contracts of employment

"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 organisation 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."

60. Lithuania did not vote against the adoption of that text but has not ratified it either (see *Cudak*, cited above, § 31).

V. RELEVANT EUROPEAN UNION LAW

61. The Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters sets out, in part 13 of the Preamble, that in relation to employment the weaker party should be protected by rules of jurisdiction more favorable to his interests than the general rules provide for. The Regulation also reads:

Article 19

"An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled;

or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated."

THE LAW

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

62. The applicant alleged that she had been deprived of her right of access to a court on account of the jurisdictional immunity invoked by her employer and upheld by the Lithuanian courts. She 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. Submissions by the parties

1. The Lithuanian Government

63. The Lithuanian Government argued that Article 6 § 1 of the Convention was not applicable to the dispute regarding the applicant's employment at the Swedish embassy.

64. They pointed out that the subject of the applicant's claim before the Lithuanian courts was not only her dismissal from her position at the Swedish embassy, but also her reinstatement to that job. Even if it was accepted that the claim for reinstatement was not a distinct claim before the Lithuanian courts, it was inseparable from her other claims to acknowledge her dismissal as wrongful and to award her compensation. It was the Lithuanian Government's view that Article 297 § 3 of the Labour Code did not allow the Lithuanian courts to exclude part of the applicant's complaints and deal with them separately. Furthermore, the "reinstatement of an individual" was *expressis verbis* indicated as one of the exceptions provided for in Article 11 § 2 (c) of the 2004 United Nations Convention, where State immunity from jurisdiction in contracts of employment could still be applied. The Court itself had repeatedly acknowledged the absence of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions (the Government relied on *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 38, ECHR 2001-XI (extracts), and *Cudak v. Lithuania* [GC], no. 15869/02, § 63, ECHR 2010).

65. The Lithuanian Government also submitted that the criteria in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II) could be applicable, *mutatis mutandis*, to the applicant's case. They admitted that the applicant could not be regarded as a Lithuanian civil servant. Nevertheless, taking into consideration the applicant's title of cultural, information and press officer at the Swedish embassy, as well as the nature of her duties there, it appeared that she had clearly contributed to the exercise of discretionary powers intrinsic to the sovereignty of the Kingdom

of Sweden. Among other functions, the applicant had been responsible for coordinating cultural events and information projects, working under the guidance of the diplomatic personnel of the embassy. That had been confirmed by the Supreme Court, which had considered that the applicant's work corresponded to one of the functions of a diplomatic mission established in Article 3 § 1 (e) of the 1961 Vienna Convention. Taking into account the applicant's duties at the Swedish Embassy, the Government also considered that the present case was clearly covered by the exception enshrined in Article 11 § 2 (a) of the 2004 United Nations Convention, to which Sweden was a party. There existed a special bond of trust and loyalty between the applicant and the Kingdom of Sweden. Contrary to the applicant's submissions (see paragraph 75 below), the size of the applicant's salary at the embassy did not of itself contradict such a conclusion. The decision by the Kingdom of Sweden to invoke State immunity in the applicant's case proved that the applicant's dispute had arisen out of legal relations regulated by public law (*acta jure imperii*), not by private law (*acta jure gestionis*).

66. The Lithuanian Government also maintained that the applicant could have begun proceedings in the Swedish courts to complain about the termination of her contract with the Swedish embassy in Vilnius, as the Court of Appeal had in fact suggested. It was possible to presume that the Swedish courts could easily be accessible to the applicant because the Kingdom of Sweden, whilst asking for the application of State immunity from the jurisdiction of the Lithuanian courts, had in the present case simultaneously undertaken an obligation to respect the applicant's right to a court hearing. In that context the Lithuanian Government also noted that the applicant had been represented by a Swedish lawyer practising in Stockholm. That lawyer or some other could have explained to the applicant how to turn to the Swedish courts. However, the Lithuanian Government had no information that the applicant had ever brought such an action in Sweden, and she had thus failed to exhaust the available remedies.

67. In the same connection, the Lithuanian Government reiterated the Court's case-law to the effect that access to court without the possibility of the execution of a binding court decision rendered the right to a fair hearing illusory (they cited *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X). Given that the Kingdom of Sweden had very clearly invoked the doctrine of State immunity before the Lithuanian courts, the lack of any possibility to enforce a Lithuanian court decision – had the Lithuanian courts decided not to apply the doctrine of State immunity – would in any case have meant a denial of the applicant's right to a fair hearing, for which Lithuania could not have been held responsible. The practical value of such a decision by the Lithuanian courts therefore remained questionable.

2. The Swedish Government

68. The Swedish Government argued that the applicant was not within the jurisdiction of Sweden within the meaning of Article 1 of the Convention. The proceedings related to the applicant's dismissal were instituted before the Lithuanian courts, were conducted exclusively on Lithuanian territory and the Swedish courts had no direct or indirect influence over decisions and judgments delivered by the Lithuanian courts.

69. The ways for giving effect to State immunity were expressed in Article 6 of the 2004 United Nations Convention, which provides that the forum State gives effect to State immunity by ensuring that its courts "determine *on their own initiative* that the immunity of that State under Article 5 is respected" (emphasis by the Swedish Government). The obligation to ensure that immunity is properly respected is incumbent on the forum State. Its courts must make an *ex officio* determination of whether a State is entitled to immunity. This was further clarified in the 1991 ILC commentary, which states that "[e]mphasis is placed, therefore, not so much on the sovereignty of the State claiming immunity, but more precisely on the independence and sovereignty of the State which is required by international law to recognize and accord jurisdictional immunity to another State" (*Yearbook ILC* (1191) Vol. II Part Two, p. 23). Thus, it is the forum State alone that has sovereign authority to grant State immunity, taking into account relevant national and international law. As a result, the invocation of immunity itself is without legal effect. Only when a court in the forum State decides to grant immunity is a legal effect produced.

70. The Swedish Government left it for the Court to decide as regards the applicability of Article 6 § 1 to the applicant's court proceedings in Lithuania.

71. The Swedish Government submitted that there were two exceptions justifying the maintenance of the rule of State immunity in the applicant's case. The first one was set out in Article 11, paragraph 2 (c) of the 2004 United Nations Convention, which covers cases where the employee seeks the renewal of his or her employment or reinstatement after dismissal. The fact that the applicant had sought reinstatement, as opposed to the applicant in *Cudak* (cited above), who had only sought compensation for her dismissal, was undisputed. The invocation and subsequent granting of immunity for that part of the claim had thus undoubtedly been correct. The above-mentioned rule was, however, without prejudice to the possible recourse that might still be available in the forum State for compensation or damages for wrongful dismissal, which was also part of the applicant's claims.

72. The Swedish Government also insisted that the applicant's duties at the Swedish embassy were clearly distinguishable from those performed by the applicant in *Cudak* (cited above). Whilst Ms Cudak's work had primarily been of the nature of an assistant, the applicant in this case had

carried out roles which included various elements of independent decision-making related to the management of cultural affairs at the Swedish embassy. For instance, the applicant had had the power to decide without supervision how financial support for cultural and related purposes should be granted to various organisations and to make payments to appointed recipients. Those duties had been aimed at achieving the public and institutional objectives of the embassy. They had also involved an element of trust and confidentiality since they had touched upon the actual business or policy of a foreign government, Sweden. While that discretion had to a certain extent been limited when the post of counsellor for cultural affairs had been established, the applicant had retained the ability to act in the relevant field after the organisational changes at the embassy. The outside perception had likely been that the applicant had retained her responsibilities for cultural affairs and she had in fact continued to make independent decisions on granting financial support without consulting the counsellor for cultural affairs. In addition, the applicant had assisted in secretarial and assistant duties. Even though the applicant's duties had been varied, both in their nature and in the degree of responsibility, a number of them had involved the "exercise of governmental authority" at the Swedish embassy. In turn, that had been the ground for invoking State immunity, as provided for in Article 11 paragraph 2 (a) of the 2004 United Nations Convention.

73. In the light of the above the Swedish Government argued that the Swedish embassy could not be said to have failed to preserve a reasonable relationship of proportionality by invoking an objection based on State immunity in the proceedings instituted by the applicant before the Lithuanian courts, and accordingly to have exceeded the margin of appreciation allowed to States in limiting an individual's access to court. It was therefore clear that the complaint under Article 6 § 1 was manifestly ill-founded.

3. The applicant

74. The applicant argued that her case was different from *Fogarty* (cited above) in that the case brought to the Lithuanian courts concerned a labour dispute over contractual rights concerning an employee already employed. There was far less scope for the States to grant immunity in the present case, as opposed to a recruitment situation. Concerning the alleged distinction between a mere claim for damages, as opposed to reinstatement, the applicant maintained that such a distinction was of no relevance, and, moreover, was hardly compatible with the right of access to court under Article 6 § 1 of the Convention. If it was, the Swedish Government should only have invoked partial immunity concerning the reinstatement claim, which the Lithuanian courts should have granted.

75. The applicant then argued that her case was similar to that of *Cudak* (cited above), in that she had not performed any particular functions that were closely related to the exercise of governmental authority. She maintained that her job description did not indicate that she had held the kind of high-ranking position that would allow State immunity. Indeed, her duties had been to assist the diplomatic personnel at the embassy, and she had had no authority to influence any policies that had been adopted. Metaphorically speaking, it was appropriate to describe the applicant's duties as a "messenger", rather than as the author of the message, let alone as someone who adopted or made decisions about policies underlying whatever message had to be communicated. The applicant's fairly low-ranking position at the embassy was further confirmed by her accreditation certificate, which had indicated that she was part of the Swedish embassy's administrative and technical personnel, and had not benefited from any diplomatic immunities or privileges. Last but not least, the fact that she had held a very low-ranking position at the embassy was further illustrated by the fact that she had a fairly low salary (see paragraph 108 below).

76. The applicant also submitted that as she had been a simple employee at the embassy, there was no legitimate reason for the Lithuanian courts to "offer" her a Swedish remedy and to refuse to examine her complaint of unlawful dismissal. It would be hard to explain why someone who had an ordinary job, who resided and was stationed in Lithuania and was a Lithuanian citizen, should turn to a Swedish court to claim his or her right under an employment contract which was, in all its relevant parts, including the question of dismissal, regulated by Lithuanian law. Given the current trend to have disputes over employment contracts resolved in the State where they arose, it was also highly uncertain whether a Swedish court would assume jurisdiction over her case. Even if a case was accepted for examination in Sweden, the applicant would face substantial disadvantages in a Swedish procedure, owing to the different legal system and language and the need to have legal advisors specialising in Swedish procedural law, private international law and Lithuanian labour law.

77. Lastly, the applicant submitted that it had been possible for the Swedish Government to waive the right to immunity and that such a waiver would have been binding on the Lithuanian courts. However, the Swedish Government had actively invoked and vigorously maintained immunity in three levels of Lithuanian courts. That was sufficient to attract Sweden's responsibility under Article 6 § 1.

B. The Court's assessment

1. Admissibility

(a) In so far as the complaint is directed against Sweden

78. The Court must first determine whether the facts complained of by the applicant are such as to engage the responsibility of Sweden under the Convention. In the instant case the Court notes that Sweden, which was the defendant in the civil court proceedings brought by the applicant, did not exercise any jurisdiction over her. The proceedings were conducted exclusively in Lithuania and the Lithuanian courts were the only bodies with sovereign power over the applicant. In that regard Sweden could be likened to a private individual against whom proceedings have been instituted. The fact that the Swedish ambassador raised the defence of sovereign immunity before the Lithuanian courts, where the applicant had decided to institute proceedings, does not suffice to bring the applicant "within the jurisdiction" of the Kingdom of Sweden for the purposes of Article 1 of the Convention (see *McElhinney v. Ireland and the United Kingdom* (dec.) [GC], no. 31253/96, 9 February 2010; *Kalogeropoulou and Others*, cited above; and *Treska v. Albania and Italy* (dec.), no. 26937/04, ECHR 2006-XI (extracts)). There is no other factor justifying a different conclusion.

79. Accordingly, this part of the application is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

(b) In so far as the complaint is directed against Lithuania

(i) Exhaustion of domestic remedies

80. The Lithuanian Government argued that the applicant could have begun proceedings in the Swedish courts to complain about her dismissal from the Swedish embassy in Vilnius, as the Lithuanian Court of Appeal had in fact suggested (see paragraph 34 *in fine* above).

81. The Court has already held that Article 35 § 1 of the Convention refers in principle only to remedies that are made available by the respondent State. It does not therefore cover, in the present case, remedies available in Sweden (see *Cudak*, cited above, § 35).

82. Moreover, the Court notes that the applicant was a Lithuanian national, recruited in Lithuania. The contract of employment between the applicant and the Swedish embassy referred to Lithuanian legislation as regards most of the disputes arising under it (see paragraph 13 above), and the Kingdom of Sweden had itself agreed on this choice of law in the contract. It could therefore be argued that if the applicant had submitted her complaints to the Swedish courts, they would have applied the substantive

law chosen by the parties, that is to say, Lithuanian law. The Court finds that such a remedy, even if it was theoretically available, was not a particularly realistic one in the circumstances of the case. If the applicant had been required to use such a remedy she would have encountered practical difficulties which might have hindered her right of access to a court, which, like all the other rights in the Convention, must be interpreted so as to make it practical and effective, not theoretical or illusory (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports of Judgments and Decisions* 1998-I; point 4 of the ILC commentary, reproduced in paragraph 58 of this judgment; on this issue also see the extracts from Council Regulation (EC) No. 44/2001, in paragraph 61 of this judgment).

83. Accordingly, and in the circumstances of the instant case, a submission of the applicant's complaint to the Swedish courts cannot be regarded as an effective remedy which the applicant needed to exhaust (see *Cudak*, cited above, § 37).

(ii) Applicability of Article 6 § 1

84. The Court considers that the Lithuanian Government's objection as to the applicability of Article 6 § 1 of the Convention is intrinsically linked to the merits of the applicant's complaint that she did not have access to court and the extent of the examination of her complaint by the Lithuanian courts. Accordingly, it must be joined to the merits.

(iii) Conclusion

85. The Court also finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

86. The general principles of the right of access to a court secured by Article 6 § 1 of the Convention have been set out in *Cudak* (cited above, §§ 54-59) and *Sabeh El Leil v. France* ([GC], no. 34869/05, §§ 46-54, 29 June 2011).

(b) Application of the Court's principles to the present case

87. Firstly, the Court observes that in *Cudak* (cited above), which concerned the dismissal of a member of the local staff of an embassy, it found that the grant of immunity to a State in civil proceedings pursued a legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's

sovereignty (ibid., § 60). It does not find any reason to reach a different conclusion in the present case.

88. 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.

89. The Court has already found that there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of disputes concerning the recruitment of staff in embassies (see *Fogarty*, cited above, §§ 37-38; *Wallishauser v. Austria (no. 2)*, no. 14497/06, § 69, 20 June 2013). In this connection, the Court notes that the application of absolute State immunity has, for many years, clearly been eroded. It has also affirmed that Article 11 of the ILC's 1991 Draft Articles, on which the 2004 United Nations Convention was based, applies to Lithuania under customary international law. This Article enshrines the rule that a State has no jurisdictional immunity in respect of employment contracts, except in the situations exhaustively enumerated therein. The Court must take this into consideration in examining whether the right of access to a court, within the meaning of Article 6 § 1, has been respected (see *Cudak*, cited above, §§ 64-68).

90. The Court notes that the applicant was neither Swedish national, nor a diplomatic nor consular agent of that State (see paragraphs 1 and 12 above). Accordingly, she did not fall within either of the exceptions, 2 (b) (i) or 2 (b) (e), enumerated in Article 11 of the 2004 United Nations Convention (see paragraph 59 above).

91. The Court recalls that the applicant's dismissal took place in the turmoil surrounding trade-union related activities at the Swedish embassy in Vilnius (see paragraphs 14, 16-18, 24 and 29 above). Be that as it may, the Swedish authorities have not argued before the Lithuanian courts that proceedings for the applicant's dismissal could undermine Sweden's security interests (see paragraph 31 above; also see, *mutatis mutandis*, *Cudak*, cited above, § 72). Consequently, paragraph 2 (d) of Article 11 of the 2004 United Nations Convention cannot reasonably apply in the present case. It has also not been argued before this Court that the applicant and the Swedish embassy had agreed in writing to exclude the applicant from the jurisdiction of the Lithuanian courts, an exception listed in paragraph 2 (f) of Article 11.

92. Furthermore, the Court does not share the Lithuanian Government's view that the instant case is analogous to *Fogarty* (cited above). It recalls that in *Fogarty* the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process (see paragraph 38 of that judgment). In the instant case, however, the applicant had worked at the Swedish embassy in Vilnius for nearly fourteen years.

The fact that after her dismissal she asked for reinstatement along with her claim for compensation does not change this conclusion in any major way (see point 10 of the ILC commentary, cited in paragraph 58 of this judgment). Such an interpretation was also to an extent supported by the Swedish Government (see paragraph 71 *in fine* above). In this connection the Court also observes that Article 297 § 4 of the Lithuanian Labour Code allows the court to award a severance payment instead of reinstatement (see paragraph 50 above). This possibility is also confirmed by the Court of Appeal's decision in the case of *A. Cudak vs the Embassy of Poland*, where that court acknowledged that Ms Cudak's reinstatement was not an option and awarded her severance pay as an alternative (see paragraphs 45 and 46 above). Lastly, while paragraph 2 (c) of Article 11 of the 2004 United Nations Convention does not prohibit a State from invoking immunity when court proceedings concern the reinstatement of an individual, that ground was not relied on by the Lithuanian courts in the applicant's case. Rather, they were taken up with another of the ground listed in Article 11 of that Convention – whether the applicant performed particular functions in the exercise of governmental authority (paragraph 2 (a)), a matter which the Court will address next.

93. The Court observes that the applicant, who was recruited in March 1992 by the Swedish embassy, initially performed secretarial duties. Later on, she was promoted to culture, information and press officer. On the basis of the applicant's job description in the contract of 2001, as well as in her job descriptions of March and November 2005, the Court is ready to accept that the applicant worked on culture and information matters, thus being involved in the embassy's activities in this field. Nevertheless, the Court would note that in accordance with her job description she was to act "in consultation", or "in cooperation with and under the guidance" of Swedish diplomatic staff (see paragraphs 9, 15 and 20 above). This fact was also corroborated by the statement of the applicant's former Swedish colleague at the embassy (see paragraph 10 above).

The Court further observes that the applicant was the head of a trade union for locally employed staff at the Swedish embassy in Vilnius. Nonetheless, neither the Lithuanian courts nor the Lithuanian Government have shown how the latter duties could objectively have been linked to the sovereign interests of the Kingdom of Sweden (see paragraph 14 above, and also *Sabeh El Leil*, cited above, § 62).

94. The Court cannot overlook the applicant's own written statement which accentuated the importance of her duties at the Swedish embassy in her request for a rise in salary (see paragraph 8 above). Neither does it escape the Court's attention that a conflict between her and the new counsellor for cultural affairs arose over the applicant's responsibilities at the embassy as early as 2003 and 2004, and especially immediately before the events of November 2005, culminating in the applicant's dismissal (see

paragraphs 11, 19 and 20 above). Be that as it may, the Court considers that it was precisely the scope of the applicant's actual duties that should have been examined in substance by the Lithuanian courts in order to answer the question of whether the applicant "performed particular functions in the exercise of governmental authority".

95. The Court finds that by plainly considering that everyone who worked in a diplomatic representation of a foreign State, including the administrative, technical and service personnel, by virtue of that employment alone in one way or another contributed to the meeting of the sovereign goals of a represented State (see paragraph 38 above), and thus upholding an objection based on State immunity and dismissing the applicant's claim without giving relevant and sufficient reasons that the applicant in the instant case in reality performed specific duties in the exercise of governmental authority (see paragraphs 32, 34 and 38 above), the Lithuanian courts impaired the very essence of the applicant's right of access to a court.

The Government's objection that Article 6 § 1 is inapplicable on account of the applicant's special bond of trust and loyalty to the Swedish embassy must be dismissed.

96. Accordingly, there has been a violation of Article 6 § 1 of the Convention in respect of Lithuania.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

97. The applicant also complained against Sweden that her dismissal from her job at the Swedish embassy in Vilnius had been linked to her membership of the local employees' trade union and had thus been in breach of Article 11 of the Convention, taken alone or in conjunction with Article 14.

The relevant parts of those provisions read as follows:

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restriction on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

1. The parties' arguments

(a) The applicant

98. The applicant noted that her complaint of wrongful dismissal had not been examined on the merits. It was therefore fair to hold that she had never been given an opportunity to state the underlying reasons for her dismissal. Had her case been accepted for examination, she would have had such an opportunity, according to Lithuanian procedural law. She also noted that her complaint under Articles 11 and 14 of the Convention essentially concerned the difference in treatment of different categories of employees, including herself, by the Swedish embassy. The applicant stated that the accusations against her by the embassy were grossly exaggerated. Accordingly, she did not find it fruitful or relevant to go into the details of who was to blame for the dispute, but emphasised that there were always two sides to every argument and that insisting on trade-union rights and collective agreements often gave rise to conflict. Even so, at the time of the conflict the Swedish media itself had noted that locally employed staff at Swedish embassies were treated less favourably than Swedish employees. She stated, however, that she did not hold the Lithuanian Government responsible for that, and that her complaints under Articles 11 and 14 of the Convention were directed only against Sweden.

(b) The Lithuanian Government

99. The Lithuanian Government submitted that the applicant had neither directly nor indirectly referred to her trade-union activities in her civil claim, or in her appeals before the Lithuanian courts claiming unlawful dismissal from her job at the Swedish embassy. Nor had she raised such a complaint before the Swedish courts. The complaint was therefore inadmissible for failure to exhaust the available domestic remedies.

(c) The Swedish Government

100. The Swedish Government shared the view that the applicant should have raised the complaints under Articles 11 and 14 of the Convention before the Lithuanian courts, which she had failed to do. In the Government's view, the question of whether or not there existed a procedural bar that prevented the Lithuanian courts from examining the case on the merits did not affect the applicant's obligation to invoke the relevant Convention complaints, at least in substance, at the domestic level.

Moreover, it had not been obvious, in view of the applicable domestic law and case-law, that the Lithuanian courts would come to the conclusion that State immunity barred their jurisdiction.

101. In the alternative, the Swedish Government argued that the complaint was inadmissible as unfounded. Contrary to the applicant's view, locally employed staff working at the Swedish Embassy were not in an analogous situation for the purpose of Article 14 of the Convention to Swedish staff working there. There was a fundamental difference between those two categories of employees. On the one hand, employees of the Swedish Ministry of Foreign Affairs who were posted abroad were individuals who were employed by the Swedish Government in their country of origin, in accordance with applicable Swedish legislation and corresponding labour market conditions. That category of employees in principle had no relation to the local labour market of the receiving State. Locally employed staff, on the other hand, were resident in the country where the diplomatic mission was situated. They were employed under the labour legislation of that country and other labour market conditions. That order was generally recognised and applied in relation to staff at diplomatic missions all over the world.

2. The Court's assessment

(a) The general principles

102. The general principles as to the obligation to exhaust the available domestic remedies have been set out in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 37, ECHR 1999-I), and, more recently, in *Soares de Melo v. Portugal* (no. 72850/14, §§ 68-70, 16 February 2016).

(b) Application of the general principles to the instant case

103. The Court firstly underlines that the applicant raises her Article 11 and 14 complaints only against Sweden (see paragraph 98 *in fine* above). The Court next turns to the two Governments' objection that domestic remedies have not been exhausted in the instant case.

104. The applicant argued that a civil claim in the Swedish courts would not have been an effective remedy in the circumstances of the case (see paragraph 76 above). The Court has accepted that the applicant was not obliged to raise her complaints in the Swedish courts (see paragraphs 81-83 above). That being so, it nonetheless considers that the applicant should have properly voiced in the courts of her choice, which were the Lithuanian courts, her complaint of having been discriminated on account of her trade union activities and thus provided Sweden, as the defendant, an opportunity to make any amends called for.

105. The Court observes that in her civil claim before the Vilnius Regional Court the applicant complained of unlawful dismissal, in

particular because she had been dismissed while on sick leave on the basis of allegedly ungrounded accusations of gross misconduct (see paragraph 30 above). The Court has also examined the applicant's appeal and her appeal on points of law. However, it can find no trace at all in those documents of any statements about the applicant having been dismissed because of trade-union activities. The Court accepts that under Lithuanian law a plaintiff is entitled to change the legal basis of a claim on certain conditions (see paragraph 51 above). Even so, it considers that even if there was a theoretical possibility for the applicant to revise the basis of her claim during oral arguments before the first-instance court or the appellate court, that is not sufficient to absolve her of the duty to raise that basis, however briefly, in either of the three written documents submitted to the Lithuanian courts (see *Association Les Témoins de Jéhovah v. France* (dec.), no. 8916/05, 21 September 2010; contrast *Karapanagiotou and Others v. Greece*, no. 1571/08, § 29, 28 October 2010).

106. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

107. 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

108. The applicant claimed 30,000 euros (EUR) from both Governments (jointly and severally) in respect of non-pecuniary damage. She noted that she had worked at the Swedish embassy in Vilnius for fourteen years and had a good record. The applicant stated that her dismissal had caused her great anxiety and frustration, which had not only led to a loss of self-esteem, but had also had an impact on her health. In her application the applicant stated that she was unemployed.

She also submitted that there was an element of a loss of a real opportunity. In support of her claim, she submitted a document issued by the Swedish embassy in Vilnius, showing that between September 2004 and August 2005 her monthly salary after taxes had been between 2,490 Lithuanian litai (LTL) and LTL 2,937 (between EUR 720 and 850). Proceeding on that basis, in her claim of just satisfaction sent to the Court in July 2011, the applicant claimed a sum of LTL 328,740 (approximately EUR 95,200), which represented her unpaid salary with interest. The applicant also emphasised that seeking redress for pecuniary damage by

reopening court proceedings in Lithuania was not a viable option. That was well illustrated by the case of Ms A. Cudak, whose full claim had been denied by the Lithuanian courts, even after the European Court's judgment in her favour (see paragraphs 42-47 above).

109. The Lithuanian Government disputed the claim for non-pecuniary damage as wholly unreasoned, excessive and unsubstantiated. They also argued that the applicant's claim regarding her alleged loss of a real opportunity was purely speculative in nature because it was not possible to state what the outcome would have been if her civil claim had been examined by the Lithuanian courts.

110. The Court notes that it has found a violation of Article 6 § 1 of the Convention in respect of Lithuania in that the Lithuanian authorities had failed to secure the applicant's right to access to court. The Court considers that 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 8,000 for non-pecuniary damage. The Court also notes that where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation (see *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006-II; *Cudak*, cited above, § 79; and also, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

B. Costs and expenses

111. The applicant also claimed LTL 15,000 (approximately EUR 4,350) for court proceedings in Lithuania. That was based on invoices showing that her Lithuanian lawyers worked for 60 hours at an hourly rate of LTL 250 (approximately EUR 72) in preparing the applicant's claim, appeal and appeal on points of law.

She also claimed 59,694 Swedish kronor (SEK) and SEK 58,500, or a total of SEK 118,194 (approximately EUR 12,735), for costs and expenses incurred before the Court. That sum comprised 52 hours of work by her Swedish lawyer in advising the applicant and preparing responses to the observations by the Lithuanian and Swedish Governments.

112. The Lithuanian Government "categorically declined" the request to compensate the applicant for her legal costs before the domestic courts.

They argued, *inter alia*, that the amount claimed in the proceedings before the Court had not been proved as having been necessarily incurred. Moreover, it was not reasonable as to quantum.

113. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that they have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 17,000 covering costs under all heads.

C. Default interest

114. The Court considers it appropriate that the default interest rate 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, UNANIMOUSLY,

1. *Joins* to the merits the Lithuanian Government's objection as to applicability of Article 6 § 1 of the Convention, and *rejects* it;

2. *Declares* the complaint in respect of the Republic of Lithuania concerning the applicant's right of access to court admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds*
   (a) that the Republic of Lithuania is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 17,000 (seventeen thousand euros), plus any tax that may be chargeable, 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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	András Sajó
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Kūris;

(b) concurring opinion of Judge Motoc.

A.S.
M.T.

CONCURRING OPINION OF JUDGE KŪRIS

1. After brief consideration (see paragraphs 90-94 of the judgment), the Chamber was satisfied that "by plainly considering that everyone who worked in a diplomatic representation of a foreign State, including the administrative, technical and service personnel, by virtue of that employment alone in one way or another contributed to the meeting of the sovereign goals of a represented State (see paragraph 38 above), and thus upholding an objection based on State immunity and dismissing the applicant's claim without giving relevant and sufficient reasons that the applicant in the instant case in reality performed specific duties in the exercise of governmental authority (see paragraphs 32, 34 and 38 above), the Lithuanian courts impaired the very essence of the applicant's right of access to a court" (paragraph 95).

This sentence, albeit not a short one, forms the concentrated basis both for the dismissal of the Government's objection that Article 6 § 1 was inapplicable in the present case and for finding a violation of that Article.

2. Given that the Lithuanian courts devoted many pages (some of them directly quoted in the judgment) to the applicant's duties, more explicit reasoning would have been instructive. It would also have been in line with the Court's position of principle, which is reflected verbatim in paragraph 95 (cited above), that courts should give "relevant and sufficient reasons" for their findings. However, in its reasoning as to why it found a violation of Article 6 § 1 in respect of Lithuania, the Chamber itself appeared to be quite sparing with its language. I am not sure that the manner in which the finding of a violation is substantiated in paragraphs 90 to 94 is conducive to regarding the reasons given by *this* Court as "relevant" or "sufficient". My doubt is even greater in view of the Court's assertion that "in the instant case ... the reopening of the case, if [the applicant] so requests, represents in principle an appropriate way of redressing the violation" (see paragraph 110 of the judgment).

The words used in paragraph 95 should have been explicitly substantiated before being used in that "summing up" paragraph.

3. The words "without giving relevant and sufficient reasons" could have been substantiated in the following way. It transpires from the case file that the applicant's title as the "head" of culture, press and information projects appeared only in some of her own submissions to the domestic courts, and not in any of her job descriptions at the embassy. On the other hand, in her objection to the civil proceedings, the Swedish ambassador neither gave the applicant's title nor explained the applicant's duties in order to justify the application of State immunity by the Lithuanian courts (see paragraph 31 of the judgment). The Chamber rightly attached no particular weight to how the applicant interpreted and designated her own duties, because litigants are free to employ different strategies in court

proceedings. But this aspect was passed over in silence, as was the striking parallel between the present case and *Cudak v. Lithuania* ([GC], no. 15869/02, § 71, ECHR 2010). More particularly, in *Cudak*, the Lithuanian Supreme Court acknowledged that it had been unable to obtain any information allowing it to establish the scope of the applicant's "actual duties". In the present case the domestic courts did not even go that far. Instead, the Vilnius Regional Court and the Court of Appeal simply based their reasoning on the "job position itself" and "the title of the job itself" respectively (see paragraphs 32 and 34 of the judgment), thus finding that the applicant had "to a certain extent" helped Sweden to carry out its sovereign functions. The courts did not explain to what extent that was so by examining the actual duties she performed, nor did they justify their decisions by explaining on what basis – documents or facts brought to their attention – they had reached such a conclusion. Thus, the level of legal consideration concerning the merits of the applicant's argument was unjustifiably limited. All of this took place against the background of the applicant's plea that no evidence about the scope of her functions had ever been analysed (see paragraph 33 of the judgment). On this point it could have been noted that the provisions of Article 11 of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (although not ratified by Lithuania, it is used by its courts as a "guideline"), and in particular the exceptions enumerated therein, must be strictly interpreted (see *Sabeh El Leil v. France* ([GC], no. 34869/05, § 66, 29 June 2011). This last provision from the Grand Chamber's case-law – although it is the most important and directly relevant to the case under examination! − is not even mentioned in the judgment. An attentive student would ask: why? Does it signify that the Court's attitude is about to change?

4. The words "by plainly considering that everyone who worked in a diplomatic representation of a foreign State, including the administrative, technical and service personnel, by virtue of that employment alone in one way or another contributed to the meeting of the sovereign goals of a represented State ..., and thus upholding an objection based on State immunity" could have been substantiated by mentioning the following circumstances. The Supreme Court noted that, pursuant to Article 3 of the Vienna Convention on Diplomatic Relations, the gathering of information about a receiving State, as well as the promoting of cultural relations, were among the functions of a diplomatic representation (see paragraphs 38 and 53 of the judgment). That being the case, the Supreme Court also held that everyone who worked in the diplomatic representation of a foreign State, including the administrative, technical and service personnel, in one way or another contributed to the meeting of the sovereign goals of the represented State, with the result that the diplomatic representation's immunity from jurisdiction was justified (see paragraph 38). To support that finding in the present case, the Supreme Court then relied on its own earlier

finding in *A. Cudak vs the Embassy of Poland*. Such an overarching application of State immunity to everyone who works at a diplomatic representation is in plain contradiction with the current developments in international law (see *Sabeh El Leil*, cited above, § 53) as well as with the spirit of the Court's judgment in *Cudak* (cited above). The Supreme Court's choice to grant State immunity in this case thus appears to have been based largely on the Swedish ambassador's demand to that effect (see paragraph 38 *in fine*). Such "expanded" reasoning would also have provided justification for the dismissal of the Government's objection that Article 6 § 1 was inapplicable on account of the applicant's special bond of trust and loyalty to the Swedish embassy.

5. Lastly, it would have done no harm (rather the opposite) had the Chamber explicitly dealt with the Supreme Court's conclusion that despite the fact that an employment contract had been concluded between the Swedish embassy and the applicant the latter, just like any other person working in a diplomatic representation, was considered as being in the civil service of the represented State, that is, Sweden (see paragraph 38 of the judgment). Such a conclusion appears to run counter not only to Swedish legislation, as the Public Employment Act does not apply to staff employed locally by Sweden abroad (see paragraph 52), but also to the arguments provided by the Swedish Government (see paragraph 101).

6. The above considerations do not affect my agreement with the findings of the judgment. Still, the Court should seek to make its judgments as clear as possible and thus to provide them with what is sometimes called greater "educational value". At times, the overly concise reasoning of the domestic courts alone prompts this Court to find a violation of the applicable Article of the Convention. However, when overly concise reasoning is provided in this Court's judgment, which – being the "last word in law" – is not subject to any review, there remains scope for unnecessary and undesirable guesswork and speculation, first of all at the national level, as to what precisely this Court had in mind.

Why serve up a concentrate to the readership – which includes the domestic courts – when that concentrated version can at no extra cost be made into a full drink?

CONCURRING OPINION OF JUDGE MOTOC

I voted with the majority in this case with a number of reservations. I must point out that in regard to some of the issues at stake, either the Court does not deal with them in its reasoning or my position is different.

The case concerns the infringement of the applicant's right to access the Court, under Article 6 of the Convention, by the Lithuanian State. The applicant, a Lithuanian national and a former employee of the Swedish Embassy in Vilnius, has brought a claim under Article 6 of the Convention in relation to the negation of her court action challenging her dismissal from the Embassy on the basis of State immunity requested by the Kingdom of Sweden and granted by the Lithuanian courts. In assessing the relationship of proportionality between the applicant's right to access the court and the legitimate aim of respecting another State's sovereignty, the Court has concluded that the Lithuanian court has impaired the very essence of the applicant's rights under Article 6, and thus has unduly interfered with her conventional guarantees.

The first issue that I will tackle in my concurrent opinion is the applicability of Article 6 and the question of jurisdiction, the second concerns customary law in matters of immunity in the sphere of employment, the third relates to questions of subsidiarity in the implementation of the relevant provision, and the fourth and last issue concerns remedies.

I. Article 6 and the question of jurisdiction

Article 6 cannot have been intended to confer on the Contracting States jurisdiction which they otherwise do not hold, nor can it have conferred a type of jurisdiction which is contrary to general international law such as to be binding on non-Contracting States. It is regrettable that our Court missed the opportunity also to deal with these considerations in the present judgement.

The ECtHR has never expressly addressed these questions. But the established case-law of our Court states that Article 6 is relevant prima facie to immunity cases. This holds true for this case as well. Furthermore, paragraph 87 of Naku confines itself to stating the following: "[f]irstly the Court observed that in Cudak, which concerned the dismissal of a member of the local staff of an embassy, it found that the grant of immunity to a State in civil proceedings pursued a legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty (ibid., paragraph 60). It does not find any reason to reach a different conclusion in the present case."

This separation of the two issues of immunity and jurisdiction is in conformity with the general international law position established by the ICJ in its "Arrest Warrant" judgment, which states:

"The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction "does not imply absence of immunity, while absence of immunity does not imply jurisdiction" (paragraph 59).

The right of access to a court as secured under Article 6 does not confer jurisdiction on a domestic court: although the latter is bound to exercise the jurisdiction which it already holds, it may nonetheless opt not to exercise it pursuant to a rule of international law.

In the present case, the Court might suggest that the domestic courts adopt an approach whereby they are "not bound to choose between the aforementioned competing approaches", and that granting immunity to Sweden would breach the applicants' right of access to a court: the relevant provisions of the Lithuanian Immunities Act have been ruled incompatible with Article 6 ECHR and deemed non-applicable in pursuance of Article 47 of the European Charter of Fundamental Rights, inasmuch as the claims related to rights guaranteed under European Union legislation (see Philippa Webb, "A Moving Target: The Approach of the Strasbourg Court to State Immunity", A. van Acken and I. Motoc, "The ECHR and General International Law", Oxford University Press, forthcoming).

Again, the fact that the applicability of Article 6 was not analysed and backed up with proper reasoning was a missed opportunity for the Court.

II. The role of customary law

The Naku case follows the belief enunciated in the previous jurisprudence on the matter which is taken as an established fact: "the Court has already found that there is a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes ... The Court notes that the application of absolute State immunity has, for many years, clearly been eroded ..." (see paragraph 88). In fact, the Court merely repeated what was stated in Cudak.

In the case of *Cudak*, the Court had cited the comment of the ILC on Article 11, which stipulates that "the rules established by Article 11 seem to be compatible with the new trends in the legislative and conventional practices implemented by a growing number of States". The Court subsequently jumped forward from the 1991 draft Articles to the United Nations Convention of 2004, and from "the new trends implemented by a growing number of States" to well-established State practices, largely and representatively accompanied by the *opinio juris.*

At the time, but in fact still nowadays, the *Cudak* decision was an example of the ECtHR applying international law without really assessing

whether it is appropriate to completely defer legal matters to this sphere. In this light, it is also argued that if the ECtHR had decided to take account of the international norms, it would also have been useful to examine the origin, quality and reliability of the customary norms in question. The growing interference by the Strasbourg Court in the regulation of employment disputes had been criticised because it determines the application of international rules of State immunity from a regional perspective, which approach is not necessarily accepted elsewhere, These criticisms relate not only to courts which take little account of the merits of the internal procedures of alternative dispute resolution, but also to the lack of recognition of the flexibility of the contract as a way to fairly distribute the contradictory interests of all parties (see, for example, R. Pavoni, "The myth of the United Nations Convention on State Immunity: does the end justify the means?", and A. van Acken and I. Motoc, "The ECHR and General International Law", Oxford University Press, forthcoming).

The approach to general international law adopted by the European Court of Human Rights through its adherence to Article 11 of the UNCSI (and Article 11 of the Draft Articles of the ILC) has resulted in the emergence of a European Court of Human rights approach, separate from the one governing employment disputes which involve States and international organisations.

National Courts have also followed our Court approach. In *Benkharbouche*, the UK Court of Appeal has abolished the immunity of Sudan and Libya in what has been called "a dramatic stretch of the principle of effectiveness of EU law." This seems to offer potential applicants the possibility to enforce EU fundamental rights directly, notwithstanding the immunity of the national State, and even against non-member States.

In Naku, the domestic Courts set out "the contemporary international law and doctrine of limited immunity, whereby immunity from the jurisdiction of foreign State courts in areas of State activities are regulated by public law".

The dilemmas of this case relate not so much to lack of knowledge of the nature of Article 11 UNSCI in the ECHR approach, as if we were in the pre-*Cudak* era, as to the difficult decision regarding the actual duties of the plaintiff, who presented herself as "Head of Culture and Information Projects at the Embassy" (see paragraph 30); this will be further explained below.

III. Subsidiarity

The most problematic question raised by the majority in this case is that of subsidiarity. In all the other cases concerning immunity in employment, starting with Cudak, the ECHR gives clear indications to domestic Courts

on how to apply the criteria set out in Article11. Naku is the first case in which the Court does not give any such indications.

In Cudak, for example, having stated that it is possible to affirm that Article 11 of the ILC's 1991 Draft Articles, on which the 2004 UN Convention was based, applies to the respondent State under customary international law, the Court "notes that the applicant is not covered by any of the exceptions enumerated by Article 11 of the ILC's Draft Articles", and analyses the case on the merits.

The Court took the same approach in Sabeh El Leil v. France. Here again the Court noted that Article 11 § 2 was not relevant to that particular case, and in the ensuing paragraphs gave clear indications regarding the application of Article 11 of the ILC's 1991 Draft Articles.

In Naku, however, the Court chooses simply to criticise the approach of the domestic Courts, which is considered to have an overarching conclusions without giving further indications to the national Courts how to proceed with the application of Article 11 of the Draft Articles of the ILC.

Prima facie, it would seem that compliance with the principle of subsidiarity was more acknowledged and emphasised in this case than in *Cudak, Sabeh El Leil* and the other subsequent cases.

In fact, the Court left the domestic courts without any indication of how to solve a difficult case of State immunity in the employment sphere. During the domestic proceeding the applicant presented her herself as the Head of Culture and Information Projects at the Embassy. Furthermore, the Swedish government noted that the applicant had the power to decide, unsupervised, how financial support for cultural and related proposed should be granted (see paragraph72).

IV. Remedies

Another highly problematic issue concerns available remedies in the State claiming immunity. In *Cudak* the Court stated "[i]t could therefore be argued that if the applicant had submitted her complaints to the Swedish courts, they would have applied the substantive law chosen by the parties, that is to say, Lithuanian law. The Court finds that such a remedy, even if it was theoretically available, was not a particularly realistic one in the circumstances of the case. If the applicant had been required to use such a remedy she would have encountered practical difficulties which might hinder her right of access to a court, which, like all the other rights in the Convention, must be interpreted so as to make it practical and effective, not theoretical or illusory (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports of Judgments and Decisions* 1998-I; point 4 of the ILC commentary, reproduced in paragraph 58 of this judgment; on this issue also see the

extracts from Council Regulation (EC) No. 44/2001, in paragraph 61 of this judgment)" (paragraph 82).

It could therefore be argued that if the applicant had submitted her complaints to the Polish courts, they would have applied the substantive law chosen by the parties, that is to say Lithuanian law. However, the Court finds that such a remedy, even supposing that it was theoretically available, was not a particularly realistic one in the circumstances of the case. If the applicant had been required to use such a remedy she would have encountered serious practical difficulties which would have been incompatible with her right of access to a court, which, like all other rights in the Convention, must be interpreted so as to make it practical and effective, not theoretical or illusory (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, Reports of Judgments and Decisions 1998-I). The applicant was a Lithuanian national, recruited in Lithuania under a contract that was governed by Lithuanian law, and the Republic of Poland had itself agreed on this choice of law in the contract (see paragraph 36)

This paragraph of *Cudak* raises many questions regarding the application of the rules of international private law. Even if the application of the foreign law is difficult, time-consuming and costly, it does not make this remedy theoretical and illusory.

It is even more difficult to agree with this assessment in the present case (see paragraph 82 in the context of Council Regulation (EC) no.44/2001).