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Part Three. Judicial decisions on questions relating the United Nations and related inter-governmental organizations

Chapter VIII. Decisions of national tribunals

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Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. United States of America

U.S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

U.S. EX. REL. ROBERTO SANTIESTEBAN CASANOVA v. WALTER W. FITZPATRICK: JUDGEMENT OF 16 JANUARY 1963[1]

Status of staff member of Permanent Mission to United Nations—Interpretation of Article 105 of United Nations Charter and article V, section 15 of the Headquarters Agreement—Jurisdiction of Federal District Court

Petitioner Casanova, who had entered the United States on 3 October 1962 on a diplomatic passport to serve as an attaché and resident member of the Cuban Permanent Mission to the United Nations, was arrested on 16 November 1962 on a charge under Title 18, sections 2155(*b*) and 371, of the United States Code. He sought release from custody on a writ of habeas corpus on the ground of the Court's lack of jurisdiction over him, contending that he was entitled to diplomatic immunity from arrest and prosecution under the United Nations Charter, the Headquarters Agreement and international law, and contending further that even if his claim to immunity was overruled, the writ, nonetheless, had to be sustained because the Supreme Court of the United States had original and exclusive jurisdiction to try him. By a judgment of 16 January 1963 the District Court (Weinfeld, J.) denied the writ.

The Court held that Article 105 of the Charter did not purport, nor did it confer, diplomatic immunity, and that the "broadest claim that can be made is that it is self-operative with respect to functional activities". Even if it were so construed, the Court stated, it would not avail the petitioner, since the crime with which he was charged was not a function of any mission or member of a mission to the United Nations.

The Government of the United States, a party to the Headquarters Agreement and to the present controversy, challenged by way of submitting a certificate the petitioner's claim for diplomatic immunity under section 15 (2) of article V of the Headquarters Agreement. The certificate pointed out that section 15 (2) expressly provides that immunity thereunder is accorded only to "such resident members of their staffs as may be agreed upon between the

[1] 214 Fed. Supp. 425. Defendant moved for leave to file petition for writ of prohibition or writ of mandamus in the Supreme Court of the United States on 25 February 1963 and took an appeal under 28 USC 2253 on the issue of immunity under the Headquarters Agreement, the Charter of the United Nations and the law of nations. Following an order dismissing proceedings against the defendant (apparently in connexion with a prisoner exchange, see New York Times of 23, 24 and 25 April 1963), the motion in the Supreme Court was dismissed under Rule 60 of the Rules of the Court by agreement of the parties (373 United States Reports 906) and the appeal which had become moot was allowed to lapse. The United States Government has been informed that it is the position of the Secretary-General that section 15 (2) of the Headquarters Agreement does not properly permit the interpretation that the consent of the United States authorities is required in each individual case. The matter is presently under negotiation.

Secretary-General, the Government of the United States and the Government of the Member concerned" and it denied that any such agreement was ever manifested, although it admitted that an application therefor was made by the Secretary-General pursuant to the request of the Cuban Mission. The Court held this certificate as "evidential but not conclusive" since the question as to whether "immunity exists by reason of the agreement is not a political question but a justiciable controversy involving the interpretation of the agreement and its application to the particular facts."

The Court then went on to deny the petitioner's claim that the phrase in section 15 (2) "such resident members. . . as may be agreed upon" contemplates agreement only as to categories and not as to the individuals. The Court said:

". . .full diplomatic immunity is accorded under subdivision I of section 15 to top echelon representatives of member nations identical to that accorded to accredited diplomats to the United States. As to their staff members, pending agreement by the United States under section 15 (2), which would entitle them to diplomatic immunity, there is available under the International Organizations Immunities Act the immunity necessary for the independent exercise of their functions, apart from Article 105 of the Charter, if in fact it is self-executing. No member State is prevented from appointing whomever it will to serve on the resident staff of its mission to the United Nations, but the United States, under section 15 (2), is not required, simply by reason of one's employment in a particular category, to grant diplomatic immunity. It retains the right thereunder to agree or not to agree that diplomatic immunity shall extend to individuals, who qualify under the broad category 'Resident Members of their Staffs'. . .

"The language of the section controls. There is nothing in its history or in the practice under it to support petitioner's claim. To accept his contention would in effect amend section 15 (2) by inserting therein the words 'classes of' to read 'such classes of resident members'. . ."

As to the effect of the issuance of the G-1 visa (applicable to the principal resident representative of a recognized foreign member government to an international organization, his staff, and members of immediate family) and the landing permit, the Court held:

"The fact that the G-1 visa recognized that petitioner had the status encompassed within section 15 (2) does not mean that by reason thereof the United States gave the required agreement thereunder. The visa was issued at the request of the Cuban Mission upon presentation of a diplomatic passport issued by the Cuban Government and its representation of petitioner's appointment as 'diplomatic attaché'. Since the designation rested with the Cuban Government, the United States was obligated under sections 11 and 13 of the Headquarters Agreement not to impose any impediment in his transit to and from the Headquarters District and to provide him with the necessary visa. . .

"The question of the agreement of the United States Government to diplomatic immunity was entirely separate from facilitating petitioner's entry [into the United States] to assume his duties with his mission.

". . .the Government of the United States did not, by the issuance of the visa and the landing permit, give its agreement that petitioner. . . was thereby entitled to diplomatic immunity under section 15 (2) of the Headquarters Agreement."

So far as the petitioner's claim was based on the law of nations, the Court held that he was not entitled to diplomatic immunity from the time of his entry until he was either agreed upon or rejected in response to this government's request, for his position was not analogous to that of diplomats awaiting acknowledgment by governments to which they are accredited. The Court also stated:

"It is the Headquarters Agreement, the Charter and the applicable statutes of the United States that govern the determination of his rights, not the Law of Nations. The Law of Nations comes into play and has applicability in defining the nature and scope of diplomatic immunity only once it is found a person is entitled thereto under an applicable agreement or statute."

Finally, the jurisdictional contention that by virtue of the Constitution [2] and the Judicial Code [3] the petitioner may be prosecuted and tried only before the Supreme Court was rejected. The Court said *inter alia*:

"The Constitutional provision and the statute are designed to apply to diplomatic representatives of foreign governments accredited to the United States. International organizations which have come into full bloom only in the last several decades were not envisaged by the Founding Fathers; clearly it was not within their contemplation that staff members of missions to such international organizations were included within the term 'Ambassadors and other public Ministers'. . ."

[2] See article III, section 2, clause 2.

[3] See section 1251(a) of Title 28 United States Code.

2. United States of America

U.S. DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

U.S.A. v. IVAN DMITRIEVICH EGOROV AND ALEKSANDRA EGOROVA: JUDGEMENT OF 7 OCTOBER 1963 [1]

Effect of visa and diplomatic passport—United Nations employee accused of criminal act not within his official duties is not entitled to immunity or Supreme Court's original jurisdiction.

Defendant Egorov, who was an employee of the United Nations Secretariat, and his wife were arrested and charged under Title 18, sections 371, 794(*a*) and (*c*), and 951, of the United States Code. They made a motion for an order dismissing indictment against them claiming that they were entitled to diplomatic immunity and, in the alternative, that the United States Supreme Court had original and exclusive jurisdiction pursuant to article III, section 2, clause 2 of the United States Constitution. By a judgement of 7 October 1963 the District Court (Rayfield, J.) denied the motion.

The defendants based their claim on the fact that the U.S.S.R., exercising its rights as a sovereign power, invested Egorov with immunity by issuing to him a diplomatic passport wherein he was designated as First Secretary of the Ministry of Foreign Affairs; and that the American Embassy at Moscow issued to Egorov and his family non-immigrant visa upon the receipt of Egorov's application in which he stated his afore-mentioned diplomatic rank. The Court said *inter alia*:

"The visa issued to Egorov was not a diplomatic visa but a G-4 visa, which is issued to officers and employees of international organizations, and bore the notation 'Employee of United Nations Secretariat'. . .

"The issuance to Egorov of a diplomatic passport is not controlling of his status. The title of 'First Secretary of the Ministry of Foreign Affairs' would entitle him to diplomatic immunity provided that he had been accepted and recognized as such by the United States. Section 252 of Title 22 U.S. Code grants immunity from arrest only to those ambassadors or public ministers of foreign states who have been 'authorized and received as such by the President'. . ."

The Court, after noting the absence of the United States' acceptance and recognition of Egorov's diplomatic status, pointed to the sovereign right of a government to pass upon the acceptability of diplomatic representatives of foreign governments.

[1] 222 Fed. Supp. 106.

With regard to the privileges and immunities to which Egorov was entitled as an employee of the United Nations Secretariat pursuant to the International Organizations Immunities Act (sections 288-288(*f*) of Title 22 of the United States Code), the Court stated:

" Section 288 d (b) thereof provides that 'Representatives of foreign governments in or to international organizations... and officers and employees of such organizations shall be immune from suit and legal process *relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees...*' The limitation created by the underscored provisions of the said Section precludes Egorov from claiming general immunity."

As to Article 105 of the United Nations Charter, urged by Egorov as a further basis for his claim of immunity, the Court also held that he derived no protection therefrom so far as the charges against him were concerned.

The Court then concluded that since Egorov did not have diplomatic status he did not come within the purview of article III, section 2, clause 2 of the Constitution.
