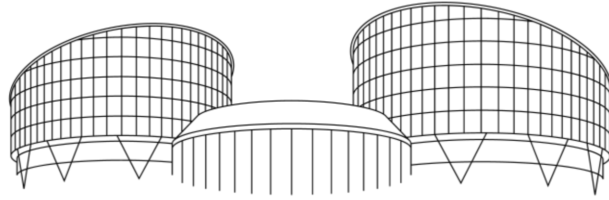

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF WALLISHAUSER v. AUSTRIA

(Application no. 156/04)

JUDGMENT

STRASBOURG

17 July 2012

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of Wallishauser v. Austria,

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

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 26 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 156/04) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mrs Roswitha Wallishauser ("the applicant"), on 15 December 2003.

2. The applicant was represented by Mr M. Celar, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged, in particular, that she did not have access to court in connection with her claim for salary payments arising out of her employment contract with the embassy of the United States of America in Vienna.

4. On 25 October 2006 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). On 27 March 2009 the Court informed the parties of its decision of 26 March to adjourn the proceedings pending the outcome of the Grand Chamber proceedings in the cases of *Cudak v. Lithuania,* no. 15869/02, and *Sabeh El Leil v. France,* no. 34869/05. Following delivery of the *Cudak* judgment on 23 March 2010, the Chamber decided on 3 June 2010 to resume the proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1941 and lives in Vienna.

A. Background

6. The applicant had been an employee of the embassy of the United States of America in Vienna since March 1978. From January 1981 onwards she had a contract of indefinite duration and worked as a photographer at the embassy. Following an accident in 1983 the competent authority issued a decision stating that she qualified for protection under the Disabled Persons (Employment) Act (*Invalideneinstellungsgesetz*). Following a further accident, classified as work-related, the embassy dismissed her in September 1987.

7. Her dismissal was declared void by the Vienna Labour and Social Court (*Arbeits- und Sozialgericht*) on the ground that it required the prior agreement of the competent authority under the Disabled Persons (Employment) Act. The court dismissed the argument submitted by the United States that it lacked jurisdiction on account of the United States' immunity. It found that, while foreign States enjoyed immunity with regard to *acta iure imperii*, they came within the jurisdiction of the domestic courts with regard to *acta iure gestionis*. The conclusion and performance of an employment contract fell within the latter category. The Supreme Court (*Oberster Gerichthof*) upheld that judgment on 21 November 1990, noting that the United States had not maintained the objection of State immunity in the further course of the proceedings.

8. As a result of the above proceedings, the applicant continued to have a valid employment contract with the United States embassy in Vienna. However, the latter refused to make use of her services. Instead, on 31 January 1991, they applied to the Vienna Committee for Disabled Persons requesting retroactive approval of the applicant's dismissal or, alternatively, agreement to a future dismissal. The Committee refused to grant retroactive approval for the applicant's dismissal of September 1987 but gave its approval for a future dismissal. The competent Federal Ministry upheld that decision. On 13 September 1994 the Administrative Court, ruling on a complaint by the applicant, set aside the decision to grant approval for the applicant's future dismissal, finding that the authorities had failed to establish relevant facts and had not duly weighed the parties' interests. The case was referred back to the Committee. On 16 January 1996 the United States withdrew its application, stating that it had always

maintained that the application of the Disabled Persons (Employment) Act to employees of the embassy interfered with the country's sovereignty.

9. Meanwhile, the applicant brought proceedings against the United States requesting payment of her salary. In a first set of proceedings, concerning salary payments up to June 1995, the United States unsuccessfully raised an objection of jurisdictional immunity. Subsequently, the United States paid the applicant salary arrears of 3.7 million Austrian schillings (approximately 269,000 euros (EUR)). On the occasion of the payment, the lawyer who had represented the United States in the proceedings informed the applicant by a letter dated 16 October 1996 that the payment did not imply any acceptance of the Austrian courts' judgments and that the United States considered her employment contract to be terminated and would, if she raised any further claims, "make use of its diplomatic rights and immunities".

10. Further proceedings relating to the payment of salary from July 1995 to August 1996 led to a final default judgment by the Vienna Labour and Social Court. However, the United States did not pay the amount awarded to the applicant.

11. The applicant also unsuccessfully brought proceedings against the United States claiming reimbursement of the social security contributions which she had been ordered to pay by the Austrian authorities and a part of which the employer was, under her employment contract, obliged to refund. In those proceedings the United States authorities refused to serve the summons to attend the hearing. The Austrian courts dismissed the applicant's request for a judgment in default. Their position was upheld by the Supreme Court's judgment of 11 June 2001 (see below, paragraph 28).

B. The proceedings giving rise to the present application

12. On 29 December 1998 the applicant brought an action against the United States of America before the Vienna Labour and Social Court, claiming salary payments from September 1996 onwards. The court scheduled a first hearing for 20 October 1999.

13. An attempt to serve the applicant's action and the summons to the hearing on the United States through the Austrian Ministry of Foreign Affairs, under section 11(2) of the Service Act (*Zustellgesetz*), failed. According to the file a staff member of the Austrian embassy in Washington handed these documents over to a staff member of the United States Department of State. However, by letter of 25 January 2000 the Ministry of Foreign Affairs informed the Ministry of Justice, which in turn informed the Vienna Labour and Social Court, that the United States authorities had refused to serve the summons and had returned the documents at issue to the Austrian embassy in Washington. The letter was accompanied by a note from the United States Department of State informing the Austrian Ministry

of Foreign Affairs that the United States wished to assert its immunity in any case brought by the applicant. In a letter of 4 February 2000 the Ministry of Foreign Affairs also informed the applicant accordingly.

14. On 18 February 2000 the Vienna Labour and Social Court dismissed the applicant's request for a judgment in default, noting that it had been impossible to summon the defendant. An appeal by the applicant to the Vienna Court of Appeal (*Oberlandesgericht*) was unsuccessful.

15. The Supreme Court dismissed her appeal on points of law on 5 September 2001. Referring to its judgment of 11 June 2001 in a parallel case brought by the applicant (see paragraph 28 below), it noted that the summons had not been duly served on the defendant, namely the United States Department of Justice. Consequently, the conditions for giving a judgment in default were not fulfilled.

16. By a decision of 29 October 2001 the Vienna Labour and Social Court held that the applicant's action and the summons to the hearing had not been served on account of the manifest refusal of the United States to comply with the request for service. It followed that further attempts to summon the defendant did not have any prospects of success.

17. Subsequently, the applicant requested that the summons be served by means of publication under Article 121 § 2 of the Code of Civil Procedure (*Zivilprozeßordnung*) or, alternatively, that it be served on a court-appointed representative (*Curator*) under Article 116 of the Code.

18. By decision of 25 April 2002 the Vienna Labour and Social Court appointed a lawyer, Dr G., to represent the United States of America. It noted that the foreign authorities had refused to serve the summonses in any of the proceedings brought by the applicant. In the court's view the United States had wrongly relied on its alleged immunity.

19. On 18 November 2002 the Vienna Court of Appeal, following an appeal by Dr. G., quashed that decision. The relevant part of its decision reads as follows:

> "In acting on a request for service, the State to which the request is made is exercising sovereign powers. This applies even if the court documents in question are addressed to that State and the authority responsible for acting on the request for assistance (in this instance the Department of State) refuses to forward them to the authority empowered to represent the State in private-law proceedings (in this instance the Department of Justice). This is not a case of refusal to accept service (§ 20 of the Service Act) but rather a case of refusal to comply with a request for legal assistance. Such refusal is a sovereign right of the foreign State, against which a remedy can be sought only through diplomatic channels ...
>
> The Supreme Court endorsed this legal stance (8ObA 201/00t), stressing that, as international law currently stands, compliance or refusal to comply with a request for legal assistance is to be regarded as a sovereign act, irrespective of the subject-matter of the claim. The nature of the act is the defining factor. It is beyond doubt that the service of documents in court proceedings falls within the scope of so-called *acta iure imperii* and not *acta iure gesionis*, as a private individual cannot perform an act of this

nature. Although negotiations have been in progress for some time on an international agreement concerning service of process on foreign States (which might make it sufficient for the action to be served on the country's foreign ministry), no such agreement has to date been concluded, with the result that the issue remains unregulated by any treaty between Austria and the United States.

In a commentary on this decision, which had been published in JBl 2002, 57, Hintersteininger observed, *inter alia*, that, while the restrictive theory of service of process applied by the Supreme Court might be appropriate for the purposes of avoiding disagreements between States, it was not a requirement under international law. The author concluded that section 11 of the Service Act – at least as currently applied to judicial proceedings instituted in Austria against foreign States – amounted to a "self-imposed shackle" as a result of which the standard of protection of individuals' legal interests was subordinated to international-law considerations. Unless and until the Austrian courts saw fit to apply a different interpretation of the provision in question – the fact that the Supreme Court, in its 2001 ruling, continued to apply its case-law from 1963 indicated that this was unlikely – there was an urgent need for the legislature to enact amending legislation in order to provide a practical solution to the problem of service of process.

Referring to Hintersteiniger's international-law argument, the appellant raises the possibility of transmitting the action and an explanation of the legal circumstances, together with a translation into the country's official language, to the US Department of State through diplomatic channels. In this case the defendant State would have no justification for returning the copy of the action at will; in the event of a refusal to accept service, it should be deemed to have received the request. This would make effective service possible and would remove the need to appoint a representative.

The objection to this line of argument is that such a procedure – which from a general international-law perspective is possible – is incompatible with the applicable legal provisions in Austria. As clarified in 8 ObA 201/00t, the action has to be served on a competent body within the Department of Justice, which is the authority representing the United States in the present employment-related proceedings. It is not sufficient for the document to have somehow reached another authority which appears to be responsible for forwarding the request for service. Accordingly, it is incorrect to speak of a refusal to accept service if the document was never transmitted to the competent authority. In this connection the Supreme Court stressed that, conversely, it would not be sufficient, in order to institute legal proceedings, for an action against the Republic of Austria to be received by the Foreign Ministry if, for whatever reason, it was not forwarded to the Attorney-General's Office as the competent authority representing the State in such matters. The first-instance court already acknowledged that a further request for service would have little prospect of success in view of the earlier comments of the US authorities.

Nevertheless, the (definitive) refusal of the US Department of State to forward court documents concerning the appellant to the Department of Justice does not justify the appointment of a representative for the defendant in accordance with Article 116 of the Code of Civil Procedure. As the appellate court explained in detail in its decision 8 Ra 23/00t, cited above, service of process on a foreign State is (also) based on section 11(2) of the Service Act. Hence, for the purpose of performing it, recourse is to be had in any event to the Federal Ministry of Foreign Affairs. On the basis of this provision, which takes precedence, service via any means other than the diplomatic channels to which it refers – for instance, on a court-appointed representative – is

ruled out. In view of the principle whereby a remedy against a refusal to comply with a request for legal assistance, which flows from the sovereign power of the foreign State, can be sought only through diplomatic channels (see SZ 36/26, EvBl 1963/210; for a critical perspective, see *Schreuer*, *Die Durchsetzung zivilrechtlicher Ansprüche gegen ausländische Staaten,* ÖJZ 1991, 41 et seq. [49]), the impugned decision lacks any legal basis."

20. On 7 May 2003 the Supreme Court dismissed an appeal on points of law by the applicant. It started by referring to its decision of 11 June 2001 (see paragraph 28 below) in a previous case brought by the applicant against the United States. It followed from that decision that the action brought by the applicant had to be served through diplomatic channels. It held that Article 121 § 2 of the Code of Civil Procedure, although it concerned the service of summonses abroad, was not applicable in a case like the present one in which the person or legal entity to be summoned relied on their immunity. The applicant's interpretation of the provision in question would undermine the concept of immunity.

21. Only section 11(2) of the Service Act was applicable. The applicant did not contest the fact that foreign States came within the scope of that provision as they enjoyed "privileges and immunities" under international law. In that context the Supreme Court went on to state as follows:

"No agreement exists between Austria and the defendant concerning service of process from the perspective of State immunity from jurisdiction. In the absence of such agreement the generally recognised rules of international law (Article 9 of the Federal Constitution), together with section IX of the Introductory Act to the Austrian Jurisdictional Statute (EGJN) and the principles developed in this connection by the case-law and by legal commentators, must apply. On that basis it is unanimously agreed that foreign States enjoy immunity in the exercise of their sovereign powers and are to that extent exempt from the jurisdiction of the domestic courts (see, among other authorities, SZ 23/143; Herndl, JBl 1962, 15; JBl 1962, 43; Heß, JBl 1989, 285; ZfRV 1990, 300 [Seidl-Hohenveldern]; Schreuer, ÖJZ 1991, 41; Fischer, NZ 1991, 154; DRdA 1991/53 [Simotta]; Neuhold/Hummer/Schreuer, Österreichisches Handbuch des Völkerrechts Bd 1[3] para. 834, 837; Seidl-Hohenveldern, Völkerrecht 9 paras. 1462 et seq.; Matscher, loc. cit, Art IX EGJN para. 2, 115 et seq., 196 et seq.; Mayr in Rechberger, ZPO[2] Art IX EGJN para. 3 et seq.). The service of process abroad, as a sovereign act, amounts – in the absence of an agreement between the States concerned governing the relevant procedure – to interference with the sovereign rights of the foreign State in question. For that reason it is a requirement in such cases to have recourse to the Federal Ministry of Foreign Affairs, which maintains close contact with the milieu concerned and is competent to take account of the relevant international-law considerations (RV 162 BlgNR XV.GP 10), as the appellant correctly points out. However, contrary to her assertion, exclusive recourse to the Federal Ministry of Foreign Affairs is not merely recommended, but is required by statute (the mandatory "shall" in section 32(3) of the Jurisdictional Statute and section 11(2) of the Service Act). The service of documents by any other means would be in breach of the law (Walter/Mayer, op. cit., section 11 Service Act, footnote 15).

Although Hintersteininger, in her commentary on 8 ObA 201/00t (JBl 2002, 57) concludes that the "restrictive theory of service of process" is appropriate for the

purpose of avoiding international disagreements, she nevertheless calls on the legislature to amend section 11 of the Service Act, as she sees evidence of a "self-imposed shackling" at least in the way in which that provision is applied. The legislature has not taken any action to date. It should further be observed that the strict approach to diplomatic immunity can be traced back to the Jurisdictional Statute, according to which the violation of immunity renders the proceedings in question null and void, in a manner which cannot be remedied even by the parties (except by a waiver of immunity) (§ 42 JN; Ballon, op. cit., § 42 JN para. 3, 14 et seq.; Mayr, op. cit., § 42 JN para. 2, 7).

Contrary to the appellant's assertion, her request for the action to be served on the defendant by publication or by the appointment of a representative does not fall in the present case within the "classic scenario" under Article 121(2) of the Code of Civil Procedure, but is governed by the exception thereto and undermines the defendant's claim to diplomatic immunity. Accordingly it is not possible, precisely in this case, to proceed on the basis of that provision. On the contrary – in so far as the proceedings against the defendant in Austria are concerned – exclusive recourse must be had to diplomatic channels, as reasoned by the Supreme Court in case 8 ObA 201/00t."

22. The Supreme Court's decision was served on the applicant's counsel on 3 July 2003.

C. Further developments

23. In April 2002 the applicant reached pensionable age. She gave the United States embassy in Vienna notice of her intention to terminate her employment contract and applied to the competent Pensions Insurance Office for an old-age pension from 1 May 2002.

24. Subsequently, the applicant extended her claim in the above-mentioned proceedings to salary payments from September 1996 to April 2002. She requested again that the defendant be summoned to a hearing. In that context she referred to the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (see paragraphs 30 to 34 below), and argued that, according to Article 22, transmission of the documents to the United States Department of State through diplomatic channels would be sufficient to effect service. The summons was handed over to a staff member of the United States Department of State but was again returned to the Austrian embassy in Washington with the remark that the United States wished to assert its immunity in any case brought by the applicant.

25. On 17 July 2006 the Vienna Court of Appeal upheld the first-instance court's decision refusing to give a default judgment. Referring to the Supreme Court's case-law, it held that the refusal to serve a summons was an act of sovereign power. It noted, *inter alia*, that the Convention relied on by the applicant did not apply to proceedings which had been initiated before its entry into force and added that there were no rules of customary international law to indicate that States could not rely on

immunity in the context of the service of a summons. No further appeal on points of law lay against this decision.

II. RELEVANT DOMESTIC AND INTERNTIONAL LAW

A. Domestic law and practice

26. Section 11 of the Service Act (*Zustellgesetz*) deals with the service of official documents abroad and the service of official documents on foreign nationals and foreign States or international organisations enjoying privileges and immunities under international law. It provides as follows:

> "1. Service of process abroad shall be effected in accordance with existing international agreements or as provided for by the laws or other legal provisions of the State in which service is to be effected or by international custom, if necessary with the cooperation of the Austrian diplomatic authorities.
>
> 2. Service of process on foreign nationals or international organisations which enjoy international privileges and immunities shall be effected through the intermediary of the Federal Ministry of Foreign Affairs, irrespective of where their place of residence or headquarters is located."

27. The relevant provisions of the Code of Civil Procedure (*Zivilprozeßordnung*) read as follows:

Article 116

> "In the case of persons on whom process can only be served by publication because their address is unknown, the court shall appoint a representative (Article 9), on application or of its own motion, if the persons concerned would have to perform a step in the proceedings as a result of being served with the documents, and in particular if the documents to be served contain a summons."

Article 121

> "1. In the case of service on persons outside the country who do not fall into the categories of recipients referred to in section 11(2) and (3) of the Service Act, the Federal Minister of Justice, in agreement with the Federal Chancellor, may order service to be effected by post, using the system of advice of receipt customarily used for international postal deliveries, to countries in which service in accordance with section 11(1) of the Service Act is not possible or gives rise to difficulties.
>
> 2. If no confirmation is received within a reasonable time that process has been served on an individual outside the country, the applicant party may request, depending on the circumstances, that service be effected by publication (section 25 of the Service Act) or by the appointment of a representative under Article 116. This shall also apply in cases where an unsuccessful attempt has been made to serve process abroad or where the request for service has no prospect of success owing to a

> manifest refusal by the authorities of the foreign State to comply with the request for legal assistance.”

28. In a judgment of 11 June 2001 (8ObA 201/00) in a related case concerning claims for reimbursement of social security contributions brought by the applicant against the United States (see paragraph 11 above), the Supreme Court held as follows:

> “The appellate court was correct in taking the view that, as international law currently stands, the decision to comply with or refuse a request for legal assistance is a sovereign act, irrespective of the subject-matter of the request. The nature of the act is the defining factor. It is beyond doubt that the service of documents in court proceedings falls within the scope of *acta iure imperii* and not *acta iure gesionis*, as a private individual cannot perform an act of this nature (Seidl-Hohenfeldern, Völkerrecht 317 et seq., esp. paras. 1472-79; Neuhold/Hummer/Schreuer, Österreichisches Handbuch des Völkerrechts3, para. 837).
>
> The criticism of the current legal situation raised by the appellant, relying on Schreuer (ÖJZ 1991, 41 et seq. [esp. 48 et seq.], does not alter the fact that, although negotiations have been in progress for some time on an international agreement concerning service of process on foreign States (which might make it sufficient for the action to be served on the country’s foreign ministry), no such agreement has to date been concluded, with the result that the issue remains unregulated by any treaty between Austria and the United States. It is not disputed that, under American Federal law, the United States is represented by the Department of Justice in matters which are to be regarded as *acta iure gestionis* (compare 9 ObA 244/90 = SZ 63/206 with further references concerning the employment contract between the claimant and the defendant). The action must therefore be served – as correctly requested by the appellant herself – on a body within that authority. It is not sufficient – as the appellant has claimed in the appeal proceedings – for the document to have somehow reached another authority which is meant to be responsible for forwarding the request for service (the Department of State (Foreign Ministry)). Conversely, it would not be sufficient, in order to institute legal proceedings, for an action against the Republic of Austria to be received by the Foreign Ministry if, for whatever reason, it was not forwarded to the Attorney-General’s Office, which is the competent authority in such matters.”

B. International law

1. The 1972 European Convention on State Immunity

29. The 1972 European Convention on State Immunity (“the Basle Convention”) entered into force on 11 June 1976 after its ratification by three States. It has been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kindgom) and signed by one State (Portugal). On 11 June 1976 it entered into force in respect of Austria, which had ratified it on 10 July 1974. The relevant provisions read as follows:

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. ... "

Article 16

"1. In proceedings against a Contracting State in a court of another Contracting State, the following rules shall apply.

2. The competent authorities of the State of the forum shall transmit
the original or a copy of the document by which the proceedings are instituted;
a copy of any judgment given by default against a State which was defendant in the proceedings,

through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State, for onward transmission, where appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the defendant State.

3. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs. ..."

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

30. State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 ("the 2004 Convention"). The principle is based on the distinction between acts of sovereignty or authority (*acta jure imperii*) and acts of commerce and administration (*acta jure gestionis*) (see *Sabeh El Leil v. France* [GC], no. 34869/05, §§ 18-23, 29 June 2011; see also *Cudak v. Lithuania* [GC], no. 15869/02, §§ 25-33, ECHR 2010).

31. The Convention was opened for signature on 17 January 2005 and has not yet entered into force. Austria signed the Convention on 17 January

2005 and ratified it on 14 September 2006. The United States has not ratified the 2004 Convention, but did not vote against it when it was adopted in the General Assembly of the United Nations.

32. The draft text of the Convention was prepared by the United Nations International Law Commission (ILC) which, in 1979, 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. They were subsequently further revised by the Sixth Committee of the United Nations General Assembly. States were again given an opportunity to comment.

33. Article 11 (contracts of employment) of the 2004 Convention reads as follows:

> "1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
>
> 2. Paragraph 1 does not apply if:
>
> (*a*) the employee has been recruited to perform particular functions in the exercise of governmental authority;
>
> (*b*) the employee is:
>
> (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
>
> (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;
>
> (iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or
>
> (iv) any other person enjoying diplomatic immunity;
>
> (*c*) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
>
> (*d*) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

> (*e*) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or
>
> (*f*) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding."

34. Article 22 (Service of process) of the 2004 Convention reads as follows:

> "1. Service of process or writ or other document instituting a proceeding against a State shall be effected:
>
> (*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
>
> (*b*) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of forum; or
>
> (*c*) in the absence of such a convention or special arrangement:
>
> (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
>
> (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of forum.
>
> 2. Service of process referred to in paragraph (1) (*c*) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.
>
> 3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.
>
> 4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3."

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

> "1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
>
> 2. Paragraph 1 does not apply if:
>
> (a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

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

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

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

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

36. In the commentary on the International Law Commission's Draft Articles of 1991, it was stated that the rules formulated in Article 11 appeared to be consistent with the trend in legislative and treaty practice in a growing number of States (ILC Yearbook, 1991, Vol. II, Part 2, p. 44, § 14).

37. In the Draft Articles of 1991, Article 20 (service of process) read as follows:

"1. Service of process or writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) in the absence of such a convention:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of forum.

2. Service of process referred to in paragraph 1 *(b)* (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3."

38. The International Law Commission's commentary on that Article (ILC Yearbook, 1991, Vol. II, Part 2, p. 60, §§ 1-3), in so far as relevant in the present context, stated as follows:

"(1) Article 20 relates to a large extent to the domestic rules of civil procedure of States. It takes into account the difficulties involved if States are called upon to modify their domestic rules on civil procedure. At the same time, it does not provide too liberal or generous a regime of service of process, which could result in an excessive number of judgments in default of appearance by the defendant State. The

article therefore proposes a middle ground so as to protect the interests of the defendant State and those of the individual plaintiff.

Paragraph 1

(2) Paragraph 1 is designed to indicate the normal ways in which service of process can be effected when a proceeding is instituted against a State. Three categories of means by which service of process is effected are provided: first, if an applicable international convention binding upon the State of the forum and the State concerned exists, service of process shall be effected in accordance with the procedures provided for in the convention. Then, in the absence of such a convention, service of process shall be effected either *(a)* by transmission through diplomatic channels or *(b)* by any other means accepted by the State concerned. Thus, among the three categories of the means of service of process provided under paragraph 1, an international convention binding both States is given priority over the other two categories. The variety of means available ensures the widest possible flexibility, while protecting the interests of the parties concerned.

Paragraphs 2 and 3

(3) Since the time of service of process is decisive for practical purposes, it is further provided in paragraph 2 that, in the case of transmission through diplomatic channels or by registered mail, service of process is deemed to have been effected on the day of receipt of the documents by the Ministry of Foreign Affairs. Paragraph 3 further requires that the documents be accompanied, if necessary, by a translation into the official language, or one of the official languages of the State concerned. ...”

In respect of Article 20 § 1 the commentary also gives numerous examples of relevant provisions in national legislation. In addition it refers to Article 16 §§ 1-3 of the European Convention on State Immunity.

39. During the drafting process the United States commented on Article 20 of the 1991 Draft Articles (which became Article 22 of the 2004 Convention). It did not object to the rules enshrined in Article 22 (1) *(c)* (i) and Article 22 (2).

THE LAW

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

40. The applicant complained that she had not had access to the Austrian courts in connection with her claim for payment of salary from September 1996 onwards arising out of her employment contract with the embassy of the United States of America in Vienna. She relied on Article 6 of the Convention, the relevant part of which reads as follows:

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

41. The Government contested that argument.

A. Admissibility

1. Compliance with the six-month rule

42. The Government submitted that the proceedings concerning the applicant's request for a judgment in default had been terminated by the Supreme Court's judgment of 5 September 2001. In those proceedings the question of effective service of the summons on the United States had already been determined with final effect. Accordingly, the application, introduced on 15 December 2003, had been lodged outside the six-month time-limit.

43. The applicant contested that view. She asserted that the proceedings concerning her claim for salary payments from September 1996 onwards had to be considered as a whole. It should not be held against her that, following the Supreme Court's judgment of 5 September 2001, she had attempted to obtain a decision on the merits of her claim by other means, namely by requesting the appointment of a representative, before lodging her application with the Court. Those attempts had by no means been without prospects of success, as was shown by the fact that the first-instance court had granted her request. Moreover, there had been no case-law on the question whether it was possible to appoint a representative for a foreign State. That question had only been settled by the Supreme Court's judgment of 7 May 2003, served on the applicant's counsel on 3 July 2003.

44. The Court notes that the proceedings at issue in the present application concerned the applicant's claim for salary payments from September 1996 onwards against the United States of America. In both judgments the Supreme Court considered that the defendant had not been duly summoned. In its judgment of 5 September 2001 the Supreme Court concluded that a default judgment could therefore not be issued, and in its judgment of 7 May 2003 it found that the appointment of a representative was not admissible either. Consequently, the courts could not proceed with the applicant's case. Thus, both judgments concerned the question of the applicant's access to court. In sum, the Court considers that the proceedings have to be seen as a whole and that no issue of failure to comply with the six-month rule arises. It therefore dismisses the Government's objection.

2. Applicability of Article 6 § 1 of the Convention

45. The Court observes that the Government did not contest the applicability of Article 6 § 1 to the present proceedings, which concerned claims for salary payments arising out of the applicant's employment contract with the United States embassy in Vienna. The Court reiterates that in *Cudak* (cited above, §§ 39-47) and *Sabeh El Leil* (cited above, §§ 36-42) it applied, *mutatis mutandis*, the principles it had developed for establishing whether a dispute between a State and a national civil servant fell within the

scope of Article 6 § 1 to a dispute between an employee of an embassy and a foreign State. According to these principles (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II, § 62), two conditions must be fulfilled in order for the respondent State to be able to rely before the Court on an applicant's status as civil servant in excluding him or her from the protection embodied in Article 6. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.

46. It follows from the domestic court's decisions in the previous set of proceedings relating to salary payments up to June 1995 (see paragraph 9 above) that the Austrian civil courts had jurisdiction over such claims. The applicant thus had, in principle, a right of access to court and it is therefore not necessary to examine whether the second condition was fulfilled. In any case, it has not been suggested that the nature of her post as a photographer was such as to justify excluding her from access to court. Nor has it been contested that the dispute in issue concerned the applicant's "civil rights" within the meaning of Article 6 § 1 of the Convention. The Court therefore concludes that Article 6 § 1 was applicable to the proceedings at issue.

3. Conclusion

47. In conclusion, the Court notes 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.

B. Merits

1. The parties' submissions

(a) The applicant

48. The applicant asserted that the present case was comparable to *Cudak* (cited above). As in that case, the proceedings at issue concerned claims arising out of an employment contract with the embassy of a foreign State, in respect of which the State did not enjoy immunity. The domestic courts themselves had dismissed the United States' objection of immunity in the previous set of proceedings brought by the applicant. It was also clear from that previous set of proceedings that Austrian law applied to the dispute at issue.

49. Like in *Cudak* it followed from Article 11 of the 2004 Convention that the United States could not claim jurisdictional immunity with regard to the employment dispute at issue. Although that Convention had been

adopted after the final decision in the present case, it must be considered to codify customary international law, which therefore applied as such at the time when the contested decisions had been given.

50. The gist of the present case was that the Austrian courts, in accepting that the United States' refusal to serve a summons on the United States Department of Justice was an act of sovereign power, had disregarded the fact that the United States could not rely on immunity in respect of the underlying claim. The Supreme Court, in adopting this approach, had relied on case-law which did not reflect the current state of international law.

51. The Austrian courts should either have effected service according to section 11(1) of the Service Act on the grounds that the United States did not "enjoy immunity under international law" or, alternatively, if relying on section 11(2) of the Service Act and effecting service through diplomatic channels, should have considered that service had been duly effected as the United States Department of State had actually received the documents at issue.

52. The Supreme Court's view that effective service required service of the documents on the United States' Department of Justice (as the authority competent to represent the State in civil proceedings) was not in line with the state of international law. On the contrary, it followed from Article 22 of the 2004 Convention and its predecessor provision, Article 20 of the International Law Commission's 1991 Draft Articles, that service of process through diplomatic channels was deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs. As the United States Department of State had received the applicant's action and the summons to a hearing, the Austrian courts should have proceeded on the basis that the defendant had been duly summoned. Consequently, they could and should have appointed a representative for the United States in order to proceed with an examination of the merits of the applicant's claim.

53. Although the limitation of the applicant's right of access to court might be considered to have served a legitimate aim, namely guaranteeing comity and good relations between States, it had been disproportionate in her case. In fact the Austrian courts' legal view did not reflect the state of international law. It had made it entirely impossible for the applicant to pursue her claim and had thus impaired the very essence of her right of access to court.

(b) The Government

54. For their part, the Government submitted that the present case had to be distinguished from *Cudak* (cited above). That case had concerned the question whether accepting a foreign State's objection of State immunity in an employment-related dispute violated the right of access to court. By contrast, the present case raised the question whether the procedure of

serving a summons in a civil action against a foreign State was as such to be qualified as a sovereign act.

55. The Government stressed once more that the question of international law facing the Austrian courts had been how effective service of a civil action on the United States was to be carried out and to what extent the service procedure itself was to be considered as an act of sovereign power. According to the Supreme Court's case-law, in particular its decision of 11 June 2001 (see paragraph 28 above), carrying out a request for service of a summons – or refusing it as in the present case – fell within the category of "*acta iure imperii*". Consequently, it was irrelevant whether the objection of State immunity could be successfully relied on in relation to the claim at issue.

56. In any case, the limitation of the applicant's right of access to court had served a legitimate aim, namely compliance with the generally recognised rules of international law and the promotion of good relations between States. Section 11 of the Service Act, which had been applied in the present case, was a reflection of respect for the foreign State's sovereignty as required by international law regarding service of process abroad. After the United States had made it clear that it wished to assert its immunity in any further case brought by the applicant, the service of the applicant's action could only be effected through diplomatic channels under section 11(2) of the Service Act. Repeated attempts to do so had indeed been made but had been unsuccessful.

57. The Supreme Court, in its decision of 7 May 2003, had thus proceeded on the assumption that the United States was entitled under international law to refuse to serve a summons, in the absence of any agreement between Austria and the United States which would have obliged it to agree to such service. Granting any of the measures requested by the applicant, namely effecting service by publication or appointing a representative in accordance with Article 116 of the Code of Civil Procedure was excluded as this would have undermined the principle of respect for another State's sovereignty and would have negatively affected good relations between States.

58. In short, in respecting the United States' refusal to serve the summonses in the present proceedings, the Austrian courts had done no more than apply generally recognised rules of international law. There was thus no indication that they had overstepped their margin of appreciation and the limitation of the applicant's right of access to court had therefore been proportionate.

2. *The Court's assessment*

(a) General principles

59. The Court has recently summarised the applicable principles in two Grand Chamber judgments, *Cudak* (cited above) and *Sabeh El Leil* (cited above). The relevant paragraphs of the *Cudak* judgment read as follows:

> "54. The Court reiterates that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way Article 6 § 1 embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII).
>
> 55. However, the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V; and *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 33, ECHR 2001-XI).
>
> 56. Moreover, the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account, including those relating to the grant of State immunity (see *Fogarty*, cited above, § 35).
>
> 57. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity (see

Kalogeropoulou and Others v. Greece and Germany (dec.), no. 59021/00, ECHR 2002-X, and *Fogarty*, cited above, § 36).

58. Furthermore, it should be remembered that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, 28 October 1998, § 52, *Reports* 1998-VIII). It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

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

60. In its subsequent judgment in *Sabeh El Leil* (cited above), the Court reiterated these principles and, summarising its further findings in *Cudak*, added the following:

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

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

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

(b) Application of these principles to the present case

61. The Court observes that *Cudak* and *Sabeh El Leil* (both cited above) concerned the dismissal of a member of the local staff of an embassy, a receptionist in the first case and a head accountant in the second. In both cases the applicants had raised complaints about lack of access to court after the domestic courts had dismissed their claims for compensation, upholding the foreign State's objection based on State immunity.

62. In the present case it is not in dispute that the United States could not validly rely on jurisdictional immunity in the proceedings at issue. The applicant, an Austrian national, had been employed as a photographer at the United States embassy in Vienna. In proceedings concerning the lawfulness of the applicant's dismissal the United States had made an objection of State immunity but apparently did not maintain it (see paragraph 7 above). In a first set of proceedings relating to salary claims up to June 1995 the Austrian courts had dismissed the United States' objection of State immunity (see paragraph 9 above). Subsequently, the applicant brought an action for further salary payments from September 1996 onwards. In those proceedings the applicant's action and a summons to a hearing were transmitted to the United States Department of State via diplomatic channels. The latter returned the documents to the Austrian embassy in Washington together with the information that the United States wished to assert its immunity in any case brought by the applicant (see paragraph 13 above).

63. As both parties pointed out, the issue raised by the present case is whether the Austrian courts' acceptance of the United States' refusal to accept the summonses and to serve them on the Department of Justice, which had authority to represent the State in civil proceedings, violated the applicant's right of access to court. The courts' acceptance of this refusal was based on their legal view that the service of a summons in a civil action against a foreign State was in itself a sovereign act. Consequently, the refusal had to be accepted, while the nature of the underlying claim was irrelevant. As a result, the applicant could not obtain an examination of the merits of her claim before the Austrian courts.

64. The Court therefore has to examine whether the limitation of the applicant's right of access to court served a legitimate aim and whether the impugned restriction was proportionate to the aim pursued. The Court has already found that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty (see *Cudak*, cited above, §§ 60-62, and *Sabeh El Leil*, cited above, § 55). Despite the difference between these cases and the present case, the Court takes the view that the Austrian courts' acceptance of the United States' refusal to serve the summonses issued to it also served that legitimate aim.

65. The Court therefore has to examine the proportionality of the impugned restriction on the applicant's right of access to court. It reiterates that in *Cudak* and *Sabeh El Leil* the domestic courts had dismissed claims by local employees of foreign embassies, accepting the defendants' objection of State immunity. The Court noted the development in international law towards limiting State immunity in respect of employment-related disputes. That development was reflected in Article 5 of the 1972 European Convention on State Immunity and in Article 11 of the International Law Commission's 1991 Draft Articles and is now enshrined in Article 11 of the 2004 Convention.

66. Furthermore, the Court observed that according to a well-established principle of international law a rule enshrined in a treaty could be binding on a State as a rule of customary international law even if the State in question had not ratified the treaty, provided that it had not opposed it either (see *Cudak*, cited above, § 66, and *Sabeh El Leil*, cited above, §§ 54 and 57). In *Cudak*, the Court noted that Lithuania had not objected to the wording of Article 11 of the International Law Commission's 1991 Draft Articles. Although it had not ratified the 2004 Convention it had not voted against it either. The Court therefore concluded that the rule contained in Article 11 of the International Law Commission's 1991 Draft Articles applied to Lithuania under customary international law (see *Cudak*, cited above, § 67). Similarly, in *Sabeh El Leil*, the Court noted that France had not opposed the adoption of the 2004 Convention, and was in the process of ratifying it. It therefore found it possible to affirm that the provisions of the 2004 Convention applied to France under customary international law (see *Sabeh El Leil*, cited above, § 58). In both cases the Court found that this was a factor to be taken into account when examining whether the right of access to court, within the meaning of Article 6 § 1, had been respected (ibid.).

67. In both cases the Court observed that the domestic law of Lithuania and France, respectively, had moved away from the doctrine of absolute State immunity. The Court then went on to examine, on the basis of the facts, whether the respective applicants could be considered to be covered by any of the exceptions enumerated in paragraph 2 of Article 11 of the International Law Commission's 1991 Draft Articles. Finding that this was not the case, it concluded in both cases that in upholding the objection based on State immunity the domestic courts had failed to preserve a reasonable relationship of proportionality and had impaired the very essence of the applicant's right of access to court (see *Cudak*, cited above, § 74, and *Sabeh El Leil*, cited above, § 67).

68. The Court will examine whether a similar line of argument can be developed in relation to the issue arising in the present case. It notes that the International Law Commission's 1991 Draft Articles contained a provision on service of process, namely Article 20. Article 20 § 1 *(b)* (i) provided that

service of process or writ or other document instituting proceedings against a State was to be effected, in the absence of an applicable international convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned. Furthermore, under Article 20 § 2, service of process referred to in paragraph 1 *(b)* (i) was deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs. Rules with the same content are contained in Article 22 § 1 *(c)* (i) and § 2 of the 2004 Convention (see also the similar provisions which are contained in Article 16 §§ 2 and 3 of the 1972 European Convention on State Immunity).

69. The question therefore arises whether the rules embodied in Article 20 of the International Law Commission's 1991 Draft Articles applied to Austria as rules of customary international law. In the Court's view, the question is to be answered in the affirmative (see paragraph 38 above and the reference made in the commentary on Article 20 § 1 of the 1991 Draft Articles to Article 16 §§ 1 to 3 of the 1972 European Convention on State Immunity). Austria did not object to this provision of the 1991 Draft Articles. It did not vote against the adoption of the 2004 Convention and subsequently signed and ratified it. In addition, the Court notes that the United States did not object to the rules contained in Article 20 § (1) *(b)* (i) and § 2 of the 1991 Draft Articles either. While it has not signed or ratified the 2004 Convention, it did not vote against it.

70. The Court observes furthermore that the Austrian courts were aware that, on the basis of developments in international law, service of process on the foreign ministry of another State might be sufficient (see in particular the Supreme Court's judgment of 11 June 2001, paragraph 28 above, and the Vienna Court of Appeal's judgment of 18 November 2002, paragraph 19 above). However, they limited themselves to stating that no treaty regulating the issue had been adopted, without examining whether the relevant rules might apply as rules of customary international law. Moreover, the domestic courts held that, although the view that service on the foreign ministry of the State concerned (in this instance the United States Department of State) was defendable under international law, it was not provided for under Austrian law. Consequently, they accepted the Department of State's refusal to serve the summons on the Department of Justice as a sovereign act. Therefore, the domestic courts concluded that it had not been possible to duly summon the defendant and refused to proceed with a default judgment. They likewise found that the conditions for appointing a representative for the United States had not been fulfilled. As a result, it was impossible for the applicant to proceed with her case.

71. In addition, the Court would reiterate that the applicant's claim was not one in respect of which jurisdictional immunity could be relied on. According to the rule contained in Article 11 of the 2004 Convention (and Article 11 of the International Law Commission's 1991 Draft Articles) State

immunity does not apply to a State's employment contracts with the staff of its diplomatic missions abroad, except in situations that are exhaustively enumerated in paragraph 2 of that Article and not relevant here (see also Article 5 of the 1972 European Convention on State Immunity).

72. In conclusion, by accepting the United States' refusal to serve the summonses in the applicant's case as a sovereign act and by refusing, consequently, to proceed with the applicant's case, the Austrian courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicant's right of access to court.

73. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION AND ITS PROTOCOLS

74. The applicant complained of a violation of Article 1 of Protocol No. 1 in that the Austrian courts' decisions had made it impossible for her to assert her claims and constituted unjustified interference with her right to peaceful enjoyment of her possessions. Furthermore, she complained under Article 14 taken in conjunction with Article 1 of Protocol No. 1 or Article 6 of the Convention that she had been discriminated against as a disabled person.

75. The Court reiterates that Article 1 of Protocol No. 1 only protects existing possessions, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see, for instance *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX). The Court cannot find that salary claims against an employer which have not been granted by the domestic courts constitute "possessions" within the meaning of this provision. Consequently, Article 1 of Protocol No. 1 does not apply, nor does Article 14 taken in conjunction with Article 1 of Protocol No. 1.

76. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

77. In so far as the applicant complains under Article 14 of the Convention taken in conjunction with Article 6, the Court finds that there is no indication that the applicant was treated differently in the proceedings at issue on account of her disability. The courts, in accordance with their case-law, considered that the United States' refusal to serve the summonses in proceedings concerning the applicant's salary claims was to be considered as an act of sovereign power and therefore made it impossible for them either to give a default judgment, to serve the summonses by any other means or to appoint a representative for the United States. There is nothing

to suggest that they would have decided otherwise had the applicant not been disabled.

78. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed pecuniary damage in respect of her lawyer's fees and her own expenses. The Court considers that this claim is in essence one for costs and expenses and will deal with it under that head.

81. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage. She submitted in particular that she had suffered considerable stress and anxiety as a result of her lack of access to court. She argued that she had been a single mother, still financially responsible for her daughter, when she was unlawfully dismissed in 1987. She had a walking impairment following her accidents and had to live on a very low income, borrowing money and conducting complex legal proceedings from 1987 until October 1996, when she eventually received salary payments following the first set of proceedings. However, that sum had been considerably reduced by income tax and by her obligation to pay not only the employee's but also the employer's social security contributions. Against that background, the continuing insecurity caused by the fact that she could not obtain a judgment in respect of her salary claims for the period starting from September 1996 in the proceedings at issue had caused her considerable distress.

82. The Government contended that the finding of a violation would in itself provide sufficient just satisfaction for any non-pecuniary damage suffered. In any case, the amount claimed was excessive.

83. The Court accepts 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 (see *Cudak*, cited above, § 79 and *Sabeh El Leil*, cited above, § 72). Making its assessment on an equitable basis, it awards the applicant EUR 12,000 under this head, plus any tax that may be chargeable.

B. Costs and expenses

84. The applicant claimed EUR 54,586.98 in respect of costs and expenses incurred in the domestic proceedings. This sum includes her lawyer's fees, amounting to EUR 27,090.50 and EUR 23,732.45, both including value-added tax (VAT), and EUR 3,764.03 for her own expenses. She explained that these were expenses incurred for translations and for contacting various authorities and organisations, lawyers and law professors in Austria and in the United States and for travelling to Washington in 1995.

85. In addition the applicant claimed EUR 17,933.38, including VAT, for the Convention proceedings, composed of EUR 12,279.84 for the proceedings up to and including the first set of observations and EUR 5,653.54 for the further observations following continuation of the proceedings after the Grand Chamber's judgment in *Cudak* (cited above).

86. With regard to the costs incurred in the domestic proceedings, the Government asserted that it had not been shown that the amounts claimed under the head of lawyer's fees had been incurred to prevent or redress the alleged violation. In any case, the fees claimed were not in line with the Austrian Lawyers' Fees Act and were thus excessive. Moreover, it was clear from the applicant's submissions that an amount of EUR 3,219.55 had been covered by her legal expenses insurance. This sum would have to be deducted in any event. Furthermore, the Government commented that the applicant had not shown that a causal link existed between the alleged violation and her own expenses. Moreover, she had not submitted sufficient evidence in support of the amount claimed, namely EUR 3,764.03.

87. In the Government's view the applicant's claims in respect of costs incurred in the Convention proceedings were also excessive.

88. 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 these have been actually and necessarily incurred and are reasonable as to quantum. In respect of the costs claimed for the domestic proceedings, the Court notes that some of the lawyer's bills submitted by the applicant relate to proceedings which pre-date the proceedings at issue in the present case. In so far as the bills actually relate to the present proceedings, not all the items listed concern costs which were necessarily incurred. The same applies to the costs incurred by the applicant herself. Furthermore, the Court considers that the costs claimed in respect of the Convention proceedings are excessive. Regard being had to the documents in its possession and the above considerations, the Court finds it reasonable to award the sum of EUR 15,000, plus any tax that may be chargeable to the applicant, covering costs under all heads.

C. Default interest

89. 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. *Declares* the complaint concerning lack of access to court admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts,
      (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President