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Diplomatic Immunity - Foreign Nationals Employed by the United Nations Are Not Afforded the Same Degree of Immunity as Foreign Diplomats; Seizure of Illegally Obtained National Security Information from a Foreign Minister Did Not Violate His Right to Diplomatic Immunity

Keywords

Immunity, National Security, United Nations, National Defense, Espionage, States

DIPLOMATIC IMMUNITY—FOREIGN NATIONALS EMPLOYED BY THE UNITED NATIONS ARE NOT AFFORDED THE SAME DEGREE OF IMMUNITY AS FOREIGN DIPLOMATS; SEIZURE OF ILLEGALLY OBTAINED NATIONAL SECURITY INFORMATION FROM A FOREIGN MINISTER DID NOT VIOLATE HIS RIGHT TO DIPLOMATIC IMMUNITY. *United States v. Enger*, 472 F. Supp. 490 (D. N.J. 1978).

Defendants Valdik Aleksandrovich Enger and Rudolf Petrovich Chernyayev, citizens of the Union of Soviet Socialist Republics, were both employees of the United Nations working in New York City. Chernyayev served as an Administrative Officer in the Office of Personnel Services, Enger as a Political Affairs Officer attached to the Office of the Under-Secretary-General for Political and Security Council Affairs. They had been under FBI surveillance for espionage activities from August 1977 to May 1978. On numerous occasions, they had allegedly obtained from an American naval officer secret information relating to the national defense of the United States. Evidence indicated that the defendants had paid the officer, who acted as a "confidential government source" in the subsequent prosecution, several thousand dollars to deliver information regarding anti-submarine warfare, including materials involving underwater acoustics, submarine detection systems, and other classified U.S. Navy programs. Repeatedly, the FBI had observed the defendants making contact with the American naval officer. At some of these meetings, the defendants were accompanied by the Third Secretary of the Soviet Mission to the United Nations, only identified as Zinyakin.

On May 20, 1978, the confidential source took films provided by the FBI of the U.S. Navy Light Airborne Multipurpose System for submarine detection. Following instructions given by Enger during a previous operation, the source placed the film in a Tropicana orange juice carton and left it at a dropsite in New Jersey. There he picked up a bartlett pears can that contained four thousand dollars in twenty-dollar bills and a schedule for future operations.

Shortly after the naval officer left the area, defendant Enger, accompanied by Secretary Zinyakin, drove to the dropsite. Zinyakin got out of the car, picked up the Tropicana carton and placed it in a brown paper bag. Before he could return to the car, however, Zinyakin was apprehended by two FBI agents. The agents took the bag, opened the carton, and found the films that they had given to the naval officer earlier that day. According to one agent's affidavit, submitted by the Government in the subsequent litigation, the Tropi-

cana carton was sticking out from the top of the bag, and thus the container that he knew carried national defense secrets was in plain view. The agents then placed Enger and Chernyayev under arrest. Zinyakin was not arrested because of his entitlement to immunity as a foreign diplomat.

The defendants were charged in a three-count indictment alleging espionage and conspiracy to commit espionage in violation of 18 U.S.C. section 793.¹ The present action came before Judge Lacey of the Federal District Court in New Jersey on a variety of defense motions.

The defendants sought, *inter alia*, to dismiss the indictment on a claim of diplomatic immunity. They relied on letters submitted by the Honorable Anatoly F. Dobrynin, the Soviet Ambassador to the United States, and by the Honorable Erik Suy, Legal Counsel to the United Nations, to support their claim that they held diplomatic rank. Ambassador Dobrynin's letters claimed that the defendants each held the diplomatic rank of Second Secretary, and that this status was conferred by decree of the Presidium of the U.S.S.R. Supreme Soviet. Mr. Suy's letter indicated that Chernyayev was employed by the United Nations as a Personnel Officer and that Enger held the rank of Political Officer. The court noted that the letters contained no claim that the defendants were designated Soviet representatives or that they had ever been assigned to perform any diplomatic duties on behalf of the Soviet Union. Therefore, the defense could not claim immunity based upon official diplomatic accreditation, but rather, they could only argue that they merited *de facto* diplomatic status.

The court decided that the lack of official accreditation prohibited the defendants from claiming diplomatic protection. First, the court concluded that the general diplomatic immunity statute, 22 U.S.C. section 252,² was inapplicable because the defendants were not members of the protected class, *i.e.* ambassadors and public ministers of a foreign state.³ For the same reason, the defendants could not invoke the immunity provision of the Vienna Convention

1. 18 U.S.C. § 793 (1976) makes it unlawful to obtain or transmit information respecting the national defense with the intent to use the information either to cause injury to the United States or to use for the benefit of a foreign country.

2. 22 U.S.C. § 252 (1976) grants to any ambassador or public minister of any foreign country immunity from arrest, imprisonment, or attachment of his goods or chattels.

3. Although the court analyzed this case in light of the existing statutory law, sections 252-254 of 22 U.S.C. were repealed one month subsequent to this decision.

on Diplomatic Relations and Optional Protocol on Disputes.⁴ Article 29 of this convention provides that the person of a diplomatic agent is inviolable and shall not be subject to any form of arrest or detention. Further, article 1 defines "diplomatic agent" as the head of the mission or a member of the mission staff having diplomatic rank. Enger and Chernyayev were thus not afforded immunity under the Vienna Convention on Diplomatic Relations.

Furthermore, the defendants' alleged espionage activities were not protected under the International Organization Immunities Act (IOIA).⁵ The court read this act as granting employees of appropriate organizations immunity from laws regulating entry into and departure from the United States as well as immunity from liability accruing from acts done within the scope of employment. Thus, the IOIA only provides the basis for a limited grant of immunity. This interpretation is supported by the policy underlying the IOIA. Since the United Nations maintains its headquarters in New York, a large number of foreign government employees reside in the United States. Since it is impracticable to evaluate the activities of each employee prospectively, such employees can only be granted immunity based on a narrow interpretation of the scope of their employment. To hold otherwise would open the floodgates to allow foreign agents to engage in espionage activities under the broad umbrella of diplomatic immunity.⁶ Thus, for all of the above reasons, the court denied the defendants' motion to dismiss on the basis of diplomatic immunity.

The defendants also moved to suppress the evidence of the films seized from Secretary Zinyakin on the basis that they were illegally seized without a warrant and in violation of his diplomatic status. The court first determined that the defendants had standing to assert this defense, because the second count of the indictment was based on the possession of illegal material,⁷ and because the search was conducted in their immediate presence.⁸ On the merits, the court held that the immunity from seizure afforded a diplomat's

4. Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, [hereinafter cited as the Vienna Convention].

5. 22 U.S.C. §§ 288a-288i (1976).

6. See *United States v. Egonov*, 222 F. Supp. 106 (E.D.N.Y. 1963). See also Ling, *A Comparative Study of the Privileges and Immunities of the United Nations Member Representatives*, 33 WASH. & LEE L. REV. 91 (1976).

7. In *Jones v. United States*, 362 U.S. 257 (1960), the Supreme Court held that, where possession of illegal material is an ingredient of the offense, the defendant has a sufficient interest in the material to establish "automatic standing."

8. See *Brown v. United States*, 411 U.S. 223 (1973).

goods or chattels by 22 U.S.C. section 252⁹ should be construed consistently with the full immunity conferred on a foreign diplomat by that statute and by Article 29 of the Vienna Convention. Therefore, the defendants urged, all items in Zinyakin's possession should be protected from seizure.

The focus of the court's consideration of this issue centered on the construction to be given to the terms "goods or chattels" under 22 U.S.C. section 252. The origins of this statute trace back to the English Diplomatic Privilege Act of 1708¹⁰ which provided the basis for the first American diplomatic immunity statute in 1790.¹¹ The provisions of the 1790 Act have been carried forward, with only minor changes to the present. Despite this statutory heritage, however, the terms "goods or chattels" have been given only sparse judicial interpretation, none of it dealing with the issue at hand.

Accordingly, the court concluded that the proper interpretation must be drawn from the policies underlying the grant of diplomatic immunity. For this, the court referred to the writings of Grotius and Vattel. Grotius set forth that an ambassador should enjoy full immunity to his person and those things which are necessary for the fulfillment of his consular duties.¹² Similarly, Vattel wrote that a foreign minister's entitlement to immunity should extend to those things that enable him to live in dignity and to discharge his functions as a minister.¹³ As might be expected, applying these sweeping principles, the court held that illegally obtained national defense information of the host state is not helpful or necessary for the fulfillment of the diplomatic function, and thus could not be afforded the protection of immunity.

This situation is analogous to the case of the thief who, when compelled to return the goods to the rightful owner, cannot claim that he has been deprived of his property. Zinyakin knew that the Tropicana carton contained stolen national defense information, and thus could not claim that he had been deprived of his "goods or chattels" under the statute. The court supported this holding by referring to the underlying equities involved. As stated by Vattel, the receiving state has the right and justification to take all steps to prevent a foreign diplomat from conspiring to defeat the sovereign

9. See 22 U.S.C. § 252 (1976).

10. 7 Anne c. 12 (1708).

11. Act of April 30, 1790, ch. 9, § 25, 1 Stat. 117 (1790).

12. 2 H. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, ch. 18, § 9 (Grotius Society ed. 1969).

13. E. VATTTEL, *THE LAW OF NATIONS*, 491-92 (Chitty ed. 1817).

of which he is a guest.¹⁴ Moreover, had the FBI agents waited until Zinyakin delivered the package to Enger, who apparently was in charge of the operation, seizure of the carton could have been made incident to Enger's arrest and therefore no right of diplomatic immunity would have been violated. Since the carton was in "plain view," and because the agents had a limited search warrant to retrieve the carton, the court held that the agents had acted properly.

The court noted that this holding is consistent with the Vienna Convention on Diplomatic Relations. The court quoted the introductory language of the Convention which sets forth the objective of maintaining international peace and security and the promotion of friendly relations among nations. Article 3 provides that the functions of a diplomatic mission consist of the ascertainment "by all lawful means conditions and developments in the receiving state" and the promotion of "friendly relations between the sending State and the receiving State." Since operating as a spy is not within these diplomatic functions, Zinyakin could not claim protection under the Convention, and thus the FBI's seizure of the Tropicana carton containing the national defense films was proper.

The court's decision in this case clarifies the scope of protection provided by diplomatic immunity. Initially the court reiterated the principle that full diplomatic immunity is afforded only to those foreign diplomats that are officially accredited by the receiving state. Foreign nationals employed by international organizations such as the United Nations are entitled to immunity only with respect to activities performed in their official capacity. The court interpreted the grant of full immunity to accredited diplomats as to not include protection from seizure of illegally obtained information which could be used to the detriment of the receiving state. Although this decision, which is based on the broad principle that foreign diplomats cannot abuse the comity of the receiving state, does not abrogate a diplomat's entitlement to immunity, it does prevent the use of that immunity as a subterfuge for illegal espionage activities.

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14. *Id.* at 476-78.