

DECISION of the
SWEDISH SUPREME COURT

Case No.

given in Stockholm on 1 July 2011

Ö 170-10

APPELLANT

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MATTER

Execution of enforcement measure

APPEALED DECISION

Decision of Svea Court of Appeal

Decision of the Court of Appeal

see Appendix

DECISION OF THE SUPREME COURT

The Supreme Court does not grant the appeal.

The Supreme Court's prior decision on stay of execution shall no longer apply.

The Russian Federation is ordered to compensate Franz J. Sedelmayer for his costs in the Supreme Court in the amount of SEK 253,300, out of which SEK 252,600 relates to fees for legal counsel, plus interest pursuant to Section 6 of the Interest Act from the day of the Supreme Court's decision until the date of payment.

MOTIONS BEFORE THE SUPREME COURT ETC.

The Russian Federation has moved that the Supreme Court, in reverting the decision of the Court of Appeal, upholds the decision of the District Court. Further, the Russian Federation has moved the Supreme Court to order Franz J. Sedelmayer to compensate the Russian Federation for its costs in the District Court as well as in the Court of Appeal.

Franz J. Sedelmayer has disputed any changes to the decision of the Court of Appeal.

The parties have claimed compensation for costs incurred during the proceedings before the Supreme Court.

On 8 March 2010, the Supreme Court decided that further measures to enforce the decision of Svea Court of Appeal of 17 December 2009 in the matter ÖÄ 4239-08 should not be taken until further notice.

FOUNDATIONS

Background and the issue of the present matter

1. After Franz J. Sedelmayer had initiated arbitration proceedings to resolve a dispute that had arisen between him and the Russian Federation and an arbitration award had been rendered in 1998, the Russian Federation initiated challenge proceedings at the Stockholm District Court regarding the validity of the arbitration award. In 2002, the District Court decided in favor of Franz J. Sedelmayer and ordered the Russian Federation to compensate Franz J. Sedelmayer for his costs. Franz J. Sedelmayer requested the Enforcement Authority to enforce the District Court's judgment.
2. On 12 September 2003, the Enforcement Authority ruled that the judgment of the Stockholm District Court could be executed. When

investigating the enforcement matter, the Enforcement Authority found, among other things, that the Russian Federation was the registered owner of the real property Lidingö Kostern 5, a multi-family property. Approximately sixty individuals were registered as residents at the property and two companies, Fastighetsmäklare Dick Lindström AB and NBN Networks AB (the business purpose of which was stated as arranging travel tours for tourists in Russia and Sweden etc.), had their respective registered address at the property. The question arose whether or not the rental payments collected by the Russian Federation from lessees at the property could be subject to distraint.

3. In its decision of 9 May 2005, the Enforcement Authority held that the requested execution measure could not be granted. On 25 April 2008, Nacka District Court upheld the Enforcement Authority's decision. Upon Franz J. Sedelmayer's appeal of the District Court's decision, Svea Court of Appeal held that distraint of the property and the rental payments paid by the people registered at the property and the company that has its business address there is not barred.

4. The Russian Federation has claimed that it enjoys diplomatic immunity with respect to the jurisdiction of Swedish courts in the enforcement matter, and that enforcement of the judgment of the Stockholm District Court with respect to the currently relevant property is barred. The Russian Federation has, with respect to the matter of enforcement, claimed that the property is used for official purposes of the Russian Federation.

5. The main issue in the matter is whether, due to state immunity with respect to a foreign state's property, distraint of the property Lidingö Kostern 5 and rental payments collected by the Russian Federation from the office and the apartments located at the property is barred or not.

Jurisdiction in the enforcement matter

6. The question of a state's immunity from jurisdiction should not be decided upon separately in matters of enforcement in the foreign state's property.

Immunity from enforcement with respect to a foreign state's property

7. State immunity is deemed as an inherent consequence of the principle that states are sovereign and mutually equal, and consequently do not have jurisdiction over each other. In general, it can be said that the principle of state immunity has evolved from a previous right for states to claim absolute immunity to a current more restrictive practice.

8. The more restrictive practice on states' immunity from jurisdiction has led to the view that immunity currently applies only sovereign acts, i.e. acts by the state as a state. A state's commercial or other actions under private law are, in the more restrictive theory on immunity, excluded from the right to claim immunity before another state's courts.

9. Immunity from enforcement in state property is a consequence of the view that states are equal. It has been viewed as a bigger intrusion in a state's sovereignty to subject its property to distraint than subjecting the state to the jurisdiction of foreign courts. Internationally, courts have been reluctant to not grant diplomatic immunity from enforcement measures. It appears that the evolution towards a more restrictive scope of the immunity, as is the case with jurisdiction, has not taken place with respect to immunity from enforcement measures. Further, there is a lack of international case law with respect to limitations in the immunity from enforcement measures. In the Government Bill Immunity of states and their property, it is noted that in Western countries also the principle on immunity from enforcement measures in international case law has evolved towards a more restrictive theory, pursuant to which immunity from enforcement applies to state property that is

used for official state purposes, but enforcement measures are permitted with respect to property that is used or intended to be used for commercial purposes, even if the state has not rescinded its immunity (Government Bill 2008/09:204 pages 45 and 56; cf. e.g. Hazel Fox, *The Law of State Immunity*, 2nd edition, 2008, page 599 pp., and August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, in the *European Journal of International Law*, Vol. 17 (2006), page 803 pp.)

10. In its rulings NJA 1999 p. 821 and NJA 2009 p. 905, the Supreme Court has applied the restrictive immunity theory with respect to state immunity from jurisdiction. In the latter ruling, it was held that a state could not claim immunity as a ground for inadmissibility as defense against a claim for rental payments under a lease agreement for the premises of the state's embassy in Sweden.

11. In the rulings NJA 1942 p. 65 and p. 342 on the so-called Sequestration-boats (*Sw. Kvarstadsbåtarna*) the Supreme Court stated that the principle of immunity was particularly rigorously upheld with respect to enforcement measures. There are no rulings of later date in which the Supreme Court has had to decide on the issue of immunity from enforcement measures. However, in the ruling NJA 2009 p. 905 the Supreme Court held that a judgment ordering a party to make a payment in general is enforceable, also when the paying party is a state. The Supreme Court also stated that, even if there is great discrepancy in the opinions of states on when immunity can be claimed, it is generally agreed that it is possible to enforce judgments on payment at least with respect to certain state property. However, in said case it was not necessary for the Supreme Court to rule on the enforcement issue.

12. On 2 December 2004, the General Assembly of the United Nations adopted a convention on immunity of states and their property (United Nations Convention on Jurisdictional Immunities of States and Their Property). The convention is largely – but not entirely – a codification of

customary law. On several issues, it forms a compromise between the opinions of different states. In 2009 the Swedish Parliament decided in favor of the government's proposal set out in Government Bill 2008/09:204 mentioned in item 9 above that Sweden should ratify the convention and incorporate it into Swedish law. Neither the convention, nor the Act (2009:1514) on jurisdictional immunities of states and their property has entered into force.

13. The convention provides rules on immunity from enforcement measures in connection with court procedures in Articles 18-21. Articles 18 and 19, that govern state immunity prior to and after a court ruling, provide the main rule that no enforcement measures with respect to state property may be taken other than as provided in the Articles. Under certain circumstances it is possible to use enforcement measures subsequent to a court ruling even if the state has not approved it. The permissibility of the enforcement is in these cases, as far as is relevant for the present matter, dependent on for what purpose the state holds the relevant property. Property that, as far as is now relevant, may be subject to enforcement measures subsequent to a court ruling is described in Article 19 (c) in the English wording as "property [...] specifically in use or intended for use by the State for other than government non-commercial purposes". There is no official Swedish language version. A translation is available in the act that has not yet entered into force.

14. The 2004 convention must be considered to state the principle currently accepted by many states that enforcement may be taken with respect to at least some state property, namely with respect to property that is used for other purpose than government non-commercial purposes (see Article 19 (c)). However, there is an apparent disagreement – with respect to subject matter and over time – on what should be considered a holding for government non-commercial purposes. Thus, the meaning of the phrase must be narrowed down. In this context, the phrase must generally be considered to entail that immunity from enforcement measures can be claimed at least with respect to property that is used for a state's official functions. However, the phrase

cannot be considered to mean that immunity from enforcement measures can be successfully claimed solely based on the fact that a property is owned by a state and used for government non-commercial purposes. Enforcement measures should however be held impermissible if the purpose of the holding of the property is of a more specific nature, such as when the property is used for state acts proper and similar purposes of official nature or when the property is of such particular nature as stated in Article 21 of the 2004 UN convention.

15. An individual property may be used for several, various purposes. Through the provisions on state immunity provided under international law in the Vienna convention, the physical integrity of, *inter alia*, embassy personnel, the residences of diplomats (and certain other personnel), official vehicles and archives is protected (Articles 22, 24, 30 and 37 of the Vienna convention on Diplomatic Relations of 18 April 1961, SÖ 1967:1; Act 1976:661 on immunities and privileges in certain cases). The limits of state immunity and diplomatic immunity do not coincide. Thus, the limits of state immunity cannot be immediately decided by a comparing with the limits of diplomatic immunity. It is clear, however, that the real property of a state, which is to a substantial extent – but not necessarily mainly – used as premises for the state’s officials (or for a different official use which is tied to the representation based on a bilateral agreement), should be covered by immunity from enforcement measures, since the property is used for the carrying out of diplomatic functions.

16. However, it is not clearly evident what applies if the real property is used to some extent for official purposes or purposes nearly linked to the official purposes (such as providing apartments to the personnel covered by diplomatic immunity), but is mainly used for other purposes represented by the foreign state, for purposes that are a prerequisite to or consequence of a state run operation that is commercial or otherwise non-official in nature, or both. In these situations it must be decided whether the different purposes of the use together make up the specific nature that is required to safeguard the

property from enforcement measures. When deciding on these matters it is possible that the respect for state immunity with respect to property used for official purposes and that a foreign state cannot be forced to hand over information it does not wish to hand over, may have the consequence that the regular rules on evidence requirements in enforcement matters cannot be fully upheld.

Assessment of the present matter

17. From the agreement of 1927 between the Union of Socialist Soviet Republics and Sweden (as later confirmed to apply between Sweden and the Russian Federation) with respect to the rights and obligations of the Russian trade delegation's in Stockholm (SÖ 1928:8) it is clear that the trade delegation is connected to the representation of the Union in Sweden and that it should enjoy exterritorial privileges for its premises in Stockholm. In a written notice from the trade delegation received by the Swedish Ministry for Foreign Affairs on 26 May 1976 the trade delegation informed that it would move from its old premises at the property Lidingö Kostern 5 to new premises at Ringvägen 1, Lidingö. Thus, the property Kostern 5 can no longer be considered to be notified as official premises of the trade delegation pursuant to the agreement of 1927. Nevertheless and as noted above, the Russian Federation has claimed that the property is exclusively used for the official purposes of the Russian Federation and thus enjoys immunity from enforcement measures.

18. The claim that the property is exclusively used for the official purposes of the Russian Federation has been disputed by Franz J. Sedelmayer, who has claimed that it is used for commercial purposes. Franz J. Sedelmayer has submitted into evidence his own investigation, as well as the investigation of mainly publicly available written sources carried out by the Enforcement Authority, relating to the actual use of the property at the time of the decision of the Enforcement Authority, in order to show that the property was used as residence for approximately sixty people, out of which no one was notified as

a diplomat with the Ministry for Foreign Affairs and ten were Swedish citizens, and that two Swedish companies had their address at the property.

19. The Russian Federation has stated, in response to Franz J. Sedelmayer's claims, that the ground floor of the building is an archive used both by the trade delegation and the embassy, as well as a garage used for diplomatic vehicles. Before the Svea Court of Appeal, the Russian Federation stated *that* the property is not a regular commercial housing property, *that* out of the 48 apartments on the property four were used as residence for diplomats, *that* eleven apartments were used as residence for other personnel working for the trade delegation or the embassy, *that* 13 apartments were used by students or researchers as a result of the agreement between the Russian Federation and Sweden on financial and technical-scientific cooperation within the fields of agriculture and foods industry and which can be realized *inter alia* through exchange students and researchers, *that* 14 apartments were used as temporary residence and offices for people with official assignments to Sweden and *that* six apartments were used by people with special needs and the daughter of a former diplomat. The Russian Federation has further claimed that the tenants pay compensation only for actual costs. Before the Supreme Court, the Russian Federation has, among other things, added that the property comprises premises used for official purposes of such nature that they cannot be further divulged without breaching the Russian Federation's right to integrity and that as from 1 July 2010 all apartments will be used by people who have diplomatic immunity.

20. The assessment as to whether the use of the property is of such specific nature that distraint of the property would be barred should, since the property was not notified as official premises of the trade delegation and since what has been claimed by Franz J. Sedelmayer cannot be left without consideration, in this case be based on the actual use of the property. The relevant time of use for this assessment is, in conformity with what must be considered to have been established internationally, when the application was received by the Enforcement Authority. Thus, changes in the use of

apartments and premises that have taken place thereafter shall not be taken into consideration.

21. The evidence in the matter provides that the property Lidingö Kostern 5 is a housing property, which at the time relevant for the assessment was not used for official purposes of the representation of the Russian Federation or the trade delegation related thereto. However, according to what the Federation stated before the Court of Appeal, 15 apartments were used for diplomats or personnel at these, and two premises were used as archive and storage of diplomatic vehicles. This use relates to such apartments, premises or property, the physical integrity of which is protected by the Vienna Convention. The question whether this use is sufficient grounds to make distraint of the property inadmissible then turns on the other use of the property.

22. The other use of the property was for purposes under private law but that were of non-commercial, but also non-official nature. Some apartments have been let to researchers and students who visit Sweden as a result of a bilateral agreement between the Russian Federation and Sweden, but the provision of the apartments is based on agreements between these individuals and the Russian Federation and not on an official state act between the Russian Federation and the Swedish state. These lease agreements cannot be considered so closely connected to the fulfillment of the agreement that such use is for official purposes.

23. In light of the above, it is clear that the property Lidingö Kostern 5 was not to a substantial part used for the official purposes of the Russian Federation. The nature of the use has not otherwise been of such specific nature as to grant the property immunity from enforcement in the present enforcement matter.

24. A claim for rent is an asset that has arisen through an act that is of a private nature, and typically it is an asset that is of a commercial nature. The

fact that the rent is meant to only cover or assist in covering the costs for the administration of the building is irrelevant in this respect.

25. In light of the above, enforcement of the decision of the District Court ordering the Russian Federation to compensate Franz J. Sedelmayer for his costs through distraint of the property Lidingö Kostern 5 and of the rental payments related to that property is not barred. Thus, the decision of the Court of Appeal shall be upheld.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices Leif Thorsson,
Kerstin Calissendorff (Reporting Justice), Per Virdesten, Gudmund Toijer
and Johnny Herre
Reporting clerk: Kerstin Norman

True copy:

[ILLEGIBLE SIGNATURE]