

## DEVYANI KHOBRADE'S ISSUE RELATING TO DIPLOMATIC IMMUNITY VIS-A-VIS CONSULAR IMMUNITY

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Now taking into consideration the recent situation the author would like to emphasize on the recent case of **United States of America v. Devyani Khobragade**. The following issue has been decided on 12<sup>th</sup>, March 2014. This case basically talks about the role of consular immunity in Criminal cases.

Devyani Khobragade, Indian citizen, she served in the United States as a consular officer. Her period of service started from 26<sup>th</sup> October, 2012 and continued till 8<sup>th</sup> January, 2014. Thus as per the provisions of Vienna Conventions she had the consular immunity.

She was arrested in New York on the felony charges of visa fraud and false statements relating to hiring of a personal domestic help under the exploitative conditions. Before her arrest she had been notified by the United States Department of State as she was a consular general of India in New York City. As per the provisions of the Vienna conventions she was conferred the consular immunity, consular immunity is given only for the functions in the frame of consular general. Hiring a personal domestic help does not fall under the purview of performing official function. Thus prosecuting Devyani in the United States on the grounds of visa fraud and false statement would not be violative of the immunity conferred to her and that would also be in compliance with the Vienna Convention on Consular Relations.

The prosecution of Devyani Khobragade were discontinued in the United States as eight days after her arrest she had been appointed as a counsellor to the Permanent Mission of India to the United Nations. Moreover her immunity status had changed from consular immunity to diplomatic immunity. As per the Vienna Conventions the diplomatic immunity is wider than the consular immunity. The diplomats have more immunity than the consular officers. The diplomat cannot be prosecuted even for their personal acts in the receiving state until and unless the sending state waves off their immunity.

It had been requested by the United States, the receiving state to India, the sending state to waive off Devyani's immunity so that they could continue the prosecution but India has refused

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to do so hence she was asked to move out of United States on that occasion. Thus she returned to India and her prosecution stopped in U.S. But if she returns to U.S it would again continue. In this way she managed to escape the criminal liability for her actions.

The purpose of immunity under both the Consular Convention and the Diplomatic Convention “is benefit not to individuals but to ensure the efficient performance of functions of consular posts and diplomatic missions on behalf of their sending states.”<sup>248</sup>

Diplomatic relations play a crucial role as it is a direct linkage and is a means of communication between the sending country and the receiving country. It basically facilitates communication between the sending and the receiving country. Consular immunity does not immune the consular officers from the prosecution for their criminal acts which are not required to perform the essential consular functions. Here in the present case Devyani was charged with fraud and misuse of visa, which is violative of 18 U.S.C. § 1546 and under 18 U.S.C. § 1001 ie. Statement or entries generally for making false statements. Khobragade has been charged of entering into a fraudulent employment contract with her live in domestic help which is against United States wage and labour laws. These laws basically talk about the protection of the labourers and exploitation of the work place. Devyani had signed a contract with her domestic help in which required condition against exploitative work conditions were deleted. She made the domestic help work for about 100 hours plus per week which was against the laws and moreover only paid her \$1 to \$3 per hour whereas per the provision she had to be paid around \$9.75 per hour. Moreover she took away her passport as well. Thus it is very clear that these acts were not done in pursuance of her official consular duties. In *Park v. Shin*, the court by applying the functional approach has held “The hiring and employment of a domestic worker is not an act in the furtherance of official consular functions and does not entitle a consular officer to consular immunity.”<sup>249</sup>

This is a criminal action.

“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction”<sup>250</sup> Thus, the diplomatic agents are immune from the criminal jurisdiction of the receiving states.

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<sup>248</sup> The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards a Principled Interpretation, Curtis J. Milhaupt, 88 COLUM. L. REV. 841, 857–58 (1988).

<sup>249</sup> *Park v. Shin*, 313 F.3d 1138, 1141–43 (9th Cir. 2002)

<sup>250</sup> Vienna Conventions on Consular Immunity, Article 31 1. A

“A diplomatic agent shall not be liable to any form of arrest or detention”<sup>251</sup>

“Diplomats can only be prosecuted for their crimes if the sending state consents to an express waiver of the diplomat’s immunity under article.”<sup>252</sup>

“Consular officers may not be arrested or detained except in case of a grave crime and following a decision by the competent judicial authority. If, however, criminal proceedings are instituted against a consul, he must appear before the competent authorities. The proceedings are to be conducted in a manner that respects his official position and minimises the inconvenience to the exercise of consular functions.”<sup>253</sup>

“Immunity from jurisdiction is restricted in both criminal and civil matters to acts done in the official exercise of consular functions.”<sup>254</sup>

Thus from the above provisions of the Vienna conventions it is clear that the consular officers are not protected from their criminal actions which do not fall under the purview of essential actions for performing their official function. The word “grave crime” in Article 41 of the Vienna convention in the current case can be interpreted as felony. The Judicial authority have the powers to interpret the word grave crime and here they have interpreted the word “grave crime” as felony.

In the current situation the criminal offences that were alleged at her, there was no legitimate government interest. Here the offences committed by her did not facilitate any function of the Indian Consulate and moreover the crimes were liable to warrant accountability. Thus, the immunity from consular immunity has only been elevated to diplomatic immunity so that she could escape the prosecutions in United States.

## **CONCLUSION:**

In this case as per the authors view Devyani should have been subject to full prosecution in the United States for her criminal action of high ring a living domestic help and exploiting her. But, India, the sending state came to her rescue and elevated her position to which full diplomatic immunity was attached and this way she escape the criminal prosecution and liabilities for her actions. This is arbitrary and violative of the Vienna convention on consular

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<sup>251</sup> Vienna Conventions on Consular Immunity, Article 29

<sup>252</sup> Vienna Conventions on Consular Immunity, Article 32

<sup>253</sup> Vienna Conventions on Consular Immunity, Article 41

<sup>254</sup> Vienna Conventions on Consular Immunity, Article 43

relations and it takes away the entire essence of the conventions. It also creates imbalance of the interest of the sending state and the receiving state.

Diplomats are the representative of the head of state whereas the work of the consular officers is restricted and they are not the representative of the head of the state. They have just been assigned a particular work to do in the receiving state. Hence immunity conferred to the diplomats has a wider scope than the immunity conferred upon the consular officers. Diplomats are immune for their personal wrong whereas the immunity given to the consular officer is restricted to their official work.

Thus, the diplomatic relations and the consular relations are justified on the bases of different principles. Diplomatic immunity should not be manufactured to protect consular officers who have committed crimes from the prosecution in the receiving state.

Basically, in this situation the alternative remedies do exist but it is mainly theory. The civil suit or criminal suit can be filed against the consular officers in the sending state but only if his conduct is considered as crime by the sending state. But, in practical full prosecution in receiving state is the best way to meet the end of justice.

