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October 14, 2011

VIA HAND DELIVERY

Docket and File As Defendants
Motion to Dismiss.

Hon. J. Paul Oetken
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

RE: Vathsala Devi and Seetharam Sivam v. Shavendra Silva, 11 Civ. 6675

Dear Judge Oetken:

We represent Ambassador Shavendra Silva, the Defendant in the above captioned action. Ambassador Silva is currently the Deputy Permanent Representative of Sri Lanka to the United Nations and, as set forth below, is entitled to automatic and immediate dismissal of this action on grounds of diplomatic immunity.

In this action, brought by two Sri Lankan nationals on behalf of deceased relatives, certain allegations and claims are made against Ambassador Silva in connection with his service as an officer of the Sri Lankan armed forces during the period when the group "Liberation Tigers of Tamil Eelam" – proscribed by the United States, the European Union, and other countries as a foreign terrorist organization¹ – was active in that country. Relief is sought under the Alien Tort Claims Act, 28 U.S.C. § 1350, and other statutory and common law theories.

¹ See United States Department of State list of Foreign Terrorist Organizations, dated September 15, 2011, available at <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited October 13, 2011), Council Decision 2011/70/CFSP, dated January 31, 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:028:0057:0059:EN:PDF> (last visited

SO ORDERED:


J. PAUL OETKEN
U.S.D.J.

10/25/11

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What the Complaint fails to acknowledge – but which is a matter of public record and must have been known to Plaintiffs' counsel at the time of filing – is that Ambassador Silva is an accredited diplomat to the United Nations, whose credentials have been officially recognized by the United States Government. (*See* Ex. A hereto (Diplomatic Note dated October 3, 2011 from the United States Mission to the United Nations concerning diplomatic status of Ambassador Silva).) Accordingly, to quote from the United States Government's own Diplomatic Note:

Pursuant to Article IV, Section 11 of the Convention on Privileges and Immunities of the United Nations, 21 UST 1418, TIAS 6900, and Article V, Section 15 of the Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations, 12 Bevans 956, TIAS 1676, Ambassador Lokugan Hewage Shavendra C. Silva is entitled to the same privileges and immunities in the United States as the United States accords to diplomatic envoys who are accredited to it. Such diplomatic immunity is defined by the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502, 500 UNTS 95.

(Ex. A.) In this regard, Article 31 of the Vienna Convention on Diplomatic Relations² explicitly provides that "[a] diplomatic agent shall enjoy immunity from

October 13, 2011), and Public Safety Canada's list of terrorist entities, last reviewed with respect to the Liberation Tigers of Tamil Eelam on December 22, 2010, available at <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx> (last visited October 13, 2011).

² Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972) (the "Vienna Convention"). A full copy of the Vienna Convention appears as Exhibit B hereto. The Vienna Convention applies because:

- Article IV, Section 11(g) of the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 (entered into force with respect to the United States Apr. 29, 1970) ("CPIUN") provides that "[r]epresentatives of [U.N.] Members to the principal and subsidiary organs of the United Nations . . . shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities . . . [including] privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy", *id.*, and
- Article V, Section 15 of the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947) ("United Nations Headquarters Agreement") provides that "[e]very person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary . . . shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities,

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[the receiving State's] civil . . . jurisdiction" (emphasis added) – save for certain exceptions that plainly do not apply here.³

The immunity afforded to currently serving diplomats under Article 31 of the Vienna Convention has been described on numerous occasions as "absolute," including by the Second Circuit. See *Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) (holding that under Article 31, "current diplomatic envoys enjoy *absolute immunity* from civil and criminal process" (emphasis added)), *cert. denied*, 131 S. Ct. 151 (2010); *Baoanan v. Baja*, 627 F. Supp. 2d 155, 160-161 (S.D.N.Y. 2009) ("Under the [Vienna Convention], a current diplomatic agent enjoys *near-absolute immunity* from civil jurisdiction. This immunity is given full effect under United States law pursuant to the Diplomatic Relations Act As the preamble to the Vienna Convention recognizes, 'the purpose of such . . . immunit[y] is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.'" (second alteration and omission in original) (emphasis added) (citations omitted)); *accord Aidi v. Yaron*, 672 F. Supp. 516, 517 (D.D.C. 1987).

Article 31's absolute immunity thus precludes any civil action from proceeding against a currently-serving diplomat – regardless of the nature of the allegations being made against him or her. In this context, *Aidi* is highly instructive. In that case, plaintiffs brought a civil action against a former brigadier general in the Israeli Defense Forces, seeking damages for, *inter alia*, wrongful death for allegedly "knowingly facilitating and permitting the deaths of plaintiffs' decedents" during Israel's activities in Lebanon in 1982. See *Aidi*, 672 F. Supp. at 516. In 1986, the brigadier general was appointed as an attaché to the Israeli embassy, and thus recognized by the United States as having the status of a diplomat. In those circumstances, the *Aidi* court held, Article 31 of the Vienna Convention conferred immunity from suit on the brigadier general, regardless of the nature of the

subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it." *Id.*

Copies of the CPIUN and the United Nations Headquarters Agreement appear as Exhibits C and D hereto.

³ The narrow exceptions to Article 31 do not apply in this matter because the allegations in the present Complaint clearly do not relate to (1) an action involving "private immovable property" in the U.S.; (2) an action relating to succession where the diplomat is "executor, administrator, heir or legatee"; or (3) "professional or commercial activity" by the diplomat within the United States.

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allegations made against him.⁴ *See id.* at 516 (rejecting plaintiffs' argument that "no immunity should be afforded one who is guilty of international war crimes"). Thus, because "defendant's diplomatic immunity [was] in tact and deserving of full recognition," service was quashed and the case dismissed. *Id.* at 517.⁵

Precisely the same conclusion applies here. Accordingly, Ambassador Silva is fully entitled to absolute diplomatic immunity from civil suit in the United States.

Moreover, as illustrated in the *Aidi* and *Vulcan Iron Works* decisions, diplomatic immunity prohibits any attempt to effect service of process upon a serving diplomat. *See Aidi*, 672 F. Supp. at 517 ("It is axiomatic that if jurisdiction is not available, then service of process is void, making a motion to quash service of process a valid remedy.") Accordingly, the purported efforts to "serve" Ambassador Silva with the current Complaint are wholly invalid – indeed, improper.⁶

The Diplomatic Relations Act of 1978, 92 Stat. 808, 809 (1978) explicitly sets forth the appropriate procedure in cases such as this:

Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or

⁴ The *Aidi* plaintiffs conceded that none of the three narrow exceptions to Article 31 of the Vienna Convention applied. *See Aidi*, 672 F. Supp. at 518.

⁵ In support of its decision, the *Aidi* court cited to *Vulcan Iron Works, Inc. v. Polish American Machinery Corp.*, 472 F. Supp. 77, 78 (S.D.N.Y. 1979), *rev'd on other grounds on reconsideration*, 479 F.Supp. 1060 (S.D.N.Y.1979), which "declared that the Vienna Convention and the Diplomatic Relations Act provided protection [for the attachés of the Polish Commercial Counselor's office in New York City] from the jurisdiction and *compulsory process* of this court." *Aidi*, 672 F. Supp. at 517 (internal quotation marks omitted). The *Vulcan Iron Works* court confirmed that "[t]he immunity of representatives of foreign nations (and their staffs and households) from criminal and civil jurisdiction has long been a precept of international law [and] [i]n the United States this precept is embodied in the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act." *Vulcan Iron Works, Inc.*, 472 F. Supp. at 78 (footnote omitted).

⁶ We bring to the Court's attention the fact that, according to the "Affirmation of Service" filed with the Court, purported service was attempted by at least one private investigator at Ambassador Silva's personal residence. Compounding matters, the attempted "service" was video-taped and posted on YouTube. These actions are wholly inconsistent with the treatment that members of the United Nations diplomatic community are entitled to receive under the Vienna Convention, CPIUN, and the United Nations Headquarters Agreement, all of which are predicated on the inviolability of a diplomat's person and private residence.

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254c of this title, or under any other laws extending diplomatic privileges and immunities, *shall be dismissed*. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

22 U.S.C. § 254d (emphasis added). As the Second Circuit has observed, this statute "makes pellucid that American courts must dismiss a suit against anyone who is entitled to immunity under either the [Vienna Convention] or other laws extending diplomatic privileges and immunities." *Brzak*, 597 F.3d at 113 (internal quotation marks omitted). Accordingly, on behalf of Ambassador Silva, who has been accorded full diplomatic privileges by the United States government, we hereby suggest that 22 U.S.C. § 254d requires the immediate dismissal of this case, with prejudice.

Should the Court want us to supplement this request with a formal motion to quash service pursuant to Federal Rule of Civil Procedure 12(b)(5), or a motion to dismiss pursuant to F.R.C.P. 12(b)(1), we are fully willing and prepared to do so. But, as we are sure the Court will appreciate, we are reluctant to engage in motion practice that would in any way dignify the alleged attempts at "service" on the Ambassador.⁷ Moreover, the primary vehicle for dismissal would appear to be the above-quoted statute.

We therefore seek immediate dismissal of this action pursuant to 22 U.S.C. § 254d or, in the alternative, a direction (with expedited briefing schedule) requiring the Plaintiffs to demonstrate why this proceeding should not be dismissed on grounds of diplomatic immunity. The Court also has the power to request the State Department's views (although we believe the United States Government's own Diplomatic Note speaks for itself).

⁷ For completeness, we emphasize that our appearance and request for dismissal is limited and does not constitute a waiver of immunities, rights, or objections to jurisdiction that Ambassador Silva (or any other member of the Permanent Mission of Sri Lanka) possess or may possess under the Vienna Convention, the CPIUN, the United Nations Headquarters Agreement, or any other applicable treaty, statute, or doctrine.

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Should the Court require, we are prepared to participate in a telephone conference at any time mutually convenient to the Court and Plaintiffs' counsel.

Respectfully submitted,



Timothy G. Nelson

cc: **Ali Abed Beydoun (Via Federal Express and Electronic Mail)**
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