Neutral Citation Number: [2024] EWCA Civ 1602

Case No: CA-2023-002612

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MRS JUSTICE ELLENBOGEN
[2023] EAT 153

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2024

Before :

LORD JUSTICE BEAN
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

- -

Between :

THE KINGDOM OF SPAIN	**Appellant**
- and -	
LYDIA LORENZO	**Respondent**

- -
- -

Jonathan Davies (instructed by **Gunnercooke LLP**) for the **Appellant**
Matt Jackson and **Caitlin Page** (instructed by **Leigh Day**) for the **Respondent**

Hearing date: 27 November 2024

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Approved Judgment

This judgment was handed down remotely at 12.00am on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. Lydia Lorenzo worked at the Spanish Embassy in London from 2008 to 2011 and again from 2013 to 2015. In the summer of 2015 she resigned, her last day at work being 24 September 2015.

2. On 24 December 2015 she issued an employment tribunal ("ET") claim for constructive unfair dismissal; failure to provide a written statement of the terms of her contract of employment; direct racial discrimination on the grounds of nationality; and harassment on similar grounds. Her claim form and later particulars of the facts on which she relied made factual allegations of discriminatory conduct, principally by Señor Jose Gonzelez, a *Canciller* at the Embassy. The respondent ("Spain") asserted first state immunity and then (by way of amendment made in 2020) diplomatic immunity.

3. A preliminary hearing took place before Employment Judge Oliver Segal QC at which he heard oral evidence from Ms Lorenzo and an embassy official (not Sr Gonzalez). The judge held that Spain was entitled to immunity from claims made under the Employment Rights Act 1996 and Employment Act 2002 (that aspect of the decision has not been the subject of any appeal), but rejected its claims to either sovereign or diplomatic immunity from claims under the Equality Act 2010.

4. Spain's appeal against the rejection of their claims to immunity was dismissed by Ellenbogen J in the Employment Appeal Tribunal ("EAT"). Spain now appeals to this court pursuant to permission which I granted on 23 May 2024, subject to a condition that the Appellant would in no circumstances be entitled to recover costs.

Findings of fact by the ET

5. Employment Judge Segal found as follows:-

> "14. The facts were largely agreed and/or matters of documentary record. I record only those facts which are material to my decision.
>
> 15. The Claimant was recruited to work in the Spanish Embassy in about January 2008 whilst she was living in London. She had at that time dual nationality (UK and Spain) and a Spanish passport.
>
> 16. The Claimant initially worked as the Ambassador's Social Secretary, in which capacity she worked mainly from his official residence (next door to the Embassy) and sometimes saw confidential documents for the purposes of copying them, etc. After what was described to me as a career break, the Claimant returned to work in 2013 in a more junior capacity, Administrative Assistant, as one of a staff of about 42 working in the Embassy. In the latter capacity, she rarely had sight of confidential documents; and in particular in so far as she placed or listed documents in the 'diplomatic bag' they were almost always in sealed envelopes. At some point towards the end of her employment with the Respondent, the Claimant acted up in

> the capacity of Protocol Officer, which was described to me as a quasi-civil servant role, liaising with the FCO about arrivals and departures of staff and issues of duty-free goods, diplomatic cars, etc, in that context.
>
> 17. The Claimant's contract of employment, dated January 2008, is made, on its face, between herself and the then Ambassador, Mr Carlos Miranda Elio. Mr Miranda left the London Embassy later in 2008 and apparently retired in 2013. Ms Aparicio told me that it was predictable that no new contract would be issued to the Claimant when Mr Miranda left, nor even when the Claimant returned from a period of unpaid absence in 2013, because Embassy staff employment contracts are made with the Spanish Ministry of Foreign Affairs, on whose behalf the current Ambassador acts when he executes those contracts.
>
> 18. The contract records that the Claimant has Spanish nationality and a Spanish passport and is resident in Notting Hill, London. At clauses 4 and 5, the Claimant is subject to Spanish social security law and is responsible for her own taxes. The Claimant told me (and there was no dispute raised by the Respondent) that these terms were offered to all staff, regardless of whether they had Spanish nationality.
>
> 19. The presence of the Claimant was not notified to the FCO because, as a locally employed member of staff, such notification was only required (or at least only made in practice) where the staff member enjoyed diplomatic 'privileges', such as exemption from local taxes, diplomatic immunity, etc. That contrasts with the position of Mr Gonzales, whose presence in the UK was notified to the FCO on the basis that he enjoyed those 'privileges' in the capacity of 'Attache (Administrative Affairs) – Diplomatic Staff'"

State Immunity Act 1978

6. The State Immunity Act 1978 ("the 1978 Act"), as it stood prior to amendments made in 2023 to which I shall refer later, provided so far as material as follows:

> a. Section 1(1) provided that:
>
> "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."
>
> b. Section 4 provided that:
>
> "Contracts of employment
>
> (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual

> where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.
>
> (2) Subject to subsections (3) and (4) below, this section does not apply if—
>
> (a) at the time when the proceedings are brought the individual is a national of the State concerned; or
>
> (b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or
>
> (c) the parties to the contract have otherwise agreed in writing.
>
> …
>
> (6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee."

c. Section 16(1)(a) provided that:

> "(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and —
>
> (a) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a diplomatic agent or consular officer;,,,"

Benkharbouche

7. On 18 October 2017 the UK Supreme Court gave judgment in two consolidated appeals, *Benkharbouche v Embassy of the Republic of Sudan*; *Janah v Libya* [2017] UKSC 62; [2019] AC 777, to which I shall refer together as *Benkharbouche*. The court was considering the issue of state immunity in the context of claims by two employees, each of Moroccan nationality, who were carrying out domestic duties for diplomatic agents at the embassies in London of Sudan and Libya respectively. One was permanently resident in the UK, the other was not. Both claimants were domestic staff whose functions were clearly of a private law character. The Supreme Court held that there was no basis in customary international law for the application of state immunity in an employment context of that type. The wider immunity which had been conferred in such cases by sections 4(2)(b) and 16(1)(a) of the 1978 was therefore inconsistent with Article 6 of the European Convention on Human Rights and with Article 47 of the Charter of Fundamental Rights of the European Union.

8. Lord Sumption JSC gave a judgment with which the other Justices agreed. He noted at paragraph 8 that during the second half of the 19th century the common law had adopted the doctrine of absolute immunity of foreign states from the adjudicative jurisdiction of

the courts of the forum, but that by 1978 the position at common law had changed as a result of one decision of the Privy Council and one of this court. He continued:-

> "These decisions marked the adoption by the common law of the restrictive doctrine of sovereign immunity already accepted by the United States and much of Europe. The restrictive doctrine recognised state immunity only in respect of acts done by a state in the exercise of sovereign authority (*jure imperii)*, as opposed to acts of a private law nature (*jure gestionis*). Moreover, and importantly, the classification of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it save in cases where that purpose threw light on its juridical character: *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)* [1983] 1 AC 244."

9. At paragraphs 53 to 59 he said [emphasis taken from the ET judgment in this case]:-

> "53 As a matter of customary international law, **if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune**. It is not always easy to determine which aspects of the facts giving rise to the claim are decisive of its correct categorisation, and the courts have understandably avoided over-precise prescription. The most satisfactory general statement is that of Lord Wilberforce in *The I Congreso*, at p 267:
>
> > "The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, **the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity … of a private law character**, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and **within the sphere of governmental or sovereign activity**."
>
> 54 In the great majority of cases arising from contract, including employment cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. **This will in turn depend on the functions which the employee is employed to perform**.
>
> 55 The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, i e the head of mission and the diplomatic staff; (ii) **administrative and technical staff**; and (iii) staff in the domestic service of the mission. Diplomatic agents participate in the functions of a diplomatic mission defined in article 3, principally representing the sending state, protecting

the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state. These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority. **The role of technical and administrative staff is by comparison essentially ancillary and supportive. It may well be that the employment of some of them might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission. Cypher clerks might arguably be an example. Certain confidential secretarial staff might be another**: … … In Cudak v Lithuania 51 EHRR 15, *Sabeh El Leil v France* 54 EHRR 14, *Wallishauser v Austria* CE:ECHR:2012:0717JUD000015604 and *Radunovic v Montenegro* CE:ECHR:2016:1025JUD004519713, all cases concerning the administrative and technical staff of diplomatic missions, **the test applied by the Strasbourg court was whether the functions for which the applicant was employed called for a personal involvement in the diplomatic or political operations of the mission, or only in such activities as might be carried on by private persons**. In *Mahamdia v People's Democratic Republic of Algeria* (Case C-154/11) [2013] ICR 1, paras 55—57 **the Court of Justice of the European Union applied the same test, holding that the state is not immune "where the functions carried out by the employee do not fall within the exercise of public powers"**. The United States decisions are particularly instructive, because the Foreign State Immunity Act of the United States has no special provisions for contracts of employment. They therefore fall to be dealt with under the general provisions relating to commercial transactions, which have been interpreted as confining state immunity to exercises of sovereign authority: see Saudi Arabia v Nelson (1993) 507 US 349, 360. The principle now applied in all circuits that have addressed the question is that **a state is immune as regards proceedings relating to a contract of employment only if the act of employing the plaintiff is to be regarded as an exercise of sovereign authority having regard to his or her participation in the diplomatic functions of the mission**: see Segni v Commercial Office of Spain (1987) 835 F 2d 160, 165 and Holden v Canadian Consulate (1996) 92 F 3d 918. Although a foreign state may in practice be more likely to employ its nationals in those functions, **nationality is in itself irrelevant to the characterisation**: see *El-Hadad v Embassy of the United Arab Emirates* (2000) 216 F 3d 29, paras 4, 5. …

57 I would, however, wish to **guard against the suggestion that the character of the employment is always and necessarily**

decisive. Two points should be made, albeit briefly since neither is critical to this appeal.

58 The first is that **a state's immunity under the restrictive doctrine may extend to some aspects of its treatment of its employees or potential employees which engage the state's sovereign interests**, even if the contract of employment itself was not entered into in the exercise of sovereign authority. Examples include claims arising out of an employee's dismissal for reasons of state security. They may also include claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which in the nature of things impinge on the states recruitment policy. …

59 The second point to be made is that **the territorial connections between the claimant on the one hand and the foreign or forum state on the other can never be entirely irrelevant, even though they have no bearing on the classic distinction between acts done jure imperii and jure gestionis**. This is because the core principle of international law is that sovereignty is territorial and state immunity is an exception to that principle. As the International Court of Justice observed in *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, para 57, the principle of state immunity:

> "has to be viewed together with the principle that each state possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the state over events and persons within that territory. Exceptions to the immunity of the state represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it".

The whole subject of the territorial connections of a non-state contracting party with the foreign or the forum state raises questions of exceptional sensitivity in the context of employment disputes. **There is a substantial body of international opinion to the effect that the immunity should extend to a state's contracts with its own nationals irrespective of their status or functions even if the work falls to be performed in the forum state; and correspondingly that it should not extend to staff recruited from the local labour force in whose protection the forum state has a governmental interest of its own**. Both propositions received substantial support in the preparatory sessions leading to the United Nations Convention and were reflected in the final text of article 11. **Both receive a measure of recognition in the Vienna Convention on Diplomatic Relations which carefully distinguishes between the measure of immunity accorded to the staff of a**

> **diplomatic mission according to whether they are nationals of the foreign state or nationals or permanent residents of the forum state: see articles 33(2), 37, 38, 39(4) and 44. In a practical sense, it might be thought reasonable that a contract between a state and one of its own nationals should have to be litigated in the courts of that state under its laws, but unreasonable that the same should apply to locally recruited staff**. There is, however, only limited international consensus on where the boundaries lie between the respective territorial responsibilities of the foreign and the forum state, and on how far the territorial principle can displace the rule which confers immunity on acts *jure imperii* but not on acts *jure gestionis*."

10. The finding of inconsistency with the EU Charter led the Supreme Court to hold that ss 4(2)(b) and 16(1)(a) of the 1978 Act would not apply to the claims derived from EU law or discrimination, harassment and breach of the Working Time Regulations. In the present case Ms Lorenzo seeks a similar disapplication of s 4(2)(a) of the 1978 Act. She is entitled to make that application because the claim was brought before the withdrawal of the UK from the European Union: see paragraph 39 of Schedule 8 to the European Union (Withdrawal) Act 2018.

The 2023 Remedial Order

11. The Supreme Court also held that ss 4(2)(b) and 16(1)(a) of the 1978 Act, insofar as they barred Ms Benkharbouche's claims, were incompatible with Article 6 of the ECHR (and also, in the case of s 4(2)(b), with Article 6 read with Article 14 of the Convention). Following this declaration of incompatibility the Secretary of State made the State Immunity Act 1978 (Remedial) Order 2023, which applied in relation to proceedings in respect of a cause of action which arose on or after 18 October 2017, the date of the Supreme Court judgment. This amended s 16(1) of the 1978 Act by adding a new subsection (1)(aa) as follows:-

> "Section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a member of a diplomatic mission (other than a diplomatic agent) or as a member of a consular post (other than a consular officer) and either— "
>
> (i)the State entered into the contract in the exercise of sovereign authority; or
>
> (ii)the State engaged in the conduct complained of in the exercise of sovereign authority;"

The decision of the employment tribunal

12. After setting out his findings of fact (recorded above), the submissions of the parties and the relevant law, in particular the judgment of Lord Sumption JSC in *Benkharbouche*, EJ Segal said:-

"64. I note, by reference to the citations in that last paragraph from the Vienna Convention, that all of the Articles referred to make the key distinction, whether or not the persons concerned are "nationals of or permanently resident in the receiving State"; if they are, then the immunities granted by those various Articles do not apply.

65. On the question of primary principle, whether the interactions complained of between the Claimant and Mr Gonzales "arise out of an inherently sovereign or governmental act of" the State of Spain, I hold that they did not. Focussing in particular on the "functions which the employee [the Claimant] is employed to perform", it seems to me they were not comparable to the functions of the cipher clerk or confidential secretary. They were not "the functions [which] called for a personal involvement in the diplomatic or political operations of the mission" but were rather "such activities as might be carried on by private persons". The acts complained of did not "engage the state's sovereign interests".

66. In that regard, the Respondent's reliance on the earlier case of *Sengupta v Republic of India* [1983] ICR 221, where the EAT found that the acts of a person at 'the lowest clerical level' fell into the category of sovereign acts, is misplaced. As Lord Sumption commented at para [73] of *Benkharbouche*:

> "*Sengupta v Republic of India* was decided at an early stage of the development of the law in this area and, in my opinion, the test applied by the Employment Appeal Tribunal was far too wide. I agree with the criticism of the decision in Fox, The Law of State Immunity, p 199n, that the reasoning had more regard to the purpose than to the juridical character of the claimant's employment."

67. Against that important background, I turn to the narrow question of whether I should disapply s 4(2)(a) SIA by reference to article 47 of the Charter. There is a tension, in this case, between two competing principles: (1) that immunity should apply between a state and nationals of that state; and (2) immunity should not apply in respect of locally recruited staff who are nationals of and permanently resident in the forum state. From the Vienna Convention, it would seem that the latter is the dominant consideration.

68. In this case, the Claimant, although in both categories, is in any event, on the material facts, much more in the second. It is almost, although not quite, a coincidence that the Claimant had Spanish nationality (though it was essential that she was bilingual). She was, effectively, a member of locally recruited staff who spoke Spanish and happened to have dual Spanish nationality.

> 69. I therefore hold that, for the same reasons of principle as s 4(2)(b) was disapplied in *Benkharbouche*, s 4(2)(a) should be disapplied in respect of the Claimant's EqA claims in this case."

13. The judge went on to hold that Spain could not rely on s 16(1) of the 1978 Act (employment of the members of a mission) since that section had been clearly disapplied by the Supreme Court in *Benkharbouche*; that Article 47 of the EU Charter continued to apply to Ms Lorenzo's claims; and that accordingly the claims under the Equality Act 2010 should proceed.

The decision of the EAT

14. Ellenbogen J affirmed the decision of EJ Segal by rejecting the defences of state and diplomatic immunity. On one aspect of the case she was critical of the judgment of the ET, although not so as to affect the outcome of the appeal. Since the criticism is relied on by Spain in its appeal to this court I should set it out:-

> "40. The Tribunal's conclusion as to 'whether the interactions complained of between the Claimant and Mr Gonzales' had arisen out of an inherently sovereign or governmental act of the State of Spain was briefly stated and its foundation was not explained. It is fairly to be assumed that it was informed by the findings of fact set out at paragraph 16 of its judgment (summarised at paragraph 4, above). In the absence of any detail, the Tribunal's summary of the claimant's activities upon her return to work in 2013 says little of her functions and, in particular, of how close they were to the governmental functions of the mission. Each case is fact-sensitive. In this case, both parties urge that the relevant context in which the claim is made extends beyond the nature of the relationship to which the contract gives rise and necessarily engages consideration of the pleaded case as to discrimination, albeit that Mr Davies, candidly, acknowledged that that submission 'was not the subject of focus before the Tribunal; thoughts develop on appeal and I accept criticism in that regard'. It is, perhaps, unsurprising in that context, and in the context of paragraph 54 of *Benkharbouche*, that the Tribunal does not appear to have had regard to the latter. Nevertheless, if the submission is correct (as, in this case, I consider it to be, in accordance with the principle articulated at paragraph 58 of *Benkharbouche)* that, too, does not inexorably lead to the conclusion urged by the respondent, whether the pleaded acts are considered in isolation or in combination with the functions which the claimant was employed to perform, as identified by the Tribunal. The nature of the acts of discrimination alleged in this case is not inevitably inherently sovereign or governmental, nor was it the subject of elaboration in evidence before the Tribunal. In my judgment, had the Tribunal considered those acts, it would have come to the same conclusion."

> 41. Mr Davies' submission that the exception in *Benkharbouche* relates only to domestic staff plainly puts his case too high. If the submission is that Lord Sumption's analysis was obiter in so far as it related to employment other than that of the nature carried out by Ms Janah and Ms *Benkharbouche,* I reject it. His analysis of the application of the restrictive doctrine of State immunity to contracts of employment, as a matter of customary international law, was a necessary part of his conclusion, forming part of the ratio decidendi. I regard the distinction which Mr Davies seeks to draw between staff falling, respectively, within Articles 1(f) and (g) of the Vienna Convention as lacking any principled basis.
>
> 42. Thus, whilst accepting that the Tribunal ought to have had, but did not have, regard to the pleaded acts of discrimination in this case, it is a trite proposition of law that a perversity appeal 'ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence, and the law, would have reached……. I am not satisfied that the respondent has surmounted the high hurdle imposed by *Yeboah* and related authority, so as to establish that the Tribunal's decision that the employment claim here did not arise out of an inherently sovereign or governmental act of the foreign State was perverse."

Grounds of appeal to this court

15. The grounds of appeal lodged by Spain were as follows:

> "1. The Employment Appeal Tribunal, having correctly upheld the Appellant's contention that the employment tribunal ought to have considered state immunity by reference to the pleaded claim, erred in law by concluding that the conduct complained of did not engage sovereign acts.
>
> 2. Both the Employment Tribunal and Employment Appeal Tribunal erred in law in concluding that:
>
> (a) the Claimant's status as a member of the administrative and technical staff as defined by Article 1(f) of the Vienna Convention on Diplomatic Relations 1961;
>
> (b) the Claimant's Spanish nationality; and
>
> (c) the nature of the Claimant's employment
>
> were not factors relevant to whether the Kingdom of Spain enjoyed state immunity…….

> 3. The Employment Tribunal and Employment Appeal Tribunal erred in law in failing to permit the Kingdom of Spain to rely on diplomatic immunity."

16. Grounds 2(a) and (c) go together, while the nationality issue raised by Ground 2(b) is somewhat separate. As argued by Mr Davies before us there were essentially four issues:-

(1) whether the acts complained of were sovereign acts

(2) whether the claimant's status and the nature of the functions she carried out were treated as irrelevant by the employment tribunal and should have led it to uphold the claim of sovereign immunity;

(3) the dual nationality issue;

(4) whether Spain's claim to diplomatic immunity should have been upheld.

Submissions

Were the acts complained of sovereign acts?

17. Mr Davies asked us to note that the particulars of Ms Lorenzo's claim given in her form ET1 included, for example, a variety of disparaging remarks allegedly made by Señor Gonzalez about her personally or about British people in general. He submitted that:-

> "A diplomatic agent's view, expressed, privately, and behind the doors of the diplomatic mission, whether expressed seriously or in jest, or in terms that fall somewhere between the two, about:
>
> (a) the receiving state, its inhabitants and its government;
>
> (b) his or the sending state's views about the desirability of employing staff who do not have the nationality of the sending state on the basis of the extent of their loyalty to the sending state; and
>
> (c) the restriction of a member of staff's access to documents and parts of the diplomatic mission itself
>
> go to the heart of the business and hence purpose of a diplomatic mission: to represent the interests of the sending state either in co-operation with, but potentially in conflict with, the receiving state. It cannot be in accordance with the purpose or spirit of the Vienna Convention on Diplomatic Relations 1961 to permit claims in which a diplomatic agent by being asked to even disclose such statements, still less to justify them in public, and even less to be found legally liable in respect of them."

18. Mr Jackson submitted that it is clear from *Benkharbouche* that there are only limited circumstances in which the actions of the State are relevant to the issue of state immunity: they are likely to be of the character where it is alleged that a dismissal was

for national security, due to recruitment conditions for the civil service or for claims for reinstatement.

The Claimant's status and the nature of her employment

19. Mr Davies submitted that:-

> "The Claimant was employed as the Ambassador's social secretary and carried out the duties of the role of Protocol officer….. Under the Vienna Convention on Diplomatic Relations 1961 there is a clear distinction between personal secretaries, cipher clerks, wireless operators on one hand and staff whose functions are essentially domestic. The Claimant was not a domestic worker working in the household of a member of a mission. She was not a cook or a cleaner. She worked in the mission itself. Being the Ambassador's social secretary or carrying out the functions of the Protocol officer are not things the Claimant could ever have done as a 'private person'. She could have been a cook or a cleaner contracted with persons within or outside of a diplomatic mission to do those roles. The same cannot be said of being a PA to an Ambassador or an Embassy Protocol Officer. Those roles can only be carried out for and within a diplomatic mission. Those functions are close to the governmental functions of the diplomatic mission."
>
> The finding of the Employment Tribunal failed to take into account, among other things, the fact that Claimant dealt with confidential documents and the contents of the diplomatic bag which is itself protected from interference by the receiving state in accordance with the Vienna Convention…….. The fact the documents may have been in envelopes is neither here nor there. They may not have been……. The cleaners and cooks in *Benkharbouche* clearly sat outside sovereign functions. Administrative staff tend to assist other people's work which may at times be sovereign and confidential other times not."

20. Mr Jackson did not accept that the ET or EAT had treated the Claimant's status under the Vienna Convention as irrelevant. As to the decision of EJ Segal, he submitted that it is simply wrong to say that he gave no weight to the Claimant's status as a member of the technical and administrative staff. The judge's findings of fact on this subject are, he argued, unappealable.

Dual nationality

21. For the appellant, Mr Davies relied on the observation of Lord Sumption at [59] of *Benkharbouche* that "there is a substantial body of international opinion to the effect that the immunity should extend to a state's contracts with its own nationals irrespective of their status or functions even if the work falls to be performed in the forum state." He argued that the burden should be firmly on the Claimant to demonstrate a rule of customary law to disapply the clear words of section 4(2)(a) of the State Immunity Act 1978.

22. In response Mr Jackson cited [66] of *Benkharbouche* in which Lord Sumption said that "the considerable body of comparative law before us suggests that unless constrained by a statutory rule, the general practice of states is to apply the classic distinction between acts *jure imperiii* and *jure gestionis*, irrespective of the nationality or residence of the claimant." This led him to the conclusion that s 4(2)(b) of the 1978 Act was not justified by any binding principle of international law.

Diplomatic immunity

23. Mr Davies submitted that it was an error of law for the ET and EAT *not* to permit Spain to rely on diplomatic immunity. At [34] and [42] of his skeleton argument he wrote:-

> "34. Whilst it may seem a bold submission in the light of the result in *Benkharbouche*, there is no evidence from the judgment in *Benkharbouche* that the plea of diplomatic immunity was raised in and in the circumstances, it cannot be taken to have held that diplomatic immunity is irrelevant to employment claims against a diplomatic mission other than when the claim is pleaded (under the rather unusual provisions of the Equality Act 2010 for so doing) against the diplomatic agent personally. The Supreme Court confirmed its co-existence with State Immunity in *Benkharbouche*.
>
> ...
>
> 42. The idea that diplomatic immunity from suit is personal does not make sense in the light of the distinction running through the Vienna Convention on Diplomatic Relations 1961 between acts done on behalf of the Sending State (where there is immunity) and those done in a personal capacity (where there is not)."

24. Mr Davies relied on a decision of the Nigerian Court of Appeal in *Kramer Italo Limited v Government of Kingdom of Belgium; Embassy of Belgium* 103 ILR 299 1 November 1988. The court concluded in that case that it would "destroy the basis of diplomatic immunity if a foreign sovereign were to be made answerable in court for the actions of his envoy who enjoyed diplomatic immunity".

25. In response, Mr Jackson submits that unless the Appellant can demonstrate a rule of customary international law (with the requisite widespread, representative and consistent practice of states in question) that diplomatic immunity provides a state with absolute immunity from suit, this ground cannot succeed. The *Kramer Italo* case is an outlier and was against the grain of international opinion even when it was given more than 30 years ago.

Respondent's notice

26. By a Respondent's Notice in this court Ms Lorenzo seeks a declaration that Section 4(2)(a) of the State Immunity Act 1978 is incompatible with Article 6 and with Article 1 of Protocol 1 ("A1 P1") to the ECHR. This was not a remedy which could have been granted either by the ET or by the EAT notwithstanding that this case was heard in the

EAT by a High Court Judge. The Secretary of State was invited to apply to intervene in the appeal to this court but declined.

Discussion

Ground 1: Were the acts complained of sovereign acts?

27. It does not seem to have been argued before the ET that one should look in detail at the acts of Señor Gonzalez of which Ms Lorenzo complained in order to decide whether Spain was entitled to sovereign immunity. Indeed, Mr Davies conceded before Ellenbogen J that this had not been the focus of his submissions at first instance. This is no doubt the reason why EJ Segal's treatment of this issue at paragraph 65 of his decision is very brief. Lord Sumption makes it clear that "in the great majority of cases one should look at the nature of the relationship and the functions which the claimant was employed to perform". He goes on to say that this is not always decisive and gives three examples at paragraph 59 of cases where it is not. The first is a dismissal on the grounds of state security. The second is where the complaint is about a recruitment policy for civil servants. The third is where a claim is made for specific reinstatement after a dismissal.

28. Whether one looks at what Señor Gonzalez is alleged to have said or done in detail or with a broad brush, I do not think that any of the acts complained of were sovereign acts or analogous to any of Lord Sumption's very specific exceptional cases. Some of Mr Davies' submissions almost seem to argue that anything said or done by a senior diplomat at an embassy must be a sovereign act. Mr Davies sought to derive comfort from the terms of the amendments to the 1978 Act by the 2023 Remedial Order following *Benkharbouche*. As an aid to interpretation of the law as declared by the Supreme Court. I do not think that the Remedial Order assists him at all. It does not, of course, apply retrospectively: it gives effect to *Benkharbouche* by saying that where a contract of employment is entered into or an act is done in the exercise of sovereign authority the state is immune from suit. But that begs the question. If the legislature had wanted to say that a foreign state cannot be sued under a contract of employment by anyone working at their embassy in respect of things said or done by a diplomatic agent it would have been easy enough to say so. I also consider that Lord Sumption's example of a claim for reinstatement being potentially an exceptional case is a powerful indicator that most claims for express or constructive unfair dismissal are not to be treated as exceptional.

The Claimant's status and the nature of her employment

29. Ground 2 alleges that the Claimant's status and the nature of her employment were treated as irrelevant by the ET. I do not think that they were. EJ Segal distinguished her employment from that of a cypher clerk or a confidential secretary. He said that her functions did not call for personal involvement in the diplomatic or political operations of the mission but were rather activities such as might be carried out by private persons. We were not shown any authority demonstrating that, as a matter of customary international law or UK domestic law, anyone employed at an embassy who has any access to confidential documents or conversations must be treated as barred by state immunity from bringing a tribunal claim. Cleaners, at least in the era of hard copy documents, may have the opportunity to read confidential documents if they choose to do so. Most employees who work for senior diplomats may know about their

confidential activities or overhear their confidential conversations. This does not elevate the employee to become the equivalent of a diplomatic agent.

Dual nationality

30. The case advanced by Spain relies heavily on the fact that Ms Lorenzo, though permanently resident in the UK, has dual nationality, British and Spanish. But Lord Sumption says at paragraph 66 of *Benkharbouche* that the distinction between acts *juri imperii* and *jure gestionis* does not generally depend on either the nationality or the place of residence of the claimant employee. EJ Segal was in my view right to hold in the ET that there is a tension between two competing principles: (1) that immunity should apply between a state and its nationals and (2) that immunity should not apply in respect of locally recruited staff who are nationals of and permanently resident in the forum state. He described it as "almost, though not quite a coincidence" that she had Spanish nationality. She was a member of locally recruited staff who spoke Spanish (which was essential) and happened to have dual nationality. The case might have been different if Spanish nationality had been a prerequisite for employment. But that is not what happened in this case. The message of *Benkharbouche* is that the nature of the job is generally of much greater significance than the nationality of the post-holder.

Disapplication of s 4(2)(a) of the State Immunity Act 1978

31. I agree with Ellenbogen J's observation that "once it is acknowledged that the Tribunal's finding as to the private law character of the acts in question is not susceptible of challenge, the rationale of the Supreme Court for the disapplication of s 4(2)(b) applies equally to s 4(2)(a)." Like her, I would uphold the decision of EJ Segal disapplying s 4(2)(a) of the 1978 Act in Ms Lorenzo's case.

Diplomatic immunity

32. With the exception of the *Kramer Italo* case decided by the Nigerian Court of Appeal 30 years ago there appears to be no authority to contradict the established principle that diplomatic immunity is personal to the diplomatic agent concerned (giving, for example, immunity from prosecution) and cannot be invoked by the agent's sending state. The immunities of diplomatic agents are in some significant respects wider than those of the state: see *Benkharbouche* at [28]. If it were indeed possible for a state to rely on diplomatic immunity it seems to me that the cases of *Benkharbouche* and *Janah* (both brought by domestic staff working for diplomatic agents) would have been struck out without the complex arguments on state immunity which took them to the Supreme Court.

Delay

33. I must record my dismay at the fact that we are now nine years from Ms Lorenzo's alleged constructive dismissal, without the merits of her case yet having been tried. It was entirely sensible for the ET claim to be stayed in September 2016 for what turned out to be just over a year until the Supreme Court had delivered judgment in *Benkharbouche.* But after that judgment had been given the case was before the employment tribunal for a further three years and eight months and the Employment Appeal Tribunal for almost two and a half years, including ten months during which judgment was reserved. If the case cannot now be settled it should be heard on its merits

in the ET without further delay. Whatever its outcome, Ms Lorenzo may understandably feel that the English ET system has not treated her well.

Conclusion

34. I would dismiss the appeal on all grounds. I would also invite further submissions in writing from the parties and from the Secretary of State as to whether we should make a declaration that s 4(2)(a) of the State Immunity Act 1978 is incompatible with the ECHR.

Lord Justice Baker

35. I agree.

Lady Justice Andrews

36. I also agree.