Neutral Citation Number: [2023] EAT 149

Case No: EA-2022-000096-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 December 2023

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

THE ROYAL EMBASSY OF SAUDI ARABIA (CULTURAL BUREAU)
Appellant

- and –

MS A ALHAYALI
Respondent

- -

Claire Darwin KC and Andrew Legg (instructed by Reynolds Porter Chamberlain LLP) for the **Appellant**
Madeline Stanley (instructed by Saltworks Law Ltd) for the **Respondent**

Hearing dates: 4th – 5th October 2023

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JUDGMENT

SUMMARY

Jurisdictional points – state immunity

Having (through its then solicitors) accepted the jurisdiction of the Employment Tribunal ("ET") over claims derived from EU law, the respondent subsequently sought to reassert state immunity, relying on an official stamped (but unsigned) statement from the Embassy stating that no authority had been given to the former solicitors to waive state immunity. The ET concluded, however, that the respondent had validly submitted to its jurisdiction, going on to find that the claimant's employment was not an exercise of sovereign authority, nor were acts of sovereign authority pleaded to which state immunity could attach. In the alternative, the ET found that pursuant to section 5 of the State Immunity Act 1978 ("the SIA") state immunity would be disapplied in respect of the claimant's claim that the respondent caused her psychiatric injury, this being a claim for personal injury.

The respondent appealed.

Held:

The fact that a statement had been produced by the Embassy did not mean that the ET was bound to accept its content; however, in this case the ET had in failing to give the statement *any* weight. Furthermore, when considering whether the functions performed by the claimant fell within the sphere of sovereign activity, the ET's analysis had lacked precision and had elided the questions it was required to consider (*Benkharbouche v Embassy of Sudan* [2017] ICR 1327 SC and the provisions of the State Immunity Act 1978 (Remedial) Order 2023 applied). Applying the correct test to the ET's findings of fact, it was apparent that the claimant was participating in the public service of the Embassy, not merely its private administration. As there could only be one correct legal outcome on the ET's findings of fact, there was no scope for remitting this issue and, in this respect, its decision on sovereign immunity must be set aside. That said, there was no basis for considering that the case of *Federal Republic of Nigeria v Ogbonna* [2012] 1 WLR 139 EAT had been wrongly decided and the ET had not erred in following and applying that decision, holding that section 5 SIA disapplied sovereign immunity in respect of the claimant's claim for psychiatric injury.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction and factual background

1. I shall refer to the parties as they were before the Employment Tribunal ("ET") i.e. as Claimant and Respondent. This is an appeal by the Respondent against a decision made on 7 January 2022 by Employment Judge Brown ("the EJ") following a Preliminary Hearing.

2. The Claimant was employed by the Respondent between January 2013 and January 2018 in the Respondent's Academic and Cultural Affairs departments. On 30 January 2018 she made claims to the ET under a number of heads. The claim was eventually served through diplomatic channels.

3. In grounds of resistance dated 15 February 2019, the Respondent asserted state immunity under the State Immunity Act 1978 ("the SIA"):

> **"It is averred that the Tribunal does not have jurisdiction to hear the Claimant's claims (or, alternatively, some of the claims) by reason of the Respondent's reliance on the State Immunity Act 1978 (SIA 1978) and the related provisions of the Vienna Convention on Diplomatic Relations ('the Vienna Convention'), incorporated into English law by the Diplomatic Privileges Act 1964."**

4. At a preliminary hearing ("PH") on 19 March 2019 the Claimant was permitted to file amended grounds of claim and the Respondent was ordered to make clear, in amended grounds of resistance, whether it conceded that the ET had jurisdiction over such claims as were derived from EU law i.e. for discrimination on grounds of religion and belief, discrimination on grounds of disability, harassment related to sex and religion, victimisation and unpaid holiday pay.

5. By an email dated 9 April 2019 from its then solicitors, Howard Kennedy LLP, the Respondent accepted that the ET had jurisdiction over the claims derived from EU law. In due course the Claimant would withdraw her other claims i.e. those based only on domestic law, for unfair dismissal, unlawful deductions and breach of contract.

6. The litigation continued and both parties took various procedural steps. Eventually a final hearing was listed for 8 days from 21 February 2022.

7. On 4 August 2021 the Respondent's solicitors made an application for that hearing to be vacated, stating that the Respondent was now "reasserting state immunity".

8. The ET listed a PH on 30 November and 2 December 2021 to determine whether the Respondent had submitted to its jurisdiction by its email of 9 April 2019 or by taking steps in the proceedings up to 4 August 2021 and, if it had not, whether the Respondent had the benefit of state immunity.

9. By a judgment dated 7 January 2022 the EJ decided that:

    i. the Respondent had validly submitted to the ET's jurisdiction with the authorisation by the Head of Mission or his deputy;

    ii. the Respondent's employment of the Claimant was not an exercise of sovereign authority and so the ET had jurisdiction to hear the complaints based on EU law;

iii. there were no particular acts of sovereign authority pleaded by the parties to which state immunity could attach; and

iv. even if the Respondent otherwise had state immunity, this was disapplied by section 5 of the SIA in respect of the Claimant's claim that the Respondent caused her psychiatric injury, this being a claim for personal injury.

10. Permission to appeal was granted by the President, Mrs Justice Eady, on 31 January 2023. The appeal proceeds on the following grounds:

i. The Employment Tribunal ("ET") erred in law in failing to give due weight to the official stamped statement from the Embassy (as set out at [J/82]) that no authority had been given to Howard Kennedy LLP to waive state immunity in this matter, and as a result the ET should not have found that there had been a waiver of state immunity.

ii. Having regard to *Benkharbouche v Embassy of Sudan* [2017] ICR 1327 (SC) ("*Benkharbouche*") and to the State Immunity Act 1978 (Remedial) Order 2023 ("the Remedial Order") which came into effect on 23 February 2023, the ET should have considered whether the functions performed by the Claimant fell within the sphere of sovereign activity, not (as the ET incorrectly considered) whether her role fell into the middle category of embassy employees (technical and ancillary) identified by Lord Sumption, a matter that was not in dispute.

iii. In applying *Benkharbouche* (and having regard to the Remedial Order), the ET failed properly to consider the context in which the Claimant carried out her functions.

iv. In finding that the Claimant was entitled to rely on the personal injury exception to immunity in section 5 of the SIA, and in placing reliance on *Federal Republic of Nigeria v Ogbonna* [2012] 1 WLR 139 (EAT) ("*Ogbonna*"), the ET took an overly literal approach to statutory construction and the interplay between sections 4, 5 and 16 of the SIA rather than a broader construction that took into account international law.

v. Alternatively, *Ogbonna* was wrongly decided and the ET erred by relying on it, because the EAT in that case was not referred to additional authorities and legal materials which support a construction of s.5 of SIA that limits the exception to state immunity to physical or bodily injury rather than psychiatric injury.

Legal framework

11. The legal principles relating to state immunity under the SIA were authoritatively explained by the Supreme Court in *Benkharbouche*. This judgment seeks to summarise them to the extent necessary for present purposes.

12. International law gives effect to the sovereign immunity of states by limiting the rights of the courts or tribunals of one state to exercise authority over other states. In the UK, the general principles of state immunity used to be applied by way of common law rules. At one time there was a doctrine of absolute immunity, but in the 1970s in the UK this gave way to a more restrictive doctrine which had been accepted in many other countries, recognising state immunity only in respect of those acts done by a state in the exercise of sovereign

authority[1], as opposed to acts of a private law nature such as might be done by any private party[2].

13. The UK Parliament passed the SIA in 1978 for several purposes. One was to give effect to a pair of international treaties, referred to as the "Brussels Convention" of 1926 and the European Convention on State Immunity of 1972 ("ECSI"). Another was, more broadly, to codify the rules on state immunity as they were now understood.

14. The SIA provided in section 1 for a state to be immune from the jurisdiction of the courts of the United Kingdom except as provided in the following sections of Part I. The exceptions relate to a broad range of acts of a private law character, including widely defined categories of commercial transactions and commercial activities as well as contracts of employment and enforcement against state-owned property used or intended for use for commercial purposes.

15. As I shall explain, amendments to the SIA were necessitated by the decision of the Supreme Court in *Benkharbouche*. The Remedial Order made the amendments with effect from 23 February 2023 i.e. after the ET's decision, but they apply to any cause of action arising on or after 18 October 2017 and they may therefore be relevant to some of the Claimant's allegations.

16. I now set out the main relevant provisions of the SIA, as originally enacted but with the relevant amendments noted in square brackets:

> 1 General immunity from jurisdiction.
>
> (1) 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.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.
>
> 2 Submission to jurisdiction.
>
> (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
>
> (3) A State is deemed to have submitted—
> (a) if it has instituted the proceedings; or
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—
> (a) claiming immunity; or

[1] In some of the authorities these are described in Latin as acts "jure imperii".
[2] Sometimes described as acts "jure gestionis".

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

…
4 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

[***paragraph (b) as amended reads:*** **"the State concerned is a party to the European Convention on State Immunity and** 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.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2)(b) above "national of the United Kingdom" means—
(a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen; or
(b) a person who under the British Nationality Act 1981 is a British subject; or
(c) a British protected person (within the meaning of that Act).

(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.

[*in the amended version subsection (6) is omitted*]

5 Personal injuries and damage to property.
A State is not immune as respects proceedings in respect of—
(a) death or personal injury; or
(b) damage to or loss of tangible property,
caused by an act or omission in the United Kingdom.

…
16 Excluded matters.
(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 concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;
**[*in the amended version the following is substituted for paragraph (a):*
"(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;
(aa) 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;]

(b) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.

[*in the amended version there is a new subsection (1A) containing definitions of terms such as "consular officer"*]

(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.

(3) This Part of this Act does not apply to proceedings to which section 17(6) of the Nuclear Installations Act 1965 applies.

(4) This Part of this Act does not apply to criminal proceedings.

(5) This Part of this Act does not apply to any proceedings relating to taxation other than those mentioned in section 11 above.

17. The Supreme Court decision in *Benkharbouche* in October 2017 concerned employment law claims by a number of employees of foreign embassies. The central question was whether the provisions of the SIA were incompatible with the right of access to a Court under Article 6 of the European Convention on Human Rights. Giving the judgment of the Court, Lord Sumption explained that provisions giving immunity to foreign states would be incompatible with Article 6 unless they were justified because they gave effect to the

requirements of customary international law. Thus a foreign state would have immunity from employment claims which arose out of their inherently sovereign or governmental acts.

18. In this regard Lord Sumption said:

> 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, trading or commercial, or otherwise 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, ie 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: see *Governor of Pitcairn and Associated Islands v Sutton* (1994) 104 ILR 508 (New Zealand Court of Appeal). However, I find it difficult to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act jure gestionis. The employment of such staff is not inherently governmental. It is an act of a private law character such as anyone with the necessary resources might do."

19. The Supreme Court considered section 4(2)(b) of the SIA, which extended immunity from employment claims to claims brought by employees who were nationals or habitual residents of third countries, "irrespective of the sovereign character of the relevant act of the foreign state" ([64]). This, Lord Sumption explained at [67], was not justified by any binding principle of international law. Therefore section 4(2)(b), and also section 16(1)(a) which similarly barred any claim brought by a member of a mission or consular post, were incompatible with Article 6.

20. Lord Sumption further ruled at [78] that, for the same reasons, the sections also violated Article 47 of the EU Charter of Fundamental Rights, which provides:

> **"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article."**

21. The remedy for incompatibility with Article 6 was merely the making of a Declaration of Incompatibility, but the remedy for the violation of Article 47 (i.e. of EU law) was the disapplication of the relevant provisions of the SIA. Therefore the relevant provisions were not applied to those claims, such as discrimination claims, which were derived from EU law, and those claims were remitted to the ET. However the provisions of the SIA were effective to bar the purely domestic law claims, which therefore failed.

The hearing before the ET

22. The EJ had to decide the distinct questions of (1) whether the Respondent had validly submitted to its jurisdiction for the purposes of section 2 of the SIA and in the alternative (2) whether the Respondent was generally entitled to immunity under the SIA and, if so, whether the Claimant had brought a personal injury claim falling within an exception to such immunity.

23. On the first question she heard evidence from Ms Amel Trabelsi, the Respondent's Student Compliance Adviser. Ms Trabelsi's job was to provide support and advice to Saudi students who were studying or hoping to study in the UK. She told the EJ that she had no legal qualifications or experience and that she never had any authority to make any decisions about any affairs of the Embassy or the Cultural Bureau or any staff. She first heard about this case at a meeting in 2018 when the Cultural Attaché, a Mr Almagushi, introduced her to a Ms Murray-Hinde who was a partner at Howard Kennedy LLP. Ms Trabelsi said that the sole direction given by the Attaché to the solicitors at the meeting was to claim state immunity. The Attaché simply asked Ms Trabelsi to provide any information which Ms Murray-Hinde might require and to process her fee invoices. She believed that she had been chosen for this role because she speaks Arabic and English. No other person at the Cultural Bureau communicated with Ms Murray-Hinde. Ms Trabelsi occasionally updated the Attaché about the case.

24. No solicitors' file was disclosed but the EJ was shown some emails to and from the solicitors.

25. On 8 April 2019 Ms Murray-Hinde emailed Ms Trabelsi, saying:

> **"As you know, the orders made at the Preliminary Hearing on 19 March 2019 required a response from us on or by 9 April 2019. In short, we need to confirm the following: 1. Whether we wish to file an amended response in relation to jurisdictional points, and/or of the SACB's standing within the Embassy - my view is that we do not need to do so and we can simply confirm this. 2. SACB's position re mediation. As I previously advised judicial mediation would come at a cost. At this time, we do not know whether any of the Claimants will stay all of their claims, or opt to pursue only the discrimination ones…"[3]**

26. The EJ inferred from that email that Ms Murray-Hinde must previously have communicated with Ms Trabelsi about the hearing on 19 March and the requirement for the Respondent to clarify its position on immunity (and also about mediation) and that there must have been

[3] The reference to "any of the Claimants" is because there were four claims, but only Ms Alhayali's claim is now relevant.

some discussion about the distinction (in light of *Benkharbouche*) between discrimination and other claims.

27. Ms Trabelsi replied, saying: "We agree with your point 1 and point 2 so please go ahead." Her evidence to the ET was that (1) she thought Ms Murray-Hinde meant that the Respondent would simply "confirm the original default position of immunity", (2) Ms Murray-Hinde had not explained the legal implications of submission to jurisdiction and she did not know what this meant and (3) she replied under pressure of time.

28. On 9 April 2019 Ms Murray-Hinde again emailed Ms Trabelsi, copying in another individual called Alaa Al-Alem from whom the ET did not hear. Ms Murray-Hinde's email said:

> **"Thank you for confirming your instructions yesterday. I have this morning emailed the Tribunal in each of the four Tribunal claims to confirm that (1) the SACB accepts the claimants can pursue claims deriving from EU-law, and (2) that the SACB is not minded to consider settlement at this time."**

29. The EJ pointed out that although this was at odds with what Ms Trabelsi has said was her understanding of what was happening, there was no evidence that Ms Trabelsi ever questioned what had happened.

30. According to Ms Trabelsi, the position changed after a Dr Altmani, the Head of Legal Affairs, came to the Cultural Bureau in early 2020 and learned that there had been a submission to jurisdiction.

31. The EJ described the evidence about the Respondent's instructions to its solicitors as "partial and unsatisfactory", noting that she did not have the solicitors' file, or any file note of the initial meeting in 2018 between Ms Trabelsi and Ms Murray-Hinde, or any statement from any solicitor, or any evidence from the Attaché, Dr Altmani or Alaa Al-Alem, or any statement from the Ambassador or his Deputy. Instead she was given "an unsigned statement from the Saudi Embassy saying that neither the Ambassador nor his Deputy had given authority to Ms Amel Trabelsi or anyone at the Cultural Bureau to waive state immunity".

32. The "unsigned statement" is important for this appeal because it provides the basis for ground 1. It consists of a single sheet bearing the letterhead of the Royal Embassy of Saudi Arabia. At the bottom, in the manner of a signature, are the words "Royal Embassy of Saudi Arabia" followed by the Embassy's stamp. Above that, it states:

> **"24 November 2021**
>
> **The Embassy provides this statement for the sole purpose of asserting state immunity.**
>
> **The Embassy hereby confirms that the Ambassador (including His Excellency Mohammed bin Nawwaf bin Abdulaziz for the period from 2007 to 2019, and His Excellency Khalid bin Bandar Al Saud for the period from 2019 to present) is the only person authorized by the Saudi Government to waive any immunity including state immunity. This applied in 2019, at the time the email dated 9 April 2019 was purportedly sent by Howard Kennedy on behalf of the Royal Embassy of Saudi Arabia (Cultural Bureau). Neither the Ambassador nor anyone working on his behalf has waived state immunity with respect to the ongoing proceedings between Ms Alhayali and the Cultural Bureau. Moreover, neither the Ambassador nor any one working on his behalf has given authority to Ms Amel Trabelsi or anyone at the Cultural Bureau to waive state immunity in the above matter.**
>
> **The Royal Embassy of Saudi Arabia does not waive any privileges or immunities in this statement,**

nor does it submit to the court's jurisdiction in the above matter."

33. Ms Trabelsi was the only witness on the question of whether Howard Kennedy LLP were given proper authority to submit to the jurisdiction. She denied that she had given them any such instructions or that she had been authorised by anyone to do so. But the EJ, noting that jurisdiction was conceded on 9 April 2019 and that that remained the position for about 2 years and 4 months thereafter while steps were taken in the proceedings, said:

> **"105. However, Ms Trabelsi's evidence was not credible. She clearly did give instructions to Howard Kennedy. She was given advice by Howard Kennedy and never queried it, nor said that she did not understand it. She communicated decisions to Howard Kennedy on the basis of that advice. I did not accept that she did not understand that she was giving instructions. The plain wording of Howard Kennedy's communications asked for approval to take important actions in the proceedings and Ms Trabelsi replied using words which indicated that she understood the content of the communications.**
>
> **106. It was not credible that Ms Trabelsi acted alone, without securing official approval for her communications with Howard Kennedy. In her evidence to the Tribunal, Ms Trabelsi emphasized her lack of experience in legal matters and her limited role. It was inconceivable that such a junior employee would have taken it upon themselves to make decisions about the conduct of the proceedings without seeking authority to do so. Such conduct would have been inexplicably reckless and incompetent in the extreme."**

34. The EJ also did not believe that the Respondent would have permitted Ms Trabelsi, who had no legal experience, to correspond with the solicitors for such a long period without supervision, and she found it "very difficult to believe" that experienced specialist solicitors would act without establishing that the person giving instructions had authority to do so.

35. Having directed herself that no steps in the proceedings would constitute waiver (i.e. submission to jurisdiction) unless they were authorised by the head of the mission or a person authorised by the head of the mission, and that the doctrine of ostensible authority did not apply, the EJ went on to find:

> **"114. On the facts that I have set out, I infer that Ms Trabelsi was authorised by the Ambassador or his deputy to give instructions to Howard Kennedy. I note the words of Parker LJ in *Baccus SRL v Servicio Nacional del Trigo [*1957] 1QB 438 at 474. I cannot believe that such a junior employee as Ms Trabelsi acted as she did, giving instructions to Howard Kennedy in legal proceedings against the Respondent, without having been given authority by the relevant person – the Ambassador or his Deputy - to do so. I cannot believe that Ms Trabelsi's correspondence was not reviewed by a senior person in the Embassy acting under the instruction of the Ambassador. I cannot believe that the Respondent submitted to the jurisdiction on 9 April 2019 and continued to do so for more than 2 years, without the Ambassador being aware of this and having agreed to it.**
>
> **115. I decide that the Respondent submitted to the jurisdiction in respect of the Claimant's EU law-derived claims and that the Head of Mission, or his deputy, authorised this."**

36. Then, on the question of whether the Respondent's employment of the Claimant was an exercise of sovereign authority and therefore attracted immunity, the EJ made findings based on the Claimant's own evidence. She rejected evidence from two other witnesses, who described the Claimant as having management and decision-making responsibilities, as unreliable. She found the following:

    i. The Claimant was employed in 2013 under a contract which identified her role as "Student Services coordinator". Until July 2015 she worked as an Academic Adviser in the Respondent's Academic department, handling requests from Saudi students studying in the UK, e.g. for financial guarantee letters or travel tickets. She would consider the requests and check that the student had supplied the necessary

supporting documentation. If the documentation was complete, the Claimant would forward the request and documentation to her head of department. She did not sign guarantee letters herself.

ii. During this period she also received academic reports on students from their universities and uploaded these to a computer system. If a student was not obtaining good grades or had failed part of their course, the Claimant would report this to the Head of Department.

iii. From July 2015 to September 2017, she worked in the Cultural Affairs department on cultural projects which Saudi students at UK universities wanted to set up, such as academic conferences or art exhibitions. The student would make a request for funding and support to Dr Bin Ghali, Head of the Cultural Affairs department. The Claimant would then write a report for Dr Bin Ghali which summarised the project and outlined its requirements, such as room hire and catering. Dr Bin Ghali would discuss the proposal with the Cultural Attaché, who would decide whether to support the project and offer funding. If a project was approved, the Claimant would ask various UK universities whether they would host the event and send out notifications to Saudi students about it.

iv. The Claimant attended Saudi student conferences and exhibitions. She helped the students to set up exhibits, discussed them with visitors and helped Saudi students to explain their art to British students and teachers, and also helped sort out technical problems at the venue. She was also an editor for a cultural journal which the Embassy released every three months. Dr Bin Ghali's secretary sent articles for her to proofread, she would then forward them to Dr Bin Ghali, the Head of the Department, who would decide which articles would be included in the magazine.

v. For around 3 months the Claimant worked on a project to translate well known books by Saudi writers, selected by Dr Bin Ghali and the Cultural Attaché, from Arabic into English.

vi. She was only copied into emails to or from Dr Bin Ghali which were directly relevant to her own work. When Dr Bin Ghali wrote to the Cultural Attaché, he did not copy her into that correspondence.

vii. She was given little or no work from March 2017, until she was transferred to the Respondent's Ticketing Department on 18 September 2017 to arrange student travel, but in that final period until January 2018 she remained absent from work.

37. Analysing the case by reference to *Benkharbouche*, the EJ decided:

i. Although the Respondent's activity of promoting the culture and traditions of a foreign State and protecting the interests of their nationals whilst studying abroad may have been inherently governmental, all of the Claimant's duties "were truly ancillary and supportive to this, as described by Lord Sumption in *Benkharbouche*".

ii. The Claimant had no "important decision-making functions, but referred any non-standard matters to her Head of Department".

iii. "All these were functional, practical, supportive duties" and were "'essentially ancillary and supportive' to the governmental functions of the Respondent".

iv. "The Claimant's correspondence with external bodies was confined to correspondence concerning students and their universities. This was not a governmental matter but involved making practical arrangements for Saudi nationals studying abroad."

v. Although she provided the secretarial services necessary to operate Dr Bin Ghali's office, she did not type communications between him and Government officials or his official instructions.

vi. Dealing with requests for letters of guarantee and funding for travel and arranging travel for Saudi students was "purely practical and administrative" and "had little connection with any governmental function of the mission".

38. The EJ therefore rejected a submission by Ms Darwin KC, representing the Respondent, that "because the Claimant's job role assisted the Respondent to carry out its governmental functions as described in Article 3 of the Convention on Diplomatic Relations, her employment was an exercise of sovereign authority".

39. At paragraphs 189-190 of her judgment, the EJ referred to Lord Sumption's observation that the employment of some merely technical and administrative staff might be an exercise of sovereign authority if their functions were "sufficiently close" to the Governmental functions of the mission. She distinguished this case from *Governor of Pitcairn and Associated Islands v Sutton*, where a secretary's role "encompassed typing governmental-level communications". She considered that the present case more closely resembled *Cudak v Lithuania* where an applicant failed to demonstrate that administrative functions such as typing, faxing, photocopying and organising events were related to the sovereign interests of the Polish Government. In the present case, she concluded at [194], "the Claimant's functions were not 'close' to the governmental functions of the mission; they were relatively low-level ancillary and supportive functions."

40. The EJ also ruled that the Claimant could rely on the exclusion from state immunity under section 5 of the SIA because her claim, though a discrimination claim within the field of employment law, was a claim for personal injury within the meaning of section 5. In that regard she followed the decision of Underhill P in this Tribunal in *Ogbonna* [2012] 1 WLR 139.

41. Again following *Ogbonna*, the EJ also rejected a submission on behalf of the Respondent that the phrase "personal injury" in section 5 should be construed, reflecting principles of international law, as extending only to physical injury and not to psychiatric injury.

Ground 1

The parties' submissions

42. Ms Darwin KC, leading Andrew Legg of counsel, accepted that the Respondent had informed the ET that it accepted jurisdiction by Ms Murray-Hinde's email of 9 April 2019, and that it had gone on to take steps in the proceedings. Therefore jurisdiction might have been accepted expressly under section 2(2) and/or by the deeming provision of section 2(3)

of SIA. However, both are subject to the requirement of section 2(7) that such acceptance should be by "the head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions". In this case the head of mission was the Ambassador.

43. So, as Pill LJ said in *Republic of Yemen v Aziz* [2005] EWCA Civ 745, [2005] ICR 1391 in respect of the deemed waiver of immunity:

> **"56 Section 2(3) should, however, be read in the light of authority of long standing establishing the importance of state immunity and the importance of its not being waived except with appropriate authority. The fact that the step in proceedings alleged to constitute the waiver is taken by solicitors instructed by the embassy does not conclude the matter. A solicitor acting without authority cannot waive the immunity. The solicitor's actions establish a waiver only if they have been authorised by the state, which includes authority exercised or conferred by the head of the state's diplomatic mission. That would include a step authorised by the head of mission himself or herself. Authority may be conferred on the solicitors either directly or, in my view, indirectly by a member of the mission authorised by the head of mission to do so."**

44. Ms Darwin also relied on *Arab Republic of Egypt v Gamal-Eldin* [1996] ICR 13 ("*Gamal-Eldin*") where it was decided (by Mummery LJ at page 21F) that this requirement applies to an express waiver of immunity and not just to a deemed waiver.

45. Ground 1, as I have said, is based on the unsigned statement dated 24 November 2021. Ms Darwin also referred to it as a "certificate", perhaps to reflect the fact that it is not the statement of an identified individual.

46. Ms Darwin referred me to some authorities concerning certificates generally.

47. First, she points out that the concept of a certificate having evidential value is recognised in the SIA. Section 13(4) provides that although State property is generally immune from process for enforcement of judgments, enforcement is permissible against property which is in use or intended for use for commercial purposes. Section 13(5) provides that a certificate given by the head of a diplomatic mission to the effect that property is not in use or intended for use for commercial purposes "shall be accepted as sufficient evidence of that fact unless the contrary is proved".

48. Meanwhile section 21 is entitled "Evidence by certificate" and provides for a certificate by the Secretary of State (rather than by any official of a foreign state) to be evidence of certain facts about other states, e.g. whether a country is in fact a state for the purposes of Part 1 of the Act.

49. Ms Darwin also refers to a passage in *Phipson on Evidence* (20th edition) at paragraph 32-93:

> **"The certificates, letters or returns of public officers, entrusted by law with authority, for the purpose, are prima facie, but not generally, conclusive, evidence at common law of the facts authorised to be stated, but not of extraneous matters. Thus in *Krajina v Tass Agency*, a certificate from a foreign ambassador that a company was part of the organisation of a department of his state was received."**

50. *Phipson* goes on to explain at 32-94 that:

> **"The ground upon which such documents are admitted is that where the law has appointed a person to act for a specific purpose, it will trust him so far as he acts under his authority."**

51. Ms Darwin also relies on a passage from volume 18 of *Halsbury's Laws* under the heading "Admissibility of certificates" at paragraph 944:

> **"At common law the general rule was that certificates were not admissible in evidence to prove the facts stated in them. Some certificates, however, were admissible at common law, and are now admissible in civil cases by statute, as being public documents. Certain other certificates were admissible at common law as exceptions to the rule against hearsay; they are now only admissible in civil cases to prove the facts stated in them if they comply with the provisions of the Civil Evidence Act 1995.**
>
> **Where the court acts upon a certificate by the Secretary of State as to the existence or non-existence of a state of war, or as to the sovereign status of a foreign power or individual, the proper view is that it is not receiving evidence, but is taking judicial notice."**

52. In the different context of deciding whether expert evidence can be adduced in civil proceedings otherwise than by way of a report complying with Part 35 of the Civil Procedure Rules, Judge Paul Matthews (sitting as a Deputy Judge of the High Court) noted in *Swiss Independent Trustees SA v Sofer and others* [1012] EWHC 12 (Ch) at [39]:

> **"… there are several pre-CPR authorities holding that foreign law may be proved by the certificate of the relevant ambassador: see eg *In bonis Dormoy* (1832) 3 Hagg Eccl 767, *In bonis Klingemann* (1862) 32 LJ Prob 16, *In bonis Oldenburg* (1884) 9 PD 234; *Krajina v Tass Agency* [1949] 2 All ER 274 CA. Since Part 35 is not exclusive, I do not doubt that such certificates would still be admissible today, though not conclusive."**

53. Ms Darwin also argues that special considerations apply in cases concerning sovereign immunity. She notes provisions of the Vienna Convention, incorporated by the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968, whereby diplomatic agents and members of consular posts are not obliged to give evidence in this jurisdiction. She argues that it would not be unreasonable for embassy officials to think that it would be inappropriate to give witness evidence. She suggests that this occurred in *Gamal-Eldin*, where the state of Egypt did not give evidence in the tribunal at first instance because an official considered that it would not be correct for anyone to attend, and where the EAT allowed its appeal and ruled that the tribunal had had no jurisdiction, applying the duty under section 1(2) of SIA to give effect to immunity even where the state does not appear in the proceedings.

54. Ms Darwin relies on *Krajina v Tass Agency*, to which reference was made in two of the extracts quoted above and in a footnote to the passage from *Halsbury*. In *Krajina* the Court of Appeal, applying common law principles, ruled that the Soviet news agency Tass was a department of the state of the USSR and therefore benefited from sovereign immunity. That fact had been stated in a certificate by the ambassador, which was exhibited to the affidavit of a witness. Tucker LJ at page 281H said:

> **"… it is common ground that the certificate of their ambassador in this country is not conclusive of the matter, though, no doubt, it is evidence of very high evidential value, and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured."**

55. Ms Darwin also referred to *Malaysian Development Authority v Jeyasingham* [1998] ICR 307. There an official entered a notice of appearance in response to an unfair dismissal claim, apparently submitting to the jurisdiction on behalf of a state authority. The ET heard evidence from a solicitor and saw the draft affidavit of the High Commissioner to the effect that the solicitor had wrongly advised the official to waive immunity whilst the High Commissioner had thought immunity should be claimed. The ET found that their account of events had been invented as a device to avoid a finding of waiver. This Tribunal allowed an

appeal, holding that any appearance that the official's act was authorised by the High Commissioner had to yield to the solicitor's sworn evidence that the High Commissioner had said that he had not given authorisation. Judge Hull QC, at 316G, said that most courts and tribunals, rather than inferring that an official had been given the necessary authority by the head of mission, "would in fact seek the certificate of the High Commissioner or some other evidence of his express submission to the jurisdiction". He continued, citing the passage from *Krajina* quoted above:

> **"Who, apart from the High Commissioner, could give better evidence of the fact that he had not submitted to the jurisdiction? Who, apart from a solicitor, could be better qualified to convey that message?"**

56. It is also of note that rule 41 of the Employment Tribunals Rules of Procedure provides that the ET "is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts".

57. I have not found any of these materials to be decisive.

58. As the Claimant's counsel Madeline Stanley pointed out, section 13(5) of the SIA is if anything unhelpful to the Respondent. Although it contemplates the certificate of an ambassador being admitted in evidence, it does so for a specific purpose and therefore does not tend to suggest that Parliament contemplated such a certificate being used for any other purpose. It also highlights the difference between a certificate given by an ambassador and a certificate given, as in this case, merely in the name of the Embassy. Meanwhile, certificates of the Secretary of State under section 21 are given for a different purpose and, in my judgment, do not shed light on the question.

59. The point made in *Phipson* expressly depends on showing that the person giving the certificate is entrusted by law to give it. Official certificates may have an important part to play in public life, e.g. to prove a person's professional qualifications. That does not shed light on the evidential weight to be given to the anonymous certificate in the present case.

60. The passage from *Halsbury* does not in fact state any proposition which is relevant to the question before me.

61. The extract from *Swiss Independent Trustees* deals with admissibility in a civil court, which is a question that does not directly arise in an Employment Tribunal. The passage suggests that the certificate of an ambassador is admissible to prove foreign law but that it is not conclusive. In the present case the EJ did not make any ruling about admissibility and, in any event, the certificate was not given by the Ambassador.

62. *Krajina* is somewhat closer to the present case, indicating that the Courts would accord "very high evidential value" to the certificate of an Ambassador as to one of the facts making good a claim to sovereign immunity. There are, however, two significant differences from the present case. First, in this case the certificate was not given by the Ambassador but by the Embassy. Second, in *Krajina* the certificate was exhibited to an affidavit sworn by a witness who could, if necessary, have been questioned on it.

63. Meanwhile, as Ms Stanley said, *Jeyasingham* must be read in its context, i.e. as a case in which this Tribunal overturned a controversial finding by an ET for perversity.

64. It is, however, a second case (after *Krajina*) which (1) refers to the possibility of a "certificate" providing the necessary evidence and (2) approves the use of hearsay evidence to prove facts on behalf of a diplomat who considers it inappropriate to give evidence in person.

65. Despite the differences between those cases and this one, Ms Darwin submits that the Embassy's certificate was nevertheless an important document which deserved weight. She submits that on a proper analysis of the judgment, the EJ erred by failing to accord any weight to it. She further submits that while wholly disregarding a material piece of evidence would be an error in any event, the error was heightened in this case because section 1(2) of SIA imposes a duty of inquiry on courts or tribunals which are considering state immunity. Ms Darwin submits that by rejecting or disregarding the certificate, the EJ was in effect finding that the certificate was prepared without the input of the Ambassador, and/or that its contents were untrue. She submits that there was no proper basis for the EJ to make those very serious findings.

66. In response, Ms Stanley submits that the EJ's finding that submission to jurisdiction was authorised was a finding of fact. Normally an ET's findings of fact can be challenged in the EAT only on the ground of perversity, and in this case there is no perversity ground of appeal. She also characterises ground 1 as being a challenge to the EJ's decision on what weight to give to the certificate, and notes that the attribution of weight is a matter for the fact-finding tribunal. Ms Stanley resists the suggestion that there is any rule of law which requires any particular weight to be given to a "certificate" of this kind, or any other reason why that document should carry any particular weight. She contends that *Krajina* is of little assistance because the observations relied upon were obiter and also the relevant evidence in that case was agreed to be the evidence of the Ambassador.

67. In support of those submissions Ms Stanley reminds me that the certificate was not a witness statement and was not supported by a statement of truth signed by any individual. It is more like a pleading than a statement. The identity of its author is unknown and it does not appear to have been prepared by solicitors.

68. Nor, Ms Stanley argues, is there any reason to conclude that the EJ failed to appreciate the nature of the certificate i.e. that it was an official stamped document.

Discussion

69. In my judgment, the difficulty is that the EJ did not appear to give the certificate or unsigned statement any weight at all. At any rate, nothing in her Reasons enables me to identify the weight that it was given.

70. In fairness to the EJ, I could understand her being exasperated by the way in which the Respondent dealt with this issue. Where solicitors had expressly accepted jurisdiction and that position was then reversed, it would be entirely reasonable for her to expect a full explanation of how the mistaken acceptance had come about and what had led to the change of position. That did not happen. I am told that that is because of a dispute between the Respondent and its former solicitors. And, as there is at least some precedent for the evidence of a head of mission being given in hearsay form as an exhibit (whether or not described as a certificate) to the evidence of a witness such as a solicitor on oath, it would be entirely reasonable for the EJ to be critical of a party resorting to a mere anonymous

statement or certificate of the kind used here without the document being exhibited to a witness statement.

71. It is also a matter of record that the EJ did not believe the evidence of Ms Trabelsi, who was the only live witness on the point. I have asked myself whether her findings in that regard made it unnecessary to decide what weight to give to the unsigned statement.

72. The problem is that, having rejected the suggestion that Ms Trabelsi acted without any authority at all, the EJ inferred that authority must have been given by the Ambassador or his deputy.

73. But the rejection of Ms Trabelsi's evidence did not logically compel that conclusion. The EJ did not explain why she did not infer that authority came from anyone else, such as the Cultural Attaché who was the only person mentioned in the evidence as supervising Ms Trabelsi in any way. That, it seems to me, was the crucial question once the EJ had rejected Ms Trabelsi's evidence.

74. I agree with Ms Darwin that, when that question came to be answered, it was necessary to give some weight to the unsigned statement. That is not to accord any special status to such a statement, but merely to recognise that it was put forward by an Embassy as an official document and that its contents ran directly contrary to the EJ's inference.

75. I do not conclude that there was only one possible outcome. That could be taken as authorising the use of such unsigned statements for this purpose in future, and that is not my intention. On the contrary, a state party in a situation such as this would be well advised to place formal witness evidence before the ET, as in *Krajina* or *Jeyasingham*. And where there has been a mistaken submission to jurisdiction, the party should expect to have to adduce candid witness evidence explaining exactly what went wrong. That would be consistent with the approach taken by courts and tribunals generally when a party seeks to withdraw a concession of any kind.

76. Nevertheless, I conclude that the EJ erred in law by not giving any weight, or any perceptible weight, to the unsigned statement.

Grounds 2-3

The parties' submissions

77. Essentially ground 2 depends on showing that the EJ applied the wrong test when deciding whether the Claimant's work attracted sovereign immunity, and ground 3 depends on showing that she reached the wrong outcome.

78. Ms Darwin reminded me of Lord Sumption's discussion, at paragraph 55 of *Benkharbouche* (quoted above), of the roles and activities within a diplomatic mission which are and are not "exercises of sovereign authority" attracting immunity. The present case, she submits, concerns one of those "technical and administrative staff" whose role, unlike that of a diplomat, is "essentially ancillary and supportive" but whose employment "might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission".

79. It is therefore clear, she submits, that an employee's role may be both "ancillary and supportive" and "sufficiently close to the governmental functions of the mission". The

crucial question in such a case is whether the functions discharged by the Claimant were sufficiently close to the governmental functions of the mission.

80. Ms Darwin submits that the EJ erred by trying to measure the responsibility given to the Claimant, rather as the Tribunal might in an equal pay claim, instead of deciding precisely what functions she was discharging. She continued that error, Ms Darwin contended, by asking whether the Claimant's work was "ancillary and supportive" instead of asking whether, though ancillary and supportive in nature, it was sufficiently close to the Governmental sphere of activity.

81. Ms Darwin submits that the outcome in this case should have been as it was in *Webster v USA* [2022] IRLR 836, where the EAT considered a pair of appeals against rulings that employment at a US Air Force base attracted sovereign immunity. The claimant in one case was a records manager, and the other was a firefighter. The EAT upheld findings by the ET that each employee was involved in discharging State functions.

82. In the present case, Ms Darwin submits, the relevant activities are recognised as diplomatic functions by Article 3.1 of the Vienna Convention:

> **"The functions of a diplomatic mission consist, inter alia, in:**
>
> **(a) Representing the sending State in the receiving State;**
>
> **(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;**
>
> **(c) Negotiating with the Government of the receiving State;**
>
> **(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;**
>
> **(e) Promoting friendly relations between the sending State and the receiving State, and developing economic, cultural and scientific relations."**
>
> **(emphasis added)**

83. The EJ appeared to accept that the Claimant's functions were "broadly supportive" of Article 3 functions but rejected the submission that this meant that her employment was an act of sovereign authority. Ms Darwin submits that this was an error, either because the test was wrongly framed or because the test was plainly satisfied on the facts as found.

84. In response, Ms Stanley submits that the EJ identified the right test by reference to paragraphs 53-55 of *Benkharbouche*, applied it and reached a factual conclusion which was open to her on the evidence. She points out that those employees to whom Lord Sumption's "sufficiently close" test falls to be applied will by definition be supporting sovereign functions to some extent, and therefore showing that they are supporting sovereign functions by itself is not enough.

85. Ms Stanley resists a suggestion by Ms Darwin that the provision of educational activities for a State's nationals is necessarily within the sphere of sovereign authority. Such activities were held by the House of Lords to be within that sphere in *Holland v Lampen-Wolfe* [2000] 1 WLR 1576, but in the same case Lord Clyde (at 1579-80) emphasized the difficulty, in some cases, of drawing the distinction between sovereign and non-sovereign activities and the need to assess the particular facts rather than trying to fit the case into a particular precedent or category.

86. In that context Ms Stanley emphasises the detailed nature of the EJ's findings and points out the contrast drawn between the Claimant's lower level activities and the more autonomous functions which she did not discharge, such as decision making.

Discussion

87. Whichever side of the line this case falls upon, it is close to the boundary. The answer is not obvious, as it would be for cleaning staff on the one hand or perhaps for some senior managers on the other. It was therefore a relatively difficult case to decide.

88. I also consider that, once a tribunal has made findings of fact about the duties of the employee in question, there can logically be only one right answer to the question as a matter of law. It has been suggested that two different EJs could validly arrive at different conclusions on the same facts, but in my judgment that cannot be right. Sovereign immunity removes the tribunal's jurisdiction. That cannot be done as a matter of individual impression, let alone discretion. So, although I agree that two EJs could reasonably disagree about the answer in a borderline case, it seems to me that one of those judges would be right, and the other wrong, as a matter of law.

89. I am therefore in no doubt that both grounds 2 and 3 raise a genuine issue of law. EJ Brown's findings of fact cannot be disturbed. Her conclusion based on those facts was either legally right or legally wrong.

90. It was first necessary to decide whether functions of a sovereign kind were being discharged at all. The EJ was slightly non-committal, saying at [183] that "the functions of the Respondent itself may have been inherently governmental". That, with respect, was not entirely satisfactory, because the exercise of analysis necessitated the clear identification of any sovereign activity in order to decide whether the Claimant's work was sufficiently close to it.

91. I am in no doubt that the work of the Respondent's Academic and Cultural Affairs departments, looking after the interests of Saudi students in the UK and promoting Saudi academic and artistic work, involved the exercise of sovereign authority. Those are functions identified in Article 3.1(b) and (e) of the Vienna Convention.

92. Ground 2 focuses on whether the EJ then asked the right question. The use of terminology is of clear relevance to that ground. Applying *Benkharbouche*, the test was not whether the Claimant's work was "ancillary and supportive" to the exercise of sovereign authority. It was whether her ancillary and supportive work was "sufficiently close" to that exercise. In the passage quoted at the end of paragraph 39 above, those different tests appear to have been elided.

93. Ground 3 focuses on the application and outcome of that test. In that regard it may be helpful to consider what work would definitely not be sufficiently close. Leaving aside the terms "ancillary" and "supportive", work of an insufficient kind might be described as being purely collateral to the exercise of sovereign authority. So, whilst the Head of the Cultural Affairs department was exercising sovereign authority, a person who cleaned his office was not. Nor was a person who drove him to work. A person who merely typed documents was probably not, though the *Governor of Pitcairn* case shows that a certain degree of trust or confidentiality might carry that individual across the line.

94. Then there was the example to which the EJ referred, of *Cudak v Lithuania*, where the European Court of Human Rights ruled that sovereign immunity did not apply. The Court stated at [70]:

> **"The Court observes in particular that the applicant was a switchboard operator at the Polish Embassy whose main duties were: recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events. Neither the Lithuanian Supreme Court nor the respondent Government have shown how these duties could objectively have been related to the sovereign interests of the Polish Government."**

95. That bare description may invite some comparison with the present case but, given the lack of detail, caution is needed and previous cases should not simply be used as precedents (see *Holland* above). We do not know what "providing information" or assisting with event organisation actually consisted of. And the final sentence of the quotation above suggests that a lack of evidence was material to the outcome. So I am not convinced that the comparison with *Cudak* was directly helpful.

96. In fairness to the EJ, it seems clear that some of the Claimant's activities, such as inputting information to a computer system, were of a purely clerical nature and purely collateral to any exercise of sovereign authority.

97. However, on the EJ's findings of fact, I have concluded that when the correct test of "sufficiently close" rather than "ancillary and supportive" is applied, in the context of what was an exercise of sovereign authority by the Embassy of a kind contemplated by the Vienna Convention, some of the Claimant's activities throughout the period of her employment passed the test. By sifting compliant and non-compliant guarantee requests, writing reports on funding requests and discussing art exhibits with visitors and British students and teachers, she played a part, even if only a small one, in protecting the interests of the Saudi state and its nationals in the UK and in promoting Saudi culture in the UK. To put it another way (reflecting French case law to which Lord Sumption referred in *Benkharbouche* at [56]), she was participating in the public service of the Embassy and not merely in the private administration of the Embassy.

98. I therefore conclude that ground 3 succeeds although, as I have said, this was a borderline and difficult case and it appears that the EJ was not greatly assisted by witness evidence called on behalf of the Respondent which she found to be unreliable.

99. I also allow the appeal on ground 2 on the basis that a lack of precision in the terminology of the analysis contributed to what I have found to be a legally erroneous outcome.

100. For the reasons I have explained above, there can be only one correct legal outcome on the EJ's findings of fact, and therefore there is no scope for remitting this issue to the ET.

Grounds 4-5

The parties' submissions

101. The Claimant's claims based on EU law included a claim for personal injuries consisting of psychiatric harm. Her case was that (1) even if sovereign immunity would otherwise apply to the claim, section 5 of the SIA disapplies it because this is a claim for personal injury, and

(2) for this purpose a personal injury claim includes a claim for psychiatric injury. As I have said, the EJ accepted those submissions, considering herself bound by *Ogbonna*.

102. By ground 4, Ms Darwin argues that on a proper construction of section 5 together with section 16, immunity applies to this claim in spite of its personal injury element. In the alternative, by ground 5, she argues that section 5 does not remove State immunity where the claim is for psychiatric injury rather than physical injury.

103. The relevant sections are quoted above. I now interpose a brief summary of their effect:

i. The starting point under section 1(1) of the SIA is State immunity, subject to the later sections.

ii. Section 4 removes the immunity in proceedings based on a contract of employment between the State and an individual if the contract was made in the UK or the work is to be wholly or partly performed there.

iii. Meanwhile section 5 provides that a State is not immune in a claim for death or personal injury, or loss of tangible property, caused by an act or omission in the UK. It makes no separate reference to proceedings based on a contract of employment.

iv. Section 16(1)(a) disapplies section 4 in proceedings based on a contract of employment where the employee is a member of a mission or consular post or, after the amendments, a diplomatic agent or consular officer or a member in whose case the employment or the conduct complained of was an exercise of sovereign authority.

v. Section 16 does not make express reference to section 5, though some of its provisions such as section 16(2) refer to "this Part" of the SIA i.e. all of sections 1-17.

104. Ms Darwin submits that the clear Parliamentary intention revealed by section 16 is for claims by relevant Embassy employees to attract immunity, and for that to override the exception to immunity for employment claims generally which section 4 creates. So, she submits, Parliament cannot have intended section 5 to mean that a claimant in employment law proceedings such as a discrimination claim, who would normally be met with a defence of sovereign immunity, could sidestep immunity purely by pleading personal injury as a head of loss.

105. But if section 5 does have that effect, then Ms Darwin submits that the exception to immunity should be confined to claims for physical injury rather than psychiatric injury so that the section is construed consistently with customary international law.

106. In support of both grounds, Ms Darwin contends that international law materials show that a narrow scope is given to "territorial tort" claims for which there is no immunity, and that such claims do not extend to claims for pure psychiatric injury.

107. The EAT case of *Ogbonna* (above) stands in Ms Darwin's path, because Underhill P there rejected both of the contentions which found grounds 4 and 5. EJ Brown considered that she was bound by that decision. Ms Darwin invites me to depart from *Ogbonna*, submitting that

it was wrongly decided because of a failure to take sufficient account of international law and/or because some relevant international law materials were not cited.

108. The parties agree that, as Singh J decided in *British Gas v Lock* [2016] ICR 503 at [75], I should not depart from a previous decision of this Tribunal unless (on the facts of this case) that decision was "*per incuriam, in other words where a relevant legislative provision or binding decision of the courts was not considered*", or it was "*manifestly wrong*" or there are "*other exceptional circumstances*".

109. In response, Ms Stanley emphasizes the limited role of international law materials in a case which turns on domestic law. She agrees that as a matter of principle, domestic law must be interpreted so as to comply with the UK's international obligations so far as possible, but the "so far as possible" qualification is an important reminder that international law is only an interpretive aid. Ms Stanley also emphasizes that the interpretive aid is supplied only by materials which reveal an international consensus and submits that there are no such materials which compel an interpretation in line with Ms Darwin's case.

110. So far as construction of the SIA is concerned, Ms Stanley points out that section 16(1)(a) narrows the scope of section 4 by disapplying it in particular cases, and it does not purport to have any effect whatsoever on section 5. She contrasts section 16(2), which expressly affects the application of all the sections in Part 1, thereby including section 5 as well as section 4, by dis-applying them to proceedings concerning foreign armed forces present in the UK. Ms Stanley submits that the meaning of these provisions is entirely clear and that there is therefore no scope for interpreting them as having a different meaning in light of international law materials.

Discussion

111. I begin with *Ogbonna*. The claimant, who was employed as a member of a diplomatic mission, brought a claim for associative disability discrimination in respect of her dismissal which she said had occurred because she sought time off to look after her ill daughter. She claimed to have suffered both physical and mental injuries as a consequence. The employer claimed state immunity, arguing that section 16(1)(a) prevented her from relying on section 4 to bring an employment claim, and that she could not rely on section 5 either (1) because section 16(1)(a) applied state immunity in respect of all employment claims by members of diplomatic missions regardless of section 5 or (2) because section 5 applies only to a claim for damages for a physical injury and not to harm to mental health unless it was consequent on a physical injury. Thus the two issues in this case were squarely in issue in *Ogbonna*.

112. As to the first point, Underhill P said at [12]:

> **"The first point, as helpfully elucidated by Mr Pipi in his skeleton argument and oral submissions, is that the effect of sections 4 and 16 taken together is that a state enjoys absolute immunity in respect of "proceedings relating to a contract of employment" which includes a claim of infringement of statutory rights: see section 4(6) – in the case of employees who are members of a mission, and that section 5 has no application in such a case. I cannot accept this submission. Sections 4 and 5 are separate and freestanding exceptions to the general rule of state immunity provided by section 1: that is so even though on the facts of a particular case, and specifically in a case of a claim for personal injury by an employee, both exceptions might be engaged. Section 16(1)(a) expressly qualifies that exception as regards section 4 but it has no impact on section 5."**

113. Underhill P accepted at [15] that the SIA, and section 5 in particular, should be construed so far as possible to conform to any recognised international norm because Parliament intended it to conform in the relevant respects to the terms of ECSI, whose terms were subsequently adopted by the United Nations Convention on Jurisdictional Immunities of States and their Property ("the UN Convention").

114. However, he did not find that any of the relevant conventions supported a restrictive meaning being given to the phrase "personal injuries". He noted that article 11 of ECSI provides that a state cannot claim immunity in proceedings which relate to "redress for injury to the person or damage to tangible property" occurring in the state of the forum. He considered that "injury to the person", or "préjudice corporel" in the French text, could cover injury to mental health though it did not necessarily do so. Meanwhile the Council of Europe's explanatory report on ECSI contrasted the position "where there has been no physical injury", but he considered that the authors there were concerned not with a distinction between injuries to physical and mental health, but instead with the distinction "between injury to the person on the one hand and such other forms of injury as damage to economic interests or to reputation on the other".

115. Underhill P made the same comment at [18] about the report of the International Law Commission on the work of its 43rd session, which laid the foundations for the UN Convention, and which also distinguishes between cases where there is and is not "physical damage" as opposed to "Damage to reputation or defamation … [or] interference with contract rights or any rights including economic or social rights damage to tangible property".

116. The same distinction, he considered at [19] could be found in passages relied on from Fox's *The Law of State Immunity*, which did not address the question of whether personal injury could include damage to mental health.

117. Underhill P also considered the decision of the Canadian Supreme Court in *Schreiber v Canada (Attorney General)* [2002] 3 SCR 269. The claimant there complained of an unlawful attempt by Germany to extradite him. He sued Germany in Canada claiming to have suffered "mental distress" (and other irrelevant heads of loss). The State Immunity Act in Canada disapplied the normal immunity rule in claims relating to "death or personal or bodily injury" occurring in Canada, and there was an issue about whether this covered the claimant's claim. The Supreme Court held that the exception was "limited to instances where mental distress and emotional upset were linked to a physical injury". It relied on Canadian case law which, unlike English law, appeared to treat "personal injury" as referring only to bodily injury but said that its conclusion was consistent with "international law sources" including those cited to Underhill J. Underhill J pointed out that *Schreiber* concerned "mental distress", connoting distress falling short of psychiatric injury, and that the judgment also contained at least one indication that "préjudice corporel" in the French text of the Canadian statute might cover a condition such as "nervous stress". And, as Underhill P observed at [25], this decision on any view could not justify the conclusion that "personal injury" had a fixed meaning in international law which would exclude psychiatric injury.

118. Having ruled that "personal injury" should therefore be given its normal meaning in domestic law, covering psychiatric as well as physical injury, Underhill P added at [28]:

> **"This is a result which I am glad to reach. Not only is the distinction urged on me by Mr Pipi one**

> **which would mean that the concept of personal injury in section 5 of the Act was different from its meaning elsewhere in English law but it would give rise to what would frequently be difficult, and frankly artificial, debates about the extent to which a particular injury in respect of which claim was made was physical or mental. The whole trend of recent authority has been to recognise that these kinds of distinction are difficult both conceptually and evidentially."**

119. As to the first point and ground 4, Ms Darwin contends that Underhill J took a "textual/logical approach to construction of the interplay between sections 4, 5 and 16 without reference to the wider purpose of reflecting public international law".

120. However, in my judgment there is a lack of material to demonstrate a consensus in international law that the "territorial tort" exception to immunity should not apply to an embassy employment dispute containing a personal injury claim. According to Ms Darwin, the exception was originally intended to cover the negligent use of motor vehicles by state officials, and the status of this general exception as a matter of customary international law is uncertain. That submission is based on the judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* [2012] ICJ Rep 99. After setting out a debate on the question, the Court said:

> **"65. The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a 'tort exception' to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict."**

121. That passage therefore does not establish that there is no such general exception.

122. The *Jurisdictional Immunities* case essentially concerned acts committed by armed forces (specifically those of the German Reich during World War II) and therefore the facts were distant from those of the present claim. The International Court at [67] referred to Article 11 of ECSI as setting out "the territorial tort principle in broad terms":

> **"A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."**

123. The International Court then observed that Article 11 is qualified by Article 31, which disapplies the provisions to anything done by a State's armed forces while on the territory of another State.

124. As Ms Darwin points out, this is mirrored by the SIA which deals expressly in section 16(2) with the armed forces exception to the exception.

125. The International Court then examined Article 12 of the UN Convention on Jurisdictional Immunities, which is in similar terms to Article 11 of ECSI. In that Convention there is no equivalent of Article 31 of ECSI, but the International Law Commission's commentary on the text of Article 12 states that that provision does not apply to "situations involving armed conflicts". That interpretation, the Court found, was also supported by the weight of judgments of national Courts on that question, and represented a consensus of international law [78].

126. Ms Darwin relies on this decision to demonstrate that "implicit exclusions are properly part of international law" (skeleton argument paragraph 78.3).

127. However, she faces the difficulty that, whereas there are multiple sources in international treaties and case law for the proposition that the territorial tort exception does not apply to armed forces, as well as the express provision in section 16(2), there is a dearth of material to suggest any such consensus that the exception should not apply to a personal injury claim by an embassy official. Ultimately Ms Darwin relies on *Benkharbouche* and its restatement of the basic principle of State immunity in the case of sovereign acts, but that judgment did not decide the scope of the territorial tort exception.

128. Instead, all the indications in the SIA are that Parliament did not intend to provide that the exception should not apply to a personal injury claim by an embassy official. Section 16 makes an express carve-out from section 4 but makes no express carve-out from section 5, although it could have done so. The armed forces exception was expressly provided for by section 16(2), but there is no such equivalent for a claim by an embassy employee.

129. I therefore agree with the construction of the sections adopted by Underhill P in *Ogbonna* and with the earlier decision which he followed, in *Military Affairs Office of the Embassy of the State of Kuwait v Caramba-Coker* (EAT, 10 April 2003). Ms Darwin does not come close to surmounting the *British Gas v Lock* test.

130. As to ground 5, Ms Darwin can point to little if any significant material to suggest that I should depart from *Ogbonna* on the question of whether "personal injuries" include a psychiatric injury.

131. First there is material to which Underhill P in fact had regard, including paragraph 48 of an explanatory report on ECSI, and Article 12 of the UN Convention and commentaries on it. In brief, I agree with his comments on those materials.

132. Underhill P also had regard to *Schreiber* and, again, I agree with his analysis of that case. Far from being persuaded that it should have driven him to the opposite conclusion, I consider that Ms Darwin's case is rather undermined by the words which I have emphasised in this quotation from paragraph 80 of the judgment:

> **"… the guiding principle in the interpretation of the s. 6(a) exception, more consonant with the principles of international law and with the still important principle of state immunity in international relations, is found in the French version of the provision. It signals the presence of a legislative intent to create an exception to state immunity which would be restricted to a class of claims arising out of a physical breach of personal integrity, consistent with the Quebec civil law term 'préjudice corporel'. <u>This type of breach could conceivably cover an overlapping area between physical harm and mental injury, such as nervous stress</u>; however, the mere deprivation of freedom and the normal consequences of lawful imprisonment, as framed by the claim, do not allow the appellant to claim an exception to the State Immunity Act." (emphasis added)**

133. Ms Darwin contended that a different result might have been reached in *Ogbonna* if regard had been had to *King v Bristow Helicopters Ltd* [2002] 2 AC 628, where the House of Lords ruled that the phrase "bodily injury" in the Warsaw Convention on claims by airline passengers, or "lésion corporelle" in the French version of the Convention, did not encompass purely psychological injury. But it seems to me that the argument is deprived of much force by this passage in the opinion of Lord Steyn:

> **"15 The Warsaw Convention is an exclusive code of limited liability of carriers to passengers.**

> **On the other hand, it enables passengers to recover damages even though, in the absence of the Convention and the Act, they might have no cause of action which would entitle them to succeed: *Swiss Bank Corpn v Brink's MAT Ltd* [1986] QB 853, 856G-H, per Bingham J (now Lord Bingham of Cornhill). It is therefore not necessarily right to approach the meaning of the phrase 'bodily injury' in article 17 of the Convention through the spectacles of full corrective justice.**
>
> **16 It follows from the scheme of the Convention, and indeed from its very nature as an international trade law convention, that the basic concepts it employs to achieve its purpose are autonomous concepts. It is irrelevant what bodily injury means in other contexts in national legal systems. The correct inquiry is to determine the autonomous or independent meaning of 'bodily injury' in the Convention: *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477. And the premise is that something that does not qualify as a 'bodily injury' in the Convention sense does not meet the relevant threshold for recovery under it."**

134. Even in the context of international law, Lord Steyn also drew a contrast between "bodily injury" and "the wide term 'personal injury' in the Guatemala Protocol which never came into force" (page 638G). And, he explained at paragraphs 26-27 that at the time of the Warsaw Convention "a line was drawn between bodily injury … and mental injury or illness", and that an extension of that system to accommodate more modern medical thinking did not command international support in view of the financial implications for the airline industry.

135. In short, whilst *King* contains lengthy and interesting discussions about the boundary or overlap between physical and mental injury and their treatment under different legal systems, the outcome was context-specific and does not illuminate the issue in the present case.

136. Ms Darwin also relies on another decision of the Supreme Court of Canada which postdates *Ogbonna*, namely *Kazemi Estate v Iran* [2014] 3 SCR 176. This was a claim brought by the son of a mother who was detained and tortured in Iran and died as a result. In addition to damages on behalf of his mother's estate, he sought damages for psychological and emotional prejudice that he sustained as the result of her death. Iran relied on State immunity. The relevant issue was whether under the Canadian statute (as in *Schreiber*) the son could rely on the exception for "personal or bodily injury" (to him) occurring in Canada. He failed because the tort did not occur in Canada, but also because he did not claim to have suffered physical harm or an injury to his physical integrity, but only "psychological and emotional prejudice".

137. On the latter point, the Court followed *Schreiber*. LeBel J said:

> **"77. First, in order to maintain coherence with the civil law, it is necessary to interpret 'dommages corporels' in the French version of s. 6(a) of the SIA as requiring physical harm … Second, considering the lack of ambiguity in the French wording of the provision, there is no need to resort to Charter values to interpret s. 6(a) … Finally, although the facts in Schreiber were indeed different, the Court in that case did turn its mind to situations analogous to the present case. The Court noted that when torture involves 'physical interference' with the person, that individual will have experienced a 'préjudice corporel' regardless of signs of physical injury to the body (*Schreiber*, at para. 63). The 'préjudice corporel' will not, however, extend to those who, although close to the victim, experienced a 'préjudice moral' (mental injury) with no physical breach.**
>
> **78. It is my view, then, that *Schreiber* is good law and perfectly applicable to the case at hand. Even if current medical research maintains that it is often difficult to distinguish between physical and psychological injuries, I agree with the amicus that '[t]he fact that psychological trauma may cause physiological reactions does not alter the fact that no [physical] injuries have been pleaded as having been suffered by Mr. Hashemi' (supplemental factum, at para. 30). Mr. Hashemi did not plead any kind of physical harm or any injury to his physical integrity.**

> **Therefore, his claim is barred by the statute on two grounds. First, the alleged tort did not "occu[r] in Canada" within the meaning of the SIA. Second, Mr. Hashemi has not claimed any "dommag[e] corpore[l]" which could potentially have brought him within the exception stated at s. 6(a), had the tort occurred in Canada."**

138. It does not seem to me that *Kazemi* adds anything of significance to *Schreiber*. If anything it was a clearer case because the claimant was a secondary victim who had suffered an emotional or psychological response to tortious violence inflicted not on him but on another. And, like *Schreiber*, it was a decision about the construction of the Canadian statute and does not reveal any relevant consensus in international law.

139. In short, while the materials cited by Ms Darwin reveal a debate in international law about the extent of the territorial tort exception, they do not reveal any consensus which could change the clear meaning of section 5 of the SIA. They therefore do not dissuade me from following and applying *Ogbonna*.

Conclusion

140. The appeal succeeds on grounds 1, 2 and 3 and is allowed to that extent. Grounds 4 and 5 are dismissed.

141. In circulating my draft judgment, the parties were invited to make further submissions on (1) any further ruling that they seek on the effect of the Remedial Order and amendments to the SIA and (2) the final disposal of the case and whether there is any need/scope for the waiver issue to be remitted. The respondent having sought to make such further submissions, I have given directions in this regard and will make a final decision on disposal following receipt of the parties' further representations in accordance with that order.

142. In addition to their submissions on disposal, those acting for the respondent also drew my attention to a decision of Mr Justice Julian Knowles in the case of *Shehabi v Bahrain* [2023] EWHC 89 (KB), which considered the judgment in *Ogbonna* and the application of section 5 SIA to cases claiming psychiatric injury. Although this decision was handed down prior to the hearing before me in the present proceedings, neither party had been aware of it at that stage and had therefore failed to refer to it in argument. It has now been drawn to my attention to correct that omission; it is not suggested that it has any material impact on the outcome of the appeal, or that either party would wish to address me further in this regard.

143. I have duly considered the Judgment in *Shehabi* (the relevant passages are at paragraphs 54, 64 and 148-185), which essentially adopts the same approach to *Ogbonna* as I have done, and am satisfied that there is no reason for any further submissions to be made in this regard or for me to make any amendments to my Judgment.

144. If the question of waiver needs to be remitted to the Employment Tribunal, I would not consider that it would be fair to ask Employment Judge Brown to decide it anew, given the extent of findings so far made which I have not upheld, and therefore it would be remitted to a differently constituted tribunal.