Neutral Citation Number: [2023] EAT 153

Case No: EA-2021-000659-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 December 2023

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

THE KINGDOM OF SPAIN **Appellant**

- and –

MS L LORENZO **Respondent**

- -
- -

Mr J Davies (instructed by Gunnercooke LLP) for the **Appellant**
Mr M Jackson (instructed by The Free Representation Unit) for the **Respondent**

Hearing dates: 07 and 08 February 2023

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JUDGMENT

SUMMARY

JURISDICTION, RACE DISCRIMINATION

Only grounds two to six of the appeal had been pursued. As a matter of principle, ground four would be allowed, though, in the event, would have made no difference to the Tribunal's decision, which would stand. The remaining grounds of appeal would be dismissed.

The Tribunal had correctly held that, as a matter of law, the diplomatic immunity conferred upon a diplomatic agent by Article 31 of the Vienna Convention was not conferred upon the State, as respondent to claims brought under the Equality Act 2010. When considering State immunity, in this case, it ought to have considered the pleaded acts of discrimination, though its decision as to whether the acts of the appellant had been sovereign acts of the sending State had not been perverse. Consistent with the decision in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, the Tribunal had been correct to disapply section 4(2)(a) of the State Immunity Act 1978, as being contrary to EU Law.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

Judgment

1. In this judgment I refer to the parties by their respective statuses below.

2. This is the respondent's appeal from the judgment of the London Central Employment Tribunal, (Employment Judge Segal KC, sitting alone — 'the Tribunal'), sent to the parties on 16 June 2021. That judgment followed an open preliminary hearing at which the claimant represented herself and the respondent was represented, as it was before me, by Mr Jonathan Davies. On appeal, the claimant was represented by Mr Matthew Jackson.

3. The issues for determination by the Tribunal had been identified in an earlier case management summary as being whether the claims should be struck out because they were barred by diplomatic immunity, pursuant to Article 31 of the Vienna Convention on Diplomatic Relations 1961 ('the Vienna Convention'); alternatively, State immunity, pursuant to section 1 of the State Immunity Act 1978 ('the SIA'), on the basis that the claims and/or the acts of which the claimant complained arose out of an inherently sovereign or governmental act of the Kingdom of Spain. Each issue was sub-divided into a number of elements. The Tribunal held that: (1) the claimant's claims deriving from the Employment Rights Act 1996 and the Employment Act 2002 would be dismissed; (2) her claims of direct race discrimination, contrary to sections 13 and 39 of the Equality Act 2010 ('the EqA'), and harassment related to race, contrary to sections 26 and 39 of the EqA (in each case reliant upon her British nationality) would proceed to a substantive hearing; and (3) the correct respondent to those claims was 'The Kingdom of Spain', rather than, as had been pleaded by the claimant, the 'Embassy of Spain'.

4. The Tribunal received written and oral evidence from the claimant and from the then current Canciller (Ambassador) at the Spanish Embassy, in London. It observed that the facts had been largely agreed and/or matters of documentary record. It noted ([15] and [16]) that the claimant had been recruited to work in the Spanish Embassy in about January 2008, whilst she had been living in London. She had had dual nationality (British and Spanish) and a Spanish passport. Initially, she had worked as the Ambassador's social secretary, in which capacity she had worked, mainly from his official residence, next door to the embassy. She had sometimes seen confidential documents, for the purposes of copying them et cetera. After what had been described to the Tribunal as a career break, she had returned to work in 2013, in a more junior capacity, as Administrative Assistant, being one of approximately 42 staff then working at the embassy. In that capacity, she had had sight of confidential

documents and, in particular, in so far as she had placed or listed documents in the 'diplomatic bag', they had almost always been in sealed envelopes. At some point, towards the end of her employment with the respondent, the claimant had acted up, in the capacity of Protocol Officer, a role described to the Tribunal as having been a quasi-civil servant role, entailing liaison with the Foreign and Commonwealth Office (as it was known until September 2020) regarding arrivals and departures of staff; and issues concerning duty-free goods, diplomatic cars etc, in that context. At paragraphs 17 to 19 of its Reasons, the Tribunal recorded:

> **'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 'Attaché (Administrative Affairs) — Diplomatic Staff'.'**

5. In summary, so far as material to this appeal the Tribunal concluded that:

Diplomatic immunity

a. The claims having been advanced solely against the Kingdom of Spain, and not against an individual diplomat, diplomatic immunity did not apply. Regardless of the derivation of such immunity, it was that of the individual diplomat, not of the State. The position was particularly clear in relation to claims under the EqA, in which any liability of an employer and employee separately and respectively derived from sections 109 and 110 of that Act.

There was no reason why a claim against the State should be precluded on the basis that the employee was a diplomat;

State immunity

b. As a matter of domestic law, under section 4 of the SIA, the respondent had immunity in respect of claims brought by the claimant, because, at the material time, she had been a national of Spain, as well as of the United Kingdom. The question was whether, applying the principles established in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and/or Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') meant that section 4(2)(a) of the SIA should be disapplied in relation to the claims advanced under the EqA in this case;

c. Having regard to the principles in *Benkharbouche*, the impugned interactions between the claimant and Sr Gonzales (who was assumed, for the purposes of the preliminary issues, to benefit from diplomatic immunity) had not arisen out of an inherently sovereign or governmental act of the State of Spain. The functions which the claimant had been employed to perform had not been *'the functions* [which had] *called for a personal involvement in the diplomatic or political operations of the mission'*, rather *'such activities as might be carried on by private persons'* which had not *'engage*[d] *the state's sovereign interests'*;

d. Against that background, it was necessary to consider the narrow question of whether section 4(2)(a) of the SIA ought to be disapplied, by reference to Article 47 of the Charter. There was a tension, in this case, between two competing principles — that immunity ought: (1) to apply between a State and nationals of that State; and (2) not to apply in respect of locally recruited staff who were nationals of, and permanently resident in, the forum State. From the Vienna Convention, the latter appeared to be the dominant consideration. In any event, in this case, the Claimant, although falling within both categories, fell, on the material facts, much more within the second. It had been almost, although not quite, a coincidence that she had had Spanish nationality (though it had been essential that she be bilingual).

Effectively, she had been a member of locally recruited staff, who spoke Spanish and happened to have dual Spanish nationality. Accordingly, and for the same reasons of principle which had led to the disapplication of section 4(2)(b) of the SIA in *Benkharbouche*, section 4(2)(a) ought to be disapplied in relation to the claims advanced under the EqA in this case;

e. The Supreme Court in *Benkharbouche* had determined that section 16(1) of the SIA — which extended immunity in respect of claims by any employee of the diplomatic mission, irrespective of whether the relevant act had been in exercise of sovereign authority — could not be justified by reference to any rule of customary international law, and, therefore, had disapplied it in respect of claims derived from EU law. For the same reason, the respondent in this case could not rely upon immunity in respect of the claims advanced under the EqA;

f. Sections 4(2)(a) and 16(1) of the SIA prima facie precluded the claimant from pursuing pure domestic law claims against the respondent; as the Supreme Court had held in *Benkharbouche*, it was not possible to 'read down' section 16(1) so as to render it compliant with Article 6 of the ECHR. In the circumstances, the claimant could not pursue her claims under the Employment Rights Act 1996 and the Employment Act 2002.

The issues on appeal

6. The issues to be determined on appeal went through a number of iterations as the hearing progressed. In their final form, they were agreed by the parties as set out below. Of the six pleaded grounds of appeal, only five were pursued, ground one having been abandoned by the respondent:

a. **Issue one**: if an employee of a mission sues the State, can the State rely on diplomatic immunity? (Grounds 2 and 3);

b. **Issue two**: if State, rather than diplomatic, immunity applies, how is the distinction between sovereign and non-sovereign acts to be applied in this case? (Ground 4);

c. **Issue three:** was the Tribunal's finding that the claimant's employment was not sovereign one which was open to it on the facts? (Ground 5); and

d. **Issue four:** if not a sovereign act, was the Tribunal entitled to disapply section 4(2)(a) of the SIA? (Ground 6).

I deal with each such issue in turn.

Issue one: can the State itself rely upon diplomatic immunity (grounds 2 and 3)?

Submissions

7. Mr Davies submitted that a diplomatic mission was an emanation of the sending State. The implication, in the Tribunal's judgment, that diplomatic immunity aligned with personal and/or primary responsibility, and that State immunity aligned with corporate, or secondary or vicarious, liability was wrong. The Tribunal's reliance upon the constructive liability provisions of the EqA to support that approach had been 'effectively a castle built on sand'. The State should be able to rely upon diplomatic immunity and, internationally, at least, that argument was 'not entirely novel' (see *Kramer Italo Limited v Government of Kingdom of Belgium; Embassy of Belgium* 103 LR 299, at 310, Nigeria Court of Appeal, 1 November 1988). Diplomatic immunity was *'effectively the property of the sending State and not of those individuals the State sends in that capacity'*: *Re P (Children Act: Diplomatic Immunity)* [1998] 1 FLR 624, at 627, referring to an unreported decision of Laws J in *Propend Finance v Sing* 17 April 1997. *Benkharbouche* had not resolved that point and *Reyes v Al-Malki* [2017] UKSC 61 (determined by the same constitution of the Supreme Court and handed down on the same day) had reaffirmed the co-existence of both pleas. In *Benkharbouche*, the Supreme Court had not considered the first limb of section 16(1) of the SIA, which, in effect, gave precedence to diplomatic immunity and would serve no purpose were the State unable to rely upon it.

8. The Tribunal's conclusion that, in an employment claim brought against it, a diplomatic mission could not raise a plea of diplomatic immunity was surprising. The effect of the Tribunal's judgment was to render otiose diplomatic immunity in any claim (whether or not an employment case) in which the act impugned was done on behalf of the sending State since, following the logic of the judgment, in any case where the diplomat was acting on behalf of the State, the State was his employer and, as such, vicariously liable: the claim was, therefore, against the State and the rules of State immunity applied, which, depending upon the extent and ambit of the *Benkharbouche* exception, in the case of employment or the other exceptions in the SIA, might not offer any immunity at all. That approach would

not give effect to the clear and obvious intention of the Vienna Convention, most of the rules in which related to acts carried out by a diplomat on behalf of the sending State, or the materials and caselaw which confirmed that the introduction of State immunity did not operate in any way to limit diplomatic immunity.

9. Claims for discrimination and harassment deriving from sections 109 and 110 of the EqA had to be brought, respectively, under sections 39 and 40 of that Act, which enable an employee to sue her employer, but not her employer's employer. Here, the Claimant's employer had been the Ambassador, and it had not been open to her to sue his employer, or that of the putative discriminating employee. In any event, the application of diplomatic and State immunity was a matter of international law and it would be strange if it could be determined by reference to national statutory rules the primary purpose of which did not engage that issue.

10. On behalf of the claimant, Mr Jackson submitted that the Vienna Convention was irrelevant to the claims brought under the EqA (whether advanced, formally, against the Embassy or the Kingdom of Spain). The respondent's argument in respect of diplomatic immunity under the Vienna Convention was based upon a false legal premise. As a matter of law, it would not be held vicariously liable for the tortious actions of another person, were the claimant to succeed in her claims under the EqA; it would have primary liability for those actions, which Parliament had deemed to be attributable to it. That being clear, there was no basis for the respondent's novel argument that a nation State should benefit from the diplomatic immunity of an individual. There was no reason to suppose that the Diplomatic Privileges Act 1964 ('the DPA') constituted anything other than a complete code for the application of the Vienna Convention (the same conclusion reached in *Benkharbouche* in relation to the SIA), and nothing in domestic law applied vicarious liability, which would not arise on the facts of this case. Before the Tribunal, the respondent had relied upon Article 31 of the Vienna Convention, to which effect was given in domestic law by section 2 of and schedule 1 to the DPA. Whether the correct respondent be the Kingdom of Spain or the Embassy of Spain, neither was a diplomatic agent as defined in Article 1 of the Vienna Convention; rather, to use an English Law term, it was a body corporate or legal person. The fact that the immunity of an individual could not be waived other than by the sending State was irrelevant; the claims in this case had not been advanced against an individual and the Tribunal's judgment would not affect the position of any such individual, were he to have been a respondent. The Tribunal had been right to characterise the respondent's argument as novel, when rejecting it. There had been no cited caselaw, or other principle of law, to the

effect that the inviolability of an individual meant that an act of that person could not, as a matter of the law of England and Wales, be treated as that of the sending State. The basis for that submission was obscure and the submission ought not be accepted.

Discussion

11. I begin by recording that ground one of the appeal (which had challenged the Tribunal's conclusion that the correct respondent was the Kingdom of Spain) had fallen away following each party's acceptance that the merit in the arguments advanced in the remaining grounds of appeal did not depend upon the identity of the respondent and that the Embassy was an emanation of the Kingdom, having no separate personality in domestic law.

12. The starting point for issue one is the DPA, section 1 of which provides that the following provisions of that Act shall, with respect to the matters dealt with therein, have effect in substitution for any previous enactment or rule of law. Section 2(1) provides that, subject to section 3, the Articles of the Vienna Convention set out in Schedule 1 to the DPA shall have the force of law in the United Kingdom and be construed in accordance with the subsequent provisions of section 2. Not all Articles of the Vienna Convention appear in Schedule 1, but included are Articles 1 and 31, which provide (materially):

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) the "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

(f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;

> **(g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;**
>
> **(h) …**
>
> **(i) …**
>
> ***Article 31***
>
> **(1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:**
>
> **(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;**
>
> **(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;**
>
> **(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.**
>
> **(2) A diplomatic agent is not obliged to give evidence as a witness.**
>
> **(3) No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.**
>
> **(4) The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.**

13. Those Articles make clear that the immunity conferred by Article 31 is that of the diplomatic agent (as defined by Article 1(e)), who is distinguished from the sending State in Article 31(4).

14. Whilst issue one relates to diplomatic immunity, it is necessary to have regard to *Benkharbouche* and I, therefore, summarise the Supreme Court's explanation of the principles of State immunity in that decision, in which the primary question was whether sections 4(2)(b) and 16(1)(a) of the SIA were incompatible with the requirements of Article 6 ECHR and Article 47 of the Charter. The effect of the former section, as it stood at the time of the Supreme Court's decision, was that a State was immune as respects proceedings

relating to a contract of employment between a State and a person who, at the time of the contract, was neither a national of the United Kingdom nor resident there. The effect of the latter section was that a State was immune as respects proceedings concerning the employment of members of a diplomatic mission, including its administrative, technical and domestic staff. The Supreme Court held that those provisions would be incompatible with each Article, unless justified by the requirements of customary international law. As a matter of such law, a foreign State would be immune from an employment claim which arose out of an inherently sovereign or governmental act, as opposed to an act of a private law character [53]. Sections 4(2)(b) and 16(1)(a) of the SIA were incompatible both with Article 6 of the ECHR [76] and Article 47 of the Charter [78]. The remedy for the former was a declaration of incompatibility. For the latter, the remedy was the disapplication of the relevant provisions of the SIA in relation to claims deriving from EU law, but those provisions remained effective to bar purely domestic claims. Following *Benkharbouche*, certain amendments were effected to the SIA by the State Immunity Act 1978 (Remedial) Order 2023 ('the 2023 Order'), with effect from 23 February 2023, applicable to any cause of action arising on or after 18 October 2017. I shall return to the significance of the 2023 Order later in this judgment.

15. In his judgment, with which all other members of the court concurred, Lord Sumption JSC held as follows [17]:

> **'State immunity is a mandatory rule of customary international law, which defines the limits of a domestic court's jurisdiction. Unlike diplomatic immunity, which the modern law treats as serving an essentially functional purpose, state immunity does not derive from the need to protect the integrity of a foreign state's governmental functions, or the proper conduct of inter-state relations. It derives from the sovereign equality of states.… In the modern law, the immunity does not extend to acts of a private law character. In respect of these, the state is subject to the territorial jurisdiction of the forum in the same way as any non-state party.… The rule, where it applies, is that a state may not be impleaded in a domestic court *against its will*. State immunity may be waived. But waiver does not dispense with the rule. It is inherent in the rule. It is a voluntary submission to the forum court's jurisdiction, which constitutes the consent that has always qualified the rule.'**

16. In *Al-Malki v Reyes*, the claimant was a Philippine national employed by Mr and Mrs Al-Malki as a domestic servant in their residence in London, at a time when Mr Al-Malki had been a member of the diplomatic staff of the embassy of Saudi Arabia, in London. The main issues on appeal concerned the effect of Article 31(1)(c) of the Vienna Convention in a case (assumed for the purposes of determining the issue) of human trafficking. Those principles

are not engaged in this appeal, but certain dicta relating to the legal immunity of diplomatic agents remain pertinent. At paragraph 6, Lord Sumption JSC observed:

> **'… As it stands, the Convention provides a complete framework for the establishment, maintenance and termination of diplomatic relations. It not only codifies pre-existing principles of customary international law relating to diplomatic immunity, but resolves points on which differences among states had previously meant that there was no sufficient consensus to find any rule of customary international law.'**

Paragraphs 10 to 12 bear reciting in full:

> **'10. It is not in dispute that so far as an English statute gives effect to an international treaty, it falls to be interpreted by an English court in accordance with the principles of interpretation applicable to treaties as a matter of international law. That is especially the case where the statute gives effect not just to the substance of the treaty but to the text: *Fothergill v Monarch Airlines Ltd* [1981] AC 251, esp at pp 272E, 276-278 (Lord Wilberforce), 281-282 (Lord Diplock), 290B-D (Lord Scarman).**
>
> **11. The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969):**
>
> > **"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."**
>
> **The principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions.**
>
> **12. In the case of the Convention on Diplomatic Relations, there are particular reasons for adhering to these principles:**
>
> > **(1) Like other multilateral treaties, the text was the result of an intensely deliberative process in which the language of successive drafts was minutely reviewed and debated, and if necessary amended. The text is the only thing that all of the many states party to the Convention can be said to have agreed. The scope for inexactness of language is limited.**
> >
> > **(2) The Convention must, in order to work, be capable of applying uniformly to all states. The more loosely a**

multilateral treaty is interpreted, the greater the scope for damaging divergences between different states in its application. A domestic court should not therefore depart from the natural meaning of the Convention unless the departure plainly reflects the intentions of the other participating states, so that it can be assumed to be equally acceptable to them. As Lord Slynn observed in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 509, an international treaty has only one meaning. The courts

"Cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Convention."

(3) Although the purpose of stating uniform rules governing diplomatic relations was "to ensure the efficient performance of the functions of diplomatic missions as representing states", this is relevant only to explain why the rules laid down in the Convention are as they are. The ambit of each immunity is defined by reference to criteria stated in the articles, which apply generally and to all state parties. The recital does not justify looking at each application of the rules to see whether on the facts of the particular case the recognition of the defendant's immunity would or would not impede the efficient performance of the diplomatic functions of the mission. Nor can the requirements of functional efficiency be considered simply in the light of conditions in the United Kingdom. The courts of the United Kingdom are independent and their procedures fair. It is difficult to envisage that exposure to civil claims would materially interfere with the efficient performance of diplomatic missions. But as the Secretary of State for Foreign and Commonwealth Affairs pointed out, the same cannot be assumed of every legal system in every state. The threat to the efficient performance of diplomatic functions arises at least as much from the risk of trumped up or baseless allegations and unsatisfactory tribunals as from justified ones subject to objective forensic appraisal. It may fairly be said that from the United Kingdom's point of view, a significant purpose of conferring diplomatic immunity of foreign diplomatic personnel in Britain is to ensure that British diplomatic personnel enjoy corresponding immunities elsewhere.

(4) Every state party to the Convention is both a sending and receiving state. The efficacy of the Convention depends, even more than most treaties do, on its reciprocal operation. Article 47.2 of the Convention

> **authorises any receiving state to restrict the application of a provision to the diplomatic agents of a sending state if that state gives a restrictive application of that provision as applied to the receiving state's own mission. In some jurisdictions, such as the United States, the recognition of diplomatic immunities is dependent as a matter of national law on their reciprocity. As Professor Denza observes, *op cit*, 2 –**
>
> **"For the most part, failure to accord privileges or immunities to diplomatic missions or their members is immediately apparent and is likely to be met by appropriate countermeasures."**
>
> **In the graphic words of her introduction to the Vienna Convention on the United Nations law website, a state's "own representatives abroad are in a sense hostages who may on a basis of reciprocity suffer if it violates the rules of diplomatic immunity": http://legal.un.org/avl/ha/vcdr/vcdr.html.'**

17. At paragraph 26ff, Lord Sumption JSC considered the similarities and differences between State and diplomatic immunity, holding ([27] and [28]):

> **'27. Manifestly, diplomatic and state immunity have a number of points in common. Both are immunities of the state, which can be waived only by the state. Both may extend to individual agents of the state, acting as such. Both are creatures of international law. And, although only diplomatic immunity has been codified by treaty, the embryonic United Nations Convention on Jurisdictional Immunities of States is generally regarded as an authoritative statement of customary international law on the major points which it covers. These factors led Laws J, in *Propend Finance Pty Ltd v Sing* (1997) 1 ILR 611, 633-634 to suggest that "the law relating to diplomatic immunity is not free-standing from the law of sovereign or state immunity, but is an aspect of it", and to cite with apparent approval a dictum of Jenkins LJ in *Baccus SRL v Servicio National Del Trigo* [1957] 1 QB 438, 470 to the effect that the protection accorded to a diplomat under the Diplomatic Privileges Act 1708 (then in force) could not be greater than that accorded to a foreign sovereign.**
>
> **28. However, the analogy should not be pressed too far. In some significant respects, the immunities of diplomatic agents are wider than those of the state. This is because their purpose is to remove from the jurisdiction of the receiving state persons who are within its territory and under its physical power. Human agents have a corporeal vulnerability not shared by the incorporeal state which sent them. Section 16 of the State Immunity Act 1978, which defines the ambit of state immunity in the United Kingdom, and article 3 of the UN Convention on the Jurisdictional Immunities of States, both provide that the rules relating to state immunity are not to affect**

> **diplomatic immunity. These provisions are necessary because, as Professor Denza points out in *Diplomatic Law*, 4th ed (2016), p1:**
>
> **"As international rules on state immunity have developed on more restrictive lines, there has always been a saving for the rules of diplomatic and consular law and an increasing understanding that although these sets of rules overlap they serve different purposes and cannot in any sense be unified."'**

18. Having regard to the above dicta, I am satisfied that the approach urged on behalf of the respondent in this case is incorrect. First, it does violence to the language of Article 31 of the Vienna Convention, which is clearly and exclusively directed towards the immunity of the diplomatic agent, rather than of the sending State. Secondly, it urges impermissible regard to whether, on the facts of this case, recognition of the respondent's immunity would, or would not, impede the efficient performance of the diplomatic functions of the mission. Thirdly, it fails to recognise that, in some significant respects, the immunities of diplomatic agents are wider than those of the State and the reasons therefor. The fact that the acts of individuals, performed on behalf of the State for whom they act, may also be attributed to the State provides no answer to those points. It is correct, as Mr Davies submitted, that section 16(1) of the SIA provides that the part of that Act in which it is situated *'does not affect any immunity or privilege conferred by the* [DPA] *or the Consular Relations Act of 1968*', but that does not assist in determining the nature or extent of the latter and itself serves to indicate that the immunities conferred by the SIA and the DPA are not co-extensive. In my judgement, Mr Davies' submissions elide the availability of diplomatic immunity, where it applies, with the persons to whom or which it attaches and the nature of the relevant immunity. Thus, Article 31 of the Vienna Convention provides for a diplomatic agent's immunity from criminal, civil and administrative jurisdiction in the circumstances specified; provides that he is not obliged to give evidence as a witness; and prevents measures of execution being taken against him, other than in the circumstances specified. By contrast (for example), Article 22 renders the premises of the diplomatic mission inviolable, and Article 23 exempts the sending State and the head of the mission from the specified national, regional or municipal taxes in respect of the premises of the mission. It is the Vienna Convention, to the extent given the force of law in the United Kingdom by the DPA, which dictates the immunity conferred and its Articles clearly distinguish between the immunity conferred upon an individual and that conferred upon the State. Article 1 itself clearly and narrowly defines the term 'diplomatic agent'. There is simply no scope for a contention that, nevertheless, the immunity conferred by Article 31 extends to the State itself, irrespective of whether the acts impugned are carried out on its behalf. That is not to

'render otiose diplomatic immunity' in any claim in which the State is sued for the acts of a diplomatic agent; it is to recognise the limit of the diplomatic immunity conferred in relation to such acts (though other Articles given the force of law by the DPA might separately assume a relevance, and affect, for example, the disclosure obligations of the respondent State). Nothing in the academic commentary on which Mr Davies relies undermines that proposition.

19. I consider Mr Davies' reliance upon *Kramer Italo*, a 1988 decision of the Nigerian Court of Appeal, to be misplaced. In that case, the Belgian Embassy in Nigeria had commissioned Kramer Italo to build a residence for the Belgian ambassador. Kramer Italo brought an action against the Government of Belgium and the Belgian Embassy in Nigeria, claiming reimbursement of additional expenses incurred in the performance of the building contract. The defendants contended that the suit ought to be struck out on the bases of sovereign immunity, and the entitlement of the embassy staff to diplomatic immunity. In the Lagos High Court, the defendants' applications were successful. Kramer Italo appealed, asserting that the restrictive doctrine of sovereign immunity allowed the court to exercise jurisdiction in a matter arising from a commercial transaction, into which category the contract to build the residence was said to fall. The appeal was dismissed, the Court of Appeal holding that the defendants were entitled to sovereign immunity, and that, in any event, diplomatic immunity applied vis-à-vis staff of the Belgian Embassy and that to implead a foreign State on the basis of the actions of embassy staff would undermine the basis of diplomatic immunity.

20. First, and most obviously, *Kramer Italo* is not a judgment of a Court in this jurisdiction and related to the different provisions of a different statute, enacted in a different country; the Diplomatic Immunities and Privileges Act 1962, of Nigeria. Furthermore, the relevant aspect of the decision was not reasoned and comprised a single paragraph at the end of the judgment of Akpata JCA, at page 310:

> **'In effect on ground of diplomatic immunity, the action is incompetent as against the second respondent. It also seems to me that it would destroy the basis of diplomatic immunity pursuant to the 1962 Act if a foreign sovereign is made answerable in court for the action of his envoy who enjoys diplomatic immunity.…'.**

Put simply, I do not consider *Kramer Italo* to reflect the law in this jurisdiction or to undermine the reasoning set out above. I have been referred to no domestic authority

supportive of the proposition which Mr Davies advances, other than *Omerri v Uganda High Commission* 8 ITR 14, considered at paragraph 23, below.

21. *Jones v Ministry of Interior of Saudi Arabia* [2007] 1 AC 270, HL is not such an authority and relates to State, not diplomatic, immunity. *Alcom Limited v Republic of Colombia* [1984] AC 580, HL was also concerned with State immunity and the exceptions thereto, and the passage upon which Mr Davies relies, at 592 F-H, simply records counsel's submission that the operation of a diplomatic mission is a prime example of a sovereign and non-commercial function undertaken by a state within the territory of a receiving state, in the exercise of sovereign authority. The case has nothing to say on the issue here under consideration. *Re P (Children Act: Diplomatic Immunity) [1998] 1 FLR 624, FD* does not assist the respondent either, in my judgement. In that case, the mother of two children had sought various orders against their father, a diplomat for the United States of America, in London. Her application was dismissed for want of jurisdiction, on the basis of diplomatic immunity. The Court held that there was no provision in the DPA, or in the Vienna Convention, for waiver by individuals enjoying such immunity, which, per Article 32(1) of the Vienna Convention, was the property of the sending State. The court drew support for that conclusion from the earlier decision of Laws J in *Propend Finance v Sing*, to the effect that a diplomat's immunity did not belong to him 'in any right of his own', but 'in right of his sending State', for which reason only the sending State could waive his immunity. That does not provide support for the respondent's position because it confuses the source, and means of waiver, of the immunity with the individual to whom it attaches. Thus, a diplomat's immunity is conditional, because his own State may cancel it, but the immunity, nevertheless, attaches to him personally.

22. *Kuwait Investment Office v Hard* [2022] EAT 51, on which Mr Davies also relies, was concerned with Articles 24 and 27 of the Vienna Convention, respectively concerned with the inviolability of the archives and documents of the diplomatic mission and with free communication on the part of the mission for all official purposes. Unlike Article 31, neither Article relates to the immunity of the diplomatic agent himself, nor was that case concerned with the sending State's ability to invoke the latter for itself.

23. *Omerri*, decided by the National Industrial Relations Court in 1972, predated the SIA. Mr Omerri claimed that, whilst employed as a registry clerk by the Uganda High Commission, he had been unfairly dismissed, contrary to the Industrial Relations Act 1971. The industrial tribunal stayed the claim, giving as its reasons that:

> **'The certificate received from Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs makes it clear that the High Commissioner for the Republic of Uganda enjoys diplomatic immunity. As he has not waived such immunity, the purported service of the Originating Application in the instant case on the High Commission was ineffective, and the tribunal has no jurisdiction to proceed to try the case.'**

24. In his very short judgment dismissing Mr Omerri's appeal, Sir John Donaldson stated:

> **'The basis of diplomatic immunity is that of international law, international comity and respect by one sovereign state for another. It is mutual. In foreign countries, British missions enjoy the same immunity as this country and its courts extend to foreign and Commonwealth missions in London. It has always been a matter of general law. It is not to be thought from the fact that Parliament did not mention diplomatic missions, that Parliament intended, in breach of international law and the accepted standards of international behaviour, to make foreign and Commonwealth missions subject to the [Industrial Relations Act 1971].'**

Mr Davies relies on *Omerri* in support of his contention that, prior to the enactment of the SIA, the ability of an employer of an individual having diplomatic immunity (in that case, the High Commissioner) itself to assert diplomatic immunity had been recognised. The case is of some age and, other than in the broadest of terms, the rationale for the conclusion reached is not explained. Neither the DPA nor the Vienna Convention was addressed. In my judgement, it is not a safe basis upon which to resolve issue one and is not supported by any rule of customary international law, as indicated by the authorities considered above and the Conventions addressed below.

25. I also consider Mr Davies' reliance upon Article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 to be misplaced. That Article provides:

> ***'Privileges and immunities not affected by the present Convention***
> **1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:**
>
> **(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and**
>
> **(*b*) persons connected with them.**
>
> **2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.**

> **3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.'**

26. First, as noted in *Benkharbouche* [12] and acknowledged by Mr Davies, the 2004 Convention has been signed, but not ratified, by the United Kingdom. As Lord Sumption observed [12], to date it has attracted limited support. In any event, nothing in Article 3 establishes the proposition which he advances. It does not identify the nature and extent of the particular immunities which it is said not to exclude. Similarly, Article 32 of the European Convention on State Immunity (Basle, 16 May 1972), on which Mr Davies relies to the same end, provides simply that, *'Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.'* It says nothing of what those privileges and immunities are, or of which of them is conferred on the State. As was observed in *Benkharbouche* ([9] and [10]), that treaty has, to date, attracted limited international support, having been ratified by only eight of the 47 countries of the Council of Europe, and is concerned mainly with acts of a kind which would generally not attract State immunity under the restrictive doctrine. Whilst one purpose of the SIA was to give effect to the Basle Convention, enabling its ratification by the United Kingdom in 1979, by that time the Convention had been largely superseded by the adoption of the restrictive doctrine of State immunity at common law.

27. As Lord Sumption JSC held in *Benkharbouche* ([31] and [32]):

> **'31. To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation… There has never been any clearly defined rule about what degree of consensus is required.… What is clear is that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being Law: see *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131.**
>
> **32. … it is right to point out that a treaty may have no effect qua treaty, but nevertheless represent customary international law, and as such bind non-party states… It would be difficult to say that a treaty, such as the United Nations Convention[1] which has never entered into force had led to the "crystallisation" of a rule of customary international law that had started to emerge before it was concluded. For the same reason, it is unlikely that such a treaty could have**

[1] I interpose that this is a reference to the 2004 Convention.

> **"given rise to a general practice that is accepted as law". These difficulties are greatly increased in the case of the United Nations Convention by the consideration that in the 13 years which have passed since it was adopted and opened for signature it has received so few accessions. The real significance of the Convention is as a codification of customary international law. In Jones v The Ministry of the Interior of the Kingdom of Saudi Arabia [2007]1 AC 270, para 26, Lord Bingham described it as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases". However, it is not to be assumed that every part of the Convention restates customary international law. As its Preamble recites, it was expected to "contribute to the codification and development of international law, and the harmonisation of practice in this area". Like most multilateral conventions, its provisions are based partly on existing customary rules of general acceptance, and partly on the resolution of points on which practice and opinion had previously been diverse. It is therefore necessary to distinguish between those provisions of the Convention which were essentially declaratory, and those which were legislative in the sense that they sought to resolve differences rather than to recognise existing consensus. That exercise would inevitably require one to ascertain how customary law stood before the treaty.'**

28. In short, there is nothing in the caselaw and materials to which my attention has been drawn which demonstrates any recognised rule in customary international law supportive of the position adopted by the respondent in relation to diplomatic immunity.

29. Like the Tribunal, I am fortified in my conclusions on issue one by the structure of those provisions of the EqA which are engaged in this case, but do not consider them to be determinative of the outcome. Those provisions afford an illustration, in domestic law, of the circumstances in which the liability of an employer or principal ('B') may differ from that of the employee or agent ('A') by whom it acts. Mr Jackson was right to observe that the liability created by section 109 is not vicarious; it is a primary liability for the acts of the relevant employee/agent, which, in the case of an employer, may be avoided if B establishes the defence for which section 109(4) provides (i.e. that B took all reasonable steps to prevent A from doing the relevant thing, or from doing anything of that description). That is an instance, in domestic law, of circumstances in which the liability of the acting employee can diverge from that of the employer and arise on a different basis. As a matter of law, there is nothing inherently problematic in such a state of affairs.

30. In my judgement, the diplomatic immunity for which Article 31 of the Vienna Convention provides attaches to the diplomatic agent and cannot be invoked by the sending State, as respondent, on its own behalf. The Tribunal was correct so to hold.

Issues two and three: the distinction between sovereign and non-sovereign acts for the purposes of State immunity (ground 4) and whether, on the facts, the Tribunal's finding that the claimant's employment was not sovereign had been open to it (ground 5)

Submissions

31. It is convenient to consider these issues together. Mr Davies contended that the Tribunal had misapplied the distinction, for which the Vienna Convention provides, between, on the one hand, an inherently sovereign or governmental act of the Sending state, and, on the other, a private act, by focusing solely on whether the claimant's contract of employment had been concluded pursuant to such an act. He submitted that discrimination is a statutory tort and that the Tribunal ought to have considered whether the acts or omissions alleged to have constituted that tort had been committed in the context of, pursuant or ancillary to an inherently sovereign or governmental act. That, he submitted, was consistent with the amendment made by the 2023 Order to section 16(1), whereby section 16(1)(a) had been substituted with the following sub-sections, which indicated that the respondent's interpretation of *Benkharbouche* was correct:

> **'(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.'**

32. Mr Davies contended that the Tribunal had failed to have due regard to the guidance at paragraphs 57 to 59 of *Benkharbouche*. The acts of which complaint was made had been those of Sr Gonzalez, a diplomatic agent. Mr Davies further submitted that the *Benkharbouche* exception did not apply to members of administrative and technical staff, as defined by Article 1(f) of the Vienna Convention; the Supreme Court's conclusions at paragraphs 69 to 74 had related to Article 1(g); members of the service staff.

33. Alternatively, Mr Davies submitted, the exception did not apply to the claimant in particular. She had been employed as the ambassador's social secretary and had carried out the duties of a Protocol Officer. She had dealt with confidential documents and the content of the diplomatic bag. The fact that such documents might have been enclosed in sealed envelopes was neither here nor there and the United Kingdom's obligations under international treaties ought not to be determined by reference to trivial facts. Under the Vienna Convention, there was a distinction between personal secretaries, cypher clerks and wireless operators, on the one hand, and staff whose functions were essentially domestic, on the other. The claimant had not been in the domestic service of a member of the mission; she had worked in the mission itself. The *Benkharbouche* exception applied only to cooks and cleaners.

34. Mr Jackson submitted that the Tribunal had cited paragraphs 57 to 59 of *Benkharbouche* in full. Those comments expressly related to State immunity. The respondent had failed to identify the central State feature to which the following pleaded allegations had related, or to address the Tribunal thereon: treating the claimant with suspicion; accusing her of using a disrespectful tone; interrogating her motives in returning to work for the Kingdom of Spain; making her the subject of jokes to the effect that she was a double agent for the United Kingdom; ridiculing her by reference to personal matters; informing her that, if she did not like working in the embassy, there were plenty of Spaniards who would like her job, thereby insinuating that she was not 'properly' Spanish; repeatedly criticising British people and the British Government solely in front of the claimant; treating two of her Spanish-born colleagues more favourably; and bombarding her with e-mails, contrary to the approach adopted towards other staff. There appeared to be a tension between the respondent's submission that the nature of the alleged acts themselves ought to have been considered (ground 4) and its submission that it was the nature of the claimant's employment which ought to have been considered (ground 5). Mr Jackson contended that those positions were mutually exclusive and that it was the character of each allegedly discriminatory act, and not the claimant's own activities, which ought to be considered. That approach was said to be consistent with Article 31 of the Vienna Convention which, by contrast with section 4 of the SIA, was not concerned with the status of the claimant. None of the acts alleged in this case was, inherently, sovereign in nature and the absence of evidence from either party on the issue meant that it could not have been treated as such. There was a distinction to be drawn between the nature of the claimant's job and her role, on the one hand, and the nature of the respondent's acts, on the other. The Tribunal's conclusion that the acts in question had not been sovereign in nature could not be considered perverse.

Discussion

35. It is important to bear in mind the provisions of the SIA with which issues two and three are concerned. I set out below all such sections, as they stood prior to the 2023 Order and at the time of the Tribunal's consideration of the preliminary issues:

a. Section 1(1) of the SIA 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) of the SIA provided:

> **(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;**
>
> **…**

36. At paragraph 63 of its judgment, the Tribunal cited from [53] to [59] of Lord Sumption JSC's judgment in *Benkharbouche*:

> **'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 del Partido*, at 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 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.

56. This approach is supported by the case law of the European Court of Human Rights, which I have already summarised. In *Cudak*, *Sabeh El Leil*, *Wallishauser* and *Radunović*, 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, para 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* 507 US 349, 360 (1993). 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: *Segni v Commercial Office of Spain* 835 F 2d 160, 165 (7th Cir, 1987), *Holden v Canadian Consulate* 92 F 3d 918 (9th Cir, 1996). 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: *El-Hadad v United Arab Emirates* 216 F 3d 29 (DC Cir, 2000), at 4, 5. In *Park v Shin* 313 F 3d 1138 (9th Cir, 2002), paras 12-14, it was held that "the act of hiring a domestic servant is not an inherently public act that only a government could perform", even if her functions include serving at diplomatic entertainments. A very similar principle has been consistently applied in recent decisions of the French Cour de Cassation: *Barrandon v United States of America*, 116 ILR 622 (1998), *Coco v Argentina* 113 ILR 491 (1996), *Saignie v Embassy of Japan* 113 ILR 492 (1997). In the last-named case, at p 493, the court observed that the employee, a caretaker at the premises of the mission, had not had "any special responsibility for the performance of the public service of the embassy."

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 state's recruitment policy. These particular examples are all reflected in the United Nations Convention and were extensively discussed in the preparatory sessions of the International Law Commission. They are certainly not exhaustive. *In re Canada Labour Code* [1992] 2 SCR 50, concerned the employment of civilian tradesmen at a US military base in Canada. The Supreme Court of Canada held that while a contract of employment for work not involving participation in the sovereign functions of the state was in principle a contract of a private law nature, particular aspects of the employment relationship might be immune as arising from inherently governmental considerations, for example the introduction of a no-strike clause deemed to be essential to the military efficiency of the base. In these cases, it can be difficult to distinguish between the purpose and the legal character of the relevant acts of the foreign state. But as La Forest J pointed out (p 70), in this context the state's purpose in doing the act may be relevant, not in itself, but as an indication of the act's juridical character.

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*, at 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*. I shall expand on this point below, in the context of section 4 of the State Immunity Act, which is largely based on the territorial principle.'**

The Tribunal went on to hold as set out at paragraphs 5(c) and (d), above.

37. So far as material to issues two and three, the claims advanced in this case are of race discrimination and harassment, contrary to the EqA. Having regard to section 4(6) of the SIA, each such claim would constitute 'proceedings relating to a contract of employment', for the purposes of section 4(1) of the SIA. As is clear from the dicta of Lord Sumption JSC, cited above, when considering State immunity the question is whether the employment claim arises out of an inherently sovereign or governmental act of the foreign State. Per *The I Congreso*, in addressing that question the court must consider the whole context in which the claim is made. In the great majority of cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise, in turn depending on the functions which the employee is employed to perform. Administrative and technical staff perform an essentially ancillary and supportive role. The employment of some of them might be exercises of sovereign authority, if their functions are sufficiently close to the governmental functions of the mission. But, the character of the employment will not always and necessarily be decisive. A State's immunity may extend to some aspects of its treatment and not others. Territorial connections between the employee and the foreign and forum States can never be entirely irrelevant, but there is limited international consensus as to the extent to which the territorial principle can displace the rule which confers immunity on sovereign acts but not on acts of a private law nature.

38. In this case, following an earlier order for particulars, the pleaded acts of discrimination and harassment were set out over three pages, in a document headed 'Claimant's basis for the racial discrimination claim'. It is clear, from the first paragraph, that the alleged acts pleaded thereafter were said to have taken place, *'upon rejoining the Spanish Embassy on the 22.04.2013'*. They included alleged treatment as summarised by Mr Jackson and recorded above. The claimant additionally made reference to the restriction of her access to the electronic documents register system and to parts of the embassy building; to the respondent's preparation of a report at a time when she had been on sick leave, with a view to initiating disciplinary proceedings against her; and to an argument with the Vice-Chancellor. The alleged acts of discrimination are said to have *'contributed to* [her] *decision to resign'*.

39. Nothing in her contract of employment identified the duties which the claimant had been employed to perform. In her witness statement before the Tribunal, the claimant did not detail the duties which she had in fact performed, albeit stating that, from the Summer of 2013, they had included *'most of the protocol-related duties previously undertaken by the Protocol Officer'* [8]. In her witness statement, the then Canciller, stated that she had not worked at the Embassy during the period over which the claimant had been employed, but recorded her understanding that the claimant had been employed *'to perform the following functions: social secretary to the ambassador, the handling of communications, and IT equipment, accounting, telephone calls, typing, interpreting, translation, filing, registering documents, and other administrative tasks related to her role that may be assigned by the head of mission or the senior staff in which the former may delegate their authority.'* [17]

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 judgement, 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. Even in cases where the appeal tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", British Telecommunications PLC v Sheridan [1990] IRLR 27 at para 34.'* (*Yeboah v Crofton* [2002] IRLR 635 [93]). 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.

Issue four: if not a sovereign act, was the Tribunal entitled to disapply section 4(2)(a) of the SIA (ground 6)?

Submissions

43. The short point advanced by Mr Davies is that the Tribunal misapplied *Benkharbouche*. As the claimant had dual nationality, she was no less a national of the Kingdom of Spain than she was a Briton. In *Benkharbouche*, sub-section 4(2)(a) was held to have been justified as a matter of customary international law [64] and ought not to have been disapplied by the Tribunal. Article 8 of the Vienna Convention[2] permitted discrimination on grounds of nationality and, indeed, required it in some circumstances. The premise of a diplomatic mission was that it represented the interests of the members of one nation, possibly in cooperation with, but potentially against the interests of, the other nation. Loyalty to the sending State was a necessary condition of employment. Professor Denza's view was that the sending State's right to appoint whom it pleased extended to a right to dismiss. The latter did not sit comfortably with the right to claim for a discriminatory dismissal. The fact that the 2023 Order had since amended section 4(2)(b) of the SIA, whilst leaving section 4(2)(a) undisturbed, indicated that the Supreme Court's rationale in relation to the former section did not apply to the latter.

44. Mr Jackson acknowledged that the fact that an individual possesses dual nationality does not render her any less a national of either country. He further acknowledged that, if section 4(2)(a) of the SIA reflected customary international law, there could be no basis for its disapplication. The question was whether that law was as the respondent contended. Mr Jackson submitted that the general principle from customary international law was that absolute bars were not permitted. In this case, they would interfere with the obligations conferred by Article 6 ECHR, Article 47 of the Charter, Article 10 of the Treaty on the Functioning of the European Union, and/or the Race Equality Directive (reinforced by recital 26 thereto). Whilst *Benkharbouche* had not been concerned with section 4(2)(a) of the SIA and, thus, was not binding as to its application, it was binding in relation to section 16(1)(a), the Supreme Court's reasoning in relation to which applied with equal force to section 4(2)(a).

Discussion

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[2] '1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.'

45. In the form in force at the material time, sections 4(2)(a) and 16(1)(a) of the SIA extended immunity to the State irrespective of whether the acts in question were exercises of sovereign authority or acts of a private law character. As Lord Sumption held in *Benkharbouche* ([63] to [67]), in concluding that section 4(2)(b) of the SIA was not justified by any binding principle of customary international law:

> **'63. The result is that the State Immunity Act 1978 can be regarded as giving effect to customary international law only so far as it distinguishes between exercises of sovereign authority and acts of a private law character, and requires immunity to be conferred on the former but not the latter. There is no basis in customary international law for the application of state immunity in an employment context to acts of a private law character.**
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> **64. Under the terms of the Act, contracts of employment are excluded from the ambit of section 3, which applies the distinction between sovereign acts and acts of a private law character to other contracts for the supply of services. Section 4 by comparison identifies those contracts of employment which attract immunity by reference to the respective connections between the contract or the employee and the two states concerned. In principle, immunity does not attach to employment in the local labour market, ie where the contract was made in the United Kingdom or the work fell to be performed there: see section 4(1). However, this is subject to sections 4(2)(a) and (b), which are concerned with the employee's connections by nationality or residence with the foreign state (section 4(2)(a)) or the forum state (section 4(2)(b)). Section 4(2)(a) extends the immunity to claims against the employing state by its own nationals. As I have said, this may have a sound basis in customary international law, but does not arise here. Section 4(2)(b) extends it to claims brought by nationals or habitual residents of third countries. Both subsections apply irrespective of the sovereign character of the relevant act of the foreign state.**
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> **65. Sections 4(2)(a) and (b) are derived from article 5.2(a) and (b) of the European Convention on State Immunity. Like section 4 of the Act, article 5 of the Convention deals with contracts of employment without reference to the distinction between acts *jure imperii* and *jure gestionis* which are the basis of the restrictive doctrine of immunity. Contractual submission apart, the availability of state immunity in answer to employment claims is made to depend entirely on the location of the work and the respective territorial connections between the employee on the one hand and the foreign state or the forum state on the other. The explanatory report submitted to the Committee of Ministers of the Council of Europe justified this on the ground that "the links between the employee and the employing State (in whose courts the employee may always bring proceedings), are generally closer than those between the employee and the State of the forum."**
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> **66. The United Kingdom is not unique in applying this principle. Seven other European countries are party to the European Convention on**

> **State Immunity and six other countries have enacted legislation containing provisions similar to section 4(2) of the United Kingdom Act. But this is hardly a sufficient basis on which to identify a widespread, representative and consistent practice of states, let alone to establish that such a practice is accepted on the footing that it is an international obligation. The considerable body of comparative law material before us suggests that unless constrained by a statutory rule the general practice of states is to apply the classic distinction between acts *jure imperii* and *jure gestionis*, irrespective of the nationality or residence of the claimant. Indeed, the courts of a significant number of jurisdictions have refused to apply the immunity as between states which are not both party to the Convention, unless they performed functions directly related to the exercise of the state's sovereign authority, on the ground that the requirements of general international law differed on this point from those of the Convention: see *French Consular Employee Claim* (1989) 86 ILR 583 (Supreme Court, Austria); *British Consulate-General in Naples v Toglia* (1989) 101 ILR 379, 383-384 (Corte de Cassazione, Italy); *De Queiroz v State of Portugal*, 115 ILR 430 (1992) (Brussels Labour Court, Belgium, 4th Chamber); *M v Arab Republic of Egypt* (1994) 116 ILR 656 (Federal Tribunal, Switzerland); *Muller v United States of America* 114 ILR 512, 517 (1998) (Regional Labour Court, Hesse); *X v Saudi School in Paris and Kingdom of Saudi Arabia*, 127 ILR 163 (2003) (Cour de Cassation, France - note the observations of the Advocate-General at p 165); *A v B* Oxf Rep Int L (ILDC 23) (2004) (Supreme Court, Norway); *Kingdom of Morocco v HA Yearbook of International Law* (2008), 392 (Court of Appeal of the Hague, Netherlands).**
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> **67. I conclude that section 4(2)(b) of the State Immunity Act 1978 is not justified by any binding principle of international law.'**

46. That *Benkharbouche* did not itself decide the application of section 4(2)(a) is clear. Nevertheless, at [59], Lord Sumption had observed that, *'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.'* That proposition was revisited and fortified at paragraphs 65 and 66. In that context, I confess to having some difficulty in understanding the basis of his unexplained observation that ([64]): *'Section 4(2)(a) extends the immunity to claims against the employing state by its own nationals. As I have said, this may have a sound basis in customary international law, but does not arise here'*, particularly in light of the concluding sentence to the same paragraph: *'Both subsections* [4(2)(a) and 4(2)(b)] *apply irrespective of the sovereign character of the relevant act of the foreign state.'* It may be that he was drawing a distinction between a *'sound basis in'* and *'a rule of'* customary international law, the former indicative of some support, albeit lacking the requisite degree of consensus to which he had referred at [31] of his judgment.

47. In any event, 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 section 4(2)(b) applies equally to section 4(2)(a). I have been provided with no materials which would satisfy the requirements set out in paragraph 31 of *Benkharbouche* in establishing a rule of customary international law undermining the conclusions highlighted above. That, it seems to me, is dispositive of this issue. Mr Davies' submissions, whether deriving from Article 8 of the Vienna Convention or a sending State's right to appoint and dismiss employees, are not on point, essentially for the reasons set out at paragraph 70 of *Benkharbouche* (set out below, with emphasis added, albeit that that paragraph was directed towards consideration of section 16(1)(a) of the SIA and, in that context, to whether there was a special rule applicable to embassy staff):

> **'70. The Secretary of State submits that there is indeed a special rule applicable to embassy staff. He says that such a rule is implicit in the international obligations of the United Kingdom under the Vienna Convention on Diplomatic Relations, the European Convention on State Immunity, and the state of customary international law reflected in the United Nations Convention. The Vienna Convention on Diplomatic Relations has been ratified by almost every state in the world and may for practical purposes be taken to represent a universally binding standard in international law. Article 7 provides that a sending state may "freely appoint" members of the staff of a diplomatic mission. The staff referred to include the technical, administrative and domestic staff as well as the diplomatic staff: see article 1. The argument is that the freedom to appoint embassy staff must imply a freedom to dismiss them. Article 32 of the European Convention on State Immunity and article 3.1 of the United Nations Convention both provide that they are not to prejudice the privileges and immunities of a state in relation to the exercise of the functions of its diplomatic missions and persons connected with them. In my opinion, however, article 7 of the Vienna Convention has only a limited bearing on the application of state immunity to employment claims by embassy staff. I would accept that the right freely to appoint embassy staff means that a court of the forum state may not make an order which determines who is to be employed by the diplomatic mission of a foreign state. Therefore, it may not specifically enforce a contract of employment with a foreign embassy or make a reinstatement order in favour of an employee who has been dismissed. But a claim for damages for wrongful dismissal does not require the foreign state to employ anyone. It merely adjusts the financial consequences of dismissal. No right of the foreign state under the Vienna Convention is infringed by the assertion of jurisdiction in the forum state to carry out that adjustment. Therefore, no right under the Vienna Convention would be prejudiced by the refusal of the forum**

> **state to recognise the immunity of the foreign state as regards a claim for damages.'**

The same logic would apply to a claim for damages and other compensation in connection with a discriminatory dismissal. Furthermore, that a claim for an act of discrimination can, as a matter of principle, be brought against a foreign State is clear from the facts of *Janah v Libya* (conjoined with *Benkharbouche*). The fact that the 2023 Order (post-dating the hearing before the Tribunal) did not amend section 4(2)(a) of the SIA does not assist the respondent; as the Explanatory Note makes clear, it was expressly intended to remove the incompatibility with a Convention right which the Supreme Court had identified in sections 4(2)(b) and 16(1)(a). It does not follow from that that there is no similar incompatibility in section 4(2)(a), albeit undeclared in *Benkharbouche* because the section was not of direct relevance in that case.

48. Having concluded that section 4(2)(a) of the SIA is not justified by any binding principle of customary international law, it follows that it cannot operate to deprive the Tribunal of jurisdiction over the respondent and the Tribunal was right so to hold. As a conflict between EU law (here, Article 47 of the Charter) and English domestic law must be resolved in favour of the former and the latter must be disapplied (*Benkharbouche* [78]), the Tribunal was obliged to disapply that section.

Overarching conclusion and disposal

49. It follows that, of the five grounds of appeal which were pursued by the respondent (being two, three, four, five and six), all except ground four fail and are dismissed. As a matter of principle, ground four is allowed, but has no effect on the outcome of the preliminary hearing, such that the judgment of the Tribunal stands.