18 October 2017

PRESS SUMMARY

Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) and
Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v Janah (Respondent) [2017] UKSC 62
On appeal from [2015] EWCA Civ 33

JUSTICES: Lord Neuberger, Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption

BACKGROUND TO THE APPEAL

Ms Janah is a Moroccan national who was recruited in Libya to work as a domestic worker for the Libyan government at its London embassy. Ms Benkharbouche is a Moroccan national who was recruited in Iraq to work for Sudan at its London embassy. Both were dismissed from their employment and then issued claims in the Employment Tribunal against Libya and Sudan respectively. Some of their claims were based on EU law. Others were based on breach of contract or on purely domestic statutes of the United Kingdom. In both actions the Employment Tribunal dismissed the claims on the basis that Libya and Sudan were entitled to state immunity under the State Immunity Act 1978 ("1978 Act").

The Employment Appeal Tribunal ("EAT") heard Ms Janah's and Ms Benkharbouche's appeals together. The EAT allowed the appeals and held that those sections were incompatible with article 47 of the EU Charter of Fundamental Rights and Freedoms ("EU Charter") which reflects the right in EU law to a remedy before a tribunal. The EAT consequently disapplied sections 4(2)(b) and 16(1)(a) of the 1978 Act insofar as those sections barred the claims which were based on EU law.

The Court of Appeal affirmed the judgment of the EAT and declared those sections of the 1978 Act to be incompatible with the right to access a court, under article 6 of the European Convention on Human Rights ("ECHR"). The Secretary of State appeals in both cases.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sumption gives the judgment, with which Lord Neuberger, Lady Hale, Lord Clarke and Lord Wilson agree.

REASONS FOR THE JUDGMENT

The 1978 Act renders a foreign state immune from the jurisdiction of a UK court in a claim based on the foreign state's employment of the claimant, where the claimant either: (i) at the time of the contract, was neither a UK national nor UK resident; or (ii) works for the foreign state's diplomatic mission. Section 4(2)(b) confers immunity in the first category; section 16(1)(a) confers immunity in the second **[1, 11]**. Article 6 of the ECHR confers a right of access to a court to determine disputes, although that right is not absolute **[14]**. The Claimants argued that the relevant provisions of the 1978 Act were incompatible with EU law and with Article 6 of the ECHR, because they prevented access to a court in circumstances where this result was not required by international law. The Secretary of State argued (i) that a court's recognition of state immunity can never amount to an infringement of article 6, because it only reflects the court's lack of jurisdiction over a foreign state, but (ii) that in any event the relevant

provisions of the Act were consistent with international law or at least with a tenable view of international law. **[29-30, 34-35]**.

The test was whether the relevant provisions of the Act were consistent with international law, not whether there was a tenable view to that effect. These provisions were not consistent with international law. A court may identify a rule of customary international law only if enough states follow a consistent practice, on the footing that it is a legal obligation **[31]**. The Secretary of State argued that although states now recognise a more restrictive doctrine of state immunity, the immunity is still absolute unless there is sufficient international consensus to show that Libya and Sudan fall into any established exception to that absolute immunity **[33]**. This Court rejects those arguments, which mischaracterise the historical development of the restrictive doctrine of immunity. Specifically: (i) while there is a long-standing consensus of states in favour of immunity there has probably never been sufficient international consensus for an absolute rule of state immunity in customary international law; (ii) the only consensus that there has ever been about the scope of state immunity is the relatively recent consensus in favour of the restrictive doctrine; (iii) that restrictive doctrine emerged after a re-examination of the true basis of the doctrine, rather than by creating exceptions to any general rule of absolute immunity **[40-52]**.

In customary international law, a foreign state is immune where a claim is based on sovereign acts. Whether a foreign state's employment of a claimant constitutes a sovereign act depends on the nature of that employer-employee relationship. That will, in turn, depend primarily on the functions which the employee is employed to perform. The employment of purely domestic staff in a diplomatic mission is a private act, rather than an inherently sovereign act. That approach is supported by the reasoning in case law from the United States, France, and the European Court of Human Rights **[53-56]**.

Under section 4(2)(b) of the Act, whether a foreign state is immune depends entirely on the nationality and residence of the claimant at the date of the employment contract. That section draws no distinction between acts of a private nature and acts of a sovereign nature. That approach to state immunity is followed by some states but lacks any basis in customary international law **[64-66]**. A person's nationality and residence at the date of the employment contract are not proper grounds for denying a person access to the courts in respect of their employment in this country **[67]**.

Section 16(1)(a) extends state immunity to the employment of all members of a diplomatic mission. The Court rejects the Secretary of State's argument that a state is entitled in international law to absolute immunity in respect of the employment of embassy staff. Although article 7 of the Vienna Convention on Diplomatic Relations 1961 indicates that a court may not order a foreign state to employ a specific person in its embassy, this issue does not arise where the claimant only seeks damages (rather than reinstatement in his or her previous position) **[68-69]**. Nor is there any corresponding rule of customary international law to extend absolute state immunity to the employment of embassy staff **[70-72]**.

As a matter of customary international law, therefore, neither Sudan nor Libya are entitled to immunity in respect of these claims. Sections 4(2)(b) and 16(1)(a) of the 1978 Act, which confer immunity in English law, are consequently incompatible with article 6 of the ECHR **[74-75]**. In light of that, the Secretary of State accepted that those sections were also incompatible with article 47 of the EU Charter **[77]**. The Court also accepts Ms Janah's argument that section 16(1)(a) of the 1978 Act discriminated unjustifiably on the grounds of nationality, but in the circumstances that adds nothing **[76]**. EU law prevails over English law in the event of a conflict, so those sections of the 1978 Act cannot bar the claims which are based on EU law **[77]**. Those EU law claims are remitted to the Employment Tribunal, to be determined at trial. The other claims remain barred by the 1978 Act, notwithstanding that the Court of Appeal properly made a declaration of incompatibility with the ECHR in respect of them **[78]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html