



## State and diplomatic immunity

MOHINDERPAL SETHI, Devereux Chambers and CHRISTOPHER BRAGANZA, Sheridans

*The concepts of state and diplomatic immunity are ancient in origin. Recently, however, the EAT has had to grapple with the highly complex inter-relationship between domestic statutes recognising the UK's international law obligations to other sovereign states and its obligations on human rights and on the fundamental rights guaranteed by EU law.*

London hosts one of the largest diplomatic communities in the world, with thousands of members of foreign missions employed by their sending states as diplomats or as administrative, technical, or domestic staff. Virtually all states have embassies in London and will conduct some kind of commercial activity within the English courts' jurisdiction. In addition, it is common for serving diplomats to employ private servants and occasionally to conduct their own private business activities in the host state. The scope of immunity from jurisdiction will be critical to such employees.

### **State immunity**

The law on state immunity from jurisdiction is derived from customary international law which limits the rights of the courts of one state to exercise authority over other states and their officials. The rules stem from the basic principle of the sovereign equality of states and are designed to ensure that international relations can be properly and effectively conducted.

This doctrine of public international law is incorporated in the UK by the State Immunity Act 1978. S.4(1) removes immunity in certain circumstances in proceedings relating to a contract of employment. However, s.4(2) retains the immunity if when starting the claim the claimant was a national of the mission state, or if when the contract was made he was not a UK national or not habitually resident there, or if the parties have otherwise agreed in writing. Further, s.16(1)(a) retains the immunity where employment claims are brought by members of a mission.

For many years, there has been a gradual trend in international and comparative law towards limiting state immunity in respect of employment-related disputes.

The codification of state immunity is enshrined in the Convention on Jurisdictional Immunities of States and their Property, which was adopted by the General Assembly of the United Nations in 2004. The 2004 Convention distinguishes between acts of sovereignty or governmental authority, which attract the immunity, and acts of commerce or administration, which do not. Under Article 11(2)(a), immunity still applies if 'the employee has been recruited to perform particular functions in the exercise of governmental authority'.

Prior to the 2004 Convention, the ECtHR had considered in *Fogarty* that the UK had not exceeded the margin of appreciation allowed to states in limiting access to the employment tribunals of an Irish national employed as an administrative assistant in the United States embassy in London.

The Strasbourg court has, however, considered the 2004 Convention in the cases of *Cudak* and *Sabeh El Leil*. Ms Cudak, a Lithuanian national, had been employed as a secretary and switchboard operator by the Polish embassy in Vilnius and, following her dismissal, brought an employment claim against Poland. The ECtHR held that, by declining jurisdiction based on state immunity, Lithuania had breached Ms Cudak's Article 6 ECHR right to access a court. Similarly, in the case of Mr Sabeh El Leil, involving a French national who was employed as an accountant to the Kuwaiti embassy in Paris, the ECtHR ruled that France had violated Article 6.

Back on home soil, in the jointly heard appeals of *Benkharbouche* and *Janah* the EAT recently considered for the first time whether a person employed in the UK by a foreign diplomatic mission as a member of its domestic staff

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may bring a claim to assert employment rights against their mission state employer.

Ms Benkharbouche, a cook of Moroccan nationality who had been employed at the Sudanese embassy in London, claimed holiday pay and a breach of the Working Time Regulations. Ms Janah, a member of the domestic staff of the Libyan embassy in London, brought claims of race discrimination and harassment in addition to claims under the Working Time Regulations. When Ms Janah entered into her employment contract she was neither a UK national nor habitually resident there under s.4(2) SIA. Sudan and Libya asserted state immunity from suit. In both cases, two ETs separately held that state immunity barred the claims. However the ETs held that, despite the immunity being a potential or actual breach of Article 6 ECHR, the SIA could not be interpreted under s.3 Human Rights Act 1998 to permit the claims to proceed, nor should the SIA be disapplied to the extent that the claims fell within the material scope of EU law.

The President, Mr Justice Langstaff, allowed the appeals principally on the following basis:

- Article 6 was breached by the ETs permitting Sudan and Libya to assert state immunity as a bar to the claims;
- the SIA could not be interpreted under s.3 HRA so as to permit the claims to proceed. Given that the overall approach of the SIA is deliberately to limit access to justice in certain cases, there is no proper interpretative scope for altering the criteria defined in the SIA;
- to the extent that the employment claims fell within the material scope of EU law, the principle of effectiveness requires the ET to disapply provisions of legislation which are in conflict with a fundamental right guaranteed by EU law. The SIA should be disapplied on the basis that although the HRA dealt with the approach of courts and tribunals to alleged breaches of the ECHR, the EU Charter (following the adoption of the Lisbon Treaty in 2009 and the Supreme Court case of *RFU*) now has direct effect in national law 'binding member states when they are implementing EU law', and recognised general principles of fundamental importance to the EU where the employment claims fell within the material scope of EU law (in these cases, under the Race Discrimination Directive 2000/43/EC and Working Time Directive 2003/88/EC). Article 47 of the EU Charter recognised the same principle as contained in Article 6 ECHR.

Therefore, the ET was bound by EU law (following the ECJ decisions in *Küçükdeveci* and *Aklagaren*) to disapply domestic law in conflict with these principles even in a dispute between private litigants.

The implications of this case may go beyond issues of state immunity. It highlights a conflict between national provisions implementing the provisions of treaties reached by the international community, and those giving effect to fundamental EU principles agreed by member states. It is surprising, and arguably undesirable, that the HRA, which seeks to strike a careful balance between the roles of the courts and Parliament, does not operate in circumstances where general and fundamental principles of the EU do, despite the right in question being the same. Practitioners in this area will welcome a review by a higher appellate court.

### ***Diplomatic immunity***

The extent of diplomatic immunity differs from that of state immunity; generally, it extends further. Moreover, diplomats the world over employ private servants. For the first time, the case of *Reyes* raises the question of whether a private domestic servant, employed by a serving diplomat in his official diplomatic residence, may bring a civil claim against him arising out of a contract of employment by invoking the ECHR to restrict the immunity.

Two former domestic workers brought employment tribunal claims against their employer, a serving diplomat. The diplomat claimed immunity from suit under s.2(1) Diplomatic Privileges Act 1964, which incorporates into UK law the relevant provisions of the Vienna Convention on Diplomatic Relations 1961. Article 31(1) of the Vienna Convention gives diplomatic agents immunity from the criminal and civil jurisdictions of the receiving state.

Article 31(1) provides limited exceptions to diplomatic immunity, including at Article 31(1)(c) where the action relates to any 'professional or commercial activity' exercised by the diplomatic agent in the receiving state 'outside his official functions'.

An ET held that the employment of a domestic worker was not upon a literal construction a commercial activity, but did fall outside his official functions. However, the ET held that to claim immunity operated as a procedural bar to claims for substantive rights and amounted to a disproportionate interference with the claimants' right

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to access a court, contrary to Article 6 ECHR. The ET interpreted 'commercial activity' under s.3 HRA as including the employment of domestic workers. In reaching her conclusion, the employment judge relied on *Cudak* and *Sabeh El Leil*, which concerned state rather than diplomatic immunity.

Allowing the diplomat's appeal, Langstaff P, among other matters, held that:

- the employment of these private servants was not within the scope of the diplomatic agent's 'official functions' nor 'indispensable' to them. However, nor was it a 'professional or commercial activity'. This meant that the exception to diplomatic immunity in Article 31(1)(c) of the Vienna Convention did not apply;
- conferring diplomatic immunity pursued a legitimate aim, namely to ensure that diplomats are unhindered in the performance of their official functions in the receiving state. Diplomatic immunity is authoritatively recognised to be wider than state immunity in its scope;
- unlike in the case of state immunity, there is no Convention that moderates the position struck by the international community at Vienna in 1961; nor is there any decided case relating to diplomatic immunity which restricts it as being in breach of Article 6 ECHR. Denying the claimants the right of access to a court was proportionate to the aim pursued by diplomatic immunity. Accordingly, there was no breach of Article 6;
- the Appeal Tribunal therefore did not need to consider whether, if there was a breach of Article 6, the interpretive obligation placed on the tribunal under s.3 HRA is such that 'commercial activity' in the Vienna Convention should be interpreted in the UK to include entering into a contract of employment. As a result, the Appeal Tribunal did not need to deal with the issues arising from the fact that the source of the exception lies in international rather than purely domestic law and that this might favour an autonomous international as opposed to parochial domestic interpretation.

Permission to appeal to the Court of Appeal was granted since this is the first case to consider whether the approach to diplomatic immunity should be modified in respect of employment claims in the same way as has recently occurred in the Strasbourg cases of *Cudak* and *Sabeh El Leil*, where state immunity was claimed.

## Conclusion

Until further authoritative guidance is given by the Court of Appeal, the judgments of Langstaff P should be on the reading lists of all employment lawyers acting for or against the UK or foreign governments, their missions and diplomats. In the interim, it is advisable that embassies and individual diplomats consider the extent of their respective immunities in relation to employment claims. They should review the terms on which they employ administrative and domestic staff, and the scope of the duties performed. Any legal disputes arising from a diplomatic incident require careful case management so as to minimise legal risk, not least the risk of inadvertently submitting to the jurisdiction of the UK courts and tribunals.

## KEY:

SIA	State Immunity Act 1978
2004 Convention	UN Convention on Jurisdictional Immunities of States and their Property 2004
ECtHR	European Court of Human Rights
<i>Fogarty</i>	<i>Fogarty v United Kingdom</i> (2002) 34 EHRR 12
<i>Cudak</i>	<i>Cudak v Lithuania</i> (2010) 51 EHRR 15
<i>Sabeh El Leil</i>	<i>Sabeh El Leil v France</i> (2012) 54 EHRR 14
ECHR	European Convention on Human Rights
<i>Benkharbouche</i>	<i>Benkharbouche v Embassy of the Republic of Sudan</i> UKEAT/0401/12 (4 October 2013)
<i>Janah</i>	<i>Janah v Libya</i> UKEAT/0020/13 (4 October 2013)
HRA	Human Rights Act 1998
EU Charter	EU Charter of Fundamental Rights
<i>RFU</i>	<i>RFU v Consolidated Information Services</i> [2012] 1 WLR 3333
<i>Kücükdeveci</i>	<i>Kücükdeveci v Swedex GmbH and Co KG</i> [2011] 2 CMLR 27
<i>Aklagaren</i>	<i>Aklagaren v Fransson</i> Case C-617/10 (26 February 2013)
<i>Reyes</i>	<i>Al-Malki v Reyes</i> UKEAT/0403/12 (4 October 2013)
Vienna Convention	UN Vienna Convention on Diplomatic Relations 1961