Appeal No. UKEAT/0403/12/GE

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 1 May 2013
Judgment handed down on

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

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(1) MR JARALLAH AL-MALKI
(2) MRS AL-MALKI — APPELLANTS

(1) MS CHERRYLYN REYES
(2) MS TITIN SURYADI — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MR MOHINDERPAL SETHI (of Counsel) Instructed by: Reynolds Porter Chamberlain Tower Bridge House, St. Katharine's Way, LONDON E1W 1AA
For the Respondent	MR PAUL LUCKHURST (of Counsel) Instructed by: Anti-Trafficking and Labour Exploitation Unit, Islington Law Centre 232 Hornsey Road Islington LONDON N7 7LL

SUMMARY

Two domestic workers, employed one after the other by the First Respondent, a diplomat, and Second Respondent, his wife, (the appellants in this appeal) asserted they had been denied their contractually agreed or minimum wages, and had been discriminated against because of their race. They said they had been trafficked. The Respondents claimed diplomatic immunity. The ET held that the restriction of the plea of diplomatic immunity in the Vienna Convention, where a diplomat had engaged in commercial activity outside his official functions, applied. Although the employment of domestic staff was not on the face of it commercial activity, to claim immunity operated as a procedural bar which represented a disproportionate interference with the Claimants' right to access a court, contrary to Art. 6 ECHR. Accordingly, "commercial activity" was to be interpreted under s.3 HRA as including the employment of such staff as the Claimants.

In reaching her decision, the judge relied on recent Strasbourg authority which concerned State rather than diplomatic immunity. That had in turn been heavily influenced by an international Convention of 2004, relating to State but not diplomatic immunity. She had failed accurately to identify and express the underlying rationale for the plea of diplomatic immunity; had wrongly considered that the seriousness of the claims was relevant in considering proportionality; and wrongly concluded that the plea of immunity should not be respected. The appeal was allowed. A further appeal, against a conclusion that the Respondents had been validly served, was rejected, as was a cross-appeal arguing that for an ET to permit a plea of diplomatic immunity to be raised in a potential case relating to trafficked individuals would be in breach of Art. 4 ECHR.

Permission to appeal was granted, since there is apparently no decided case which has yet considered whether the previous approach to diplomatic immunity should be modified in respect of employment claims in the same way as has occurred where State immunity is claimed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On 27th April 2012, at a pre-hearing review of the claim at Watford, EJ Tamara Lewis determined that the Respondents were validly served with the proceedings, and that neither could claim diplomatic immunity so as to bar the claims. The appeal raises the question how a claim brought directly against an individual diplomat may validly be served, and whether a private domestic servant, employed by the diplomat in his official diplomatic residence, may bring a civil claim against him arising out of her employment.

2. Both Claimants worked in the official diplomatic residence of the First Respondent, who was a member of the diplomatic staff of the Saudi Arabian mission in London, and were employed there by him and his wife, the Second Respondent: the First Claimant from 18 January 2011 until 14 March 2011, and the Second from 16 May 2011 until 19 September 2011.

3. Both Claimants separately made claims that they had been directly and indirectly discriminated against because of their race, had been subject to racial harassment, and had suffered unauthorised deductions from wages (being paid less than the national minimum wage); and for compensation for accrued but untaken holiday; and for failures to provide a statement of particulars of employment and an itemised pay statement.

4. The Respondents claim immunity under the Diplomatic Privileges Act 1964 ("**DPA**"). That Act provides materially as follows:

> **"2 Application of Vienna Convention.**
>
> **(1) Subject to section 3 of this Act, the Articles set out in Schedule 1 to this Act (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961)**

shall have the force of law in the United Kingdom and shall for that purpose be construed in accordance with the following provisions of this section."

5. Article 31(1) of the Vienna Convention, thus incorporated in UK law by virtue of s.2(1) of the DPA, provides:

> **"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"**

6. The First Respondent was accredited as a diplomatic agent with effect from 22 July 2010. He claims the protection thus afforded by Art. 31. His wife claims equivalent protection as being a person to whom that diplomatic immunity is extended by virtue of Article 37 of the Vienna Convention.

7. The Claimants argued before the Employment Tribunal that the exception in Art. 31(1)(c) applied, since for the diplomat to effect a contract under which an individual was to work as an employee in his own residence was for him to engage in commercial activity. This is only part of the applicable test, for as EJ Lewis pointed out, there is a further limb which must also be satisfied before a diplomat becomes ineligible to claim immunity from suit: namely, that the action complained of fell outside his official functions.

8. Mr Luckhurst, appearing for the Claimants (respondents to this appeal), accepts for present purposes that a literal application of the words "commercial activity" does not permit

the claims to proceed. In making this concession he bases himself on the view of Laws J expressed in **Propend Finance v Sing (1997) 111 ILR 611** that "commercial activity" refers to "any activity which might be carried on by the diplomat on his own account for profit", but reserves the right to argue on any further appeal that a broader view should be taken of the expression. However, since EJ Lewis held, and Mr Luckhurst's argument is, that this literal interpretation falls to be modified in accordance with section 3 of the **Human Rights Act 1998** ("the **HRA**"), since it disproportionately restricts access to court for the Claimants, and thereby infringes Article 6 of the European Convention on Fundamental Rights and Human Freedoms ("the **ECHR**"), it is necessary to consider also the question whether the employment of a domestic worker is within the official functions of a diplomat within the force of that expression as used in Vienna Convention. This is because the determination of what is disproportionate involves asking if there is an imbalance, between the exercise of the right concerned in the relevant circumstances on the one hand, and the considerations said to outweigh it on the other. If the employment of a domestic worker, to serve a diplomat in his own home, is not only outside the scope of "commercial activity" but is also inside the scope of the diplomat's "official functions", the weight pressing in the diplomat's favour is greater.

9. Judge Lewis thought the employment of domestic staff was not within the official functions of the First Respondent (see paragraph 34 of her reasons). Mr Sethi argues that it was. He submits that there is no definition of "official functions" in the Vienna Convention, though some (limited) assistance is provided by Article 3(1) of that Convention:

> **"The functions of a diplomatic mission consist, inter alia, in:**
>
> **(a) representing the sending State in the receiving State;**
>
> **(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;**
>
> **(c) negotiating with the Government of the receiving State;**

(d) ascertaining by all lawful means conditions and developments in the receiving State and reporting thereon to the Government of the sending State;

(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

10. He argues that a broad meaning should be given to the phrase, incorporating acts which are ancillary to those identified in this (non-exhaustive) list. For this submission, Mr Sethi relied on **Portugal v Goncalves** 82 ILR 115. The Civil court in Brussels acceded to an application by Portugal to quash a default judgment against the Director of the Commercial Office at the embassy in respect of an unpaid fee for obtaining a translation. It rejected the argument that obtaining a translation did not form part of the official functions of the mission, since:

"..it is clear that Article 3 sets out the general framework for diplomatic functions which are indispensable for the performance of those general functions listed in the Article".

11. This, he argued, was supported by the views of Laws J. in **Propend** in which it was held that a member of the diplomatic staff of the Australian High Commission in London who carried out police liaison duties as part of his official duties was acting inside the scope of the official functions of a diplomat – they were "a very function of his particular diplomatic role...".

12. These decisions indicate two points: first, that help as to the scope of official functions is to be gained from considering Art. 3(1) of the Convention; and, second, that actions which it is not the purpose of the mission itself to perform, but which are closely incidental to those purposes, fall within the scope of the phrase. On this basis, it might be said that to facilitate the performance of duties which fall within the scope of Article 3(1) is to act within the scope of official functions (for they are not purely actions with a private interest, or at least one wholly distinct from the objects of the mission, such as pursuing a profession or a commercial activity

with a view of profit). Mr Sethi supported this view by referring to the consideration of "outside his official functions" by Eileen Denza in her "Diplomatic Law" (3rd ed., 2008, OUP) at pp. 306–8. She regarded the decisions in **Goncalves** and **Propend** as clearly correct, though queried whether the general scope of the non-exhaustive list of functions in Article 3 was the proper point of reference, since in her view a diplomat instructed (by the sending State) to perform particular tasks should be regarded generally as acting within the scope of his official functions.

13. In Satow's Diplomatic Practice (6th ed., 2009, OUP) it was pointed out that private servants employed by diplomatic agents were themselves in a special category: their arrival and final departure has to be notified to the receiving State (Art. 10(1)(c)), where they are not nationals of the receiving State, they enjoy freedoms from tax (Art. 37(4)) and social security provisions (Art. 33(2)), and the jurisdiction of the receiving State over them is to be exercised in a manner such as does not interfere unduly with the performance of the functions of the mission (Art. 38(2)). The draftsmen of the Convention thus had in mind that diplomats were likely to employ domestic servants. Mr Sethi goes further – to submit that it follows that the employment of private servants by diplomatic agents is part of, or sufficiently incidental to, the official functions of a diplomat.

14. This is in my view to conflate what is normally to be expected with that which is an official function of a diplomat: but I accept nonetheless that this argument gives some ground for thinking that the employment of a personal servant may be regarded as an activity which facilitates the performance of the diplomat in his mission.

15. Mr Luckhurst meets these arguments by referring to **Wokuri v Kassam** [2012] EWHC 105 (Ch), a decision of Newey J, and the subsequent Employment Appeal Tribunal decision of **Abusabib and El-Teraifi v Taddese** [2013] ICR 603. In **Wokuri** the defendant, Ms Kassam, was deputy head of mission at the Ugandan High Commission. She had employed Ms Wokuri as her chef and housekeeper in Uganda. Her duties were said by Ms Kassam to include housekeeping and catering at the residence of the Deputy Head of Mission. By the time the matter came before Newey J, Ms Kassam had left the country. The question of diplomatic immunity arose. It was common ground that there was no English authority of much assistance, though three American cases were cited in which the Vienna Convention had been considered. Newey J explained at paragraph 23 that the immunity:

> **".... reflects the fact that acts so performed are in law the acts of the sending State. Denza "Diplomatic Law", third edition, explains the position as follows (at 439):**
>
> > **'The acts of a diplomatic agent in the exercise of his official functions are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot at any time be sued in Britain in respect of such acts since this would be indirectly to implead a sending State.' "**

He then concluded in two important paragraphs as follows:-

> **"25. A former diplomat will not necessarily have immunity in relation to claims by employees carrying out domestic duties. That view is supported by both *Baoanan v Baja* (627 F. Supp. 2d 155, decided by the United States District Court for the southern district of New York in 2009) and *Swarna v Al-Awadi* (622 F. 3d 123, a 2010 decision of the United States Court of Appeals, 2nd Circuit). The Court in *Swarna v Al-Awadi* was, as it seems to me, right to consider that the residual immunity "does not apply to actions that pertain to [a diplomat's] household or personal life and that may provide, at best, 'an indirect' rather than a 'direct... benefit to' diplomatic functions". Such actions do not 'indirectly... implead the sending State' (to use words from Denza, 'Diplomatic Law'). Neither do they relate to 'a) acts performed... in the exercise of [the diplomat's] functions as a member of the mission' (within Article 39(2)).**
>
> **26. Professor Sarooshi (the advocate for the defendant) placed particular reliance on the passage in *Tabeion v Mufti* (73 F. 3d 535, a 1996 decision of the United States Court of Appeals, 4th Circuit) in which the Court said "day to day living services such as dry cleaning, or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them." However, in *Tabeion v Mufti* the Court's concern was essentially as to the meaning of 'commercial activity' in Article 31 (1) (c) ... as was pointed out in *Swarna v Al-Awadi... Tabeion v Mufti* "articulates the scope of acts as they relate to the term 'commercial activity' under Article 31 (1) (c) for sitting diplomats" and does not**

define 'official functions', much less define the official acts that are accorded for eventual immunity under Article 39 (2) to former diplomats". "

16. On the facts before him, which he then set out, Newey J decided that he could not be satisfied that Ms Wokuri's claims arose out of acts performed in the exercise of Ms Kassam's functions as a member of the mission.

17. In **Abusabib v Taddese** [2013] ICR 603, an Employment Appeal Tribunal of which I was the judicial member followed the decision in **Wokuri v Kassam**. It was another case of a former diplomat who claimed residual immunity under Art. 39. Though recognising that, as observed in the judgment of Newey J, a distinction was to be drawn between the residual immunity and that immunity applicable to a sitting diplomat, the reasoning (at paragraphs 29-36 of the decision) is general to both. It is difficult to see how the fact that a diplomat is no longer in post could change the essential character of that which he did whilst in post from being an exercise of his functions as a diplomat to that which was not.

18. Accordingly, unless **Wokuri** and **Abusabib** were wrongly decided, the principles contained in those decisions by which the scope of "functions" was determined are as applicable to the present case as they were to those. Although in neither case was either **Propend** or **Goncalves** cited, and both may be said to indicate a broader approach to the scope of "functions", they are more directly in point than the issue in either of those cases, nor in my view can the domestic services be said to be "indispensable" (per **Goncalves**) for the performance of those diplomatic functions referred to in Article 3. I am not satisfied therefore that they were incorrectly decided.

19. In **Abusabib** the Appeal Tribunal envisaged a spectrum. In principle, the employment by a diplomat of another to provide personal service to him whilst engaged in his mission might be regarded as a function of the mission, since it could be ancillary to important functions, better enabling a diplomat to attend to his central role. The employment of a domestic worker, who performed no task outside the diplomat's home, had such little connection with the functions of the diplomat's mission (which had to be regarded as closely related or ancillary to those set out at Art. 3) that it would fall at the end of the spectrum which was outside the proper scope of "official functions", and it followed that the act of employing such a person was unlikely to be an act performed in the exercise of the functions as such. A clear distinction might fall between that and the case of someone performing such services, and that of someone such as a P.A. whose job in replying to correspondence, both official and personal, and managing the diary, travel arrangements and the like of the diplomat would suggest employment toward the opposite end of the spectrum.

20. Applying those principles, I conclude that had the employment of either Claimant been regarded as within the scope of "commercial activity" that activity would not have been within the scope of the Respondent's official functions as a diplomat.

21. Thus far, therefore, I accept the judge's broad conclusions, though as will emerge I do not accept some of her detailed reasoning.

22. On the face of those conclusions, a plea of diplomatic immunity would be bound to be given effect, since there is no applicable exclusion from the plea of diplomatic immunity conferred by the wording of the Vienna Convention, unless the interpretation or application of the statute has to yield to the effect of the Human Rights Act 1998. The Claimants argue that

as a result of the doctrine of diplomatic immunity they are denied the right of access to a court, contrary to Art. 6 of the ECHR which is scheduled to the HRA. The Respondents do not dispute that the ECHR is engaged: the plea represents a procedural bar to claims for substantive rights. The right is a qualified right, but it is only if conferring diplomatic immunity is a legitimate aim, and denying access to an employment tribunal is proportionate to it, that access may be barred. Since the parties agreed before the Tribunal that the aim was legitimate, the focus of the argument below was on proportionality.

23. In relation to the issue of proportionality, the judge was referred by the Claimant's counsel only to case law which concerned State immunity, and not to any case which concerned diplomatic immunity. Thus she was invited to consider **Fogarty v United Kingdom** (2002) 34 EHRR 12; and **Cudak v Lithuania** (2010) 51 EHRR 15. On appeal, my attention has in addition been drawn to **Sabeh El Leil v France** (2012) 54 EHRR 14.

24. **Fogarty** concerned a claim by a former administrative assistant, who had successfully claimed that she had been unfairly dismissed as a result of sex discrimination at the United States Embassy, and who subsequently applied for two other positions within the Embassy. She was unsuccessful, and again commenced proceedings. At this stage, State immunity was asserted as a bar, as it had not been for her earlier proceedings.

25. The Court held, at paragraph 32, that the procedural guarantee laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the precondition for the enjoyment of those guarantees, namely, access to court. The right (paragraph 33) was not absolute but might be subject to limitations. The court must

nonetheless be satisfied that such limitations did not restrict nor reduce the access left to the individual in such a way or to such an extent that the very essence of the right was impaired:

> **"34. The Court must further examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in several proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of State's sovereignty.**
>
> **35. The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 (3) (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relationship between the parties". The Convention including Article 6(a) cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.**
>
> **36. It follow that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 (1). Just as the right of access to court is an inherent part of the fair trial guarantee and that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.**
>
> **37. The Court observes that, on the material before it, there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question of whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission. Certainly it cannot be said that the United Kingdom is alone in holding that immunity attaches to suits by employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.**
>
> **38. The Court further observes that the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, *inter alia* to the diplomatic and organisational policy of a foreign State. The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions."**

Accordingly, the Court considered that the United Kingdom had not exceeded the margin of appreciation allowed to States in limiting an individual's access to court by conferring immunity on the United States.

26. At the time **Fogarty** was decided a draft international convention relating to State immunity had been produced, but had not progressed beyond draft stage. It sought restrictions on a plea of State immunity where the proceedings related to contracts of employment. On 2nd December 2004, the General Assembly of the United Nations adopted a Convention ("the **2004 Convention**") superseding the 1991 draft. Article 11 as agreed in the 2004 Convention reads materially as follows:

> **"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed in whole or in part in the territory of that other State.**
>
> **2. Paragraph 1 does not apply if:**
>
> **(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;**
>
> **(b) the employee is...**
>
> **(iv) [a]... person enjoying diplomatic immunity...**
>
> .....
>
> **(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum"**

27. In **Cudak v Lithuania**, which post-dated the 2004 Convention as **Fogarty** did not, the applicant was hired as a secretary and switchboard operator by the Embassy of Poland in Vilnius. She complained to a Lithuanian ombudsman that she had been sexually harassed by one of her male colleagues and fallen ill in consequence. The ombudsman held an enquiry, and upheld her claim. When subsequently she was dismissed for failure to come to work (although she had not been allowed to enter the building on some days) she brought an action for unfair

dismissal. The courts declined jurisdiction on the basis of State immunity, which had been invoked by Poland. The European Court of Human Rights held that her complaint of a breach of Article 6 succeeded. Its reasoning was reflective of that in **Fogarty**, save that in place of paragraph 37 of that judgment, the Court said this:

> **"63. The Court found already in the Fogarty judgment, that there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies.**
>
> **64. In this connection, the Court notes that the application of absolute State immunity has, for many years, clearly been eroded. In 1979 the International Law Commission was given the task of codifying gradually developing international law in the area of jurisdictional immunity of States and their property. It produced a number of drafts that were submitted to states for comment. The draft articles it adopted in 1991 included one – Art. 11 – on Contracts of Employment. In 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property.**
>
> **65. The 1991 Draft Articles, on which the 2004 Convention was based, created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contract with the staff of its diplomatic missions abroad. However, that exception was itself subject to exceptions whereby, in substance, immunity still applied to diplomatic and consular staff in cases where the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual; the employee was a national of the employer State; or, lastly, the employer State and the employee had otherwise agreed in writing.**
>
> **66. The report appended to the 1991 Draft Articles stated that the rules formulated in Art. 11 appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of States. This must also hold true for the 2004 Convention. Furthermore, it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions insofar as that provision affects customary international law, either "codifying it or forming a new customary rule."**

28. On the basis that (a) the 2004 Convention applied to Lithuania, though since it had not ratified the Convention it had not voted against its adoption, and its domestic law restricted State immunity to legal relationships governed by public law, thereby excluding private employment contracts (paragraphs 67,68); (b) none of the exceptions set out in Article 11 applied; (c) she was a switchboard operator whose main duties were recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events, none of which could

objectively have been related to the sovereign interests of the Polish Government (paragraph 70); (d) the decision to grant immunity by the Supreme Court had relied solely upon the title of the position she occupied, rather than any factual enquiry (paragraph 71); (e) the acts of sexual harassment had been established by the ombudsman and could hardly have been regarded as undermining Poland's security interests, the Court concluded that there had been a breach of Article 6 ECHR.

29. **Sabeh El Leil v France** concerned an accountant to the Kuwaiti Embassy in Paris. He brought proceedings challenging the reasons for his dismissal. He was awarded damages by an Employment Tribunal in Paris. The Court of Appeal set aside the judgment, holding the claims inadmissible on the basis of sovereign immunity.

30. As with Lithuania in the case of **Cudak**, so, too, it was recognised in **Sabeh El Leil** in paragraph 57 of the judgment that France had not ratified the 2004 Convention, but had not opposed it either. Accordingly, the provisions of that Convention applied to France as customary international law. As in **Cudak**, domestic law was such that jurisdictional immunity from suit would not be applied in an absolute manner. So, too, the Claimant did not fall within any of the exceptions in Article 11 of the 2004 Convention. The Court accordingly held that there had been a violation of Article 6 (1) of the ECHR.

31. Having considered the authorities of **Fogarty** and **Cudak**, EJ Lewis said of the plea of diplomatic immunity, at paragraph 47 in the decision under appeal:

> **"Although it is in pursuance of a legitimate aim, namely the promotion of peace and comity amongst nations and enabling diplomats to discharge the sovereign functions of the sending State, I do not believe it is proportionate in the present cases.**
>
> **48. As a loose guide, I have considered the sort of factors which the ECtHR took into account on proportionality in Fogarty and Cudak. In Fogarty ...it was**

significant in relation to preserving immunity that the case concerned recruitment as opposed to the rights of a current embassy employee, and also that – as such – it might involve looking into sensitive and confidential issues concerning the diplomatic and organisational policy of a foreign State. In Cudak ...it was significant in allowing an exception to immunity that she did not perform any functions closely related to the exercise of governmental authority; she was not a diplomatic agent or consular officer; the subject matter of the dispute was linked to her dismissal and not her recruitment; and she was not a national of the employer State.

49. I believe it would have a disproportionate effect on the Claimants here to bar their claims. The claims are exceptionally serious in nature, especially those concerning race discrimination and those concerning failure to pay a minimum wage. The Claimants were particularly vulnerable....."

32. In order correctly to determine whether restricting access to a court is proportionate to the legitimate aim being pursued in so doing, the actual aim must carefully be identified. Mr Sethi argues that the Tribunal failed correctly or at all to do this, and tended to confuse the aims of diplomatic and State immunity.

33. The purpose of conferring diplomatic immunity is not identical to that of State immunity, though closely related to it. In **Aldona S v Royaume Uni**, (JDI 1963) 191, a decision of the Poland Supreme Court of 14th December 1948, a typist dismissed from the service of a British Foreign Office publication without being paid arrears of salary due to her claimed in Poland against the United Kingdom. Her claim was rejected on the basis of State immunity by the District Court of Appeal. It came before the Supreme Court. It, too, dismissed the claim. It observed:

"...the legal basis of immunity from jurisdiction of a State is different from the immunity of diplomatic agents. Immunity of foreign representatives is meant to protect their freedom in exercising their functions – "*ne impediat legatio*" (Stefko-Ehrlich), whereas the basis of the immunity from jurisdiction of foreign states is the democratic principle of their equality, irrespective of their size and power, which, in consequence, excludes jurisdiction of one State over another ("*Par in parem non habet judicium*"), unless there has been voluntary submission to such jurisdiction either by a definite document or by a conclusive action (Ehrlich, Law of Nations, p.96). ...in examining questions concerning immunity from jurisdiction of foreign States, one has to base oneself directly on general principles universally adopted in international relations. The most essential of these principles is the principle of reciprocity among States which results from the

> **fundamental principle of their equality (this principle must govern diplomatic immunity as well, not withstanding its different aspect). The principle of reciprocity is based on recognition or non-recognition of the immunity from jurisdiction by one State of another in the same measure as the latter recognises or refuses to recognise immunity from jurisdiction of other States."**

Hazel Fox, in the second edition of her seminal text "The Law of State Immunity" (2nd. ed., 2008, OUP), not only cites **Aldona S** but notes that the German Federal Constitutional Court was of the same view in the leading case **Empire of Iran** (45 ILR 57). There the German Federal Constitutional Court, considering the exceptions to immunity in Article 31 of the Vienna Convention held (at p.75):

> **"The Article governs the personal immunity of diplomats. The extent of this immunity differs from that of State immunity; generally, it extends further. In principle, therefore, the extent of State immunity cannot be determined from that of diplomatic immunity"**

Similarly, Mr Sethi submits that the extent of diplomatic immunity cannot be determined from that of State immunity, particularly since the leading case (**Empire of Iran**) regarded the former as extending further.

34. The need to protect the special vulnerability of a diplomatic agent when present in the territory of a receiving State for the purpose of representing the sending State is a major justification for diplomatic immunity which does not apply in the case of State immunity – the latter being based on the concept of equality between sovereign states, such that the laws of one cannot hold sway over the other in the absence of agreement. Bringing a claim against a State does not necessarily prevent or hinder the conduct of the affairs of the sending State, whereas making a serving diplomat personally subject to criminal or civil proceedings – however justified they may be in the domestic law of the receiving State – is always liable to hinder his performance of his official functions. He is entitled to inviolability of his person, and reference to Eileen Denza's "Diplomatic Law" (a commentary of the Vienna Convention, 3rd. ed) shows

how widely this extends. A legate of a foreign embassy may not be hindered in performance of his functions as such.

35. Whereas State immunity was subject to restrictions, most recently agreed by international convention (in 2004), that was not the case where diplomatic immunity was concerned. It was the 2004 Convention which persuaded the European Court of Human Rights to hold that Article 6 had been breached in the State immunity cases of **Cudak** and **Sabeh El Liel**; there was no similar development where diplomatic immunity was concerned, where the Vienna Convention remained unaffected. The principle of **Fogarty** was that (absent such a development) the aims pursued by the conferment of State immunity justified a restriction of access to court. Since there was no modification of the Convention applicable to diplomatic immunity as had been the case with State immunity, and since diplomatic immunity was wider reaching than State immunity, there was no warrant for holding that the restriction of access in the present case was disproportionate.

36. The Tribunal, Mr Sethi argued, had performed no proper balancing exercise of the type required by the principles as recognised in **Huang v Secretary of State for the Home Department** [2007] 2 AC 167, HL, particularly per Lord Bingham at paragraph 19.

37. In meeting these arguments, Mr Luckhurst contended for the Claimants that the approach in **Huang** had been honoured. EJ Lewis had taken into account the difference between State and diplomatic immunity by referring to **Cudak** only as "a loose guide". She did weigh the legitimate sovereign interests of the Saudi state (see para. 50, cited at para. 43 below).

Discussion

38. Any assessment of proportionality involves a balance. It is important in striking this that relevant matters alone are given weight, and that all plainly relevant considerations are balanced.

39. Fundamental to any assessment is the correct identification of the legitimate aim sought to be pursued, here by providing for a plea of diplomatic immunity. The judge's statement in paragraph 47 does not do full justice to the purpose of diplomatic immunity, which is in my view as recognised in **Aldona S** and in **Empire of Iran**. The diplomatic agent is entitled to inviolability, which includes inviolability from proceedings, since he would otherwise be impeded in his mission. There is, in his case, unlike that of the sending State, the option for the receiving State to revoke his credentials: but save as agreed internationally, no other restriction is to be imposed upon him. The agreed restrictions are those in the Vienna Convention. By contrast with the position regarding State immunity, there has been no subsequent international convention, the force of which as such was what persuaded the Strasbourg court to think that the scales tipped in favour of the Claimants in **Cudak** and **Sabeh El Liel.**

40. If I have correctly identified the underlying principle – that of placing no hindrance in the way of the serving diplomat being free to perform his tasks – it explains why diplomatic immunity is authoritatively recognised to be wider that State immunity in its scope: the principle underlying it is different. The judge did not clearly begin her assessment by starting from these principles. She did not sufficiently nor precisely identify the legitimate aim against the achievement of which the interference was to be balanced.

41. Next, the seriousness of an individual claim cannot affect the generality of the principle whether, as a class, such claims fall within the scope of an exception from immunity or outside

it. Here I am in no doubt that the judge erred in law. As part of his argument that the judge was wrong to hold the First Respondent as acting outside his official functions, Mr Sethi argued that she was in error in paragraph 34 of her decision, where she expressed her conclusion as being:

> **"I therefore believe the employment of the Claimants and *the way they were treated during the employment* was outside the first respondent's job functions..." (emphasis added)**

42. He submitted that if the employment of a domestic worker was within the functions of a diplomat, the behaviour of the diplomat toward the domestic servant could not remove it from that category. It was an irrelevant factor. He is plainly correct in this submission. If it were otherwise, then the nature of every act a diplomat did would fall to be examined by asking whether it was the function of a diplomat to do it. The parking offence, the criminal theft, the civil tort would all on this basis be liable to fall outside protection: yet none does, save insofar as it falls within the classes set out in Article 31(1). The egregious nature of behaviour toward someone in employment does not mean that to employ them at all is not a function of a diplomat.

43. This submission did not affect the conclusion expressed above as to whether employing the domestic workers concerned in the present claims would fall outside the range of "official functions" of a serving diplomat, but nonetheless has relevance for the appeal: the error, for such I hold it to be, was repeated in paragraph 50 of EJ Lewis's reasons:

> **"The claims do not concern an employee of the State itself or even one who is involved in the diplomat's work. They do not even concern a cleaner at the embassy. They involve low grade domestic workers in the respondents' private residence. There is no obvious need to investigate or touch on the diplomatic or organisational policy of the State or its diplomats in any way in order to resolve the claims. Nor are these cases of recruitment of staff. *It concerns the treatment of staff who have been taken on*" (emphasis added).**

44. Since this led directly to her conclusions on the claim for immunity in the following paragraph, it was a material error. The fact that a claim can be labelled as a serious one of its kind (or, alternatively, a minor one of its type) has nothing to say on the issue whether claims of that type fall within or without the scope of the bar. The actual rather than claimed seriousness of a case would in any event be apparent only at the conclusion of that case; and I cannot suppose it to be the case that the more serious an untried and untested allegation may be, the more likely it is that a diplomat will be required in law to answer it and have to lay aside a procedural bar he would otherwise have relied upon.

45. The balance to be struck is that between the legitimate aims of diplomatic immunity as against the interest of employees, in a class of those who do not occupy a strategic role nor will as a matter of course have access to sensitive information, in being able to litigate claimed breaches of their employment rights. One international convention (Vienna) defines the limited exceptions to the former. The aim is legitimate. The interference with the right otherwise conferred by Article 6 is in accordance with law (the DPA). Although the interference with the right is complete, there is a sound basis in principle for this; it is not to be denied by the extreme nature of any claim; there is no Convention which moderates the position struck by the international community at Vienna, though now some time ago; nor is there any decided case relating to this immunity which restricts it as being in breach of Article 6; and such indications as there are (from the reasoning in **Fogarty**, coupled with the absence of any instrument such as the 2004 Convention which persuaded the European Court of Human Rights to its decision in **Cudak**, and the acknowledgment that the scope of diplomatic immunity is wider than that of State immunity) are persuasive in favour of the assertion of the immunity. I am unable to conclude that the assertion of the plea is a breach of Article 6 ECHR.

46. It follows that the appeal succeeds. I need not consider whether, if it had failed, the interpretative obligation under s.3 of the Human Rights Act is such that "commercial activity" in the Vienna Convention should be interpreted in the UK to include entering into a contract of employment, and the difficult issues which would then have to be resolved since the source of the exception lies in international rather than purely domestic law, and there might be arguments favouring an autonomous international as opposed to parochial domestic interpretation.

47. There remain two further matters. The first was a further ground of appeal: that the Tribunal erred in law in regarding service of proceedings as having been validly effected. Mr Sethi relies heavily on the inviolability of a diplomatic agent; and on **Adams v DPP, Judge for District no. 16, Her Majesty's Secretary of State for Home Affairs** [2000] IEHC 45. He is supported by the views of Denza, at pp. 268-9 of her text, since personal service is a "manifestation of the enforcement jurisdiction of the receiving State and therefore a contravention of personal inviolability" just as "service of process even by post on inviolable premises..is a breach of their inviolability.".

48. The answer to this given by Mr Luckhurst is that these principles relate to personal service, and do not apply to service by post on solicitors who were already acting for them (as occurred in the present cases). In any event, the fact that there are some categories of civil proceedings which are expressly contemplated as being outside the scope of diplomatic immunity necessarily envisages the service of proceedings in such cases, so that there can be no blanket prohibition on such service. No decided case supports the contention that service cannot be effected by post on a diplomatic residence. Moreover, if the rights secured by Article

6 were broken by the assertion of diplomatic privilege, the provisions as to service should be applied in a manner which provided effective protection of that right.

49. In my view, the conclusions to which the Employment Judge came at paragraphs 72 and 73 of her reasons, accepting and adopting the arguments Mr Luckhurst advanced, are correct. For these reasons, the appeal on this ground fails.

Cross Appeal

50. The Claimants contended that the failure to hear their claims would not only breach Article 6 ECHR but also Article 4. They assert that they were trafficked, and rely upon a conclusion by the UK Border Agency that there was a reasonable basis to believe this. Accordingly, their claims fell within the scope of Article 4: **Rantsev v Cyprus and Russia** (2010) 51 EHRR 1, ECtHR. This required the UK to take positive steps to protect them, by putting in place an appropriate legislative and administrative framework. To bar their claims breached these positive obligations.

51. The Tribunal approached the question on the hypothetical basis that the Claimants would be able to prove they had been trafficked. It nonetheless concluded (at paragraph 63) that:

> **"It is not the tribunal's ultimate role to investigate and make a finding as to whether trafficking has taken place and, although there may be some factual overlap, many different facts and legal issues would be involved in resolving the particular employment claims made. The connection with the claims involved here and the scope of art 4 appears to me to be too remote."**

52. Mr Luckhurst submits that the judge was wrong to regard the connection as "too remote". There was, as the Tribunal acknowledged, "factual overlap" between the employment claims and the treatment prohibited under the Anti-trafficking Convention ("**ATC**"). Thus an award in respect of failure to pay the promised, or minimum wage, and for discrimination

would meet the UK's obligations under Art. 15(3) of the ATC. The barring of a whole class of claims by domestic workers (i.e. those against persons asserting diplomatic immunity) would represent a serious weakness in the legislative and administrative framework in the UK, failing effectively to discourage trafficking. Making rights in employment effective is important in achieving this. It would also represent a failure effectively to investigate the claims that there had been trafficking, despite the fact that the availability of civil proceedings might be the only way in which the Claimants' rights to an investigation of their allegations pursuant to Article 4 ECHR could be met.

53. Mr Sethi's response is, first, that neither Claimant asserted a breach of Art. 4 of the ECHR in her originating application; second, that the UK's obligations were satisfied by the enactment of section 71 of the **Coroners and Justice Act 2009,** which criminalised slavery, servitude, and forced or compulsory labour; third that the Tribunal's jurisdiction is statutory, and does not extend to the investigation of alleged trafficking (for which in any event it is ill-equipped) but only to resolving those disputes within its statutory remit.

54. In my judgment, the place to begin is in the rights which are asserted in the claims. They are not expressly based on the Claimants being trafficked. They are complaints that their employment rights have been breached. Employment Tribunals have jurisdiction – subject only to the existence of a procedural bar – to resolve such claims. They do not have any jurisdiction to resolve any free-standing complaint that there has been ill-treatment of an employee in some respect which is not germane to those claims. Such a complaint may, depending upon its nature, give rise to other claims before the common law or administrative courts, but only claims allocated by statute to an Employment Tribunal may be determined by it. An "overlap" of claims – an expression relied on by Mr Luckhurst – is not the same as a

coincidence of them. They are not co-terminous. To the extent the "trafficking" allegation goes beyond the employment claims, a Tribunal has no power and therefore no right to consider them.

55. A claim for the payment of contractual, or minimum wage, and for compensation for race discrimination is within the jurisdiction of the tribunal. Wider "trafficking" claims are not asserted in the present case. There would be no basis to hear them. The complaint in reality is that the plea of immunity defeats claims which otherwise would be within the jurisdiction of the Tribunal, and should not be permitted to do so. The argument relying on Art.4 ECHR is thus properly viewed as one in support of the contentions which I have separately rejected.

56. Since this point was argued below before the judge, even if not foreshadowed in the claim form, I reject the first line of response advanced by Mr Sethi; but it will be plain from what I have already said that I accept both his second and third points, and the conclusion of the Tribunal.

57. Finally, I have reflected on whether this "Article 4 argument" adds such weight to the conclusion reached in respect of the proportionality of permitting a plea of diplomatic immunity to be raised in response to Article 6 that I should reach a different conclusion as to whether a plea of diplomatic immunity aiming to ensure that diplomats are unhindered in the performance of their official functions is a proportionate interference with the right of access to court. I have concluded not.

Conclusions

58. The appeal is allowed on its principal grounds: the Tribunal was wrong to conclude that the plea of diplomatic immunity was no bar to the claims. The appeal against the conclusion of the Tribunal as to service, and the cross-appeal arguing there has been a breach of Article 4 ECHR are both dismissed.

59. Since there is, according to counsel, no authority which yet directly deals with the question whether a plea of diplomatic (as distinct from State) immunity constitutes a disproportionate interference with rights otherwise guaranteed by Article 6 ECHR, and there has been a noticeable recent shift in the view expressed in case-law as to whether a plea of the latter is proportionate where such as domestic staff are concerned, since I have differed from the view of the Employment Judge, and because the issue is of some importance, there will be permission to the Claimants to appeal this judgment.