

A case review prepared by Clyde & Co LLP for Concordia

Benkharbouche and Janah v the Embassy of the Republic of Sudan, Libya and the Secretary of State for Foreign and Commonwealth Affairs [2015] EWCA Civ 33

State Immunity Act 1978

Under section 1 of the State Immunity Act 1978 (SIA 1978), a sovereign state is immune from the jurisdiction of UK courts and tribunals. A foreign embassy in the UK is considered to be a sovereign state.

Section 4 of SIA 1978 provides a limited exception to state immunity, effectively allowing certain employment-related claims to proceed. However the exception does not apply to:

- nationals of the foreign embassy (or sovereign state) in the UK (section 4(2)(a)).
- a non-UK national, or someone who is not habitually resident in the UK (section 4(2)(b)).

Section 16 of SIA 1978 also specifically excludes from this exception, proceedings concerning the employment of members of a foreign mission.

Facts and background

Ms Benkharbouche, a cook employed in the UK Sudanese embassy, and Ms Janah, a member of domestic staff at the UK Libyan embassy, brought a number of claims in the UK Employment Tribunal, including for unfair dismissal, race discrimination and breaches of the Working Time Regulations 1998 (Working Time Regulations). However, the Employment Tribunal decided that those states were immune from the jurisdiction of UK courts and tribunals under the State Immunity Act 1978, in particular under sections 4 and 16 of SIA 1978, and therefore the Claimants could not proceed with their claims.

The Claimants appealed to the Employment Appeal Tribunal (EAT), on the basis that they considered the decision of the Employment Tribunal denied them their rights of access to a court or tribunal under Article 6 European Convention of Human Rights (the Convention) and Article 47 of the Charter of Fundamental Rights of the European Union (the Charter). Article 6 of the Convention provides that: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*. Article 47 of the Charter provides that individuals have a right to an effective remedy and fair trial. The Claimants argued that the provisions of SIA 1978 should be dis-applied by the EAT.

On appeal, the EAT reversed the Employment Tribunal's decision and found that, in so far as the Claimants' EU-derived rights were concerned, the relevant provisions of SIA 1978 breached Article 6 of the Convention and Article 47 of the Charter. The EAT held that the relevant provisions of SIA 1978 could not be read compatibly with the Convention and would have to be dis-applied. In doing so, the EAT relied upon the fact that since the signing of the Lisbon Treaty, the Charter is directly effective in UK law and following the CJEU's decision in *Kucukdeveci v Swedex GmbH and CO KG* [2011] 2 CMLR 27, such rights can be enforced directly against private individuals. However, the Human Rights Act 1998 (HRA 1998) did not afford the EAT jurisdiction to dis-apply the provisions of SIA 1978.

The effect of this decision was that the Claimants' race discrimination and Working Time Regulations claims were allowed to proceed, but their claims for unfair dismissal were not, as unfair dismissal is a purely domestic right.

Due to the issues at stake, all parties were given permission to appeal this decision to the Court of Appeal. The Claimants appealed and the embassies of Libya and Sudan cross-appealed. The Secretary of State made representations as an intervener.

Decision of the Court of Appeal

The Court of Appeal agreed with the approach taken by the EAT. It also held that the relevant provisions of SIA 1978 breached Article 6 of the Convention and Article 47 of the Charter. It made a declaration of incompatibility with the HRA 1998 and held that the relevant provisions of SIA 1978 should be dis-applied in so far as they conflicted with EU law. The right to an effective remedy guaranteed by Article 47 of the Charter was a general principle of EU law which was capable of having horizontal direct effect. The result of this is that the Claimants can proceed with their claims which fall within the scope of EU law, namely their claims for race discrimination and breach of the Working Time Regulations.

Court of Appeal's comments and conclusions in relation to state immunity

In summary, the effect of this decision is to significantly reduce the scope for embassies and high commissions to claim immunity in relation to employment-related claims brought by their workers in the UK.

The Court of Appeal concluded that the absolute and wide-ranging immunity provided for in section 16 of SIA 1978 was not required by international law. Whatever the position was in 1978 when SIA 1978 was enacted, the submission by Libya and the Secretary of State that blanket immunity was appropriate was no longer sustainable. The Court of Appeal further held that section 4(2) of SIA 1978 was contrary to Articles 6 and 14 the Convention because it prevented claims by non-UK nationals, or those without habitual residence in the UK when their contract was made, in circumstances where there was no rule of international law requiring such a provision and no other compelling justification for this differential treatment.

The Court of Appeal noted that *"the precise scope of immunities required by international law is often the subject of great uncertainty and the boundary lines between immunity and non-immunity will often be difficult to draw"* (paragraph 21). It also noted that opinion was divided internationally on whether state immunity should exist in relation to all employment disputes at foreign embassies and, in particular, about whether it should attach to every level of staff. The UK is not the only state which holds that immunity attaches to all claims by employees at diplomatic missions, but it was notable that the UK did not take into account, as many other states did, the nature of the employment or its proximity to "sovereign" activities.

The Court of Appeal also held that the habitual residence requirement contained in section 4(2)(b) of SIA 1978 was discriminatory on grounds of nationality, as well as being in breach of Article 6 of the Convention. Further, for Mrs Janah to be in a worse position than a UK national seeking to pursue a similar claim to hers was also a breach of Articles 21 and 22 of the Charter, as well as Article 14 of the Convention. The Court of Appeal stated that, *"viewed through the lens of modern understanding of the importance of non-discrimination, it is untenable to suggest that the forum state has no sufficient interest in adjudicating on the employment law rights of local long-term workers simply because they are non-nationals or happen to have been resident outside the jurisdiction before they commenced their employment"* (paragraph 63). Therefore, a fresh look is required at what Parliament intended in this regard in light of the *"lens of modern understanding of the importance of non-discrimination"*.

Clyde & Co LLP - 26 February 2015