ENGLISH COURT OF APPEAL DECLARES STATE IMMUNITY PROVISIONS INCOMPATIBLE WITH EUROPEAN CONVENTION ON HUMAN RIGHTS

Benkharbouche v Embassy of Sudan ; Janah v Libya [2015] EWCA Civ 33

Introduction

In a decision handed down on 5 February 2015, the English Court of Appeal declared that certain provisions of the English State Immunity Act 1978 were incompatible with the European Convention on Human Rights.

Legal Principles

Under the Human Rights Act 1998 ss3-4, the English courts are under a duty to try to interpret all legislation in a manner that is compatible with the rights contained in the European Convention on Human Rights ("the Convention"), and if this cannot be achieved then the courts may make a declaration of incompatibility in regard to such legislation.

The effect of Sections 16(1)(a) and 4(2)(b) of the State Immunity Act 1978 ("the 1978 Act") is to prevent employment claims from being brought against embassies.

Background

The decision concerned appeals by two Moroccan employees of, respectively, the Sudanese embassy in the UK and the Libyan embassy in the UK. Both had filed claims against their employer embassies based on unfair dismissal, unpaid wages and a breach of the Working Time Regulations 1998.

In both cases, the Employment Tribunal had held that the cases could not proceed because the embassies were protected against employment claims by Section 16 of the 1978 Act, although the Employment Tribunal recognised that this provision may breach the right to a fair trial under Article 6 of the Convention. Furthermore, the Libyan embassy had immunity against its complainant under Section 4(2) of the 1978 Act, because she was not habitually resident in the UK.

On appeal, the Employment Appeal Tribunal substantially upheld these findings, but allowed the claims under the Working Time Regulations 1998 and a race discrimination claim to proceed.

The employees appealed. Libya also cross-appealed the finding that the relevant provisions of the 1978 Act infringed Convention rights.

Decision

The Court of Appeal dismissed the appeal and the cross-appeal, but held that the relevant

provisions of the 1978 Act were contrary to Convention rights.

The Court of Appeal identified a division between authorities from the English courts and the European Court of Human Rights over whether Article 6 was engaged where international law required the granting of immunity, but held that it was unnecessary in the instant case to decide between the two approaches. The granting of immunity was a proportionate means of achieving the legitimate aim of complying with international law.

Section 16(1)(a) of the 1978 Act, which granted immunity in all cases that concerned an employment dispute at an embassy, was, however, too broad. This rule was not required by existing codified international law such as the UN Convention on Jurisdictional Immunities of State and their Property 2004, the Vienna Convention on Diplomatic Relations 1961 or the European Convention on State Immunity 1972. Furthermore, the practice of other states did not suggest that a provision of such breadth was a requirement of customary international law.

The requirements of Section 4(2)(b) of the 1978 Act, that immunity would be upheld if the employment contract was made with an individual who was neither a UK national nor habitually resident in the UK, were also not required by international law. The purpose of Section 4(2) was to exclude cases in which the UK did not have sufficient jurisdictional interest, but there was a sufficient link to the jurisdiction because the claims concerned UK employment contracts.

Accordingly, the Court of Appeal held that it was not possible to read down these provisions of the 1978 Act in a manner compatible with Convention rights, and that a declaration of incompatibility would be made.

Concluding Remarks

A declaration of incompatibility has no legal effect in that the law remains the same until such time as the incompatible provision is rectified or removed by Parliament. Nevertheless, such a move by the courts is often considered a last resort, only to be employed after all efforts have been made to read the legislation in a Convention-compliant manner. This decision is therefore likely to have important consequences for the law on state immunity in England & Wales.

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