UK SUPREME COURT EXAMINES THE APPLICATION OF STATE IMMUNITY AND DIPLOMATIC IMMUNITY AGAINST EMPLOYMENT LAW CLAIMS

Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs; Secretary of State for Foreign & Commonwealth Affairs and Libya v Janah [2017] UKSC 62

Reyes v Al-Malki and another [2017] UKSC 61

Introduction

In a decision handed down on 18 October 2017 in *Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs; Secretary of State for Foreign & Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, the UK Supreme Court declared Sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 ("the 1978 Act") incompatible with Article 6 of the European Convention on Human Rights 1950 ("ECHR") insofar as they conferred immunity on States in respect of employment claims brought by embassy staff members. In another decision handed down on 18 October 2017 in *Reyes v Al-Malki and another* [2017] UKSC 61, the UK Supreme Court held that a Saudi Arabian diplomat and his wife were not entitled to diplomatic immunity in claims concerning the trafficking and ill-treatment of private domestic staff.

Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs; Secretary of State for Foreign & Commonwealth Affairs and Libya v Janah [2017] UKSC 62

Background

The Claimants in these cases were two Moroccan nationals who had been employed respectively in the Sudanese and Libyan embassies in London as domestic workers. Neither of the Claimants was a UK national, although Ms. Benkharbouche had become a UK permanent resident by the time of her dismissal. Together the Claimants' claims alleged unfair dismissal, failure to pay the national minimum wage, unpaid wages and holiday pay, and breaches of the Working Time Regulations.

Section 4(2)(b) of the 1978 Act provides for State immunity in regards to a contract for employment if "*at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there*". Section 16(1)(a) of the 1978 Act provides that Section 4 does not apply to proceedings concerning the employment of the members of a diplomatic mission or consular post as defined in the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968.

All of the Claimants' claims were rejected by the Employment Tribunal on the basis that they were barred by Sections 4(2)(b) and 16(1)(a) of the 1978 Act. The Employment Appeal Tribunal upheld the dismissal of the English law claims but had allowed the EU law claims to proceed. That judgment was upheld by the Court of Appeal which declared that the aforementioned provisions of the 1978 Act were incompatible with Article 6 ECHR.

The Secretary of State for Foreign & Commonwealth Affairs appealed against the Court of Appeal's decision.

Decision

The UK Supreme Court dismissed the appeal.

Lord Sumption (giving the main judgment) held that State immunity was a mandatory rule of Customary International Law ("CIL"). In claims before the European Court of Human Rights ("ECtHR"), the ECtHR had consistently demonstrated that Article 6 ECHR was engaged when there was a successful State immunity plea. However, it was only when a State immunity plea was not founded upon a rule of CIL that Article 6 ECHR had been held to have been violated. Lord Sumption held that CIL provided that a State was entitled to immunity only as regards acts done in the exercise of sovereign authority and that there was no special rule to the contrary in the case of embassy staff. Lord Sumption held that the employment of domestic staff by an embassy was not an inherently sovereign or governmental act but instead was a private law act.

Lord Sumption held that, on a plain reading, the immunity provided for by Section 4(2)(b) of the 1978 Act was entirely dependent upon a claimant's nationality and residence at the date of his or her employment contract. This was not a proper ground for denying an employee access to the courts as regards their employment in the UK. Such an approach was not justified by international law nor did it have any basis in CIL. Section 16(1)(a) of the 1978 Act extended State immunity to embassy employees' claims regardless of whether the State's acts were sovereign in character. There was no rule of CIL justifying such an extension.

Therefore, Lord Sumption held that, in these cases, the English courts had jurisdiction over the relevant claims and the refusal to exercise that jurisdiction engaged Article 6 ECHR. As a matter of CIL, Sudan and Libya were not entitled to State immunity and insofar as the aforementioned sections of the

1978 Act conferred State immunity on Sudan and Libya, those sections were held to be incompatible with Article 6 ECHR.

Reyes v Al-Malki and Another [2017] UKSC 61

Background

The Claimant in this case was a Filipina national employed in London as a domestic servant at the residence of the Defendants (a Saudi Arabian diplomat and his wife). The Claimant brought claims for maltreatment against the Defendants, invoking the Palermo Protocol of 2000 concerning human trafficking.

Article 31(1) of the Vienna Convention on Diplomatic Relations 1961 ("VCDR") states that a diplomatic agent shall enjoy immunity from criminal jurisdiction of the receiving state, and immunity from its civil jurisdiction except in the case of "*(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions*".

The Court of Appeal had held that Mr Al-Malki was entitled to diplomatic immunity under Article 31(1) VCDR, and that Mrs Al-Malki was entitled to derivative immunity under Article 37(1) VCDR as a member of his family.

The Claimant appealed against the Court of Appeal's decision.

Decision

The UK Supreme Court allowed the appeal. Although the main judgment was given by Lord Sumption (with whom Lord Neuberger agreed), Lord Sumption and Lord Neuberger were in the minority on certain aspects related to the interpretation of Article 31(1)(c) VCDR.

The Supreme Court held that Article 31 VCDR conferred diplomatic immunity only for the duration of the diplomat's post. Once a diplomat was no longer in post, that diplomat was only entitled to immunity according to Article 39(2) VCDR – which applied only to acts performed: (i) while the diplomat was in post; and (ii) in the exercise of diplomatic functions. Lord Sumption held that the employment of a worker for acts such as cleaning, kitchen help and childcare were not acts performed in the exercise of diplomatic functions – and neither was the maltreatment of such a worker. Thus, neither of the Defendants were entitled to diplomatic immunity in respect of these claims. Furthermore, it was held that, because diplomatic immunity was a procedural (rather than substantive) immunity, the above conclusion would not have been different if the Defendants had been entitled to immunity at the time that proceedings were commenced.

In light of the above, the Supreme Court did not consider that it would give a binding answer to the question of whether the acts complained of in the instant case were "commercial activity" for the purposes of Article 31(1)(c) VCDR. Nevertheless, the Supreme Court undertook an examination of that provision. Lord Wilson, Lord Clarke and Lady Hale, after an examination of the Palermo Protocol, considered that it was rational to take the view that an employer's conduct in cases such as the instant one contained a substantial commercial element in acquiring domestic help without proper payment. Even if Article 31(1)(c) VCDR did not itself expressly contemplate the future development of its meaning, it was possible that the proper interpretation and meaning of that provision could have changed over time and been developed subsequently. Consequently, the majority recommended that the International Law Commission give consideration to an amendment to Article 31(1)(c) VCDR in order to resolve any doubt as to whether immunity was excluded in cases such as the instant one.

Lord Sumption and Lord Neuberger considered that Article 31(1)(c) VCDR expressly did not allow any future change to its interpretation and meaning – and held that the employment by a diplomatic agent at their residence of domestic staff for services that were of a purely personal character did not constitute a "commercial activity" for the purposes of that provision.

Concluding Remarks

By these two judgments, the UK Supreme Court undertook an important examination of key aspects of the Public International Law doctrines of State immunity and diplomatic immunity and provided some clarity as to their application in domestic law by domestic courts. The judgments are significant in understanding the applicability, scope and extent of any immunity claimed by States/diplomats when faced with employment law claims by embassy staff and domestic workers.