EMPLOYMENT CLAIMS BARRED BY UK STATE IMMUNITY STATUTE: UK GOVERNMENT REQUIRED TO GIVE JUST SATISFACTION TO FORMER EMPLOYEES OF FOREIGN EMBASSIES

Benkharbouche and Janah v United Kingdom [2022] ECHR 296

Introduction

By a decision handed down on 5 April 2022 in *Benkharbouche and Janah v United Kingdom* [2022] ECHR 296, the European Court of Human Rights ("ECtHR") held that the UK Government's offers of redress to former employees of foreign embassies in the UK whose claims against their former employers had been barred by decisions upholding the foreign States' assertions of State immunity, in breach of their right to access to a court enshrined in Article 6 of the European Convention on Human Rights ("ECHR"), were not adequate.

Background

The two applicants had previously been employed, respectively, at the embassies of Sudan and Libya in the UK. Each brought claims against their former employers in the Employment Tribunal alleging, *inter alia*, unfair dismissal, wrongful dismissal and failure to pay the National Minimum Wage.

By virtue of the State Immunity Act 1978 ("SIA 1978"), foreign States are immune from the jurisdiction of the English courts, unless the proceedings fall within one or more of a number of exceptions defined by the statute. Section 4 SIA 1978 provides for an exception to State Immunity where the proceedings relate to "*a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there*". However, the exception does not apply if "*at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there*" (section 4(2)(b)). Further, Section 16(1)(a) SIA 1978 provides that the Section 4 exception did not apply to proceedings concerning the employment of the members of a foreign State's diplomatic mission.

Each State asserted their State Immunity. In 2012, Employment Tribunals, in each case, accepted that the assertions of State Immunity engaged ECHR rights, but held that (a) it could not read the provisions of the SIA 1978 in a way which was compatible with ECHR rights (under Section 3 of the Human Rights Act 1998 ("HRA 1998")) without "*completely chang[ing], and possibly even revers[ing], its meaning*", but (b) neither could it issue a

declaration of incompatibility under Section 4 HRA 1998. Thus, the Employment Tribunal upheld the assertions of State Immunity.

The two cases were joined on appeal to the Employment Appeal Tribunal, which held (on 4 October 2013) there had been a breach of Article 6 ECHR and disapplied Section 16(1) SIA 1978 insofar as the claims fell within the material scope of EU law.

The applicants appealed to the Court of Appeal seeking a declaration of incompatibility in respect of those parts of the claim falling outside the material scope of EU law. On 5 February 2015, the Court of Appeal held there was no rule of international law requiring the grant of immunity in respect of general employment claims by the members of a diplomatic mission's service staff. Further, it held that Section 4(2)(b) SIA 1978 was discriminatory on grounds of nationality and that Customary International Law did not require such a limitation to the exception to State Immunity. A declaration of incompatibility was made in respect of Sections 4(2)(b) and 16(1)(a) SIA 1978.

On an appeal by Libya and the UK Foreign Secretary, the Supreme Court (giving judgment on 18 October 2017) unanimously held that Sections 4(2)(b) and 16(1) SIA 1978 were incompatible with Article 6 ECHR and Article 47 of the European Union Charter of Fundamental Rights. There was no basis in customary international law for the application of State Immunity to acts of a private law character, including the employment of domestic staff in a diplomatic mission. The two cases were remitted to the Employment Tribunal to determine the merits of those parts of the claims which were based on EU law.

By settlement agreements in August 2019 and January 2019, the parties compromised their claims. In February 2021, the UK Government informed Parliament of its intention to make a remedial order under the HRA 1998 to remedy the incompatibility with the ECHR.

With a view to resolving the issues raised by the instant applications to the ECtHR, the UK Government submitted a "*unilateral declaration*" on 1 March 2021, acknowledging the violation of Articles 6 and 14 ECHR, and undertaking to make a financial payment of £20,000 to each applicant (plus £2,500 in respect of costs and expenses). After the applicants refused that offer, the UK Government applied for the ECtHR to strike the applications out of its list of cases under Article 37.1 ECHR and Rule 62A.1(a) of the ECtHR's Rules of Court on the grounds, *inter alia*, that the applicants had refused a "*friendly-settlement proposal*". The friendly settlement procedure (under Article 39 ECHR) provides parties to proceedings before the ECtHR with an opportunity to resolve disputes out of court, and the ECtHR may consider striking out a case where an applicant has unreasonably refused a proposal made under this procedure.

Decision

The ECtHR refused to strike out the applications and awarded just satisfaction.

Whether it was appropriate to strike out an application on the basis of a respondent State's unilateral declaration would depend on whether that declaration provided adequate redress for the applicants.

The ECtHR treated the loss of the opportunity to pursue their English law claims as pecuniary loss. There was a causal link between the breach of Article 6 and 14 ECHR (by domestic legislation barring the claim, on a basis that discriminated by nationality) and the loss of the opportunity.

Both applicants' claims under English law had exceeded £200,000. A significant proportion of that amount related to the alleged failure to pay the National Minimum Wage. The UK Government had not suggested that the sums claimed were unreasonable, or that the claims lacked merit.

Although the UK Government had undertaken to introduce a remedial order, it had not provided any guarantee that the applicants' English law claims would be reheard in the Employment Tribunal. There was no published draft of the remedial order – four years after the Supreme Court's judgment.

The ECtHR held that the monetary sums proposed in the unilateral declaration fell "*significantly short*" of the amounts that it would award as just satisfaction.

The ECtHR held that the UK was to pay each applicant €50,000 in respect of pecuniary damage; €5,000 to the first applicant and €6,500 to the second applicant in respect of non-pecuniary damage, plus €12,500 to each applicant in respect of costs and expenses.

Concluding Remarks

The ECtHR's judgment illustrates that offers by respondent States to compromise claims under the "friendly-settlement proposal" mechanism need to offer proper and adequate redress in terms of the underlying rights violations.

The ECtHR approach to damages claims has consistently been different to that of domestic courts. The concept of just satisfaction as provided for in Article 41 ECHR will always lead to lower damages awards than would otherwise be made under conventional common law/civil law systems.

The judgment, and its result, also indicates the consequences of a State implementing State Immunity laws at domestic level that go beyond what is required (or permitted) by principles of International Law.