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Diluting diplomatic immunity?

Can the trafficking & slavery of a domestic worker be considered 'commercial activity'? Joseph Dyke & James McGlaughlin examine the Supreme Court's judgment in *Basfar v Wong*

IN BRIEF

- In *Basfar v Wong*, the Supreme Court's minority explained their difficulty in accepting the majority's conclusion that to employ domestic staff without payment in conditions akin to modern slavery makes the employment 'commercial activity'.
- The majority's approach does not appear consistent with the English courts' approach to other diplomatic immunity issues, begging the question: is now the time for legislative reform?

This case concerned the application of diplomatic immunity, a principle which protects certain foreign officials from the jurisdiction of local courts, and which is universally considered fundamental to international relations and the maintenance of international peace and security.

In *Basfar v Wong* [2022] UKSC 20, the Supreme Court rejected the defendant's assertion of diplomatic immunity against claims brought against him by his former domestic servant. A majority of the Supreme Court held the claimant's modern slavery and trafficking claims fell within the 'commercial activity' exception in Art 31(1)(c) of the Vienna Convention on Diplomatic Relations 1961 (VCDR 1961).

The Supreme Court's majority acknowledged (at [11]) that 'one of the most important tenets of civilised and peaceable relations between nation states' is that the principle of legal immunity for diplomatic agents is a fundamental principle of national and international law. In such circumstances, the exceptions to immunity provided in the VCDR 1961 need to be interpreted according to their ordinary meaning (Lord Sumption said of the VCDR 1961 in *Al-Malki and another v Reyes and another* [2017] UKSC 61 at [12](i) that 'the scope for inexactness of language is limited'), and any attempts to expand their scope need to be justified by clear and cogent reasons.

This article respectfully considers that the majority's reasons do not meet that description, and instead represent a dilution of diplomatic immunity in the English jurisdiction. Overall, the minority's reasoning is preferable as more consistent with the English courts' previous approach to diplomatic immunity principles.

Factual background

This aspect of the case proceeded on assumed (albeit disputed) facts. The defendant was a member of Saudi Arabia's diplomatic staff at its UK mission. The claimant, having previously worked for him in Saudi Arabia, was brought to the UK to work in the defendant's household. To get a UK visa, the claimant was given an employment contract requiring her to work a maximum of eight hours per day (with a day off each week and a month off each year), and stipulating she was to be provided with sleeping accommodation and the national minimum wage.

The Supreme Court set out in detail (at [6]-[10]) how the defendant's extremely poor treatment of the claimant, from her arrival in the UK until she escaped in May 2018, bore no relation to her contract's terms.

After the claimant brought claims in the employment tribunal, the defendant sought to have the claims struck out on the basis of his diplomatic immunity under Art 31(1), VCDR 1961, as scheduled to the Diplomatic Privileges Act 1964.

However, Art 31(1)(c) provides for an exception in respect of 'an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions'. Thus, the key question was whether the defendant's exploitation of the claimant amounted to the 'exercising' of a 'commercial activity'.

At first instance, the employment tribunal held the Court of Appeal's decision in *Reyes v Al-Malki* [2015] EWCA Civ 32 (decided on similar assumed facts), that the Art 31(1)(c) exception did not include the trafficking and employment of a domestic servant in modern slavery conditions, was not binding in circumstances where the Supreme Court had allowed an appeal on a different ground. Following the obiter observations of the Supreme Court in that case, the conclusion was that the relevant activity amounted to 'commercial activity' exercised by a diplomat 'outside his official functions'.

On appeal to the Employment Appeal Tribunal (EAT), Mr Justice Soole held the Court of Appeal's decision in *Reyes v Al-Malki* continued to represent the current law on the meaning of 'commercial activity' in Art 31(1)(c), the relevant activity was not 'commercial activity' and so the diplomatic immunity claim succeeded. However, the judge allowed a leapfrog appeal—understood to be the first from the EAT.

The Supreme Court's majority judgment

The Supreme Court (by majority) allowed the claimant's appeal. Applying the treaty interpretation principles set out in the Vienna Convention on the Law of Treaties 1969, the question was whether the relevant activity was 'commercial' when that term was interpreted contextually in the light of the VCDR 1961's object and purpose.

The purpose of the diplomatic immunity in Art 31(1) was ensuring diplomatic missions could perform their functions efficiently. Ordinary employment of domestic staff could be considered incidental to a diplomat's ordinary daily life and thus a necessary component of ensuring the efficient performance of their mission's functions. However, exploitation of domestic staff by coercing them to work in modern slavery conditions over a significant time period, with a concomitant generation of financial gain for personal profit (in money's worth), amounted

(at [61]) to a 'commercial activity…outside [the diplomat's] official functions' under Art 31(1)(c).

The Supreme Court's minority judgment

The minority judgment was given by Lord Hamblen and Lady Rose. The minority explained there was much of the majority judgment they agreed with, including on treaty interpretation principles, and that a comparison with state immunity was unhelpful. The minority also agreed ordinary employment of domestic staff did not by itself amount to 'commercial activity', but for different reasons to those of the majority. The minority held (at [112]) that:

> 'The reason the normal employment of a domestic worker falls outside the definition of "commercial activity" for the purposes of art 31(1)(c) is because it is an activity that is incidental to the ordinary conduct of daily life and, further, because the conduct of the daily life of the household is not itself a "commercial activity"'.

The minority made clear (at [113]) that:

> 'Where we disagree with the majority is in their conclusion that the conditions under which a person is employed or how they came to be employed can convert employment which is not of itself a "commercial activity" exercised by her employer into such an activity falling within the exception'.

In particular, the minority considered that:

i. The parties negotiating the VCDR 1961 had known diplomatic households engaged domestic staff, and that diplomatic agents sometimes egregiously breached the receiving state's laws. Yet they recognised the significance of maintaining diplomatic immunity notwithstanding that abuses might occur.
ii. Since the VCDR 1961, the international community had entered into various international instruments (such as the Palermo Protocol) designed to eliminate and punish trafficking, modern slavery, forced labour and domestic servitude to show the community's abhorrence. The minority considered nothing could be found in those sources to suggest the term 'commercial activity' has now been expanded to include trafficked employment.
iii. Accordingly, to expand Art 31(1)(c) to include trafficked employment, or the broader kinds of exploitative treatment described in the claim, risked seriously undermining diplomatic immunity by introducing uncertainty as to its scope and by requiring intrusive enquiries in order to apply the exception. Furthermore, it risked exposing UK diplomats overseas to retaliatory measures.

Analysis

The majority's approach in essence provides that exploiting domestic staff, including by not paying them what they are owed, amounts to 'commercial activity' because the employer thereby saves money; whereas to employ domestic staff and pay them what they are owed is not a 'commercial activity'. Definitions of 'commercial activity' often refer to trade or business or to phrases such as 'commercial gain'. It is unclear whether many businesspeople would recognise a definition of 'commercial transaction' that only includes situations in which they gained money, but not ones in which they lost money or broke even. Just as a commercial deal does not stop being commercial merely because it is bad, employment under a contract (even a sham one) does not become anything other than employment because the conditions of that employment are (appallingly) bad.

This is consistent with the English courts' approach to other diplomatic immunity issues. In *Fernando v Sathananthan* [2021] EWHC 652 (Admin), the defendant was a minister counsellor for defence at Sri Lanka's UK mission. While observing a protest outside the High Commission as part of his duties, dressed in his full military uniform, he made a 'cut throat' gesture towards the protestors, and was charged with making threats to kill. The chief magistrate held that making the 'cut throat' gesture did not fall within his job description, and therefore he was not entitled to diplomatic immunity. On appeal, the Administrative Court held (at [38]-[39]) the chief magistrate was wrong to find those acts were outside the mission's functions (with the consequence they were not covered by the defendant's residual immunity under Art 39(2), VCDR 1961):

> '… Does the act of making the threatening gesture take him not simply outside his diplomatic role but away from it? … does the commission of the additional unlawful act stop the underlying activity from being that of a member of the mission performing his official function? We are very firmly of the view that that question should be answered in the negative. The contrary conclusion would, for the reasons we have given, severely limit the scope of residual immunity in a manner which we do not consider was intended by the VCDR.
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> 'We consider that the acts in question in the present case were ones which were performed by the appellant in the exercise of his functions as a member of the mission and thus qua diplomat. *They did not somehow lose that quality and become acts performed in a personal capacity merely because they were criminal. They remained acts performed by the appellant in the exercise of his functions as a member of the mission despite their criminality*' (emphasis added).

Applying the same logic, if the lawful employment of domestic staff is not a 'commercial activity', then why does the employment of a domestic staff member in an unlawful (indeed, appalling) manner change the underlying nature of the relevant activity?

Concluding observations

Cases in this area have split the Supreme Court on multiple occasions now. The Supreme Court's judgment demonstrates the English courts' justified dissatisfaction with human trafficking under cover of diplomatic immunity. *Basfar v Wong* represents a significant development in the fight against such abuses.

However, notwithstanding its significance in that sense, it would appear (respectfully) that the reasons given for the majority's conclusion do not sit easily with the English courts' previous treatment of diplomatic immunity principles—the consistent interpretation of which lies at the foundation of the maintenance of international peace and security.

Since trafficking under the cover of diplomatic immunity in the UK was recognised by Lord Sumption in *Reyes v Al-Malki* as 'a recurrent problem', society's abhorrence of such practices might best be met by the UK pushing for the inclusion of a further exception to Art 31(1) to expressly remove immunity for cases of trafficking, modern slavery and child abuse. A treaty amendment was the course of action suggested by Mr Justice Mostyn in *A local authority v AG and others (children) (domestic abuse)* [2020] EWFC 18 at [45], in the context of the 'virtually insoluble dilemma' of whether the inviolability of diplomatic premises would prevent UK police entering to ensure the safety of a diplomat's child at risk of imminent serious bodily harm or death.

While such negotiations would undoubtedly be far from straightforward, it would position the UK at the forefront of a potential positive and principled development in public international law. **NLJ**

Joseph Dyke and **James McGlaughlin** are senior associates at McNair International (*www.mcnairinternational.com*). The views expressed are those of the authors, and do not necessarily represent the views of McNair International or its members or employees.