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The limits on state and diplomatic immunity in employment tribunals

26/10/2017

Employment analysis: The effect of state immunity and diplomatic immunity on an employment tribunal's jurisdiction to hear claims by those employed by embassies or diplomats was examined by the Supreme Court in two separate judgments. Nicholas Lakeland, a partner in Laytons LLP's employment group, explains the issues that arose in Benkharbouche and another v Secretary of State for Foreign and Commonwealth Affairs and another, and Reyes and another v Al-Malki and another.

Original news

Benkharbouche and another v Secretary of State for Foreign and Commonwealth Affairs and another [2017] UKSC 62, [2017] All ER (D) 84 (Oct)

The Supreme Court dismissed the Secretary of State's appeal against the Court of Appeal's decision that *sections* 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 (SIA 1978) had to be disapplied, with the result that an employment tribunal would have jurisdiction to hear the respondent foreign national employees' claims against their foreign embassy employers. The court held that, on the proper understanding of the customary international law concerning state immunity, a foreign state was immune where a claim was based on sovereign acts; but the employment of purely domestic staff in a diplomatic mission was a private act, rather than an inherently sovereign act. The court concluded that the two immunity conferring provisions were incompatible with *article* 6 of the European Convention on Human Rights (the ECHR) and *article* 47 of the Charter of Fundamental Rights of the European Union (EU charter).

Reyes and another v Al-Malki and another [2017] UKSC 61, [2017] All ER (D) 85 (Oct)

The Supreme Court allowed an employee's appeal against the Court of Appeal's decision that an employment tribunal had no jurisdiction to hear her claims because the first respondent had been entitled to diplomatic immunity under *Article* 31(1) of the Vienna Convention on Diplomatic Relations (the Vienna Convention) and the second respondent, as his wife, had been entitled to immunity under *Article* 37(1). The Supreme Court held that because the first respondent's diplomatic posting had finished and the respondents had left the UK, the only immunity he could possibly claim would be residual immunity, under *Article* 39(2). However, such immunity only applied to a diplomat's official acts, and the respondents' employment and treatment of the appellant to carry out domestic tasks in their residence were not acts performed in the course of the first respondent's official functions. Therefore, the respondents could not rely on any type of immunity and the employment tribunal would have jurisdiction to hear the appellant's claims.

What was the background to the two cases?

In *Benkharbouche*, the two respondents were foreign nationals who had worked at the embassies of two foreign states in London. When they were dismissed, they brought claims before employment tribunals, which rejected their claims because the states enjoyed immunity under SIA 1978, ss 4(2)(b), 16(1)(a). A state was immune under SIA 1978, s 4(2)(b), as regards proceedings relating to a contract of employment entered into when the employee was not a UK national or habitual resident and under SIA 1978, s16(1)(a), as regards proceedings concerning the employment of members of a diplomatic mission, including its administrative, technical and domestic staff. The employment tribunals therefore dismissed the respondents' claims. The Employment Appeal Tribunal (EAT) allowed their appeals and the Court of Appeal upheld that decision on the grounds that the two provisions were incompatible with the EU charter and the ECHR. The Secretary of State appealed to the Supreme Court.

In *Reyes*, the appellant was a foreign national who had worked for a foreign diplomat and his wife. Following the termination of her employment, she brought claims before an employment tribunal. The Court of Appeal held that the tribunal lacked jurisdiction to hear the claims because the employers enjoyed immunity under the Vienna Convention on Diplomatic Relations 1961 (the 1961 Convention). The appellant appealed to the Supreme Court.

What issues relating to the pursuit of employment claims and state immunity arose in Benkharbouche?

At issue was the compatibility of SIA 1978 provisions with the charter and the convention. That depended on whether the provisions had any basis in customary international law, where a foreign state would be immune when a claim was based on sovereign acts.

What issues relating to the pursuit of employment claims and diplomatic immunity arose in Reyes?

The main issue was whether the respondents would have residual immunity under the Vienna Convention from their employee's claims. That would only be so if their employing the appellant and asking her to carry out domestic tasks was an exercise of diplomatic functions of the mission.

A hypothetical question also arose as to whether the first respondent would have enjoyed immunity if he had still been in his post. Under Article 31(1)(c) of the 1961 Convention, a diplomatic agent would enjoy immunity in regard to an action that did not relate to any professional or commercial activity exercised by him outside his official functions.

How did the Supreme Court resolve the conflict between an individual's rights and state immunity in Benkharbouche?

In *Benkharbouche*, the Supreme Court emphasised that in customary international law, a foreign state is immune where a claim is based on sovereign acts. When it came to employment of an individual, whether that constituted a sovereign act would depend on the employer-employee relationship. It was held that employment of purely domestic staff in a diplomatic mission was a private act, rather than a sovereign act.

How did the Supreme Court resolve the conflict between an individual's rights and diplomatic immunity in Reyes?

On the particular facts in *Reyes* the Supreme Court held that since the diplomatic posting had finished, the employers only had immunity under Article 39(2) of the 1961 Convention, in respect of a diplomat's official acts, and that these did not include the claimant's employment to carry out domestic tasks in the employers' residence. The employment tribunal therefore had jurisdiction to hear the claim.

In relation to the hypothetical question of what the position would have been if the diplomat had remained in post, Lord Wilson (with whom two of the other justices agreed) emphasised that there were many factors to take into account, including:

- the significant problem of exploitation of migrant workers
- the global determination to combat human trafficking
- that the employment of trafficked persons could form part of the wider commercial activity of trafficking
- absence of state immunity in similar cases, which was difficult to reconcile with recognition of diplomatic immunity in this case

What similarities and what differences did the Supreme Court identify across these two cases?

The cases were heard by an identically constituted Supreme Court and the differences result from the differing facts of each case rather than a different application of legal principles. The *Reyes* case involved a domestic servant allegedly trafficked into the UK by her diplomat employer, while the *Benkharbouche* case involved staff employed at embassies, hence the emphasis of each decision is different: the former case looks in detail at what the boundaries of diplomatic immunity are, while the latter concentrates on the issues of state immunity.

What relevance, if any, was the assumption that the claimant in Reyes was a victim of trafficking?

The issue of human trafficking was discussed throughout the judgment, with Lord Wilson and two of the other Lordships concluding that an answer as to whether the first respondent would have been immune if he had remained in his post was not obvious. This is in contrast to the decision by Lord Sumption, with whom Lord Neuberger agreed, and who answered that the first respondent would have been immune. Under Article 31(1)(c) of the 1961 Convention, a diplomatic agent would enjoy immunity in regard to an action if it did not relate to any professional or commercial activity exercised by him outside his official functions. Lord Sumption found that the employment and treatment of the appellant did not amount to carrying on, or participating in carrying on, a professional or commercial activity.

As the question was not one which required an answer, it remains open for consideration in future decisions.

How does the judgment in Benkarbouche deal with the conflict between certain provisions of SIA 1978 and EU law?

The decision highlights the conflict between national provisions implementing the provisions of treaties reached by the international community, and those giving effect to fundamental EU principles agreed by Member States.

It also emphasises that EU law prevails over English law in the event of a conflict, as demonstrated in this case, in which the EAT disapplied SIA 1978, ss 4(2)(b) and 16(1)(a) as incompatible with Article 47 of the EU charter for claims based on EU law (the claims that were not based on EU law could not proceed in the employment tribunal).

How significant are the decisions in these cases? What impact will they have on future claims?

Both decisions are extremely comprehensive and will be a starting point for anyone seeking to grapple with issues of this nature in order to give their clients adequate advice. The decisions need to be read with care and a great deal of attention. Both embassies and the staff employed within them or employed by diplomatic staff will want to take note of these decisions. Embassies and their diplomats will, in particular, want to review their contractual arrangements and give careful thought as to how they recruit staff and employ them.

That having been said, the number of staff employed by embassies and their diplomats is relatively small and therefore claims in this area of law and the need to advise upon them will be relatively rare.

Interviewed by Robert Matthews.

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