Neutral Citation Number: [2015] EWCA Civ 33

Case No: A2/2013/3062

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
The Hon. Mr. Justice Langstaff, President
UKEAT/0401/12/GE
UKEAT/0020/13/GE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2015

Before :

LORD DYSON, MASTER OF THE ROLLS
LADY JUSTICE ARDEN
and
LORD JUSTICE LLOYD JONES

- -

Between:

Ms. Fatima Ahmed Benkharbouche	**1st Appellant/Claimant**
Ms. Minah Janah	**2nd Appellant/Claimant**
- and -	
Embassy of the Republic of Sudan	**Respondent**
Libya	**Cross-Appellant/ Respondent**
- and –	
The Secretary of State for Foreign and Commonwealth Affairs	**1st Intervener**
4A Law	**2nd Intervener**
The Aire Centre	**3rd Intervener**

- -
- -

Mr. Timothy Otty QC and Mr. Paul Luckhurst (instructed by **Anti Trafficking and Labour Exploitation Unit at Islington Law Centre**) for the **Appellants/Claimants**

The Respondent did not appear and was not represented

Mr. Toby Landau QC, Prof. Dan Sarooshi and Mr. Peter Webster (instructed by **MS-Legal Solicitors**) for the **Cross-Appellant/Respondent**

Mr. Tim Eicke QC and Ms. Jessica Wells (instructed by **The Treasury Solicitor**) for the **1st Intervener**

Mr. Arfan Khan and Mr. Tahir Ashraf (instructed by **4A Law**) for the **2nd Intervener**

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Hearing dates: 24th-27th November 2014

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Approved Judgment

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THE MASTER OF THE ROLLS:

I. INTRODUCTION

1. This is the judgment of the court. Paragraphs 2 to 68 have been substantially written by Lloyd Jones L.J. and paragraphs 69 to 85 have been substantially written by Arden L.J.

2. These appeals raise the question whether a member of the service staff of a foreign diplomatic mission to the United Kingdom may bring proceedings in this jurisdiction against the employer state to assert employment rights or whether such a claim is barred by state immunity. This has led, in turn, to a consideration of the compatibility of the State Immunity Act 1978 ("SIA") with Article 6, European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and Article 47, Charter of Fundamental Rights of the European Union ("EU Charter").

3. Ms. Benkharbouche, a Moroccan national, was employed as a cook at the Sudanese embassy in London. She was dismissed and brought claims against the embassy for unfair dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998. The embassy claimed immunity under section 1 SIA. Employment Judge Deol upheld the plea of immunity and dismissed the claims. He considered that the claims were based on an employment relationship of a private rather than a public nature and therefore came potentially within the ambit of Article 6. He also accepted that there was a potential inconsistency between Article 6 and the blanket immunity conferred by the SIA. However, in his view section 16(1)(a) SIA, which excludes from the exception to immunity under section 4 proceedings concerning the employment of the members of a mission, could not be read down in accordance with section 3(1), Human Rights Act 1998 ("HRA") to permit the claim. He also rejected the submission that he should disapply the SIA, since it would be beyond the powers of the tribunal to do so and he did not consider that Article 47 provided a means of enforcing EU rights over and above that provided by the HRA.

4. Ms. Janah, a Moroccan national who had lived in the United Kingdom since 2005, was employed as a member of the domestic staff of the Libyan embassy in London where her duties included cooking, cleaning, laundering, shopping and serving meals. She was dismissed and brought claims against Libya for unfair dismissal, arrears of pay, racial discrimination and harassment and breach of the Working Time Regulations 1998. Libya claimed state immunity under section 1 SIA. Employment Judge Henderson upheld the plea of immunity and dismissed the claims. It was conceded that Ms. Janah was not habitually resident in the United Kingdom at the time her contract of employment was made with the result that section 4(2) SIA disapplied the exception to immunity created by section 4(1). The employment judge felt unable to decide whether applying section 4(2) to Ms. Janah's case would infringe Article 6. However, she concluded that the grant of immunity pursuant to section 16 engaged Article 6 and that that right had been denied. However, the statutory provisions could not, in her view, be read down so as to accord with Article 6 since to do so would depart substantially from a fundamental feature of the SIA. Furthermore, the tribunal could not decline to give effect to the provisions of the SIA. Although Article 47 was part of national law and directly effective, she considered that it was not for the tribunal to consider what she regarded as a freestanding complaint under

EU law. She also considered that there was significant doubt over the enforceability of the EU Charter before the courts of the United Kingdom.

5. Appeals from the two decisions were heard together by Langstaff J., the President of the Employment Appeal Tribunal. (*Benkharbouche v. Embassy of the Republic of Sudan*; *Janah v. Libya* [2014] ICR 169.) There, as before the tribunals, it was common ground that the SIA on its face appeared to grant procedural immunity from suit. The issues on the appeal were, rather, (a) whether the claims engaged Article 6, (b) if so, whether the statutory provisions could be interpreted in a manner consistent with Article 6, and (c) if not, whether the statutory provisions could be set aside. The President considered that the exercise of jurisdiction over these disputes would not interfere with any public governmental function of the respondent states and although the argument that the SIA struck an appropriate balance might at one stage in recent history have provided a sufficient answer, it no longer did so in the light of the developing extent of the restrictions on state immunity. Accordingly he considered that there had been a breach of Article 6 insofar as section 16 SIA had been applied. He left open the question whether the application of section 4(2)(b) SIA to these claims would also infringe Article 6. Proceeding on the assumption that the application of both of these provisions would infringe Article 6, he considered that they could not be read down in accordance with section 3(1) HRA. However, the provisions of the SIA were also in conflict with the right of access to a court under Article 47 EU Charter which was a general principle and a fundamental right in EU law. To the extent that the employment rights asserted were within the material scope of EU law, namely the claims of both claimants in respect of breach of the Working Time Regulations 1998 and the claim by Ms. Janah in respect of racial discrimination and harassment, the court was required to disapply the infringing provisions of the SIA pursuant to section 2(1), European Communities Act 1972.

II. STATE IMMUNITY

6. The law of state immunity in the United Kingdom is contained, subject to certain limited exceptions, in the SIA. The Act made new provision with respect to proceedings in the United Kingdom against other states. It replaced the common law which until the 1970s had conferred an almost absolute immunity on foreign states but which in the period immediately prior to the enactment of the SIA had adopted a restrictive immunity limited to sovereign activities (*The Philippine Admiral* [1977] AC 373; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529). The Act was passed, inter alia, in order to enable the United Kingdom to ratify the European Convention on State Immunity 1972 ("ECSI"). That Convention embodied a restrictive doctrine of immunity and imposed a treaty obligation on contracting states to implement voluntarily judgments given against them. That scheme is reflected in the provisions of Part I SIA defining the areas of non-immunity and in Part II of the statute which relates to the recognition of judgments against the United Kingdom in other contracting States.

7. Section 1, SIA confers a general immunity from jurisdiction.

> "*Immunity from jurisdiction*
> 1 General immunity from jurisdiction.
> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

The following sections create exceptions to immunity. Section 3 provides that a State is not immune as respects proceedings relating to certain commercial transactions and contracts to be performed in the United Kingdom. Section 4 makes specific provision for contracts of employment and provides in relevant part:

> " 4 Contracts of employment.
> (1) A State is not immune as respects proceedings relating 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.
>
> (2) Subject to subsections (3) and (4) below, this section does not apply if—
>
> (a) at the time when the proceedings are brought the individual is a national of the State concerned; or
>
> (b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or
>
> (c) the parties to the contract have otherwise agreed in writing.
>
> (3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(*a*) and (*b*) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.
>
> (4) Subsection (2)(*c*) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.
>
> …
>
> (6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee."

Section 16 excludes certain matters from the scope of Part I of the Act. Of particular relevance in the present case is section 16(1).

> "16 Excluded matters.
> (1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and—
>
> (a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;
>
> (b) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission."

The effect of the exclusion of proceedings concerning the employment of the members of a mission from section 4 is that the exception to immunity created by that section does not apply to such cases and a state is therefore immune by virtue of section 1(1).

8. The Diplomatic Privileges Act 1964 was enacted to amend the law on diplomatic privileges and immunities by giving effect to certain provisions of the Vienna Convention on Diplomatic Relations, 1961 ("VCDR"). Those provisions which are given effect in the law of the United Kingdom include Article 1 which provides in material part:

> "For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
>
> (a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;
>
> (b) the "members of the mission" are the head of the mission and the members of the staff of the mission;
>
> (c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
>
> (d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;
>
> (e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;
>
> (f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;
>
> (g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;
>
> (h) a "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;
>
> (i) the "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."

9. Members of the service staff are, therefore, members of a mission within section 16(1)(a) SIA and within the exclusion from section 4 SIA. Accordingly, Ms. Benkharbouche, a Moroccan national who was a cook at the Sudanese Embassy in London for several years until her dismissal in November 2010 is prima facie barred by the provisions of the SIA from pursuing her claims against her former employers in this jurisdiction. Similarly, Ms. Janah, a Moroccan national employed as a member

of the service staff by the Libyan Embassy in London for several years prior to her dismissal in January 2012, is barred from pursuing her claims against her former employers here. In addition, in the case of Ms. Janah it was conceded that she was not habitually resident in the United Kingdom at the time her contract of employment was made with the result that section 4(2) SIA disapplied in her case the exception to immunity established by section 4(1). During the hearing before us we were told by Mr. Timothy Otty QC, counsel for both claimants, that the issue of the habitual residence of Ms. Benkharbouche has not been resolved below. So much was common ground before us on this appeal.

10. The heart of the present appeals and cross-appeals lies in the question whether the applicable provisions of the SIA are compatible with Article 6 ECHR and Article 47 EU Charter and, if not, what consequences follow for the pleas of immunity.

III. ARTICLE 6, ECHR

A. When is Article 6 engaged?

11. Article 6(1) ECHR provides in relevant part:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The procedural guarantees provided by Article 6 in relation to the fairness and expedition of legal proceedings would be meaningless if the ECHR did not protect the right of access to the courts which is a precondition to the enjoyment of those guarantees. As a result the European Court of Human Rights has established the principle that Article 6(1) secures a right to have any claim relating to a person's civil rights and obligations brought before an independent and impartial tribunal. (*Golder v. United Kingdom* (1975) EHRR 524, at [28]-[36].) The Strasbourg case law recognises that the right is not absolute but is subject to limitations. Contracting States enjoy a margin of appreciation in this regard. However, national courts must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Moreover, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

12. Rules of state immunity are restrictions on access to the courts and their relationship to Article 6 has been considered on a number of occasions by courts in this jurisdiction and by the Strasbourg court. These authorities reveal rather different approaches.

13. The issue arose for consideration by the House of Lords in *Holland v. Lampen Wolfe* [2000] 1 WLR 1573. Libel proceedings were brought against an education services officer of the US Government employed at a US military base in England. The SIA did not apply because of an exclusion of "proceedings relating to anything done by or in relation to the armed forces of a state while present in the United Kingdom" (section 16(2)) and the case was accordingly decided under the common law. Lord Millett, with whom Lord Cooke and Lord Hobhouse agreed, observed that Article 6

affords to everyone the right to a fair trial for the determination of his civil rights and obligations and continued (at p. 1588 C-F):

> "At first sight this may appear to be inconsistent with a doctrine of comprehensive and unqualified state immunity in those cases where it is applicable. But in fact there is no inconsistency. This is not because the right guaranteed by article 6 is not absolute but subject to limitations, nor is it because the doctrine of state immunity serves a legitimate aim. It is because article 6 forbids a contracting state from denying individuals the benefit of its powers of adjudication; it does not extend the scope of those powers.
>
> Article 6 requires contracting states to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting states have the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting states adjudicative powers which they do not possess. State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself.
>
> The immunity in question in the present case belongs to the United States. The United States has not waived its immunity. It is not a party to the Convention. The Convention derives its binding force from the consent of the contracting states. The United Kingdom cannot, by its own act of acceding to the Convention and without the consent of the United States, obtain a power of adjudication over the United States which international law denies it."

Lord Millett considered that where the extent of the jurisdiction of a state party to the ECHR is in question it must be determined first, "for if the state party has no jurisdiction to exercise, questions of legitimate aim and proportionality do not arise" (at p 1588G). In this regard he distinguished three cases then pending before the European Court of Human Rights, *Fogarty v. United Kingdom*, *Al-Adsani v. United Kingdom* and *McElhinney v. Ireland and the United Kingdom*, which at that time had been declared admissible, on the ground that in those cases the applicant was arguing that the immunity in question went further than international law requires (at p. 1588H). (See also *Matthews v. Ministry of Defence* [2003] 1 AC 1163 per Lord Millett at [103].)

14. More recently, the reasoning of Lord Millett in *Holland v. Lampen-Wolfe* has been supported in the House of Lords in *Jones v. Saudi Arabia* [2007] 1 AC 270 by Lord Bingham (at [14]):

> "First, [the claimants] must show that article 6 of the Convention is engaged by the grant of immunity to the Kingdom on behalf of itself and the individual defendants. In this task they derive great help from *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 where, in a narrowly split decision of the Grand Chamber, all judges of the European Court of Human Rights held article 6 to be engaged. I must confess to some difficulty in accepting this. Based on the old principle par in parem non habet imperium, the rule of international law is not that a state

should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give. This was the opinion expressed by Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588, and it seems to me persuasive. I shall, however, assume hereafter that article 6 is engaged, as the European Court held."

and Lord Hoffmann (at [64]):

"On the question of whether article 6 is engaged at all, I am inclined to agree with the view of Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588 that there is not even a prima facie breach of article 6 if a state fails to make available a jurisdiction which it does not possess. State immunity is not, as Lord Millett said, a "self-imposed restriction on the jurisdiction of [the] courts" but a "limitation imposed from without". However, as the European Court of Human Rights in *Al-Adsani* 34 EHRR 273 proceeded on the assumption that article 6 was engaged and the rules of state immunity needed to be justified and as it makes no difference to the outcome, I will not insist on the point."

15. The approach of the Strasbourg court is very different. In *Al-Adsani v. United Kingdom* (2002) 34 EHRR 11 proceedings before the English courts against the Sheikh and the government of Kuwait alleging torture in Kuwait had been held to be barred by state immunity. The claimant then brought proceedings in Strasbourg against the United Kingdom alleging an infringement of his Article 6 rights. The United Kingdom submitted that Article 6 was not engaged because it was required by international law to accord immunity in the circumstances of that case. The Grand Chamber did not address this submission in its judgment but proceeded on the basis that Article 6 was engaged (at [48]). It then evaluated the claim to immunity and the rule of international law contended for within the context of Article 6, in particular by reference to the concepts of legitimate aim and proportionality.

"53. The right of access to a court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see Waite and Kennedy v. Germany [GC], no. 26083/94, § 59, ECHR 1999-I).

54. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle par in parem non habet imperium, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international

law to promote comity and good relations between States through the respect of another State's sovereignty.

55. The Court must next assess whether the restriction was proportionate to the aim pursued. It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, mutatis mutandis, Loizidou v. Turkey (merits), judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

56. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."

This approach has been consistently followed by the Strasbourg court in a line of cases including *Fogarty v. United Kingdom* (2002) 34 EHRR 12 at [34] – [36], *McElhinney v. Ireland and United Kingdom* (2002) EHRR 13, *Cudak v. Lithuania* (2010) 51 EHRR 15 at [54] – [59], *Sabeh El Leil v. France* (2012) 54 EHRR 14 at [46] – [54]; Application No. 156/04, *Wallishauser v. Austria* at [59] – [60], *Oleynikov v. Russia* (2013) 57 EHRR 15 at [60] – [61] and *Jones v. United Kingdom* (2014) 59 EHRR 1 at [186] – [189].

16. This court is, therefore, faced with conflicting authority. The decision of the House of Lords in *Holland v. Lampen-Wolfe* that Article 6 is not engaged where the grant of immunity is required by international law is binding on this court. However, the Strasbourg court has consistently held in a lengthy line of authority that Article 6 is engaged in these circumstances. We find the reasoning of Lord Millett in *Holland v. Lampen-Wolfe* compelling. It is difficult to see how Article 6 can be engaged if international law denies to the Contracting State jurisdiction over a dispute. There can be no denial of justice for which the State is responsible if there is, as a matter of international law, no court capable of exercising jurisdiction. Moreover, Article 6 cannot have been intended to confer on Contracting States a jurisdiction which they would not otherwise possess, nor could it have conferred a jurisdiction denied by general international law in such a way as to be binding on non-Contracting States. It is unfortunate that in none of its many decisions in which the point has arisen has the Strasbourg court grappled with these considerations. (The statement of the court in *Fogarty* (at [48]) that the grant of immunity does not qualify a substantive right but is a procedural bar on the national courts' power to determine the right, while correct as a matter of domestic law, does not meet the point. See also *Jones v. Saudi Arabia* at [164].) However, we consider that in the present case it is not necessary for us to

choose between these competing approaches. The approach of the Strasbourg court would not result in a Contracting State being held to be in breach of Article 6 simply because it gave effect to a rule of international law requiring the grant of immunity. In any such case the grant of immunity would be held to be a proportionate means of achieving a legitimate aim. Under the Strasbourg jurisprudence, any debate as to what are the applicable rules of international law is transferred to a later stage of the analysis and addressed in the context of Article 6. Moreover, before us Mr. Toby Landau QC, who appeared on behalf of Libya, while maintaining that the approach in *Holland v. Lampen Wolfe* is correct in principle and binding on this court, did not seek to dissuade us from addressing the issues of international law in the context of Article 6.

17. The Strasbourg jurisprudence identifies the legitimate aim as compliance with international law. In the passage from the judgment in *Al-Adsani* cited above the court described it as "the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty" (at [54]). The legitimate aim is described in identical terms in *Fogarty v. United Kingdom* at [34], *Cudak v. Lithuania* at [60], *Sabeh El Leil v. France* at [52], *Wallishauser v. Austria* at [64], *Oleynikov v. Russia* at [60] and *Jones v. Saudi Arabia* at [188].

18. The approach of the Strasbourg court to proportionality in this context appears from its judgment in *Al-Adsani* at [55] – [56] which is cited above. The statement that "measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1)" is repeated in the more specific context of embassy employment disputes in *Fogarty* at [36], in *Cudak* at [57], in *Sabeh El Leil* at [49] and in *Wallishauser* at [59].

19. The observations of the Strasbourg court in *Jones v. United Kingdom* in relation to proportionality were the focus of a great deal of argument during the submissions before us. At [189] the court repeated the proposition that measures which reflect generally recognised rules of public international law on state immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court. However, in the following section of the judgment, under the heading "Application of the principles in previous state immunity cases" the court said this:

> "190. The Court has examined compliance with the right of access to a court enshrined in Article 6 § 1 in the context of the grant of State immunity in a number of different civil claims, including disputes concerning: employment at embassies (Fogarty, Cudak and Sabeh El Leil, all cited above); personal injury incurred in the forum State (McElhinney, cited above); personal injury incurred as a result of torture abroad (Al-Adsani, cited above); crimes against humanity carried out in wartime (Kalogeropoulou and Others, cited above); service of process (Wallishauser, cited above); and complaints of an allegedly private-law nature (Oleynikov v. Russia, no. 36703/04, 14 March 2013). Each of these cases concerned the extent to which the former absolute notion of State immunity had given way to a more restrictive form of immunity. In particular, the Court examined whether the respondent State's actions "[fell] outside any currently

accepted international standards" (Fogarty, cited above, § 37; and McElhinney, cited above, § 38); were "inconsistent with [the] limitations generally accepted by the community of nations as part of the doctrine of State immunity" (Al-Adsani, cited above, § 66; and, by implication, Kalogeropoulou and Others, cited above); or were potentially contrary to an exception to State immunity established by a rule of customary international law that applied (Cudak, cited above, § 67; Sabeh El Leil, cited above, § 58; Wallishauser, cited above, § 69; and Oleynikov, cited above, § 68)."

20. On behalf of Libya Mr. Landau submitted that this passage and, in particular, the different formulations set out at [190] introduce a measure of flexibility into the test of proportionality. However, it seems to us that although it may be formulated in different ways we are concerned here with essentially one test which is whether the grant of immunity is required by international law. In our view this follows from the fact that the legitimate aim at which these means are directed is compliance with international law. Despite the different formulations, it seems to us that if a state adopts a rule restricting access to the court which it is not required by international law to adopt, there is a violation of Article 6 ECHR unless the rule otherwise meets the requirements for a limitation on that right. In this regard we also note that the formulation in [189] appears in a section headed "(a) General principles on access to a court in the context of state immunity" whereas the passage at [190] appears under the heading "(b) Application of the principles in previous state immunity cases". We do not read these formulations as intended to detract in any way from the statement of principle at [189] (which is repeated at [196] and [201]) and which had also appeared consistently in the earlier cases.

21. Nevertheless, this does not mean that the application of the proportionality test is totally inflexible. In *Holland v. Lampen-Wolfe* the House of Lords was firmly of the view that international law required the grant of immunity in the circumstances of that case. However, the position will not always be that clear. The precise scope of immunities required by international law is often the subject of great uncertainty and the boundary lines between immunity and non-immunity will often be difficult to draw. The distinction between sovereign acts and non-sovereign acts is easy to state but notoriously difficult to apply in practice. Moreover, as Judge Higgins, Judge Kooijmans and Judge Buergenthal observed in their Separate Opinion in *Case concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium* (International Court of Justice, 14 February 2002; ICJ Reports 2002, p. 3, at [72]), the meaning of the concepts of *acta jure imperii* and *acta jure gestionis* is not carved in stone; it is subject to a continuously changing interpretation which varies with time reflecting the changing priorities of society. In some areas it is unclear to what extent immunities have been eroded. (See, for example, the observations of the Strasbourg court in *McElhinney v. Ireland and the United Kingdom* at [38], a case concerning the conduct of a foreign state within the forum state resulting in personal injury.) Nowhere is this difficulty more apparent than in the field of embassy employment disputes with which we are concerned in the present cases. Here, as we shall see, state practice and the decisions of national courts reveal a variety of different approaches and a diversity of views. Accordingly, while there will be many cases in which the answer to the question whether there exists an obligation in international law to grant immunity will be clear, there will be many others where the issue will not be free from doubt. In the latter category of cases it is not the function

of the Strasbourg court to make definitive rulings as to the position in international law. In this regard we would draw attention to the concurring judgment of Judge Pellonpaa, joined by Judge Bratza, in *Al-Adsani* where they observed that "when having to touch upon central questions of general international law, this Court should be very cautious before taking upon itself the role of a forerunner" (at [O-II9]). It is for these reasons that it is necessary to accord to states which are parties to ECHR a margin of appreciation in determining what are their obligations under international law.

22. This is reflected in the approach of the Strasbourg court to proportionality in *Fogarty*:

> "37. The Court observes that, on the material before it (see paragraphs 16-20, 29 and 31 above), there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission. Certainly, it cannot be said that the United Kingdom is alone in holding that immunity attaches to suits by employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.
>
> 38. The Court further observes that the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, inter alia, to the diplomatic and organisational policy of a foreign State. The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions. In this respect, the Court notes that it appears clearly from the materials referred to above (see paragraph 19) that the International Law Commission did not intend to exclude the application of State immunity where the subject of proceedings was recruitment, including recruitment to a diplomatic mission.
>
> 39. In these circumstances, the Court considers that, in conferring immunity on the United States in the present case by virtue of the provisions of the 1978 Act, the United Kingdom cannot be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to court."

23. This approach was also apparent in the submission on behalf of the United Kingdom in *Jones v. United Kingdom* (see the judgment at [174]) that there is a margin of appreciation as regards access to court, which permits states to act on their own views as to the extent of their obligations under public international law, provided that they are reasonably tenable views. Although the Strasbourg court did not expressly rule on this submission, it reiterated its previous statements that states enjoy a margin of appreciation in relation to limiting access to courts (at [186]) and concluded that, in the circumstances of that case (which were far removed from embassy employment

disputes) the grant of immunity was a proportionate means of achieving a legitimate aim.

B. The application of Article 6 to embassy employment disputes.

24. The extract from the *Fogarty* judgment set out at [22] above shows the court granting a wide margin of appreciation to the forum state in view of the state of international law in relation to embassy employment disputes. The court considered that while there was a trend towards limiting state immunity in respect of employment disputes, international practice was divided on whether immunity survived in relation to embassy employment disputes and, if so, whether it covered disputes relating to the employment of staff at all levels. The court also pointed out that it was not aware of any trend towards the relaxation of immunity as regards issues of recruitment to foreign missions which arose on the facts of that case. (See [37], [38].) The grant of immunity to the United States was held, in that case, not to infringe Article 6.

25. In later cases the Strasbourg court has gone considerably further in its analysis of international law in relation to embassy employment disputes and has taken a rather different view of the scope of the immunity. In *Cudak v. Lithuania* the applicant had been hired as a secretary and switchboard operator by the Embassy of Poland in Vilnius. She made a complaint to the Ombudsman in Lithuania who found that she had been sexually harassed by a colleague at work. She then went on sick leave and on her return was told that she had been dismissed for failure to come to work. She brought an action for unfair dismissal before the civil courts which declined jurisdiction on grounds of state immunity which had been invoked by Poland. The Lithuanian Supreme Court held that the applicant had exercised a public service function during her employment and that her duties facilitated the exercise by Poland of its sovereign functions with the result that the doctrine of sovereign immunity applied. She then brought proceedings in Strasbourg against Lithuania alleging a breach of her Article 6 rights.

26. A Grand Chamber of the Strasbourg court held that the case could be distinguished from *Fogarty* in that it did not concern recruitment but rather the dismissal of a member of the local staff of an embassy. Nevertheless, the court still took the view that the restrictions on access to courts pursued a legitimate aim. However, it concluded that the restriction on the applicant's right of access was not proportionate to the aim pursued. That conclusion depended heavily on the following reasoning:

> "63. The Court found, already in the Fogarty judgment, that there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies (§§ 37-38).
>
> 64. In this connection, the Court notes that the application of absolute State immunity has, for many years, clearly been eroded. In 1979 the International Law Commission (ILC) was given the task of codifying and gradually developing international law in the area of jurisdictional immunities of States and their property. It produced a number of drafts that were submitted to States for comment. The Draft Articles it adopted in 1991 included one – Article 11 – on contracts of employment (see paragraph 28 above). In 2004 the United Nations

General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property (see paragraph 30 above).

65. The 1991 Draft Articles, on which the 2004 United Nations Convention (and Article 11 in particular) was based, created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contracts with the staff of its diplomatic missions abroad. However, that exception was itself subject to exceptions whereby, in substance, immunity still applied to diplomatic and consular staff in cases where: the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual; the employee was a national of the employer State; or, lastly, the employer State and the employee had otherwise agreed in writing.

66. The report appended to the 1991 Draft Articles stated that the rules formulated in Article 11 appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of States (ILC Yearbook, 1991, Vol. II, Part 2, p. 44, paragraph 14). This must also hold true for the 2004 United Nations Convention. Furthermore, it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule (see the judgment of the International Court of Justice in the North Sea Continental Shelf cases, ICJ Reports 1969, p. 41, § 71). Moreover, there were no particular objections by States to the wording of Article 11 of the ILC's Draft Articles, at least not by the respondent State. As to the 2004 United Nations Convention, Lithuania has admittedly not ratified it but did not vote against its adoption either.

67. Consequently, it is possible to affirm that Article 11 of the ILC's 1991 Draft Articles, on which the 2004 United Nations Convention was based, applies to the respondent State under customary international law. The Court must take this into consideration in examining whether the right of access to a court, within the meaning of Article 6 § 1, was respected."

27. Similar but not identical reasoning appears in the judgment of the Grand Chamber in *Sabeh El Leil*:

"53. In addition, the impugned restriction must also be proportionate to the aim pursued. In this connection, the Court observes that the application of absolute State immunity has, for many years, clearly been eroded, in particular with the adoption of the Convention on Jurisdictional Immunities of States and their Property by the United Nations General Assembly in 2004 (see Cudak, cited above, § 64). This convention is based on Draft Articles adopted in 1991, of which Article 11 concerned contracts of employment and created a significant exception in matters of State immunity, the principle being that the immunity rule does not apply to a State's employment contracts with the staff of its diplomatic missions abroad, except in the situations that are exhaustively enumerated in paragraph 2 of Article 11 (ibid., § 65).

> 54. Furthermore, it is a well-established principle of international law that a treaty provision may, in addition to the obligations it creates for the Contracting Parties, also be binding on States that have not ratified it in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule (ibid., § 66). Consequently, Article 11 of the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either (ibid., §§ 66-67)."

The court considered that the restrictions on the right of access to court pursued a legitimate aim. Turning to proportionality, it came to the following conclusions, on the basis of *Cudak*:

> "57. As the Court has pointed out (see paragraph 54 above), Article 11 of the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either (see Cudak, cited above, §§ 66-67). For its part, France has not ratified it but has not opposed it: on the contrary, it signed the convention on 17 January 2007 and the ratification procedure is currently pending before the French Parliament (see paragraph 22 above).
>
> 58. Consequently, it is possible to affirm that the provisions of the 2004 Convention apply to the respondent State, under customary international law (see Cudak, cited above, § 67), and the Court must take this into consideration in examining whether the right of access to a court, within the meaning of Article 6 § 1, was respected."

28. Similar reasoning was subsequently employed by the court in *Wallishauser* (at [59], [60]) and *Oleynikov* (at [66]–[68]).

29. Mr. Landau, on behalf of Libya, has been very critical of this reasoning and it seems to us that some of this criticism is justified.

    (1) A treaty cannot create either obligations or rights which are binding on states which are not parties to it without their consent. (Vienna Convention on the Law of Treaties, 1969, Article 34.) None of the states concerned in these proceedings is a party to the UN Convention on Jurisdictional Immunities of States and their Property, 2004 ("the UN Convention").

    (2) The UN Convention requires 30 ratifications, acceptances, approvals or accessions before it will enter into force. To date the Convention has been ratified by only 16 states.

    (3) Rules contained in treaties may, however, bind non-parties if they embody existing rules of customary international law or if they subsequently attain that status. It is likely that many of the rules in the UN Convention reflect customary international law. However, as we shall see, that is not necessarily true of all its provisions. In particular, while it is clear that customary international law no longer requires immunity in all proceedings relating to

employment contracts, state practice in relation to embassy employment disputes is so diverse that it is far from clear that Article 11 of the UN Convention is a definitive statement of the limits of immunity required by customary international law in such circumstances.

(4) The court's analysis fails to take account of important differences between the text of the International Law Commission ("ILC") Draft Articles and that of the UN Convention. They cannot both represent the current state of customary international law.

(5) Neither the failure of a state to object to the adoption of the ILC Draft Articles or to vote against the adoption of the UN Convention by the General Assembly is capable, without more, of binding the state concerned to the content of the instrument in question.

30. In these circumstances, it is questionable whether Article 11 of the ILC Draft Articles (*Cudak* at [67], *Wallishauser* at [69]) or Article 11 of the UN Convention (*Sabeh El Leil* at [58]; *Oleynikov* at [66]) can be taken to be a definitive statement of the extent of state immunity required by international law in embassy employment disputes. However, this is not the end of the matter by any means. In our view it is necessary to consider whether the immunity of the respondent states in the present cases by virtue of sections 4 and 16(1)(a) SIA is required by international law or, at least, lies within the margin of appreciation accorded to states to determine the extent of their obligations under international law.

C. Section 16(1)(a)

31. Section 16(1)(a) SIA provides that section 4 does not apply to proceedings concerning the employment of the members of a mission within the meaning of the VCDR. We have seen that "members of the mission" as defined in that Convention includes members of the diplomatic staff, the administrative and technical staff and the service staff of the mission. The last category comprises the members of the staff of the mission in the domestic service of the mission. The effect of the exclusion of proceedings concerning the employment of the members of a mission from section 4 is that the exception to immunity created by that section does not apply to such cases and a state is immune by virtue of section 1(1). The effect of section 16(1)(a) is, therefore, to grant immunity in all cases concerning embassy or consular employment disputes. It is a blanket provision.

1. Sengupta v. Republic of India

32. Before turning to consider whether a rule of such breadth is required by international law, it is convenient to refer to the decision of the Employment Appeal Tribunal in *Sengupta v. Republic of India* [1983] ICR 221, a case decided on the common law in force before the commencement of the SIA. There the applicant, an Indian national, was employed as a clerk at the Indian High Commission in London. Following his dismissal he brought proceedings before an industrial tribunal for unfair dismissal which were held to be barred by state immunity. On appeal, Browne-Wilkinson J., delivering the judgment of the Employment Appeal Tribunal dismissing the appeal, observed:

> "In our judgment, in seeking to decide whether the claim in this case is excluded by the doctrine of sovereign immunity, we must ask the following questions: (a) Was the contract of a kind which a private individual could enter into? (b) Did the performance of the contract involve the participation of both parties in the public functions of the foreign state, or was it purely collateral to such functions? (c) What was the nature of the breach of contract or other act of the sovereign state giving rise to the proceedings? (d) Will the investigation of the claim by the tribunal involve an investigation into the public or sovereign acts of the foreign state?
>
> If we have asked ourselves the right questions, then in our judgment the necessary result must be that there is no jurisdiction to entertain the applicant's claim. It is true that any private individual can employ another, i.e. can enter into a contract of employment. Therefore in that sense the entry into a contract of employment is a private act. But when one looks to see what is involved in the performance of the applicant's contract, it is clear that the performance of the contract is part of the discharge by the foreign state of its sovereign functions in which the applicant himself, at however lowly a level, is under the terms of his contract of employment necessarily engaged. One of the classic forms of sovereign acts by a foreign state is the representation of that state in a receiving state. From the doctrine of sovereign immunity were derived the concepts that the embassy premises were part of the soil of the foreign sovereign state and that diplomatic staff are personally immune from local jurisdiction. A contract to work at a diplomatic mission in the work of that mission is a contract to participate in the public acts of the foreign sovereign. The dismissal of the applicant was an act done in pursuance of that public function, i.e. the running of the mission. As a consequence, the fairness of any dismissal from such employment is very likely to involve an investigation by the industrial tribunal into the internal management of the diplomatic representation in the United Kingdom of the Republic of India, an investigation wholly inconsistent with the dignity of the foreign state and an interference with its sovereign functions.
>
> We therefore conclude that, in general, there is no jurisdiction to entertain a claim for unfair dismissal from employment by, and in, a diplomatic mission." (at pp. 228D – 229B)

The respondents to this appeal rely on this passage as supporting their case that section 16(1)(a) reflects a requirement of international law. However, it is to be noted that the Employment Appeal Tribunal (at p. 229 C-D) expressly left open the question whether, apart from the SIA, employees who are solely concerned with providing the physical environment in which the diplomatic mission operates might be able to claim. The tribunal distinguished such a case from that of a claim by a person engaged in carrying out the work of the mission in however humble a role. It is possible therefore that, in this respect, section 16(1)(a) which excludes jurisdiction in cases brought by service staff of the mission may have extended the scope of immunity beyond that at common law.

<u>2. Is a rule of the breadth of section 16(1)(a) SIA required by international law?</u>

<u>(1) International Conventions</u>

(a) European Convention on State Immunity, 1972.

33. Prof. Sarooshi on behalf of Libya draws attention to the provisions of the European Convention on State Immunity, 1972 ("ECSI") corresponding to provisions in the SIA. ECSI is a Council of Europe treaty adopted by the contracting states, in the light of the tendency in international law to restrict state immunity, in order to establish in their mutual relations common rules relating to the scope of state immunity and the enforcement of judgments against a state. The ECSI, which entered into force in 1976, has eight parties (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom). It provides in relevant part:

> "Article 5
>
> 1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.
>
> 2. Paragraph 1 shall not apply where:
>
> (a) the individual is a national of the employing State at the time when the proceedings are brought;
>
> (b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or
>
> (c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.
>
> 3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2.a and b of the present article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.
>
> …
>
> Article 15
>
> A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.
>
> …
>
> Article 32
>
> Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them."

34. Prof. Sarooshi, on behalf of Libya, draws attention, in particular, to Article 32 which he says is implemented by section 16(1)(a). In enacting the SIA Parliament was undoubtedly seeking, in part, to ensure that domestic law conformed with the obligations it had assumed under ECSI. However, Article 32 ECSI is not the exact counterpart of section 16(1)(a) which, in its reference to proceedings concerning the employment of the members of a mission, extends further. Moreover, whereas the effect of section 16(1)(a) is to withdraw proceedings concerning the employment of the members of a mission from the scope of the exception to immunity created by section 4, with the result that the state concerned enjoys immunity, the effect of Article 32 is to withdraw matters concerning privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them from the scope of the ECSI altogether. As a result the Contracting States are not required to apply the rules set out in the ECSI to disputes raising such issues. The provisions of ECSI do not require a provision of the breadth of section 16(1)(a). Furthermore, we have been referred by the parties to decisions of the courts of contracting states to the ECSI in which immunity was denied in claims by staff of a mission against their employer. (See, for example, *Seidenschmidt v. USA* (1992) 116 ILR 530 (Austria); *Rousseau v. Republic of Upper Volta* (1983) 82 ILR 118 (Belgium); *Mahamdia v. Algeria*, 14 January 2009 (Germany); *MK v. Turkey* (1985) 94 ILR 350 (The Netherlands); *Landano v. USA* (1987) 116 ILR 636; *M v. Arab Republic of Egypt*, 16 November 1994, 116 ILR 656 (Switzerland).) While these claims were brought against states which are not parties to ECSI, these decisions are inconsistent with the view that international law requires immunity in all employment claims by the service staff of a mission.

(b) Vienna Convention on Diplomatic Relations, 1961.

35. The Secretary of State for Foreign and Commonwealth Affairs ("the Secretary of State") draws attention to Article 7 VCDR which provides that, subject to certain exceptions, "the sending State may freely appoint the members of the staff of the mission". This extends to all the staff of the mission including service staff. This is not one of the provisions of that convention which is given force in the law of the United Kingdom by the Diplomatic Privileges Act 1964 but it is binding on the United Kingdom in international law. The Secretary of State submits that the SIA was intended to maintain consistency with the United Kingdom's obligations in international law and that consistency with Article 7 VCDR is achieved by section 16(1)(a). It is submitted that there is widespread support in the practice of states for the view that disputes relating to the appointment of staff of a mission should attract immunity. Thus, for example the UN Convention provides that there will be immunity where the subject matter of the proceedings is the recruitment, renewal of employment or reinstatement of an individual (Article 11(2)(c)). Similarly in *Fogarty* the Strasbourg court observed that questions relating to the recruitment of staff to missions may by their very nature involve sensitive and confidential issues related, inter alia, to the diplomatic and organisational policy of a foreign State. It stated that it was not aware of any trend in international law toward a relaxation of immunity as regards such issues. The difficulty with the Secretary of State's argument, however, is that the effect of section 16(1)(a) is far wider than to preserve immunity in cases concerning appointment of staff of the mission. Moreover, the claims which are

barred by section 16(1)(a) in the present case are not concerned with the appointment of staff.

(c) UN Convention on Jurisdictional Immunities of States and their Property, 2004

36. The work of the ILC on state immunity, which was undertaken with the agreement of the United Nations, resulted in 1991 in the production by the ILC of Draft Articles on Jurisdictional Immunities of States and their Property. The Draft Articles, as subsequently amended by a Working Group and an Ad Hoc Committee of the Sixth Committee of the UN General Assembly, were incorporated into the Draft UN Convention which was adopted by the General Assembly in 2004. It has to date received 16 ratifications. It requires 30 ratifications before it can enter into force. In *Jones v. Saudi Arabia* Lord Bingham (at [9]) cited with approval the observation of Aikens J. in *AIG Capital Partners Inc. v. Republic of Kazakhstan* [2006] 1 WLR 1420 at [80] that "its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee, powerfully demonstrates international thinking on the point". As Fox and Webb observe (The Law of State Immunity, 3rd Ed., (2013), p. 284), it constitutes "a significant stage in the harmonization and articulation of the international law of state immunity". While it is likely that many of its provisions reflect the position in customary international law it cannot be assumed that this is true of all of them. (See O'Keefe, and Tams (eds), The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary, at pp. xli – xlii.) It is, therefore, necessary to examine each of its provisions with care in order to establish whether it satisfies the stringent requirements to be considered customary law. Thus, for example, this court has recently held in *Belhaj v. Straw* [2014] EWCA Civ 1394 (at [47]) that the provisions of the UN Convention in relation to indirect impleader in state immunity extend beyond the requirements of customary international law.

37. Article 11 of the UN Convention provides:

> "Article 11
> Contracts of employment
> 1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
>
> 2. Paragraph 1 does not apply if:
> (a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
>
> (b) the employee is:
>
> (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
> (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or
(iv) any other person enjoying diplomatic immunity;

(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

(f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding."

38. At first sight it might appear that Article 11(2)(b)(iv) would grant immunity in respect of the present proceedings. Under VCDR the immunity of members of the mission varies according to the category of member. Thus, under Article 37(3) VCDR members of the service staff of a mission who are not nationals of or permanently resident in the receiving State enjoy immunity in respect of acts performed in the course of their duties. A literal reading of Article 11(2)(b)(iv) UN Convention would therefore take such qualifying members of the service staff outside the exception to immunity established by Article 11(1). However, on the face of the Article there would seem to be little purpose in making special provision in sub-paragraph (i) for a diplomatic agent if he would also fall within the class to which sub-paragraph (iv) applies. As Foakes and O'Keefe point out (O'Keefe and Tams at pp. 191, 201-2) any reading of Article 11(2)(b)(iv) which encompassed the administrative and technical staff and the service staff of a diplomatic mission would run plainly contrary to the rationale for the restrictive wording of Article 11(2)(b)(i). Furthermore, consideration of the travaux preparatoires demonstrates that it was not intended to require immunity in respect of employment claims by all members of a mission. Foakes and O'Keefe explain (at p. 201) that in 2002, when the Ad Hoc Committee was confronted with the choice of including in what became Article 11(2)(b)(i) either all the members of a diplomatic mission or only those qualifying as diplomatic agents, they opted unequivocally for the second, narrower alternative, in order to keep to a minimum the range of proceedings in which a state would remain immune. A literal reading of Article 11(2)(b)(iv) would defeat that intention. It may be that, as Foakes and O'Keefe suggest on the basis of the ILC Draft Articles, the intention was, rather, to limit this residual category of employees to miscellaneous persons of diplomatic status not already mentioned in Article 11(2)(b). (O'Keefe and Tams at pp. 201-2. See, also, Fox and Webb at p. 450.) In any event, we have come to the clear conclusion that Article 11 does not require the grant of immunity in cases where the employee is a member of the service staff of a mission, such a reading being contrary to the scheme and intention of the provision.

39. Mr. Landau, on behalf of Libya, also relies on Article 3(1) UN Convention in support of his submission that customary international law requires the grant of immunity in the circumstances of the present claims. It provides in relevant part:

> "Article 3
>
> Privileges and immunities not affected by the present Convention
>
> 1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of
>
> (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organ of international organizations or to international conferences; and
>
> (b) persons connected with them."

He places particular reliance on the reference to "persons connected with them" and submits that this corresponds to section 16(1)(a) SIA. There is, as Fox and Webb point out (at pp. 449-450), a contradiction between Article 3(1) and Article 11. However, there can be no doubt that Article 11 is intended to make detailed provision for the scope of immunity in embassy employment disputes. Moreover, Article 3 provides no support for the view that the effect of section 16(1)(a) in preserving immunity in respect of all such disputes is required by international law.

40. Finally in this regard, Mr. Landau also relies on an understanding with respect to Article 11 which appeared in the 2003 report of the Ad Hoc Committee. It included the following statement:

> "… [U]nder article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post."

Foakes and O'Keefe suggest (at p. 195) that this passage is closely connected to the inclusion of Article 11(2)(b) in its final form and that it was adopted by way of consolation to those States which opposed any inroad into the immunity of a foreign employer State from proceedings relating to the employment of members of the staff of its diplomatic missions. While that may well be the explanation of how the understanding was adopted, it is difficult to see how it could qualify the operation of Article 11 which makes clear that, save in certain specified situations, there is no obligation to grant immunity from claims by members of the service staff. There is nothing here to support the view that there is a duty to grant immunity in the circumstances of the present cases.

<u>(2) State practice.</u>

41. States have addressed questions of state immunity in the context of employment disputes in diverse ways. Fox and Webb (at pp. 439-41) identify three broad approaches. Model 1 treats employment contracts within the general exception from

immunity in respect of commercial or private law transactions. Model 2 identifies special categories of employees and subjects them to a special regime of immunity. Model 3 makes an exception from immunity for employment contracts which is additional to the exception to immunity for commercial or private law transactions. Professor Richard Garnett ((1997) 46 ICLQ 81) identifies four broad approaches in distinguishing between sovereign and non-sovereign acts in the employment context. The first has regard to the context or location of the employment. The second has regard to the status of the employee, limiting immunity to cases concerning senior employees as they are closer to the sovereign functions of the state. The third has regard to the territorial nexus between the forum state and (i) the employee and (ii) the employment contract. The fourth has regard to the nature of the claim, distinguishing between purely economic claims and those which have more potential to require investigations into sovereign activities. In Case C-154/11 *Mahamdia v. People's Democratic Republic of Algeria*, [2013] ICR 1 this diversity of approach led Advocate General Mengozzi to observe (at [23]):

> "Returning to the State as an employer, national approaches are very varied and national courts sometimes give preference to the nature of the functions performed, sometimes the purpose of those functions and sometimes the nature of the contract. In some cases these criteria have to be satisfied cumulatively for immunity to be waived. Furthermore, the issue of immunity may be seen differently depending on whether the dispute concerns recruitment, dismissal or the actual performance of functions."

42. In these cases we have had the benefit of the extensive research carried out by the parties into state practice which has been helpfully presented to us in tabular form. It is not our intention to attempt in this judgment a comprehensive survey of state practice or to attempt to define the precise limits of state immunity in embassy employment disputes. The question for consideration is whether state practice supports the existence of a rule of customary international law which requires the grant of immunity in employment claims brought by service staff of a mission in the circumstances of the present cases.

43. Libya is able to point to some state practice which is consistent with the effect of section 16(1)(a) in barring employment claims by members of the service staff of a diplomatic mission. Here Libya relies on section 5, Foreign States Immunities Act 87 of 1981 (South Africa) which provides that a foreign state has immunity from jurisdiction in proceedings relating to a contract of employment if "the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission". Similarly, it relies on sections 6 and 17(1)(a), State Immunity Ordinance 1981 (Pakistan) which provide for immunity in respect of employment claims by members of a diplomatic mission or consular post.

44. Libya also seeks to rely on judicial decisions in a number of states which do not have a state immunity statute.

    (1) In *Canada v. Employment Appeals Tribunal and Burke* (1992) 95 ILR 467 the Irish Supreme Court held that an employment tribunal did not have jurisdiction to consider an unfair dismissal claim by an Irish citizen who had been employed as a chauffeur by the Canadian embassy in Dublin. A majority of the Supreme Court

considered that a restrictive immunity applied here. However, the court considered that the service provided by the chauffeur was "related to the exercise of the diplomatic functions of the ambassador". O'Flaherty J. considered (at p. 500) that "prima facie anything to do with the embassy is within the public domain of the government in question". That, however, is a rebuttable presumption as is demonstrated by a recent decision of the Irish Employment Appeal Tribunal in *Adan v. Embassy of Kenya* (unreported, 16 May 2013). There the Tribunal discussed the *Canadian Embassy case* and the decision of the CJEU in *Mahamdia* and expressed itself "satisfied that the claimant's functions as a cleaner did not fall "within the restricted form of immunity" as considered in the *Canadian Embassy case* nor did her position involve her "within the exercise of public powers" according to the test set out in *Mahamdia*.

(2) In *A v. B* (3 April 2004; ILDC 23 (NO 2004)) the Appeals Selection Committee of the Norwegian Supreme Court held a foreign state immune from an employment claim brought by a Norwegian national who had worked as a driver at the state's embassy in Oslo. Although this was a case in which reinstatement was sought, the decision does not appear to be limited to such cases. However, we note that Norway has, more recently, ratified the UN Convention on 27 March 2006.

(3) In *Heusala v. Turkey* (KKO: 1993:120; ILDC 576 (FI 1993)) the Finnish Supreme Court held that Turkey was immune in respect of an employment claim by a Finnish national who had worked as a secretary and translator in the Turkish embassy in Helsinki. However, this decision in relation to a person who would have been a member of the administrative and technical staff of the mission does not assist in relation to whether international law requires immunity in employment claims by service staff. Furthermore, we note that Finland "accepted" the UN Convention on 23 April 2014.

(4) The German decisions on which Libya relies (*Conrades v. United Kingdom* (1981) 65 ILR 205; *X v. Argentina* (1996) 114 ILR 502 and *Muller v. USA* (1998) 114 ILR 512) concern claims by members of the administrative or technical staff of a consulate.

(5) In *Brazil v. De Vianna Dos Campos Riscado* (13 February 2012, ILDC 2037 (I 2012) an Italian court held that Brazil was immune from an unfair dismissal claim by a Brazilian national who had been employed as a porter at the Brazilian embassy in Rome. However, that case indicates that a state will be denied immunity where the employee performed auxiliary services not connected to sovereign functions and the decision appears to turn on the view that the remedy of reinstatement sought by the claimant would have interfered with Brazil's sovereign powers because the claimant's role related to security at the embassy.

45. Many other states do not grant blanket immunity in respect of all employment claims by the service staff of a diplomatic mission. We refer to the following simply by way of example.

(1) The US Foreign Sovereign Immunities Act 1976 does not include a specific provision for proceedings relating to contracts of employment which are therefore governed by the exception to immunity in the case of a "commercial activity carried on in the United States by a foreign state" (section 1605(a)(2)). The employment of

domestic workers is considered a commercial activity and therefore subject to the jurisdiction of the US courts (*El Hadad v. Embassy of the United Arab Emirates* 216 F 3d 29 (DC Cir 2000) at [16]).

(2) In Australia the effect of the Foreign States Immunities Act 1985 is that in general a foreign state is not immune from proceedings concerning employment under a contract made in Australia or to be performed wholly or partly in Australia (section 12(1)). Express provisions restore immunity in claims concerning the employment of members of the diplomatic staff (section 12(5)) or the administrative and technical staff (section 12(6)) of a mission, but not in respect of claims by the service staff.

(3) New Zealand courts permit claims by service staff of a mission in certain circumstances. There is no blanket prohibition. Thus in *Governor of Pitcairn v. Sutton* (30 November 1994, 104 ILR 508) the New Zealand Court of Appeal considered that the focus must be on the particular contractual relationship and responsibilities and their termination. It observed:

> "Cleaners and others engaged to maintain the physical fabric may be able to make such a claim depending on whether their work brings them into a sufficient association with the sovereign functioning of the office … Domestic staff, who are often in a position of trust and confidence, may find it harder to establish a sufficient separation. And those employed in administrative or clerical support of the sovereign functions of the embassy or agency will clearly have difficulty in establishing that they were sufficiently distant from the exercise of governmental authority that litigation in the host country would not involve any intrusion on its domain." (at p. 522)

(4) Japan has substantially transposed Article 11 UN Convention into its domestic law (Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, Article 9).

(5) Although Singapore's State Immunity Act has a provision identical to section 4(2)(b) SIA (Article 6, State Immunity Act), it does not contain a provision equivalent to section 16(1)(a) SIA.

(6) So far as European states are concerned, Austria, Finland, France, Italy, Latvia, Norway, Portugal, Romania, Spain, Sweden and Switzerland have all deposited instruments of ratification, acceptance, approval or accession to the UN Convention. In addition we have been referred to decisions of courts refusing immunity in proceedings relating to employment contracts of service staff of a mission in Austria (*British Embassy Driver Case*, 7 July 1978, 65 ILR 20), Belgium (*Rousseau v. Republic of Upper Volta*, 25 April 1983, 82 ILR 118), France (*Saignie v. Embassy of Japan*, 11 February 1997, 113 ILR 492), Germany (*Mahamdia v. People's Democratic Republic of Algeria*, 14 January 2009, Higher Labour Court of Berlin-Brandenburg), Italy (*Zambian Embassy v. Sendanayake*, 24 May 1992, 114 ILR 532), Portugal (*X v. Israel*, 13 November 2002, 127 ILR 310), Spain (*Emilio B.M. v. Embassy of Equatorial Guinea*, 10 February 1986, 86 ILR 508) and Switzerland (*M v. Arab Republic of Egypt*, 16 November 1994, 116 ILR 656).

46. There can be no doubt that Libya is correct in its submission that state practice in relation to immunity from employment claims by members of a diplomatic mission is diverse. However, in the light of the state practice described above, we find it impossible to conclude that there is any rule of international law which requires the grant of immunity in respect of employment claims by members of the service staff of a mission in the absence of some special feature such as where the claim is for the recruitment, renewal of employment or reinstatement of an individual or where the proceedings would interfere with the security interests of the state. No such considerations arise in the present cases. Furthermore, the preponderance of state practice is such that, whatever the position may have been in 1978, the position contended for by Libya and the Secretary of State can no longer be regarded as within the range of tenable views of what is required by international law. It therefore falls outside the margin of appreciation which Article 6 affords in that regard to states which are parties to ECHR.

47. This conclusion is supported by Professor Garnett ((2005) 54 ICLQ 705). In his view the United Kingdom is almost alone among developed countries in continuing to deprive embassy employees occupying subordinate positions of rights of redress in the event of <u>any</u> dispute arising in respect of their employment. He considers that under section 16(1)(a) the rights of all embassy employees are effectively "eviscerated". Referring to the blanket nature of the provision he observes:

> "It is notable that the provision fails to take account of the different nature of the employment within an embassy or consulate, in particular the degree of proximity to, or involvement with, uniquely "sovereign" activities.
>
> …
>
> Under the Act a mission employee's claim against a foreign State is dismissed perfunctorily without any regard for the circumstances of the claim or whether an action may even be brought in the courts of the foreign State itself. The consequence is that a foreign State employer is in a disproportionately privileged legal position compared to other defendants in UK litigation. Such a rule may of course be more defensible if it were an implementation of principles of public international law. However, … it seems that the UK position is the harshest in the developed world as far as embassy and consulate employees are concerned and is therefore likely inconsistent with the international law standard." (at p. 707)

48. Further support for the view that international law does not require the grant of absolute immunity from all employment claims by employees of diplomatic missions is provided by the decision of the Court of Justice of the European Union ("CJEU") in Case C-154/11 *Mahamdia v Algeria*. Mr. Mahamdia, who had both Algerian and German nationality, lived in Germany where, in 2002 he was employed as a driver in the Algerian embassy in Berlin. His contract contained a clause conferring exclusive jurisdiction, if there was a dispute, on the Algerian courts. He brought proceedings against Algeria in the Berlin Labour Court for unpaid overtime and dismissal. Algeria contended that the German courts had no jurisdiction, relying on both state immunity and the exclusive jurisdiction clause. The Berlin Labour Court agreed but its order was set aside on appeal by the Higher Labour Court. That court held that Algeria did not enjoy immunity from the claim. There was a further appeal to the Federal Labour Court which set aside the order of the Higher Labour Court and remitted the case to it

to make further factual findings about the nature of Mr. Mahamdia's work. The Higher Labour Court then decided to refer two questions to the CJEU for a preliminary ruling. One of the questions asked whether the embassy of a non-member state, which was situated in a member state, was a "branch, agency or establishment" for the purposes of Article 18(2) of the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Regulation"). The other question related to the effect of the exclusive jurisdiction clause.

49. The importance of the case for present purposes lies in the court's consideration under the first question of customary international law on state immunity.

> "53 Before the German courts and in the observations it submitted in the present proceedings for a preliminary ruling, the People's Democratic Republic of Algeria argued that recognising the jurisdiction of a court of the receiving State of an embassy would amount to disregarding the rules of customary international law on immunity from jurisdiction, and that, taking those rules into account, Regulation No 44/2001, in particular Article 18, is not applicable in a dispute such as that in the main proceedings.
>
> 54 On this point, it must be observed that under the generally accepted principles of international law concerning immunity from jurisdiction a State cannot be sued before the court of another State in a dispute such as that in the main proceedings. Such immunity of States from jurisdiction is enshrined in international law and is based on the principle *par in parem non habet imperium*, as a State cannot be subjected to the jurisdiction of another State.
>
> 55 However, as the Advocate General observes in points 17 to 23 of his Opinion, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. It may be excluded, by contrast, if the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers.
>
> 56 Consequently, in view of the content of that principle of customary international law concerning the immunity of States from jurisdiction, it must be considered that it does not preclude the application of Regulation No 44/2001 in a dispute, such as that in the main proceedings, in which an employee seeks compensation and contests the termination of a contract of employment concluded by him with a State, where the court seised finds that the functions carried out by that employee do not fall within the exercise of public powers or where the proceedings are not likely to interfere with the security interests of the State. On the basis of that finding, the court seised of a dispute such as that in the main proceedings may also consider that that dispute falls within the material scope of Regulation No 44/2001."

50. Mr. Eicke QC, on behalf of the Secretary of State, argues that in *Mahamdia* the CJEU took no view on the question of the restrictive doctrine of state immunity applying to employment claims brought by employees of a diplomatic mission against the sending state because that was a matter for the national court. He argues that the CJEU was merely setting out the rule applied by the national court. We disagree. The CJEU had to consider whether a state is entitled to immunity from an employment claim by a domestic worker of an embassy; if it were entitled to immunity, Article 18 of the Brussels Regulation could never apply. We accept Mr. Otty's submission to that effect. Our conclusion is supported by paragraphs 53 to 55 of the CJEU's judgment set out above.

51. Mr. Eicke further submits that it was outside the competence of the CJEU to decide questions of international law, and that its judgment in *Mahamdia* should therefore be read as meaning that it did not do so. In that regard Mr. Eicke cited paragraph 78 of the opinion of the Advocate General in Case C-292/05 *Lechouritou v Dimisio Omospondiakis Dimokratias tis Germanias*. That paragraph states:

> "Accordingly, the issue of State immunity from legal proceedings must be settled before considering the Brussels Convention since, if proceedings cannot be brought, the determination of which court can hear the action is immaterial. In addition, it is not within the powers of the Court of Justice to examine whether there is State immunity in the present case and its implications with regard to human rights."

52. We accept that the CJEU's primary role is to decide matters of EU law. However, its role with regard to international law is just like that of a domestic court. It may be necessary for the CJEU – or a domestic court – to decide directly or indirectly a question of international law in order to decide disputes properly brought before it (see, for example, Case C-466/11 *Curra v. Bundesrepublic Deutschland*, 12 July 2012 (Third Chamber) at [18].) We do not understand the Advocate General to be denying that. Moreover, that, as already explained, is what happened in the court's later decision in *Mahamdia*.

<u>(3) Conclusion on whether section 16(1)(a) SIA is required by international law.</u>

53. For all the reasons we have set out at [33] to [52] above, we conclude that a rule of the breadth of section 16(1)(a) SIA is not required by international law and is not within the range of tenable views of what is required by international law. Accordingly, in its application to the claims of these claimants, section 16(1)(a) SIA is incompatible with Article 6 ECHR.

D. Section 4(2)(b) SIA

54. Ms.. Janah's claim is also barred, prima facie, by section 4(2)(b) SIA because it was conceded before the Employment Tribunal that she was not habitually resident in the United Kingdom at the time her contract of employment was made and that, accordingly, section 4(2) disapplied the exception to immunity created by section 4(1). We understand that the issue of Ms. Benkharbouche's habitual residence has not yet been resolved in her proceedings. If, in due course, it is held that she was not habitually resident in the United Kingdom at the time her contract of employment was made, section 4(2)(b) will be an obstacle in the path of her claim for the same reason.

55. The United Kingdom is not the only state to limit in this way the exception to immunity in respect of employment contracts. Similar or identical statutory provisions modelled on section 4(2)(b) SIA are to be found, for example, in Israel (Foreign States Immunity Law 5769-2008, section 4(a)(3)), Pakistan (State Immunity Ordinance 1981, section 6(2)(b)), Singapore (State Immunity Act, Article 6(2)(b)) and South Africa (Foreign States Immunities Act 87 of 1981, section 5(1)(b)). Section 4(2)(b) SIA is itself derived from and gives effect in domestic law to Article 5(2)(b) ECSI, a convention concluded under the auspices of the Council of Europe, which is in force and to which Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom are parties. This provision in ECSI reflects the fact that the convention was intended not merely to define the limits of the immunity of the contracting states but also to establish a system for the enforcement of judgments against states. As a result the exceptions to immunity were further restricted by the incorporation of connecting factors to the forum state in order to ensure that the jurisdiction of that state was properly founded. (See generally, Fox and Webb, pp. 116-123.) Furthermore, the Explanatory Report on the Convention submitted to the Committee of Ministers of the Council of Europe justifies the difference of approach to employment contract disputes as follows:

> "… A distinction has been drawn between contracts of employment and other contracts (Article 4) because in certain circumstances it may be justifiable to accord immunity to a defendant State under a contract of employment particularly when the employee is a national of the employing State (see paragraph 2, sub-paragraph (a)). The same is true when the employee is a national neither of the State for whom he works, nor of the State where he works, and where the contract of employment was not concluded on the territory of the latter State namely where the employee is a foreign worker who has not been locally recruited (see paragraph 2, sub-paragraph (b)). In both cases the links between the employee and the employing State (in whose courts the employee may always bring proceedings) are generally closer than those between the employee and the State of the forum."

56. Against this background Libya submits that these measures, including section 4(2)(b) SIA, reflect generally recognised rules of public international law on state immunity which, applying the test formulated by the Strasbourg court in *Cudak* (at [57]), cannot therefore be regarded as imposing a disproportionate restriction on the right of access to court. However, the fact that a number of states employ such a provision does not mean that there is a widely recognised acceptance that public international law requires that the exception to immunity be limited in this way and that immunity be granted in such cases. Moreover it is to be noted that whereas the rule in section 4(2)(b) SIA is a rule of general application, certain other states which are party to ECSI apply Article 5(2) only where both the forum state and the state claiming immunity are parties to that convention. Thus in the *French Consular Employee Claim* (Case No. 9 Ob A 170/89, 14 June 1989; 86 ILR 583), the Austrian court at first instance had held that France was entitled to immunity pursuant to Article 5(2)(a) ECSI because the claimant, formerly head of the visa section in the French consulate in Innsbruck, was a French national. The Austrian Supreme Court held that since France was not a party to ECSI that convention did not apply. The court considered that the issue of immunity had to be decided by the application of the generally recognised rules of international law and went on to hold that the nature of the

employment obligations was not of a sovereign character and that France was not entitled to immunity. Similarly in *De Queiroz v. State of Portugal* (22 September 1992, 115 ILR 430), another case where the claimant was a national of the respondent state and which was therefore said to concern Article 5(2)(a), the Labour Court of Brussels (Fourth Chamber) held that since Portugal had signed but not ratified ECSI the convention was not applicable to those proceedings except in relation to those of its provisions which are declaratory of customary international law. It observed:

> "Paragraph 2 of Article 5 does not reproduce a pre-existing rule of customary law since it refers to a connecting factor based on the nationality of the employee, which negates the theory of restrictive immunity based on the distinction between acts of sovereignty performed *jure imperii* and commercial acts performed *jure gestionis*" (p. 434).

In our judgment, these decisions provide compelling support for the view that there is no rule of international law which requires the grant of immunity in the circumstances identified in section 4(2) SIA.

57. The regime of state immunity established by ECSI influenced the work of the ILC on jurisdictional immunities of states and their property which it undertook between 1979 and 1991. In particular Article 11, ILC Draft Articles produced in 1991 included the following provisions which reflect Article 5(2) ECSI:

> "Article 11
>
> Contracts of employment
>
> 1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed in whole or in part, in the territory of that other State.
>
> 2. Paragraph 1 does not apply if:
>
>   … (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
>
>   (d) the employee is a national of the employer State at the time when the proceeding is instituted; …"

58. The ILC Commentary which accompanied the Draft Articles explained the Commission's view that with the involvement of two sovereign states, two legal systems compete for application of their respective laws. The employer State has an interest in the application of its law in regard to the selection, recruitment and appointment of an employee by the State or one of its organs, agencies or instrumentalities acting in the exercise of governmental authority and in the disciplinary supervision of such employees. On the other hand, it considered, the forum state appears to retain exclusive jurisdiction in matters of domestic public policy regarding the protection to be afforded to its local labour force. It observed:

> "(4) … The basis for jurisdiction is distinctly and unmistakably the closeness of territorial connection between the contracts of employment and the State of the forum, namely performance of work in the territory of the State of the forum, as well as the nationality or habitual residence of the employees. Indeed, local staff working, for example, in a foreign embassy would have no realistic way to present a claim other than in a court of the State of the forum. Article 11, in this respect, provides an important guarantee to protect their legal rights. …
>
> (5) Article 11 therefore endeavours to maintain a delicate balance between the competing interests of the employer State with regard to the application of its law and overriding interests of the State of the forum for the application of its labour law and, in certain exceptional cases, also in retaining exclusive jurisdiction over the subject-matter of a proceeding."

It then advanced the following justification for Article 11(2)(c):

> "(11) Paragraph 2(c) also favours the application of State immunity where the employee was neither a national nor a habitual resident of the State of the forum, the material time for either of these requirements being set at the conclusion of the contract of employment. If a different time were to be adopted, for instance the time when the proceeding is initiated, further complications would arise as there could be incentives to change nationality or to establish habitual or permanent residence in the State of the forum thereby unjustly limiting the immunity of the employer State. The protection of the State of the forum is confined essentially to the local labour force, comprising nationals of the State of the forum and non-nationals, who habitually reside in that State. Without the link of nationality or habitual residence, the State of the forum lacks the essential ground for claiming priority for the exercise of its applicable labour law and jurisdiction in the face of a foreign employer State, in spite of the territorial connection in respect of place of recruitment of the employee and place of performance of services under the contract."

59. Following the publication of the ILC Draft Articles a Working Group of the Sixth (Legal) Committee of the United Nations General Assembly was established which met from 1992 to 1994. Difficulty was experienced in five key areas, one of which was the exception for employment contracts. The General Assembly took up the matter again in 1999, requesting the ILC to provide any further views regarding the five contentious areas. The ILC created a Working Group which reviewed the Draft Articles, concentrating on the five main issues previously identified. In its 1999 Report the Working Group stated that divergent views existed on Article 11(2)(c), ILC Draft Articles. In particular it stated that sub-paragraph (c) could not be reconciled with the principle of non-discrimination based on nationality. Accordingly the Chairman had proposed the deletion of that sub-paragraph. (Report of the Working Group on Jurisdictional Immunities of States and their Property, Yearbook of the International Law Commission, 1999, Vol. II, at [87].) It noted that under the draft sub-paragraph the protection of the state of the forum is confined essentially to the local labour force, comprising nationals of the state of the forum and non-nationals who habitually reside in that state. The Working Group recommended to the General Assembly that it would be advisable to delete this provision as it could not be reconciled with the principle of non-discrimination based on nationality. However, it observed that this deletion should not pre-judge the possible inadmissibility of the

claim on grounds other than state immunity, such as, for instance, the lack of jurisdiction of the forum state (at [106]). The Report of the Chairman of the Working Group to the General Assembly dated 12 November 1999 (A/C.6/54/L.12) stated (at [33]) that there was widespread support for the Commission's suggestion that sub-paragraph (c) be deleted as contrary to the principle of non-discrimination based on nationality. The Report of the Chairman of the Working Group to the General Assembly dated 10 November 2000 (A/C.6/55/L.12) stated (at [47]) that there was general agreement to follow the suggestion of the Chairman to delete sub-paragraph (c).

60. In December 2000 the General Assembly established an Ad Hoc Committee on Jurisdictional Immunities of States and their Property. This Committee met between 2002 and 2004 and it produced the final text of the UN Convention which was adopted by the General Assembly on 2 December 2004. That text does not include the sub-paragraph 11(2)(c) ILC Draft Articles.

61. The claimants submit that section 4(2)(b) SIA discriminates on grounds of nationality against foreign nationals working in the United Kingdom. They point to the fact that entitlement to the equal protection of the law without discrimination on grounds of nationality is a general principle of international law reflected, inter alia, by Articles 1 and 2, Universal Declaration of Human Rights, 1948, Article 26, International Covenant on Civil and Political Rights, Article 14 ECHR and Articles 20 and 21 EU Charter. Limiting the discussion at this point to the position under the ECHR and following the approach laid down by Lord Bingham in *A v. Secretary of State for the Home Department* [2005] 2 AC 68 (at [50]), it is clear that the facts fall within the ambit of Article 6 and that there is a difference of treatment on grounds of nationality between Ms. Janah and UK nationals seeking to pursue a similar claim. It is for consideration whether these persons are in an analogous situation and, if so, whether the difference in treatment is objectively justifiable in that it has a legitimate aim and bears a reasonable relationship of proportionality to that aim.

62. For the reasons given above, we are unable to accept the submission on behalf of Libya, supported by the Secretary of State, that section 4(2)(b) gives effect in domestic law to the United Kingdom's international legal obligations under ECSI and that this provides the required objective and reasonable justification.

63. It is, therefore, necessary to consider in turn the legitimate objectives which might possibly be achieved by such a limitation on the exception to immunity. It has not been suggested, nor could it, that this is intended in any way to protect the sovereign functions of an embassy. On the contrary, the purpose seems to be a need to identify those cases in which the United Kingdom has a sufficient jurisdictional interest in the claim based, in particular, on its interest in adjudicating on the employment law rights of its local labour force. However, in that context, we consider that limiting access to justice in this way to those who are UK nationals or habitually resident in the United Kingdom at the time the contract is made cannot be justified. A sufficient jurisdictional link is already established because the exception to immunity established by section 4(1) applies only to proceedings relating to an employment contract made in the United Kingdom or where the work is to be wholly or partly performed there. As Mr. Otty puts it, viewed through the lens of modern understanding of the importance of non-discrimination, it is untenable to suggest that the forum state has no sufficient interest in adjudicating on the employment law rights

of local long term workers simply because they are non-nationals or happen to have been resident outside the jurisdiction before they commenced their employment. Furthermore, while the Explanatory Report to ECSI is correct in pointing out that the employer state will not be entitled to immunity before its own courts, the facts of the present cases serve to demonstrate that those courts will often not be a convenient alternative forum. (In this regard we should add that, in our view, the suggestion in the Commentary on the ILC Draft Articles (at [11], quoted above) that such a restriction is necessary to avoid opportunistic changes of nationality or habitual residence is totally unrealistic.) Finally, we reject the suggested justification in the Commentary to the ILC Draft Articles that without the link of nationality or habitual residence at the time the contract is made the state of the forum lacks justification for applying its employment law in priority to that of any other state. We are not here concerned with questions of applicable law.

64. Before leaving this topic, it is necessary to refer to a further submission on behalf of Libya, once again supported by the Secretary of State. They draw attention to Article 5(2)(a) ECSI (implemented by section 4(2)(a) SIA) which provides that the exception to immunity in the case of employment contracts shall not apply where the employee is a national of the employing State at the time when the proceedings are brought. Similarly, they point to Article 11(2)(e) UN Convention which provides that the exception to immunity does not apply if the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has permanent residence in the state of the forum. This, they submit, is an example of discrimination on grounds of nationality which has, apparently, been accepted by international law. Foakes and O'Keefe state (in O'Keefe and Tams at p. 194)) that when the Working Group of the ILC considered in 1999 the text which became Article 11(2)(e) of the UN Convention a number of delegations expressed the view that it might present some problems with regard to the principle of non-discrimination based on nationality, in particular regarding employees permanently residing in the forum state. They explain that there was, however, general agreement that the provision be retained, subject to the insertion of wording to meet concerns regarding employees residing permanently in the forum state. It seems to us that the reason for this limitation is rather different from that with which we are currently concerned. The ILC Report on the Draft Articles justified it on the ground that as between the state and its own nationals no other state should claim priority of jurisdiction over claims arising out of contracts of employment, in particular as remedies and access to courts exist in the employer state. However, be that as it may, it does not influence our conclusions in relation to section 4(2)(b) SIA.

65. For these reasons we consider that section 4(2)(b) SIA is discriminatory on grounds of nationality. We are fortified in this conclusion by the fact that the ILC Working Group concluded in 1999 that Article 11(2)(c) of the Draft Articles could not be reconciled with the principle of non-discrimination based on nationality and by the fact that Fox and Webb (at p. 454) conclude that section 4(2)(b) SIA is discriminatory and a disproportionate limitation contrary to Article 6 ECHR. Accordingly, no such limitation to the exception to immunity is required by customary international law, nor is it within the range of reasonably tenable opinion within the margin of appreciation granted to states in the assessment of their international obligations.

66. Accordingly, we conclude that section 4(2)(b) SIA in its application to the claims brought by these claimants infringes Articles 6 and 14 ECHR.

E. Remedies in respect of infringement of ECHR.

67. The President of the Employment Appeal Tribunal considered that the wording of sections 4 and 16 SIA could not be read down pursuant to the interpretative obligation imposed by section 3(1) HRA. That subsection provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

The judge considered (at [40]) that the Parliamentary intent expressed in the SIA was to confer immunity subject to specific exceptions. In his view the Act was framed so as to create a careful, detailed and clear pattern which balances considerations known to the legislature. He considered that if a court or tribunal were to alter the width of a provision limiting an exception to immunity (section 4(2)) or of a clear statement that section 4 does not apply to particular people (section 16) there would be a danger of its affecting the overall balance struck by the legislature whilst lacking Parliament's panoramic vision across the whole of the landscape. We agree. Any attempt to read down these provisions so as to remove immunity would be to adopt meanings inconsistent with fundamental features of the legislative scheme. (See, generally, *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 per Lord Nicholls at [33], per Lord Millett at [63], per Lord Rodger of Earlsferry at [121].) On these appeals, Mr. Otty has not sought to persuade us to the contrary.

68. Langstaff J., sitting in the Employment Appeal Tribunal, did not have the power to make a declaration of incompatibility pursuant to section 4(2) Human Rights Act 1998. We propose to make a declaration that section 16(1)(a) SIA, in its application to the claims brought by these claimants, infringes Article 6 ECHR and that section 4(2)(b) SIA, in its application to the claims brought by these claimants, infringes Articles 6 and 14 ECHR. We will hear counsel as to its precise form.

IV. THE EU LAW CLAIMS AND THE EU CHARTER

69. The next task is to examine EU law. The appellants' argument here is based on Article 47 EU Charter, which was incorporated into English law following the Lisbon Treaty. The changes took effect in domestic law on 1 December 2009 by virtue of amendments to the European Communities Act 1972 made by the European Union (Amendment) Act 2008.

70. Article 47 EU Charter provides:

> "Article 47. Right to an effective remedy and to a fair trial
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article…"

71. It is common ground that, in so far as relevant to the present case, the content of Article 47 is identical to that of Article 6 ECHR. It follows from our conclusions on Article 6 ECHR that the appellants have accordingly succeeded in showing that Article 47 is violated.

72. EU law has potentially important consequences in this case. The judge held that as a result of the violation of Article 47 EU Charter, the court was bound to disapply sections 4(2)(b) and 16(1)(a) SIA. Ms. Benkharbouche and Ms. Janah could then bring their EU law claims, and those statutory provisions would not then bar their claims. By contrast, the declaration of incompatibility which we propose to make under section 4 HRA does not affect the operation or validity of the SIA. The declaration acts primarily as a signal to Parliament that it needs to consider amending that legislation.

73. The appellants cannot of course claim a remedy under the EU Charter unless they can also show that they are entitled to rely on a violation of it to seek a remedy in proceedings before a national court. For this there must be claims which fall "within the scope of" EU law. As to this, Article 51 EU Charter confirms that the EU Charter is addressed to the EU institutions and like bodies and that it does not extend the field of application of the EU Treaties. Article 52(5) of the EU Charter states that the EU Charter only applies to these entities when they are implementing Union law, in the exercise of their respective powers. The EU Charter does not, therefore, apply to claims based on national law.

74. In fact, it is common ground that both claimants have claims that fall within the scope of EU law. As the judge explained, Ms. Benkharbouche's claims under the Working Time Regulations and Ms. Janah's claims under the Working Time Regulations and for racial discrimination and harassment are derived from EU measures. They have other claims which they accept are not within EU law, such as claims for unfair dismissal. The question of what falls within the scope of EU law is controversial in some contexts but no one has taken issue with the point that in part Ms. Benkharbouche's claims and Ms. Janah's claims are within the scope of EU law.

75. The outstanding issues are:

(1) whether Article 47 has "horizontal" direct effect, meaning that the appellants can rely on it even though Libya is not a Member State or one of the EU institutions referred to in Article 51 EU Charter;

(2) if so, whether this court should decline to disapply sections 4(1)(b) and 16(1)(a) SIA on the grounds that it is not clear what rule applies in place of these provisions as a matter of international law.

A. Horizontal Direct Effect

76. In our judgment, for the reasons given below, an EU Charter right can be relied on "horizontally" in certain circumstances.

77. The CJEU gave general principles of EU law horizontal direct effect before the EU Charter came into effect. In Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, there was a dispute between a private employer and an employee who claimed that a

provision of his employment contract discriminated against him on the grounds of age. He argued that national law was incompatible with Directive 2000/78 but that Directive had not been transposed into national law and the time for doing so had not expired. The conventional route for enforcing non-implemented Directive rights is through the EU law doctrine of direct effect, but that is not applicable where the time for transposition has not expired. The CJEU agreed that the national law was contrary to Directive 2000/78. It went on to hold that the provisions of the Directive were applicable even though it had not been transposed into national law and the time for transposition had not expired. Its reasoning was that the Directive implemented the principle of non-discrimination, and that was a general principle of EU law which had to be applied anyway. National law had to be set aside in order to give effect to the general principle.

78. It is therefore perhaps not surprising to find that the CJEU has applied *Mangold* to the equivalent Charter provision after the Lisbon Treaty came into effect. Case C-555/07 *Kücükdeveci v Swedex* [2010] IRLR 346 was another dispute between private parties about age discrimination where again national law had not properly transposed Directive 2000/78. (The time for transposition had in this case just expired). The CJEU again held that there was a general principle of non-discrimination in EU law which had to be given effect. It noted that Article 21 EU Charter now contained the principle of non-discrimination. The CJEU also stated, without apparent qualification or elaboration, that the Lisbon Treaty (specifically Article 6, Treaty on the Functioning of the EU) provided that the EU Charter had the same status as the Treaties. This was significant because, as Lord Kerr pointed out in *Rugby Football Union v Consolidated Information Services Ltd* [2012] 1 WLR 3333 at [26]:

> "[I]n its initial incarnation the Charter had persuasive value: the CJEU referred to and was guided by it: see, for instance, the *Promusicae* case [2008] All ER (EC) 809, paras 61–70."

79. A question which remained after *Kücükdeveci* was whether the CJEU's statement about the status of the EU Charter means that the Lisbon Treaty had elevated all the rights, freedoms and principles in the EU Charter to a level equivalent to *Mangold* general principles. The CJEU to an extent addressed this question in Case C-176/*12 Association de Mediation Sociale (AMS)* [2014] ECR I-000 ("*AMS*") which was decided after Langstaff J. gave his judgment. In this case, a trade union representative sought to rely on Article 27 of the EU Charter (workers' right to information and consultation) against a private employer. The relevant directive had again not been duly implemented by national law and it did not have direct effect. The CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law, but expressly distinguished *Kücükdeveci*. The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect.

80. The CJEU did not, however, go on to make it clear which rights and principles contained in the EU Charter might be capable of having horizontal direct effect, and which would not. In our judgement, however, Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect. It follows from the approach in *Kücükdeveci* and *AMS* that EU Charter provisions which reflect general principles of EU law will do so. The Explanations prepared under the authority of the Praesidium of the Convention which drafted the EU Charter, which

Article 52(7) EU Charter requires the court to take into account when interpreting the EU Charter, state that the CJEU has "enshrined" the right to an effective remedy "as a general principle of Union law". The Explanations cite Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097 and Case C-97/91 *Borelli* [1992] ECR I-6313. In *Borelli*, for instance, the CJEU held:

> "14. As the Court observed in particular in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

81. We therefore conclude that the right to an effective remedy guaranteed by Article 47 EU Charter is a general principle of EU law so that Article 47 accordingly has horizontal direct effect. It remains, of course, subject to the exceptions to be found in the jurisprudence of the Strasbourg court (subject to any contrary provision in EU law). Our conclusion accords with the analysis of the case law made by Mr. Eicke, which Mr. Landau adopted and on which Mr. Otty relied.

B. Should the court decline to disapply sections 4(2)(b) and 16(1)(a) SIA on the grounds that it is not clear what rule applies in its place as a matter of international law?

82. Mr. Landau submits that as a result of the observations of Lord Mance at [72] to [74] in *R (Chester) v Secretary of State for Justice* [2014] AC 271 it is now clear that the English courts retain a discretion in relation to the EU Charter not to disapply domestic statutes which are incompatible with an EU law right or principle in certain circumstances.

83. *Chester* was a challenge under EU law to a ban on prisoners' voting in EU elections. The UK was entitled to impose some restrictions on their voting. Lord Mance (with whom the other Justices agreed) held that, even if the challenge had succeeded, it would not have been appropriate to disapply the relevant statute law. It was a complex statutory scheme and it was not for the court to devise an alternative.

84. So, too, here Mr. Landau submits that the court would have to go beyond disapplying the SIA. It would have in effect to rewrite the SIA in order to retain state immunity in respect of claims for which the UK is required under international law to afford such immunity.

85. We do not agree with this submission. Unlike the position in *Chester,* the scope of the disapplication in this case is clear. The order of this court will disapply sections 4(2)(b) and 16(1)(a) to the extent necessary to enable employment claims (other than for recruitment, renewal or reinstatement) falling within the scope of EU law by members of the service staff, whose work does not relate to the sovereign functions of the mission staff, to proceed.

V. CONCLUSION

86. For the reasons set out above we have come to the following conclusions.

(1) Section 16(1)(a) SIA, in its application to the claims brought by these claimants, infringes Article 6 ECHR;

(2) Section 4(2)(b) SIA, in its application to the claims brought by these claimants, infringes Articles 6 and 14 ECHR;

(3) These provisions cannot be read down and given effect in a way which is compatible with ECHR pursuant to the interpretative obligation imposed by section 3(1) HRA;

(4) We propose to make a declaration of incompatibility pursuant to section 4(2) HRA;

(5) Furthermore, the claims of both claimants in respect of breach of the Working Time Regulations 1998 and the claims by Ms. Janah in respect of racial discrimination and harassment fall within the scope of EU law;

(6) Sections 4(2)(b) and 16(1)(a) SIA, in their application to those parts of the claims which fall within the scope of EU law, infringe Article 47 EU Charter;

(7) The claimants are entitled to rely in these proceedings on Article 47 EU Charter as having horizontal direct effect;

(8) The court is required, pursuant to section 2(1) European Communities Act 1972, to disapply sections 4(2)(b) and 16(1)(a) SIA, in their application to those parts of the claims which fall within the scope of EU law.