IN THE COURT OF APPEAL

On appeal from the Employment Appeal Tribunal (Mr Justice Bourne)

BETWEEN:

CA-2024-000624

THE ROYAL EMBASSY OF SAUDI ARABIA (CULTURAL BUREAU)

Appellant

and

ABIR ALHAYALI

Respondent

CA-2024-000625

ABIR ALHAYALI

Appellant

And

THE ROYAL EMBASSY OF SAUDI ARABIA (CULTURAL BUREAU)

APPEAL SKELETON ARGUMENT ON BEHALF OF MS ALHAYALI IN BOTH APPEALS DATED 5 FEBRUARY 2025

Updated to include bundle references 26 February 2025

References to paragraph numbers of the EAT judgment are in the form [J/xx]
The Employment Tribunal is referred to as "the ET."
The Employment Appeal Tribunal is referred to as "the EAT"
References to paragraph number of the ET judgment are in the form [ETJ/xx].
The parties are referred to as "the Claimant" and "the Respondent" as they were in the ET
References to the Core Bundle are in the form [C/xx].
References to the Supplementary Bundle are in the form [S/xx]

1. Ms Alhayali ("the Claimant") was employed by the Royal Embassy of Saudi Arabia ("the Respondent") from January 2013 to 6 January 2018 [ETJ/116][C/199]. She presented an ET claim on 30 January 2018 [ETJ/22][C/188]. In a judgment sent to the parties on 10 January 2022 the ET held that the Respondent did not have the benefit of state immunity in respect of the Claimant's claims. The Respondent appealed to the EAT. In a judgment handed down on 5 December 2023 the EAT reversed the ET's decision in part.

2. The EAT gave both parties permission to appeal to this Court [C/169-171]. Both parties have appealed the EAT's judgment (in so far as that judgment is unfavourable to that party). The appeals are being managed and heard together. This is the skeleton on behalf of the Claimant relating to both appeals.

THE STATE IMMUNITY ACT 1978

3. Section 1 of the State Immunity Act 1978 ("the SIA") imposes a general immunity:

> **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.**

4. Section 2 of the SIA provides that a state is not immune if that state has submitted to the jurisdiction. Section 2 provides materially:

> **2 Submission to jurisdiction.**
>
> **(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.**
>
> **(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.**
>
> **(3) A State is deemed to have submitted—**

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for purpose only of—

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) […]

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

5. Sections 4 provides for a general exception to the SIA in relation to claims arising out of a contract of employment. Section 4 provides materially:

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.

6. Section 5 provides for a general exception to the SIA in relation to personal injury claims. Section 5 provides materially:

5 Personal injuries and damage to property.

A State is not immune as respects proceedings in respect of—

(a) death or personal injury; or

(b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom.

7. Sections 16 of the SIA provides that some or all of the provisions of Part 1 of the SIA will not apply in certain contexts (Part 1 of the SIA encompasses all of the material provisions identified above). At the time of the ET's judgment section 16 of the SIA read materially:

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 relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a diplomatic agent or consular officer;

[…]

(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.

8. For completeness, it is noted that the language of section 16 of the SIA was amended in 2023 by the Remedial Order made in response to the declaration of incompatibility made by the Supreme Court in *Benkharbouche v Embassy of the Republic of Sudan* [2017] ICR 1372.

CHRONOLOGY OF LITIGATION

The ET litigation

9. The Claimant presented an ET claim on 30 January 2018 [ETJ/22][C/188]. There was a preliminary hearing for the purposes of case management before the ET on 19 March 2019 [ETJ/23][C/188]. At this preliminary hearing the ET drew the Respondent's attention to the Supreme Court judgment in *Benkharbouche* [ETJ/23][C/188].

10. There is not dispute that at the material time the position was as follows: following the Supreme Court's decision in *Benkharbouche* a state was immune (in respect of an employment claim derived from EU law brought by a member of a mission) if the claim arose out of an inherently governmental act. Otherwise a state was not immune in respect of EU derived claims. A state was immune (under section 16 of the SIA) in respect of any claim which was not derived from EU law.

11. On 9 April 2019 a partner a Howard Kennedy LLP (the firm of solicitors then acting for the Respondent) wrote the Tribunal accepting on behalf of the Respondent that the Tribunal had jurisdiction in respect of the Claimant's EU law derived claims [ETJ/24 to 25][C/188]. The Claimant withdrew those claims which were not derived from EU law [ETJ/9][C/187]. The claim was progressed with substantive involvement from the Clamant and the Respondent for a period of over two years until 4 August 2021 [ETJ/26 to 44][C/189-190].

12. On 4 August 2021 Howard Kennedy LLP wrote to the Tribunal indicating the Respondent was purporting to "re-assert" state immunity [ETJ/44].

13. The Respondent conceded before the ET that the 9 April 2019 email purported to submit to jurisdiction and that steps had been taken in the proceedings including the presentation of Amended Grounds of Resistance [ETJ/45][C/190]. Such steps would normally in and of themselves constitute a submission to the jurisdiction of the Tribunal.

14. However the Respondent contended that it had not in fact submitted to the jurisdiction as both the correspondence of 9 April 2019 and the subsequent steps taken in the proceedings had not (in fact) been authorised by the head of mission or the person for the time being performing the functions of the head of mission for the purposes of section 2(7) of the SIA [ETJ/11][C/187]. The Respondent said that conduct on the part of a solicitor can constitute waiver of state immunity only if that conduct has (as a matter of fact) been authorised by the head of mission (or the person for the time being performing his functions) (section 2(7) of the SIA and see: *Republic of Yemen v Aziz* [2005] ICR 1391 at [56]).

15. There was a preliminary hearing before the ET on 30 November and 2 December 2021 to determine:

15.1 whether the Respondent had in fact submitted to the jurisdiction. This turned on a question of fact – had the acts (which on the face of it constituted submission to the jurisdiction) been authorised by the head of mission or the person for the time being performing his functions under section 2(7) of the SIA.

15.2 whether (even if the Respondent had not submitted to the jurisdiction) the Respondent had the benefit of state immunity. This turned on the question of whether the Claimant's claim arose out of an inherently governmental act following the Supreme Court judgment in *Benkharbouche.*

15.3 whether (even if the Respondent would have otherwise have been in a position to asset state immunity) the Respondent was not immune because the Claimant's claim was a personal injury claim within the meaning of section 5 of the SIA. The Claimant brought a discrimination claim under the Equality Act 2010. The Claimant's claim was a personal injury claim in that she claimed in respect of psychiatric injury.

16. In a judgment sent to the parties on 10 January 2022 [C/185-217], the ET gave judgment for the Claimant on each of these three questions.

Appeal to the EAT

17. The Respondent appealed to the EAT. In a judgment handed down on 5 December 2023 Mr Justice Bourne ("the Judge") found that:

17.1 The ET had erred in failing to give any weight or any perceptible weight to what the Judge referred to as "the unsigned statement" (which is the document extracted as [ETJ/82][C/193-4]): see the EAT's judgment at [J/76][C/158]. As a consequence, the Judge set aside the ET's finding that the Respondent had submitted to the jurisdiction of the courts of the United Kingdom and/or waived immunity (see paragraph 1 of the order of Mr Justice Bourne sealed on 5 December 2023[C/137]); and

17.2 The ET had erred in relation to (i) the test it applied and (ii) the outcome reached in determining whether the Claimant's job functions meant her ET claim arose out of an inherently governmental act [J/77, 98 to 99][C/158, 161]. The Judge determined that (by reason of the Claimant's job functions) the Respondent had

the benefit of state immunity (see paragraph 2 of the order of Mr Justice Bourne sealed on 11 January 2024 [C/139]).

17.3 The ET had not erred in its findings on section 5 of the SIA [J/129, 139][C/166, 168]. In particular the Judge dismissed the Respondent's arguments that: (a) the Claimant's claim did not fall within the ambit of the exception under section 5 of the SIA and (b) even if a discrimination claim which includes a claim for personal injury would otherwise fall within the ambit of the section 5 exception, the section 5 exception was limited to physical (and not psychiatric injury) (see paragraph 3 of the order dated 5 December 2023 [C/138]).

18. By way of Ground 1 of her Appeal, the Claimant appeals the EAT's findings as summarised at paragraph 17.1 of this skeleton. By way of Grounds 2 and 3 of her Appeal, the Claimant appeals the EAT's findings as summarised at paragraph 17.2 of this skeleton.

19. By way of Grounds 1 and 2 of the Respondent's appeal, the Respondent appeals the EAT's findings as summarised at paragraph 17.3 of this skeleton.

THE CLAIMANT'S APPEAL

Ground 1: The learned Judge erred in finding that the ET erred in law by not giving weight or any perceptible weight to the unsigned statement (the unsigned statement being the document extracted at paragraph 82 of the Employment Tribunal judgment).

The Law

Grounds of Appeal relating to first instance findings of fact

20. There are limited grounds on which a party can challenge a finding of fact and/or mount a challenge based on the fact-finding process.

21. Most obviously, a party can challenge the first instance tribunal's findings of fact on the basis that they are findings which no reasonable tribunal could have made ("the perversity test"): see [62] to [67] of *Henderson v Foxworth Investments Limited* [2014] 1 WLR 2600 followed eg. at [43] of *JSC BTA Bank v Ablyazov* [2019] BCC 96. The Court said at [67] of *Henderson*:

> *…in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of*

relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge ***only if it is satisfied that his decision cannot reasonably be explained or justified.***

22. The reference to the question of whether findings of fact "*cannot reasonably be explained or justified*" is a reference to the application of a perversity test: see *Henderson* at [62]: "*What matters is that the decision under appeal is one that no reasonable judge could have reached*" (and see generally [62] to [67] of *Henderson*).

23. The authorities envisage that there <u>are</u> grounds of challenge in relation to a first instance fact-finding process, which do not require a finding of perversity (referred to as "*identifiable errors*" in the language of *Henderson* at [67]). The examples given in *Henderson* (emphasis added) at [67] are "*the making of a critical finding of fact which has* ***no*** *basis in evidence", "the* ***demonstrable*** *misunderstanding of relevant evidence"* or *"a* ***demonstrable*** *failure to consider relevant evidence*."

24. The use of the word "*demonstrable*" in this context is material. "Identifiable errors" which might constitute a ground of appeal in relation to the fact-finding process <u>absent a finding of perversity</u> are very limited. It is well-established that an ET (as a first instance fact-finding tribunal) need not identify all the evidence on which it relied within the judgment (*DPP Law Limited v Greenberg* [2021] IRLR 1016 at [57(2)]). See also [57(3)] of *Greenberg*:

> "…*it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision."*

<u>Grounds of appeal relating to the weight given to particular items of evidence</u>

25. The weight (or lack of weight) which a fact-finding tribunal places on a particular piece of evidence is <u>not</u> a ground of challenge (absent an accompanying finding of perversity): see Lord Reed said at [57] of *Henderson* (emphasis added):

> *…The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment).* ***The weight which he gives to it is however pre-eminently a matter for him****, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on*

the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

26. The reference (at [57] of *Henderson*) to a requirement that the findings are "*such as might reasonably be made*" is reference to the perversity test in relation to findings of fact: see [62] to [67] of *Henderson.* An argument that a first instance judge has placed too little (or too much) weight on a particular piece of evidence cannot in principle be an "identifiable error" founding an independent challenge on appeal.[1]

27. There are obvious exception: there are rules of law to the effect that particular evidence should be given particular weight (eg. statutory presumptions as to the status of certain facts, particular rules of evidence about particular documents). In those circumstances, it might be open to a party to appeal on the basis that the first instance tribunal had failed to apply those particular rules of evidence (in reaching relevant findings of fact). But absent an identifiable rule of evidence, an appellate court cannot interfere simply on the basis that the appellate court considers that the nature or content of a particular piece of evidence required that more (or less) weight be placed on that evidence. That would be inconsistent with the fundamental principle that weight is a matter for the first instance tribunal.

Key legal principles

28. The following are material legal principles for the purposes of this appeal:

    28.1 A party can usually challenge a finding of fact (or the ET's fact-finding process) only on perversity grounds;

    28.2 The weight given to a particular piece of evidence is not an independent basis for challenge on appeal. The weight given to a particular piece of evidence is a matter for the first instance ET.

    28.3 It is for the ET to weigh in the balance all the evidence before the ET applying normal evidential principles. It is not for the appellate court to interfere with

[1] For an example of this being applies in an employment law context see: Eady P in *Preston v E.ON Energy Solutions Limited* [2022] EAT 192 at [62] citing [2(iv)] of *Volpi v Volpi* [2022] EWCA Civ 464).

this exercise. The obvious exception is when there is a particular rule of evidence requiring the court to place particular weight to be placed on particular evidence.

The unsigned statement

29. The document referred to as "the unsigned statement" (for the purposes of this Ground of Appeal) appears at [S/29]. The document was exchanged (by the Respondent) with witness statements for the purposes of the preliminary hearing on 30 November and 2 December 2021.

30. The unsigned statement is not a witness statement. The statement is given in the name of "Royal Embassy of Saudi Arabia". The statement was not given in the name of any individual. The statement was not signed. The statement was stamped (with an Embassy stamp).

31. The Respondent called evidence before the ET from three witnesses [ETJ/14 and 19][C/187, 188]. None of these witnesses said they had written the unsigned statement or adopted it as evidence. There was nothing to suggest the identity of the author of the unsigned statement. There was nothing to suggest that the unsigned statement had been prepared by solicitors.

The issue before the ET

32. By the email dated 9 April 2019 the Respondent submitted to the jurisdiction. Following this submission the Respondent took (many) steps in the proceedings. The conduct of the Respondent's solicitors (on the face of it) constituted a submission to the jurisdiction under sections 2(1) and/or 2(3)(b) of the SIA. However solicitors' actions establish a waiver only if the conduct has (as a matter of fact) been authorised by the head of mission (or the person for the time being performing his functions) (section 2(7) of the SIA and see *Aziz* at [56]). The issue for the ET was whether the conduct had been authorised by the head of mission or the person (for the time being) performing his functions.

33. The unsigned statement said in terms that neither the head of mission (nor anyone working on his behalf) had authorised the waiver of state immunity. The unsigned statement was before the ET when the ET heard the issue. The entirety of the unsigned statement was extracted within the ET judgment at [ETJ/82][C/193-4].

34. The ET found as a fact that the relevant conduct had been authorised by the head of mission [ETJ/113 to 115][C/199]. This is a finding of fact by the ET.

The issue before the EAT

35. The Respondent sough to appeal the ET's finding that the relevant conduct had been authorised by the head of mission on number of grounds (see Grounds 1 to 3 of the Respondent's original Grounds of Appeal to the EAT [C/176-7]). In particular the Respondent sought to advance a wide-ranging challenge (which must have been a perversity challenge) to the ET's factual finding that the relevant conduct had been authorised by the head of mission by way of Ground 2 [C/176-7].

36. The Respondent was refused permission to appeal on paper. The Respondent renewed its application for permission to appeal orally before the EAT. The only ground of appeal on which the Respondent was given permission to appeal before the EAT (in relation to the ET's finding that the head of mission had authorised the relevant conduct) was Ground 1 of the Respondent's amended Grounds of Appeal before the EAT [C/181]. The reasons from Mrs Justice Eady (who gave the Respondent permission to appeal to the EAT) make it clear that the EAT understood this Ground of Appeal to focus on the nature of the unsigned statement [S/62].

37. There was extensive argument before the EAT as to the nature and status of the unsigned statement: see the Respondent's arguments at [J/42 to 56][C/153-6] and the Claimant's arguments at [J/58 to 68][C/156-7]. These were new arguments in that the Respondent had not argued before the ET that the unsigned statement had any particular status and/or that any particular rule of evidence required particular weight to be placed on the unsigned statement.[2] The particular authorities relied upon by the Respondent in the EAT as to the particular status of the unsigned document (and in particular the authorities at [J/42 to 56][C/153-156] were not before the ET.

38. The focus on the unsigned statement on appeal is likely because:

[2] The Respondent did refer to the unsigned statement before the ET: see paragraph 26 of the Respondent's skeleton argument before the ET [S/10]. But the Respondent did not suggest before the ET the unsigned document required any particular deference or status by reason of the nature of the document.

38.1 the Respondent wishes to challenge the finding that the relevant conduct was authorised by the head of mission; and

38.2 the Respondent has not been permitted to run Ground 2 of its original Grounds to the EAT [C/176-7] ie. a broad perversity challenge to the factual finding that the relevant conduct was authorised by the head of mission.

The EAT's decision

39. The relevant paragraphs of the EAT decision are [J/74][C/158] and [J/76][C/158]:

> [74] *I agree with Ms Darwin that, when that question came to be answered, it was necessary to give some weight to the unsigned statement. That is not to accord any special status to such a statement, but merely to recognise that it was put forward by an Embassy as an official document and that its contents ran directly contrary to the EJ's inference.*
>
> *[…]*
>
> [76] *Nevertheless, I conclude that the EJ erred in law by not giving any weight, or any perceptible weight, to the unsigned statement.*

40. The EAT found at [J/74][C/158] that the unsigned statement had "*no special status.*" In making this finding, the EAT accepted the Claimant's submission that there was no rule of evidence meaning that the unsigned statement should be accorded any particular weight.

Ground 1: Errors in the Judge's reasoning

41. First, the learned Judge erred in holding that the ET did not give the unsigned statement any weight or any particular weight. In particular:

41.1 The ET had the unsigned statement clearly in mind. The ET judgment extracts the unsigned statement [ETJ/82][C/193-4];

41.2 The judgment noted pertinent qualities of the document: it was not signed and stamped with an Embassy stamp [ETJ/82][C/193-4]. In so far as the EAT is right to suggest at [J/74][C/158] that there was a "*requirement to recognise that it* [the unsigned statement] *was put forward by an Embassy as an official*

document", then the ET judgment demonstrates the ET's recognition of this feature of the document;

41.3 The Respondent's case on waiver (which was encapsulated in the contents of the statement) is summarised within the ET's analysis of the competing arguments [ETJ/99][C/197]. In so far as the EAT is right to suggest at [74][C/158] that there was a "*requirement to recognise… that its* [the unsigned statement's] *contents ran directly contrary to the EJ's inference*" then the ET judgment demonstrates the ET's recognition of this feature of the document; and

41.4 The ET rejected the Respondent's case on waiver (and made findings inconsistent with the contents of the unsigned statement). It does not follow (and it was wrong for the EAT to find) that the ET gave no weight or no perceptible weight to the unsigned statement. In fact, the ET judgment demonstrates that the contents and pertinent features of the unsigned statement were clearly in the ET's mind when making the relevant decision.[3]

42. Second, even if the ET had given the unsigned statement no weight or no perceptible weight that is not an error of law sufficient to found an appeal: see *Henderson* (above). The weight to be given to any piece of evidence is necessarily a matter for the first instance ET. An appellate court cannot interfere with a first instance fact finding decision on the basis that that appellate court considers that particular features of the document mean that that document should have been given more (or less) weight.[4]

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[3] This is a case in which the ET made material reference to the unsigned statement. But even if the ET had not made material reference to the unsigned statement an appellate court should assume that all relevant evidence was in the mind of the fact-finding Tribunal (see *Greenberg* (above) and [2(iii)] of *Volpi v Volpi* [2022] EWCA Civ 464 cited in an employment law context by Eady P in *Preston v E.ON Energy Solutions Limited* [2022] EAT 192 at [62]).

[4] For the avoidance of doubt, it is (of course) open to a first instance court (when determining the level of weight to give to a particular piece of evidence) to give that particular piece of evidence very little or no weight. See eg. (in the employment law context) HHJ Clark at [10] of *Manning v Middleton Miniature Mouldings* UKEAT/0439/09, DM, 1 March 2010

Ground 1: Authorities on the status of the unsigned statement

43. Before the EAT the Respondent relied on various authorities (identified at [J/42 to 56][C/153-6]) which were said to go to the quality of the unsigned statement as evidence.

44. The Claimant's position (before the EAT and on appeal to the Court of Appeal) was and is as follows:

    44.1 The Respondent relied on various authorities which (the Respondent said) suggested that the unsigned statement had a particular quality as evidence.

    44.2 The "default position" is that the weight of any individual piece of evidence is a matter for the first instance fact-finding tribunal (and a matter on which an appeal court should not interfere);

    44.3 This means that the Respondent's authorities (which were said to go to the qualities of the unsigned statement as evidence) could only be relevant if these authorities established that as a matter of law documents such as the unsigned statement should be afforded particular weight (such as to displace the default position that weight is a matter for the first instance tribunal)

    44.4 In other words, the Respondents' authorities could only be relevant is they established a particular rule of evidence relating to documents such as the unsigned statement.

45. The EAT has found at [J/74][C/158] that the unsigned document had "*no special status*." If the Respondent were to ask the Court of Appeal to uphold the judgment of the EAT on the basis that the unsigned document did have particular legal status, then the Respondent would be asking the Court of Appeal to uphold the decision of the EAT for reasons different from or additional to those given by the EAT. If the Respondent had wished to make this argument, the Respondent was obliged to put in a Respondent's Notice under 52.13(2)(b). The Respondent has not done so. It is not now open to the

Respondent (on appeal) to seek to establish that there is any particular rule of evidence relating to the unsigned statement.[5]

46. The EAT did (at [J/ 63][C/156] read with [J/62][C/156]) note that there were two authorities (*Krajina v Tass Agency* 1949 1 AER 278 and *Malaysian Development Authority v Jeyasingham* [1998] ICR 307) which: (1) "*refers to the possibility of a "certificate providing the necessary evidence"* and *(2)* "*approves the use of hearsay evidence to prove facts on the part of a diplomat who considers it inappropriate to give evidence in person."*

47. In so far as the *Krajina* and *Jeyasingham* authorities formed any part of the EAT's substantive decision on Ground 1 of the Respondent's Grounds before the EAT, these authorities are addressed further below. In order to consider the proper meaning of these authorities it is necessary to set out the facts in some detail.

48. Neither *Krajina* nor *Jeyasingham* is authority for the principle that:

    48.1 evidence given by "certificate" (or any sort of hearsay evidence) in an Embassy case should be given any particular weight or status as a matter of law; or

    48.2 a first instance tribunal (in weighing evidence provided by "certificate" or any other sort of hearsay evidence) should apply anything other than normal evidential principles when "weighing" this evidence.

Krajina v Tass Agency

49. *Krajina v The Tass Agency and another* 1949 1 AER 278 related to a claim for libel. The defendant in these proceedings claimed immunity on the basis that the defendant (the Tass Agency) was a department of another state (the USSR). The Tass Agency relied on what was referred to as a "certificate" from the Soviet ambassador [276A].

[5] The Claimant's position on the point was clear from the skeleton attached to the Claimant's Notice of Appeal filed in the Court of Appeal. The skeleton said at paragraph 20:

The learned Judge found (correctly) that the unsigned statement is not a document with any "special status" [J/75]. The Judge (correctly) accepted the Claimant's submission before the EAT that there was no rule of evidence (or any other reason) that the unsigned statement (being a document prepared by an Embassy and carrying an Embassy stamp) should carry any particular weight.

The fact that the Tass Agency was a department of the USSR does not appear to have been in dispute[6] [277H to 278A].

50. The argument before the Court of Appeal in *Krajina* (and indeed substance of the judgment) concerned two subsidiary legal questions namely: (1) whether (notwithstanding the fact the Tass Agency was a department of the Soviet state) the Tass Agency was also an independent legal entity and (2) whether (in these circumstances) the Tass Agency (although a department of another state) lost the normal protection of state immunity.

51. The material portion of the "certificate" in *Krajina* is extracted at [276A]. Materially, it was a document in the name of the USSR Ambassador (unlike the unsigned statement in the instant case which is in the name of the Embassy). The "certificate" said in terms that the Tass Agency was a department of the USSR.

52. The following passages of *Krajina* have been referred to in this litigation:

    52.1 Cohen LJ at [276H] states: "*it seems clear that in light of the ambassador's certificate, we are bound to come to the conclusion that the Tass Agency is a department of the Soviet State, but whether this State has given this department a separate juridicial existence is another matter which I shall consider later."*

    52.2 Tucker LJ at [281H] states: "*it is common ground that the onus of establishing that* [that the Tass Agency is a department of the USSR] *lies on them* [the Tass Agency]. *Furthermore it is common ground that the certificate of their ambassador in this country is not conclusive of the matter though no doubt it is evidence of a very high evidential value and, in a matter of this kind, I think it is probably the best kind of evidence that could be procured"* [emphasis added].

53. These are not statements of authority that a "certificate" from an ambassador is necessarily (or even possibly) sufficient evidence of a matter in dispute. These are not

[6] Even if [277H to 278A] of *Krajina* should not be read to suggest there was a formal concession on this point, the judgment does not suggest there was any substantive argument on this question before the Court of Appeal in *Krajina*. From a practical perspective, the point does not appear to have been dispute.

statements of authority that a "certificate" from an ambassador is a document with a special status (or which should be accorded particular weight).

54. In these passages the Court of Appeal records what appears to be an agreed position about the status of particular evidence on the question of whether the Tass Agency was a department of the USSR (which was not practically an issue in dispute). At their highest the Court of Appeal's comments are a statement to the effect that (from a practical point of view) the evidence of an ambassador as to whether a particular agency constituted a department of that ambassador's home state was likely to be of high evidential value. *Krajina* is not authority for any rule of evidence as to the particular status of evidence given by a "certificate" in the name of an ambassador.

55. Even if that is wrong:

    55.1 If *Krajina* is case about the status of a "certificate", all the evidence before the court in *Krajina* (which considered the matter on application) appears to have been written evidence. The case says nothing about the status of a "certificate" in circumstances in which the parties had the opportunity to call oral evidence which would be subject to cross-examination (which is what happened before the ET in the instant case);

    55.2 If *Krajina* is a case about the status of a "certificate", it is a case about the certificate of an ambassador. The unsigned statement is not a document in the name of an ambassador (or any named person). It is a document in the name of the Embassy.

Malaysian Development Authority v Jeyasingham

56. In *Jeyasingham*, the High Commissioner gave evidence (by unsworn affidavit) before the ET that he had not authorised submission to the jurisdiction. The ET found that the High Commissioner had authorised submission to the jurisdiction. The Malaysian Development Authority ("the MDA") appealed on the basis that no reasonable Tribunal could have made that finding of fact (see grounds of appeal 4 at [308F] of *Jeyasingham*). *Jeyasingham* is a decision on a perversity appeal. It is not an appeal about the status of evidence from a head of mission by unsworn affidavit.

57. The facts are material:

57.1 The MDA's case was that Mr Lock (a solicitor) had wrongly told the MDA that the MDA could not claim immunity in reliance on an inaccurate passage in a practitioner text. Mr Lock advised Mr Abdullah (the head of the MDA but not the High Commissioner who was head of mission). Mr Abdullah gave Mr Lock authority to enter a notice of appearance and Mr Abdullah did not speak to the High Commissioner before he gave these instructions: see paragraphs (j) to (l) of the Tribunal's reasons extracted at [310J to H] of *Jeyasingham*.

57.2 Mr Lock gave evidence before the Tribunal on these points. Mr Lock was in a position to speak to the material facts as to whether the High Commissioner had authorised submission. Mr Lock was in the room with Mr Abdullah and could give evidence that Mr Abdullah had not spoken to the High Commissioner before Mr Abdullah gave Mr Lock authority to enter a notice of appearance on behalf of the MDA: see paragraph 1 of the Tribunal's reasons extracted at [310H] of *Jeyasingham.*

57.3 Mr Lock also exhibited an unsworn affidavit from the High Commissioner [311A]. The contents if this affidavit appear at [313E to 314G] of *Jeyasingham.* The affidavit (unlike the unsigned statement in the instant case) set out detailed knowledge of what the High Commissioner did and did not know. The affidavit said in terms that the High Commissioner had not given authority.

57.4 There was no evidence in opposition to the evidence of Mr Lock or the High Commissioner. Significantly there was no cross-examination of Mr Lock (who gave oral evidence) to suggest that he or the High Commissioner were seeking to mislead the Tribunal: [314G] of *Jeyasingham* p. 313.

58. This was the context in which the ET in *Jeyasingham* rejected this evidence and found (as extracted at [311a]) that this evidence "*had been invented for the sole purpose of trying to avoid a finding that the [authority] had waived its immunity."* The EAT in *Jeyasingham* noted this amounted to a finding that a solicitor had mislead the ET: [315A]. The EAT considered the ET's finding contrary "*to all principles of fairness*" [315A].

59. This is the context in which the EAT judgment includes the following paragraph on which the Respondent relied before the EAT as authority on the particular status of the unsigned statement (at [316G] of *Jeyasingham*):

"…we think that most courts and tribunals, warned by the cases to which we have referred and others to like effect, would in fact seek the certificate of the High Commissioner or some other evidence of his express submission to the jurisdiction"

60. The ET in *Jeyasingham* had not made its decision to reject the High Commissioner's evidence because it was evidence by an unsworn affidavit.[7] The ET in *Jeyasingham* also rejected Mr Lock's evidence given *viva voce*. The appeal in *Jeyasingham* was not about the type of evidence given by the High Commissioner. *Jeyasingham* is not authority which "approves" the use of hearsay evidence. *Jeyasingham* is not authority which provides that provides that hearsay evidence provided on the part of an Embassy employer has any particular status.

Ground 2: The learned Judge erred in finding that the ET had applied the wrong test in determining whether the Respondent had the benefit of sovereign immunity by reason of the Claimant's functions

Ground 3: The learned Judge erred in finding that the ET had reached the wrong outcome when applying the test to determine whether the Respondent had the benefit of sovereign immunity by reason of the Claimant's functions

The *Benkharbouche* judgment

61. As a matter of customary international law, if an employment claim arises out of an inherently governmental or sovereign act of a foreign state, the foreign state is immune ([53] of *Benkharbouche v Embassy of the Republic of Sudan* [2017] ICR 1327). There is no basis (in customary international law) for the application of state immunity in an employment context to acts of a private law character.

62. The effect of section 4 of the SIA read with section 16(1) of the SIA (as it was at the date of the ET judgment) is that a state is immune in respect of any proceedings relating to a contract of employment brought by a member (employee) of a foreign mission (regardless of whether the state would be entitled to immunity in respect of these claims under customary international law or not).

63. In *Benkharbouche* the Supreme Court held that the effect of Article 47 of the Charter was that section 16(1) (granting immunity in respect of any employment claim by any

[7] The EAT in *Jeyasingham* refers a [317B] to Tucker LJ's judgment in *Krajina*. It is clear (from context) that the EAT at [317B] of *Jeyasingham* is referring to the value of the ambassador as a witness (and not the value of a "certificate" as a form of evidence).

member of the mission) did not apply in respect of EU derived claims if there was no immunity as a matter of customary international law. If an employee of a mission brought an EU derived claim, the relevant state was only immune if the claim arose out of an inherently governmental act.

64. Lord Sumption held at [54] that in the great majority of employment cases:

> *the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. This will in turn depend on the functions which the employee is employed to perform.*

65. At [55] of *Benkharbouche* Lord Sumption said [emphasis added]:

> *The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, ie the head of mission and the diplomatic staff; (ii) administrative and technical staff; and (iii) staff in the domestic service of the mission. Diplomatic agents participate in the functions of a diplomatic mission defined in article 3, principally representing the sending state, protecting the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state. These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority.* ***The role of technical and administrative staff is by comparison essentially ancillary and supportive. It may well be that the employment of some of them might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission.*** *Cypher clerks might arguably be an example. Certain confidential secretarial staff might be another: see Governor of Pitcairn v Sutton (1994) 104 ILR 508 (New Zealand Court of Appeal). However, I find it difficult to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act jure gestionis. The employment of such staff is not inherently governmental. It is an act of a private law character such as anyone with the necessary resources might do.*

66. The focus for the purposes of the *Benkhabouche* test is on the functions of the employee (and not on the function of the employer). It is wrong to say that the employment of

any individual by an entity carrying out sovereign functions is necessarily an exercise of sovereign authority (see [1367D to E] of *Benkharbouche* and the EAT discussion of *Benkharbouche* on this point in *Webster v United States of America* [2022] IRLR 836 at [23 to 27] and [40]). The decision in *Benkharbouche* envisages that the employment of some employees of a mission (which is necessarily an entity carrying out sovereign functions) is not an exercise of sovereign authority.

Ground 2: Errors in the Judge's reasoning

67. The learned Judge erred in finding that the ET applied the wrong test in determining whether the Embassy had the benefit of sovereign immunity by reason of the Claimant's functions. The correct test was whether the Claimant's functions were "*sufficiently close to the governmental functions of the mission*" ([55] of *Benkharbouche v Embassy of Sudan* [2017] ICR 1327 (SC) as extracted at [ETJ/189][C/211]). The ET understood and applied this test (as demonstrated by the nuanced discussion at [ETJ/189][C/211]).

68. In giving reasons for his decision to uphold Ground 2, the learned Judge said only that a "*lack of precision in the terminology if the analysis contributed to what I have found to be a legally erroneous outcome*" [J/99][C/161]. The learned Judge determined Ground 2 (that the ET had applied the wrong test) after he had determined Ground 3 (that the ET had reached the wrong outcome).

Ground 3: Errors in the Judge's reasoning

The approach on appeal

69. The learned Judge erred in finding that it was open to an appellate tribunal to make its own assessment afresh (by reference the ET's findings of fact) as to whether the Embassy had the benefit of sovereign authority [J/88, 100][C/160, 161]. The EAT considered that the question of whether an employee's functions are "*sufficiently close to the governmental functions of the mission*" (referred to below as "the *Benkharbouche* test" or "the sufficiently close test") was a pure question of law. If the EAT's reasoning on this point is correct, the Court of Appeal could in principle (and in determining this appeal) substitute its own assessment afresh (provided this assessment is based on the ET's findings of fact).

70. There are two decisions by different divisions of the EAT which take a different approach to scope of the EAT's permissible interference with the ET's application of the *Benkharbouche* test:

    70.1 *Webster v USA* [2022] IRLR 836 – at [43] HHJ Taylor said that "*determining which side of the line an employee in the middle category* [of Lord Sumption's three categories in *Benkharbouche* falls] *is inherently a matter of factual assessment which is for the Employment Tribunal*." HHJ Taylor spoke also at [43] in terms of the first instance ET "*making a factual determination that was open to him* [on the application of the *Benkharbouche* test]."

    70.2 *Kingdom of Spain v Lorenzo* [2023] EAT 153 [8] – at [42] Ellenbogen J considered a challenge to the first instance Tribunal's application of the *Benkharbouche* test as a perversity challenge. This would indicate that the application of the *Benkharbouche* test is a determination of a factual question for the ET (which is subject to challenge only on perversity grounds).

71. In the alternative, even if the question of whether the Claimant's functions are "*sufficiently close to the governmental functions of the mission*" is not a factual question for the ET (which is subject to challenge only on perversity grounds), an appellate court should be slow to interfere with the ET's finding on the *Benkharbouche* test and/or should show the ET's finding on this point an appropriate measure of deference. The ET has heard the evidence and is in the best position to make a judgment in the round. The ET is in the best position to determine on which "*side of the line*" that particular employee's functions fall. [9]

[8] *Lorenzo* was subsequently appealed to the Court of Appeal: *The Kingdom of Spain v Lorenzo* [2024] EWCA Civ 1602. The judgment does not consider the question of the scope of an appeal court's permissible interference with an ET's finding on the *Benkharbouche* test. It is notable that the relevant Grounds of Appeal before the Court of Appeal in *Lorenzo* (Ground 2 extracted at [15]) asked the Court of Appeal to find that the ET had failed to take into account relevant factors as opposed to asking the Court of Appeal to make its own assessment afresh under the *Benkharbouche* test using the ET's findings on fact.

72. This should not be equated with a submission that the determination of whether the ET has jurisdiction is a matter of "impression" or "discretion" for the ET (cf. [J/88][C/160]):

    72.1 It is possible for different first instance Tribunals to permissibly reach different answers on questions of "mixed" questions of fact and law. See eg. [184] of *Pitcher v University of Oxford* [2022] ICR 338 (the issue in *Pitcher* was whether less favourable treatment on the basis of age could be justified under section 13(2) of the Equality Act 2010) which is not a question of discretion).

    72.2 There are questions on which (while there is only one right answer as a matter of law) it is well understood that appellate courts should give first instance decision an appropriate measure of deference (in circumstances the first instance court has made an assessment of a number of factors: see [16] of *Aldi Stores Limited v WSP Group plc* [2008] 1 WLR 748).[10]

The EAT's characterisation of the *Benkharbouche* test

73. The learned Judge erred in putting the following "gloss" on the *Benkharbouche* test at [J/97][C/161]: The EAT said that it had applied the test of whether the Claimant's functions were "sufficiently close" to the sovereign functions of the mission. The EAT said that the some of the Claimant's functions "*passed the test…To put it another way (reflecting the French case law to which Lord Sumption referred in Benkharbouche at [56]), she was participating in the public service of the Embassy and not merely in the private administration of the Embassy."*

74. This "gloss" does not reflect the principles of *Benkharbouche*.

75. All employees of the mission (to some extent) participate in the public functions of the Embassy. All employees of the mission participate in the functions of the mission and all the functions of the mission are necessarily public service functions. At [56] of *Benkharbouche* Lord Sumption referred to *Park v Shin* (2003) 313F 3d 1138 where it was held "*the act of hiring a domestic servant is not an inherently public act that only a government could perform even if her functions included serving at diplomatic entertainments*." The domestic servant in this example is participating (to some degree)

[10] See also Group Sever Limited v Nasir [2020] Ch 129 at [21].

in the "public service" of the mission. The employment of that domestic servant is not an act of sovereign authority because of two (interconnected) factors: (a) that individual's particular functions (ie. his/her job tasks) when viewed in the context of the diplomatic entertainment at which s/he served and (b) that individual's seniority.

The EAT's determination of the sufficiently close test

76. Further or in the alternative the learned Judge erred in his application of the "sufficiently close" test. The ET was correct to find the Claimant's functions were not sufficiently close to the sovereign functions of the Embassy (as per [55] of *Benkharbouche*). The Claimant draws attention to: (a) the ET's findings as to the Claimant's own particular functions i.e. what the ET found the Claimant did and/or did not do and (b) the ET's finding as to the Claimant's seniority.

77. The learned Judge's reasons (in his determination of the "sufficiently close" test) appear at [J/97][C/161]: "*by sifting compliant and non-compliant guarantee requests, writing reports on funding requests and discussing art exhibits with visitors and British students and teachers, she played a part, even if only a small one, in protecting the interests of the Saudi state and its nationals in the UK and in promoting Saudi culture in the UK*."

78. The Claimant's *own particular functions* (ie. what she did and did not do on a day-to-day basis): The Claimant's evidence about her job role is at [ETJ/117 to 134][C/199-201]. The ET accepted the Claimant's evidence as to her job responsibilities [ETJ/150][C/204]. The Claimant carried out low level administrative functions. There were sort of functions an administrative assistant or events assistant might have carried out for an employer which was not a diplomatic mission.

79. In relation to the particular responsibilities identified by the EAT at [J/97][C/161] as meaning the Claimant's functions were "sufficiently close" to the governmental functions of the mission:

    79.1 "*Sifting compliant and non-compliant guarantee requests*": the findings of fact in relation to these particular functions appear at [ETJ/120][C/199-200]. These findings of fact made it clear the Claimant's role was solely administrative (checking if the paperwork was complete);

    79.2 "*Writing reports on funding requests"*: the findings of fact in relation to these particular functions appear at [ETJ/123][C/200]. The Claimant would receive a

request for funding. Her role was administrative (summarising the project for her manager) and practical (outlining requirements for room hire and catering). The Claimant's line manager and the cultural attache would make the relevant decisions about the project;

79.3 "*Discussing art exhibitions"*: the findings of fact in relation to these particular functions appear at [ETJ/125][C/200]. The findings of fact are that the Claimant "*assisted Saudi students*" in explaining their art and "*helped sort out technical problems*." These are low level functions that might be carried out by an events assistant working for a non-Embassy employer.

80. The Claimant's lack of seniority. The ET found in terms that the Claimant was not in a leadership or management role and had "*no ultimate decision making capacity*" in any of the roles she undertook [ETJ/157-8][C/205].

The Court of Appeal's determination of the "sufficiently close" test

81. The EAT considered that it could re-make afresh the decision on whether the Claimant's functions were "sufficiently close" to the sovereign functions of the Respondent. If the EAT was right, then the Court of Appeal may (in determining this appeal) conduct its own assessment as to whether the Claimant's functions were "sufficiently close" to the sovereign functions of the Embassy.

82. In the event the Court of Appeal conducts its own assessment of the "sufficiently close" test then the Claimant's position is as follows:

82.1 The Court of Appeal should determine that the Claimant's functions when looked at over her employment as a whole were not sufficiently close to the sovereign functions of the Respondent (for the reasons set out at paragraphs 78 to 80 above);

82.2 In the alternative the Court of Appeal should conduct a "period-by-period" approach.

83. There were four distinct periods of the Claimant's employment:

83.1 January 2013 to 30 July 2015: The Claimant worked in the academic affairs department during this period [ETJ/150][C/204].

83.2 30 July 2015 to March 2017: Cultural Affairs (First period). The Claimant moved to the Cultural Affairs Department [ETJ/152][C/204].

83.3 March 2017 to 17 September 2017: Cultural affairs (Second Period). During this period the ET found (as a fact) the Claimant did little or no work [ETJ/156][C/205].

83.4 18 September 2017 to 8 January 2018: The Claimant worked in the ticketing department [ETJ/156][C/205][ETJ/130][C/201].

84. While the ET heard evidence on (and made findings about the Claimant's work in) the Academic Affairs department, the Claimant brings no claim (within her ET claim) arising out of any act or omission arising during that period. This is because the earliest act or omission giving rise to a claim brought by the Claimant occurred in 2016. The Claimant does bring claims which arise out of acts or omissions occurring in each of the other three periods of her employment.

85. Before the ET below the Claimant asked the ET to apply the "sufficiently close" test by reference to the Claimant's employment as a whole (see paragraph 27 of the Claimant's skeleton before the ET [S/30-31]) or in the alternative the Claimant said that the ET should determine the "sufficiently close" separately in respect of each of the three periods identified at paragraphs 83.2 to 83.4 of this appeal skeleton (between 2016 and 8 January 2017) (see paragraphs 28 to 37 of the Claimant's skeleton before the ET [S/31-32]). This is the context in which the ET made the relevant findings of fact.

86. January 2013 to 30 July 2015: Academic Affairs: There are no claims arising out of acts and omissions during this period. The EAT need not consider whether the Claimant's functions in this job role were sufficiently close to the Embassy's exercise of sovereign authority. It is to be noted that one of the functions identified by the EAT as "*sufficiently close*" to the sovereign functions of the Embassy was "*sifting compliant and non-compliant guarantee requests*" [J/97][C/161]. This was a function of the Claimant's role when she worked in the Academic Affairs department [ETJ/150][C/204]. The Claimant's functions within the Academic Affairs department are summarised in the Tribunal's judgment at [ETJ/150 to 151].

87. First period in Cultural Affairs Department: 30 July 205 to March 2017: The Claimant's functions in the Cultural Affairs department are summarised in the Tribunal's judgment

at [ETJ/152 to 155][C/204-5]. It was while the Claimant was in this department that she carried out the other two functions identified by the EAT at [J/97][C/161]: "*writing reports on funding requests*" [ETJ/153][C/204] and "*discussing art exhibits with visitors and British students and teachers*" [ETJ/154][C/204-5] read with [ETJ/125][C/200].

88. Second period in the Cultural Affairs department: March 2017 to 17 September 2017: The ET found as a fact that the Claimant was "*given little or no work from March 2017 until she was transferred to the Respondent's ticketing department on 18 September 2017*" [ETJ/156][C/205]. Even if the court determines that the Respondent has the benefit of state immunity (by reason of the Claimant's job functions) in relation to acts occurring during any other period of the Claimant's employment, the court should find that the Respondent does not have immunity in respect of any act or omission arising during this period. The Claimant had no (or very few) functions at all during this period. In these circumstances her functions cannot have been sufficiently close to the sovereign functions of the Respondent.

89. Ticketing Department: 18 September 2017 to 8 January 2018: The Claimant was transferred to the Respondent's ticketing department on 18 September 2017 [ETJ/156][C/205]. The ticketing department arranged travel through the Safeer system [ETJ/156][C/205]. The Claimant did not in this department carry out the functions identified by the EAT as "sufficiently close" to the sovereign functions of the Embassy at [J/97][C/161].

90. But in any case the Claimant never actually worked in the ticketing department, as she was absent throughout the relevant period by reason of sickness absence and annual leave [ETJ/156][C/205]. The Claimant was not in the workplace during this final period of employment. She had no functions at all. In these circumstances her functions cannot have been "sufficiently close" to the sovereign functions of the Respondent so as to allow the Embassy to benefit from immunity under the *Benkharbouche* test.

91. Even if the court determines that the Respondent has the benefit of state immunity (by reason of the Claimant's job functions) in relation to acts occurring during any other period of the Claimant's employment, the court should find that the Embassy does not have immunity in respect of any act or omission arising during this period.

THE RESPONDENT'S APPEAL

Ground 1: The ET (and the EAT) erred in law in finding that on a proper construction of the State Immunity Act 1978 a state is not immune as respects embassy employment claims if those proceedings include a claim for personal injury. It is a mandatory rule of international law that a state is immune from proceedings in respect of employment at its embassy involving the exercise of its sovereign authority and governmental functions. There is no exception to this rule in either international law or the SIA by reference to personal injury

92. Section 5 of the SIA is a free-standing exception to section 1 of the SIA. Section 5(a) provides that a state is not immune as respects proceedings in respect of "*death or personal injury*." The Claimant's claims under the Equality Act 2010 include a claim for personal injury. The ET found that the Respondent did not have immunity in respect of the Claimant's personal injury claim by reason of section 5 of the SIA.

The Law

93. *Republic of Nigeria v Ogbonna* [2012] 1 WLR 138[11] concerned an ET claim against the Nigerian Embassy for disability discrimination. Ms Ogbonna's case was that the Embassy's discriminatory treatment had given rise to physical and psychiatric harm. Nigeria argued that the effect of section 16 of the SIA meant that the Ms Ogbonna's claim could not proceed. Underhill P rejected that contention. He held that section 5 of the SIA was a free-standing exception to section 1 of the SIA.

94. The parties agreed before the EAT that the EAT should not depart from *Ogbonna* unless *Ogbonna* was "*per incuriam*" or "*manifestly wrong"* or there were "*other exceptional circumstances*" as per *British Gas v Lock* [2016] ICR 503 [J/108][C/163]. In any case, the EAT agreed with Underhill P's conclusions in *Ogbonna*: [J/129][C/166].

Statutory Construction

95. The Respondent's argument is the argument run unsuccessfully in *Ogbonna*. Underhill P was correct at [12] of *Ogbonna* as to the proper construction of the SIA when read as a whole:

    95.1 Section 4 of the SIA says that immunity does not apply in proceedings relating to a contract of employment as between a state and an individual. But section

[11] Underhill P followed the earlier decision of *Military Affairs Office of the Embassy of Kuwait v Caramba-Coker* (EAT, 10 April 2023)

16(1)(a) (as it was at the date of the ET judgment) says that section 4 does not apply to proceedings concerning members of a mission.

95.2 Section 16(1)(a) (as it was at the date of the ET judgment) specifically disapplies section 4 of the SIA in the context of employees of members of the mission, but section 16 says nothing as to any disapplication of section 5 of the SIA. Section 4 and section 5 are free-standing exceptions to the general principle of immunity as imposed by section 1 of the SIA.

96. Personal injury is a type of damage not a cause of action (see *Ogbonna* itself at [13]). Personal injury damages can (and routinely are) claimed in proceedings brought in a variety of different causes of action. Parliament has chosen to grant a free-standing exception to the general immunity conferred by section 1 of the SIA in cases (under any cause of action) in which this type of damage is claimed.

97. The SIA (when read as a whole) supports this interpretation. Section 16(1)(a) disapplies the exception at section 4 of the SIA in relation to a type of claim against a particular manifestation of the state (the mission in an employment law context). But section 16(2) of the SIA disapplies "this part of the Act" (i.e. all of Part 1 which includes section 5 of the SIA) in proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom (a different manifestation of the state in a different context). Section 5 of the Act is explicitly disapplied (by a different subsection of section 16 of the SIA) in proceedings relating to the armed forces of a state.

Interpretative obligation

98. In so far as the Respondent relies on the principle that domestic legislation must be interpreted to comply with settled principles of international law:

98.1 The Respondent has not pointed to any settled principle of international law that states should have the benefit of immunity in Embassy employment cases in so far as these cases included a claim for personal injury: see [J/120 to 128][C/165-6];

98.2 In any case, any settled principle of international law is only an interpretative aid. The meaning of the SIA is clear.

Ground 2: The ET (and the EAT) erred in law in construing s.5 of the SIA as encompassing psychiatric injury, when on its proper construction and taking into account relevant international legal materials it is limited to physical injury, thereby wrongly limiting the scope of state immunity.

99. On 4 October 2024 the Court of Appeal handed down the decision now reported as *Shehabi v Bahrain* [2025] PIQR P2. This is authority to the effect that section 5 of the SIA encompasses standalone psychiatric injury (and is not limited to physical injury): see [90] to [116] of *Shehabi*. The Court of Appeal's reasons in *Shehabi* were as follows:

    99.1 Statutory interpretation: English law now regards psychiatric injury as falling within personal injury. It is a general principle of statutory interpretation that a statute is not "frozen in time" but should be interpreted taking into account any changes which have occurred since its enactment [91 to 95].

    99.2 In any case even in 1978 (the date of the SIA) personal injury was regarded as encompassing standalone psychiatric injury. It is probable that when Parliament used the term "personal injury" in the 1978 Act Parliament used that term was understood to refer to standalone psychiatric injury [104 to 105].

    99.3 International Law materials: The Court of Appeal approved the decision in *Ogbonna* that there is nothing in the internation law materials which suggests a recognised consensus in international law that the "personal injury" is limited to physical injury (and does not include standalone psychiatric injury): [97], [106 to 107], [108 to 116].

100. This appeal was originally stayed behind the Court of Appeal's determination of *Shehabi*. In email correspondence to the Court dated 16 October 2024, the Respondent's solicitors noted (in relation to Ground 2 of the Respondent's appeal): "*we recognise that the Court of Appeal is likely to consider itself bound by its judgment in Kingdom of Bahrain v Shehabi (CA-2023-002181)*."

CONCLUSION

101. The Court is asked to allow the Claimant's appeal. The Court is asked to refuse the Respondent's appeal.

MADELINE STANLEY

OLD SQUARE CHAMBERS

5 FEBRUARY 2025

Updated to include bundle references 26 February 2025