IN THE COURT OF APPEAL (CIVIL DIVISION) **App. Nos: CA-2024-000624**

ON APPEAL FROM [2023] EAT 149 **and CA-2024-000625**

MR JUSTICE BOURNE

B E T W E E N :

THE ROYAL EMBASSY OF SAUDI ARABIA (CULTURAL BUREAU)

Appellant /Respondent

-and- **("the Embassy")**

MS A ALHAYALI

Respondent/ Appellant

("the Claimant")

THE EMBASSY'S CONSOLIDATED APPEAL SKELETON ARGUMENT

The Embassy enjoys State immunity in these proceedings. This Skeleton is filed strictly without prejudice to and solely in support of the Embassy's contention that it is immune from the jurisdiction of the ET, the EAT and the Court in these proceedings.

***[CB/*]** *= page * of the core bundle*
***[SB/*]** *= page * of the supplemental bundle*
References to paragraphs in the judgment of Mr Justice Bourne dated 5 December 2023 ([2023] EAT 149, now reported at [2024] I.R.L.R. 381, are to ***[EATJ/**].***
References to paragraphs in the judgment of EJ Brown sitting in the London Central Employment Tribunal ("ET") as sent to the parties on 10 January 2022, are to ***[ETJ/**].***

A. INTRODUCTION

1. The hearing of these appeals is to determine whether the EAT (and the ET) was right to find that the Claimant, a former employee of the Embassy, was entitled to proceed with a discrimination claim that was otherwise barred by state immunity (having set aside the ET's finding there had been a waiver of immunity) on the basis that the Claimant's claim included a claim for personal injury damages under the Equality Act 2010 said to have been "caused and/ or exacerbated" by unlawful harassment and victimisation (see paragraph 68 ET1 **[CB/259]**).

2. The Embassy's case in respect of its appeal (Appeal No. CA-2024-000624**)** is that the EAT erred on one or both of two grounds **[CB/15]**:

3. First, that on its proper construction the personal injury exception in section 5 of the State Immunity Act 1978 ("**the SIA**") is not to be interpreted as granting jurisdiction over embassy employment claims that otherwise enjoy state immunity – to do so results in a reading of section 5 SIA that is contrary to international law and cuts across the statutory scheme provided for by sections 4 and 16 SIA ("**Embassy's Ground 1**"). This is dealt with in Section E of the skeleton below.

4. Secondly, that the term "personal injury" in section 5 SIA on its proper reading and as a matter of international law must be limited to physical, bodily injury and does not extend to claims for pure psychiatric injury ("**Embassy's Ground 2**"). For the reasons explained below, this is not dealt with in this skeleton.

5. The Claimant contends in her appeal (Appeal No. CA-2024-000625)[1] that the EAT erred in three respects **[CB/51]**:

    (1) First, in finding that the ET erred by failing to give weight or any perceptible weight to a sealed certificate of the Embassy confirming that neither the ambassador nor anyone on his behalf had authorised a waiver of state immunity in the proceedings;

    (2) Secondly, in finding that the ET had erred in identifying the correct test for sovereign immunity by reason of the Claimant's functions; and

[1] Both appeals are to be managed and heard together pursuant to paragraph 1 of the Order of Bean LJ dated 21 October 2024 **[SB/122]**.

(3) Thirdly, in finding that the ET had erred in concluding that the Embassy did not have sovereign immunity in respect of the Claimant's functions.

6. The Embassy's case in respect of each of these grounds of appeal (the "**Claimant's Grounds of Appeal**") is that the EAT did not fall into error as the Claimant contends and her appeal must fail. This is dealt with in Section F below.

Embassy's Ground 2

7. These appeals were stayed on the Order of Bean LJ dated 27 March 2024 **[SB/121]** pending the hand-down of judgment in *Kingdom of Bahrain v Shehabi* (CA-2023-002181) in view of the overlap between one of the grounds in that appeal and the second of the Embassy's grounds as to whether section 5 SIA can apply to cases of pure psychiatric injury. The stay was lifted on 4 October 2024 when judgment in *Shehabi* was handed down [2024] EWCA Civ 1158, now reported at [2025] P.I.Q.R. P2, in which the Kingdom of Bahrain's appeal was dismissed on all grounds. In view of that decision (which is understood to be the subject of an application for permission to appeal to the Supreme Court) the Embassy accepts that the Court will follow its recent decision in *Shehabi*, and accordingly does not say anything more about the Embassy's Ground 2 in this appeal, whilst formally retaining it (necessitating its disposal in this appeal) in case the matter proceeds in due course to the Supreme Court.

B. BACKGROUND TO THE ISSUES RAISED BY THE APPEALS

8. The Claimant is a former employee of the Embassy in its Academic and Cultural Affairs departments. In January 2018, she brought claims including for discrimination, harassment and victimisation contrary to the Equality Act 2010 and seeking damages for personal injury [ETJ/2, 4, 9(iv)) **[CB/186-187]**).

9. The Judgment recorded the findings of the ET as to the Claimant's responsibilities at [EATJ/36] **[CB/151]**. In summary, the Claimant was employed from 2013 to 2018 as student services coordinator at the Embassy. This involved working as an Academic Adviser, processing requests from Saudi students studying in the UK e.g. for financial guarantee letters or travel tickets, and passing completed documentation to her head of department, Mr Bin Ghali for approval. She processed academic reports and reported any problems. She also worked on cultural projects for students, preparing proposals for consideration by the Cultural Attaché who discussed them with Mr Bin Ghali. She made practical arrangements for and attended those projects that were approved, helping Saudi students to explain their art to British students and teachers. She was an editor for a cultural journal which the Embassy released every three months. For some months she translated books by well-known Saudi authors into English.

10. On 30 January 2018, the Claimant filed her ET1 and grounds of claim. The Claimant's claim contains an allegation that the matters complained of have caused the Claimant to suffer a personal injury.

11. This appeal proceeds on the assumed basis that the claim does give rise to the psychiatric injury alleged and argues that, even if this is right, the section 5 SIA exception to immunity is not engaged. The ET determined the issue of immunity as a matter of principle only. The Embassy reserves its position in this regard if the matter returns to the ET [**SB/62**].

12. After service through diplomatic channels, the Embassy asserted state immunity on 15 February 2019. After the Claimant was permitted to serve amended grounds on 19 March 2019, the Embassy's solicitors accepted jurisdiction over the claims derived from EU law by email on 9 April 2019, and the Claimant withdrew her claims that were based only on domestic law (i.e. unfair dismissal, unlawful deductions and breach of contract).

13. On 4 August 2021, the Embassy made an application “reasserting state immunity” and a preliminary hearing to determine whether the Embassy had immunity or had waived the same was listed to take place on 30 November and 2 December 2021.

14. On 24 November 2021, the Embassy produced an official stamped statement stating that neither the Ambassador nor anyone on his behalf had waived state immunity or given authority for a waiver, which was filed and served on 30 November 2021 (the "**Official Statement**"). The Official Statement is at **[SB/3]**, and the Court is respectfully invited to review it.

15. The Claimant asserted for the first time in her skeleton argument for that hearing that the section 5 SIA exception to immunity applied (ET Judgment [2] **[CB/186]**). The ET directed that these were matters for submission rather than evidence and could be addressed at that Hearing, and by receiving further submissions from the parties, which the parties proceeded to do (ET Judgment [3] **[CB/186]**).

16. The ET found in the ET Judgment that, despite the Official Statement and the witness evidence in support of the Official Statement, the Embassy had waived state immunity in the case. The ET also found that, in any case, there was no immunity to waive as the Claimant’s responsibilities did not engage sovereign immunity and alternatively that her claim was a personal injury claim and fell within the exception at section 5 SIA.

17. The Embassy applied for permission to appeal the ET’s decision. That application was refused at the sift but granted by Mrs Justice Eady P following a Rule 3(10) hearing **[SB/59]**.

18. The Embassy succeeded before the EAT in relation to its appeal that the ET had failed to give any weight to the Official Statement (which is in the SB at **[SB/3]**, and that the Embassy had immunity in relation to the Claimant’s responsibilities. However, the Embassy was

unsuccessful in the EAT in relation to the two grounds of appeal that are before this Court in respect of section 5 SIA.

C. LEGAL FRAMEWORK

The Development of the Law on State Immunity

19. State immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction.

20. The sovereign equality of States is a fundamental principle of the international legal order. This is reflected in the rules of international law governing State immunity from the jurisdiction of the courts of other States (*General Dynamics v Libya* [2022] AC 318 (SC) at [59]). Such rules are designed to ensure that international relations can be properly and effectively conducted. The exercise of jurisdiction by the courts of one State over another State is an act of sovereignty (*General Dynamics* at [43]).

21. Prior to the SIA, the common law (which reflected[2] customary international law) regulated state immunity (see *Benkharbouche v Embassy of the Republic of Sudan* [2017] ICR 1327 at [8]). However, the common law, following the development of international law, moved away from the 'absolute doctrine' of state immunity towards what is called the 'restrictive doctrine' of state immunity, whereby states were only immune in respect of those acts done by a state in the exercise of sovereign authority, as opposed to acts of a private law nature (see *Argentum*

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[2] See *Pinochet (No.3)* [2000] 1 AC 147, 276B (Lord Millet) and 285B (Lord Phillips), which describe customary international law as part of the common law but see *Belhaj* at [252] (Lord Sumption) who rather describes customary international law as a source of (rather than a part of) the common law.

Exploration v The Silver [2024] 2 WLR 1259 at [17]-[25]). The Court is also invited to read the helpful description of the development of the law of state immunity in an embassy employment context in *Benkharbouche* [8]-[12], [17]-[19], [37]-[74].

ECSI

22. In 1972, the UK became a signatory to the European Convention on State Immunity ("**ECSI**"). One reason for the enactment of the SIA was to enable the UK to ratify the ECSI, which it did in 1979: see *Argentum* in [26]-[29]. The terms of ECSI thus have a particular significance for the proper interpretation of the SIA, particularly where the SIA intended to give broad effect to ECSI (even if the language is not identical) as opposed to where it intentionally departs from it: see e.g. *General Dynamics* at [45]-[47], *Argentum* [16] and *Shehabi* [62]-[63].

23. The Explanatory Report to the European Convention on State Immunity (the "**Explanatory Report**"**)** provides guidance on the interpretation of the provisions of the ECSI. It was drafted by the committee of experts that drafted ECSI and whilst not purporting to provide an authoritative interpretation of the text, it is intended to facilitate it application. It may therefore be of utility when interpreting ECSI: see *General Dynamics v Libya* [2022] AC 318 (SC) at [46]-[47] also [90] *per* Lady Rose, which provides as follows:

> "As I see it, issue 1 raises a question of statutory interpretation. The court has to find the meaning of section 12 of the SIA, but as part of this process the court can rely on as evidence as to the purpose of the legislation extrinsic evidence that would have been taken into account by Parliament. As Lord Lloyd-Jones JSC has explained, one of the key matters in Parliament's consideration was the desire that the United Kingdom should ratify the European Convention on State Immunity ("the ECSI"), on which section 12 was largely modelled. Therefore, the effect of the ECSI may be treated as an admissible aid to interpretation, and Lord Lloyd-Jones JSC has explored the assistance

to be derived from that Convention. In my judgment, **the ECSI is still an aid to interpretation even though the ECSI has itself received only limited support internationally**". (emphasis added).

24. See also Article 32 of the Vienna Convention on the Law of Treaties (1969) ("**VCLT**") by which recourse can be given to such preparatory work as supplementary means of interpretation where appropriate. Relevant provisions of ECSI and its Explanatory Report are referred to below.

UNCSI

25. Since the passing of the SIA, the United Kingdom has signed, but not ratified, a further treaty, the United Nations Convention on Jurisdictional Immunities of States and their Property (2004) ("**UNCSI**"). Saudi Arabia has acceded to the UNCSI. UNCSI has not yet entered into force as it has 24 parties (and 28 signatories)[3] and requires 30 parties to enter into force, pursuant to Article 30.

26. The UNCSI originated in the work of the International Law Commission (the "**ILC**") which had been given the task of codifying and gradually developing international law in matters of jurisdictional immunities of States and their property and was elaborated by an Ad Hoc Committee reporting to the Sixth Committee of the UN General Assembly (*General Dynamics* at [52]). In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at [26] Lord Bingham described the UNCSI as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases", but it

[3] See https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-13&chapter=3&clang=_en (accessed 27 January 2025).

should be noted that while some parts of the UNCSI have been treated as reflecting customary international law (see *Benkharbouche* [25]-[29]), others have not (see *Benkharbouche* [62]-[63] and [72]). See also *General Dynamics* [50].

THE SIA

27. Since 1978 the law of state immunity in the United Kingdom has been regulated by the SIA (*Argentum* [25]), and, insofar as any cases fall outside of Part 1 SIA, then by the common law. The SIA provided what the Supreme Court in *Argentum* described at [25] as 'a new statutory scheme providing detailed and comprehensive rules governing both adjudicative and enforcement jurisdiction in cases involving foreign and Commonwealth states'.

28. The meaning of the SIA is to be decided having regard to the ordinary meaning of the statutory provision, its purpose and its legal context, including considerations of international law and comity (*General Dynamics* at [39] and [133]). In particular, the SIA is primarily concerned with relations between sovereign states and, as a result, its provisions fall to be considered against the background of established principles of international law (*Alcom Ltd v Republic of Colombia* [1984] AC 580, p 597G-H per Lord Diplock and *General Dynamics* at [57 - 58]). A purposive construction of the SIA should facilitate, not obstruct, the restrictive doctrine of state immunity, and promote international comity (*General Dynamics* at [133]).

The General Immunity

29. The scheme of the SIA is to create a general immunity for states and their officials, subject to the exceptions set out in later sections of the SIA. Section 1 SIA provides as follows:

> 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.

30. That immunity extends to both the adjudicative and enforcement jurisdiction of the courts. The general immunity from jurisdiction has been described by this Court as *"a matter of the greatest importance*".[4] As Lord Millet said in *Holland v Lampen Wolfe* [2000] 1 WLR 1573 at 1588D, "*It is not a self-imposed restriction on the jurisdiction of its courts which the UK has chosen to adopt.* ***It is a limitation imposed from without upon the sovereignty of the UK itself***" (emphasis added).

31. The effect of s.1(1) SIA is that in order for a state to be subject to the jurisdiction of the courts of the United Kingdom, the proceedings must be of a kind specified in sections 2 to 11 of the SIA (or if, as in this case, the 'exceptions to the exceptions' in s.16 of the SIA also apply). If none of those provisions apply, the state is immune, and the court lacks jurisdiction (*Shehabi* at [6]). Whilst the SIA lays down a number of exceptions to the general immunity of a foreign State, it does not confer jurisdiction on the English courts which they would otherwise not have.

32. Where applicable, state immunity is a preliminary bar, precluding any examination of the merits. The quintessence of the doctrine of state immunity is that it applies to prevent issues being canvassed in the courts of one state as to the acts of another. Accordingly, whenever the question arises under the SIA as to whether a state is immune by virtue of s 1 or not immune by virtue of one of the exceptions, the question must be decided as a preliminary issue in favour of the claimant, in whatever form and by whatever procedure the court may think appropriate, before the substantive action can proceed (*Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2023] 1 WLR 1162 (CA) at [22].) The Court will assume the facts pleaded

[4] See *Euro Telecom International NV v Republic of Bolivia* [2009] 1 WLR 665 (CA) at [110] *per* Lawrence Collins LJ.

in the claimant's statement of case to be true and determine whether they would give rise to immunity if true. If there are disputed matters of fact upon which the claim for immunity would depend, then the Court can direct the trial of those matters as a preliminary issue.

Positive Duty of Enquiry

33. Section 1(2) SIA confers a positive duty on a court or tribunal to satisfy itself that effect has been given to an immunity conferred by the SIA, and provides as follows:

> '(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.'

34. The scope of this duty is currently before the Supreme Court in *The Royal Embassy of Saudi Arabia (Cultural Bureau) v Constantine* (heard in November 2024, judgment awaited at the time of writing).

THE EXCEPTIONS

35. The burden of proving that the claim falls within one of the exceptions to the general immunity provided by section 1 lies on the claimants (*Shehabi* at [8]). Part I of the SIA is a complete code.

36. The exceptions relevant to this appeal are the general employment exception (section 4(1) SIA) (see paragraphs 38-45 below), the territorial tort exception for personal injuries and damage to property occurring in the UK (section 5 SIA) (see paragraphs 63-67 below), and the 'exceptions to the exceptions' in section 16 SIA (see paragraphs 54 – 62 below).

37. The exceptions relate to a broad range of acts conceived to be of a private law character (*Benkharbouche* at [10]). Whilst ss.2 – 11 SIA (and s.16) are (quite properly) described as exceptions to the general rule at s.1(1) SIA, that does not mean that they should be interpreted

strictly or restrictively, in the way that (for example) a contractual exceptions clause would be interpreted (*Shehabi* at [24] –[25]).

THE GENERAL EMPLOYMENT EXCEPTION

38. Section 4 of the SIA specifically concerns proceedings relating to a contract of employment. Section 4(1) of the SIA is as follows:

> "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".

39. Accordingly, state immunity does not attach to employment in the local labour market, i.e. where the contract was made in the United Kingdom, or the work fell to be performed there (*Benkharbouche* at [64]). However, this is subject to exceptions concerned with the employee's connections by nationality or residence with the foreign state or the forum state none of which are relevant to this appeal.

40. Section 17(4A) of the SIA provides that:

> '(4A) In sections 4 and 16(1) above references to proceedings relating to a contract of employment include **references to 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**.' (emphasis added)

41. Accordingly, not only wrongful dismissal claims fall within s.4 SIA, but also holiday pay claims, or a claim that an individual was not adequately consulted in relation to a TUPE transfer or a redundancy exercise.

42. The purpose of section 4 SIA is to regulate immunity as it applies to contracts of employment entered into by a state, which had emerged as a potential problem in the years leading up to the SIA: *Benkharbouche* at [60].

43. Section 3(3) of the SIA makes clear that s.3(1) of the 1978 Act (regarding commercial transactions and contracts) does not apply to a contract of employment between a State and an individual. Accordingly, the exception to the general immunity for proceedings relating to commercial transactions and contracts to be performed in the UK contained at s.3 of the 1978 Act does not apply to proceedings relating to a contract of employment between a State and an individual (as is the case in some other jurisdictions).

44. The approach taken in s.4 reflects Article 5 ECSI (*Benkharbouche* at [65]). Article 5(1) ECSI provides that

> '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.'

45. As to the scope of Article 5 ECSI, the Explanatory Report states materially that:

> 'As regards contracts of employment with diplomatic missions or consular posts, Article 32 shall also be taken into account.'

SECTION 16: EXCEPTION TO THE EMPLOYMENT EXCEPTION

46. Section 16 SIA provides certain 'exceptions to the exceptions' to state immunity in Part 1 of the SIA. In particular, section 16 SIA qualifies the exception at section 4 for contracts of

employment to exclude certain embassy employment claims, reflecting customary international law and Article 32 ECSI.

47. The purpose of section 4 SIA when read with section 16 SIA is to ensure that embassy immunity is maintained in relation to sovereign functions and activities of the state, including in relation to an employment claim that would otherwise not engage state immunity.

48. The question raised by this appeal is whether such immunity can nevertheless be abrogated by section 5 SIA. If so, then even a case involving a diplomatic agent could be subject to scrutiny of the English courts, notwithstanding that as Lord Sumption put in *Benkharbouche* at [55], the diplomatic agent's "*functions are inherently governmental"* and an "*exercise of sovereign authority*" and where "*Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority*".

The Remedial Order

49. Prior to its amendment by The State Immunity Act 1978 (Remedial) Order 2023 ("**Remedial Order**") with effect from 18 October 2017,[5] section 16(1)(a) SIA used to disapply the employment exception to immunity at s.4 SIA as respects proceedings concerning the employment of all staff of a diplomatic mission including administrative and technical staff

[5] The Remedial Order applies in relation to proceedings in respect of a cause of action that arose on or after 18 October 2017 (whether those proceedings were initiated before, on or after the day on which this Order is made), (so in this case applies to some, but not all, of the Claimant's claims including the discrimination claims relating to the termination of the Claimant's employment on 7 January 2018 and her harassment and victimisation claims in relation to monies owed as at December 2017 and January 2018).

and staff in the domestic service of the mission, so that there was absolute immunity in relation to embassy employment claims irrespective of the sovereign character of the employment or the acts of the state complained of.

50. The Remedial Order was designed to bring the SIA in line with the UK's international law obligations following the declaration of incompatibility made by the Supreme Court in *Benkharbouche*: see *Kingdom of Spain v Lorenzo* [2024] EWCA Civ 1602 at [11]. The Explanatory Note accompanying the Remedial Order says: "*Article 5 amends section 16(1) of the SIA by limiting the immunity of States in relation to employment claims brought by the staff of diplomatic and consular missions to the immunities required under customary international law*".

51. Section 16 as amended by the Remedial Order, now reads as follows:

> "(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;
>
> (aa) 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 member of a diplomatic mission (other than a diplomatic agent) or as a member of a consular post (other than a consular officer) and either—

(i) the State entered into the contract in the exercise of sovereign authority; or

(ii) the State engaged in the conduct complained of in the exercise of sovereign authority;"

52. Accordingly, under the SIA as amended by the Remedial Order, only ambassadors and other diplomatic agents/ consular officers are exempted automatically (as performing sovereign functions) pursuant to section 16(1)(a) SIA.

53. In cases involving administrative and technical staff (like the Claimant), the employment exception in section 4 is disapplied (as it was by the EAT in the present case) where (i) the State entered into the contract in the exercise of sovereign authority or (ii) the State engaged in the conduct complained of in the exercise of sovereign authority pursuant to section 16(1)(aa) SIA.

Purpose of Section 16: ECSI

54. As noted above, the scheme of the SIA was intended to enable the UK to ratify ECSI, which includes a clear provision at Article 32 ECSI that:

> "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".

55. The Explanatory Report to ECSI makes clear in respect of Article 32 at [117] that:

> "The Convention cannot prejudice diplomatic and consular immunities, directly or indirectly."

56. Further, as is noted above, the Explanatory Report on Article 5 ECSI states that 'Article 32 shall also be taken into account.'

57. Sections 16(1)(a) -(aa) SIA comes closest to reflecting the sentiment of Article 32 ECSI, but unfortunately the express wording does not achieve on its face the intended result. That is because unlike Article 32 ECSI, which applies to the entirety of ECSI and therefore all the exceptions to immunity, sections 16(1)(a) – (aa) SIA was drafted to only refer to the employment exception at s.4 SIA. Article 32 ECSI is not otherwise specifically reflected elsewhere in the SIA.

Purpose of Section 16: International Law

58. Section 16(1) SIA's language that the SIA "*does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968*" reflects the significance and particular importance of maintaining embassy immunity.

59. The scope of section 16 SIA, as amended by the Remedial Order, was designed to reflect the customary international law position as set out by Lord Sumption recognised in *Benkharbouche* at [53]:

> 'As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune.'

60. Further, the scope of section 16 SIA, as amended by the Remedial Order, echoes the exception to the employment exception contained at Article 11(1) of the UNCSI. As Lord Sumption explained at [71] of *Benkharbouche*, the closest that any international instrument has come to providing for a general immunity of states as regards claims by embassy staff is article 11.2(b) of the UNCSI. That provides an exception to the employment exception contained at Article

11(1) of the UNCSI if the employee is (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations, 1961 ("**VCDR**"); (ii) a consular officer, as defined in the 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. As Lord Sumption recognised in *Benkharbouche* at [72], the first three categories are diplomatic or consular staff whose functions would normally be regarded as inherently governmental. He appeared to accept that those paragraphs of Article 11 reflected international law, however he doubted whether the fourth category((iv)) was declaratory of existing international law. There are further exceptions to the employment exception at Article 11(2)(a), and (c) to (f).

61. It is also of note that Article 3(1) of the UNCSI provides as follows:

> "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 organs of international organizations or to international conferences; and
> >
> > (b) persons connected with them."

62. Article 3(1)(a) and (b) UNCSI refers to and reflects customary international law as it relates to these privileges and immunities: see O'Keefe and Tams (eds) *The United Nations Convention on Jurisdictional Immunities of States and their Property* (OUP 2013) at p.77.

THE PERSONAL INJURY EXCEPTION

63. Section 5 of the SIA is as follows:

> "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."

64. Section 5 SIA was based on Article 11 of ECSI, which is as follows:

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

65. While this wording is not identical, and there are some differences relating e.g. to the locus of the author of the injury, they are not material to the present appeal (as they were in *Shehabi* [64]).

66. The exception to state immunity reflected in both section 5 SIA and Article 11 ECSI provides jurisdiction to courts or tribunals in respect of damage caused by the actions of foreign states to persons or property in the territory of the UK: see *Jurisdictional Immunities* Case at [64], and the ILC commentaries to the 1991 draft article 12, which explains at (8) that the fact that events occurred on the territory of the state justifies the exception to immunity (see also [49] of the explanatory report to the ECSI). As a matter of international law, this is the 'territorial tort exception' to state immunity (see Fox and Webb, *The Law of State Immunity* (3rd ed, OUP) p.468), initially intended to cover the negligent use of motor vehicles by state officials.

67. As far as the Embassy is aware, there is no material or commentary which supports the view that the purpose of s.5 of the SIA, or the territorial tort exception under international law, was to give the UK courts or tribunals jurisdiction over embassy employment disputes, which are expressly excluded by section 16(1) and are clearly intended to enjoy immunity without limitation in respect of ambassadors and sovereign functions and activities (as recently reaffirmed by the Remedial Order). Indeed, such a view runs contrary to Article 32 ECSI, which as explained in the Explanatory Note, provides that ECSI "*cannot prejudice diplomatic and consular immunities, directly or indirectly*".

INTERPRETATION AND INTERNATIONAL LAW

68. As is explained above, the SIA is primarily concerned with relations between sovereign states and was made to reflect the UK's obligations as a matter of international law. As a result, its provisions fall to be considered against the background of established principles of international law, including *inter alia* customary international law.

69. Further, domestic law should conform to international law. *Bennion* paragraph 26.9 provides that: "*It is a principle of legal policy that the domestic law should be interpreted in a way that is compatible with public international law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account*". See also *General Dynamics* at [134].

70. As Lord Diplock noted in *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 600 in the context of the SIA, it would be "*highly unlikely that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compelled such a conclusion*".

71. Further, in *Al Skeini v Secretary of State for Defence* [2008] 1 AC 153 at [45] per Lord Rodger "every statute is interpreted, "*so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law*": Maxwell on the Interpretation of Statutes, 12th ed (1969), p 183". This statement was cited with approval in *R (KBR Inc) v Director of SFO* [2022] AC 519, in the context of a discussion on the extra-territorial scope of statutes at [22].

72. *Bennion,* paragraph 24.16, on international treaties provides as follows:

> "(1) Where a statute is passed in order to give effect to the United Kingdom's international obligations under a treaty, the statute should if possible be given a meaning that conforms to that of the treaty. For that purpose the provisions of the treaty may be referred to as an aid to interpretation.
>
> (2) It is also legitimate to refer to preparatory work (*travaux préparatoires*), at least to resolve ambiguities, but only where that material is public and accessible.
>
> (3) Assistance from foreign courts and jurists may also be relied upon although of persuasive authority only."

73. *Bennion* paragraph 24.16 also provides that "*Where a treaty is consulted it must be interpreted in light of international law principles*", which are to be found in Articles 31-33 of the VCLT which can be summarised as seeking the common intention by reference to the ordinary meaning of the words used in context and their purpose, subsequent agreement or practice of the parties indicating the correct meaning, as well as reference to *travaux préparatoires* to confirm such meaning or resolve ambiguity or avoid absurdity: see *Revenue and Customs Comrs v Anson* [2015] UKSC 44, [2015] 4 All ER 288 *per* Lord Reed at [54]-[56] and *IRC v Commerzbank AG* [1990] STC 285 *per* Mummery J at 297g–298h (confirmed in [2013] EWCA Civ 578 at [16]).

D. ERRORS OF LAW IN RESPECT OF SECTION 5 SIA BY THE ET AND EAT

74. The ET (and the EAT) erred in two independent respects in finding that the Claimant was entitled to rely on the exception to immunity in section 5 of the SIA, which permits claims for acts in the UK causing death or personal injury to proceed against a state:

    (1) First, on the basis that section 5 cannot on its proper interpretation displace the immunity of the state in respect of embassy employment claims on the basis that it would be contrary to sections 4 and 16 SIA and be inconsistent with Article 32 ECSI;

    (2) Secondly, on the basis that section 5 SIA properly construed in accordance with international law can only confer jurisdiction in respect of physical injuries and not pure psychiatric injury only. As noted in paragraph 7 above, in light of the decision in *Shehabi* this ground whilst formally retained (and requiring determination) is not developed in this skeleton.

75. The EAT upheld the ET's finding that the Claimant could rely on the section 5 SIA exception in the Judgment at [EATJ/111-139] **[CB/163-168]**. In particular, the EAT held that the test for departing from a previous decision of the Employment Appeal Tribunal, as set out at *British Gas v Lock* [2016] ICR 503 at [75], had not been satisfied, and that it should follow the judgment of Underhill P in *Federal Republic of Nigeria v Ogbonna* [2012] 1 W.L.R. 139.

E. THE EMBASSY'S GROUND 1

Ground 1 is that 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.

Proper Interpretation of SIA

76. Section 5 SIA, on its proper construction, is not intended to displace the immunity enjoyed by an embassy pursuant to sections 1, 4 and 16 SIA in respect of employment claims. Accordingly, section 5 SIA must be read consistently with s.16, such that claims that fall within ss.4 and 16, are outwith s.5 SIA. Such an interpretation would properly reflect the meaning of the SIA as a whole, and its legal, social and historical context.

77. As per Bennion at paragraph11.2, the text of an enactment must be read in its context. Further, a phrase or passage must be read in the context of the section as a whole, and in the wider context of a relevant group of sections. Here, section 1(1) SIA provides that: *"(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.*" The wording used in s.1(1) SIA suggests that the exceptions in Part I of the Act should not be understood as isolated freestanding exceptions but should be read together as cumulatively describing the circumstances in which the general immunity does not apply. This would also be in accordance with the meaning of Article 15 ECSI.[6]

78. The purpose of section 5 SIA was to address "territorial torts" e.g. traffic accidents caused by foreign state vehicles on UK soil. It was not intended to displace immunity in cases involving embassy employment that fall within s.16(1)(a) or s.16(1) (aa) SIA. To interpret section 5 SIA as overriding sections 4 and 16 SIA would not only contradict the clear structure of the Act but would also undermine Parliament's intent to maintain state immunity for sovereign functions.

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[6] 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."

The addition of a claim for personal injury to an Employment Tribunal pleading cannot, and does not, transform inherently sovereign acts into private, non-sovereign matters.

Interpretation to Avoid Absurdity

79. If the interpretation accepted by the EAT remains good law, it would have the absurd consequence[7] that the ET would have jurisdiction in an employment dispute between a former diplomatic agent (e.g. an ambassador) and their sending states in respect of matters that would otherwise obviously be sovereign matters ; simply because part of their claim asserted a claim for damages for personal injury. This would drive a cart and horses through sections 4 and 16 SIA by permitting a substantial intrusion into state immunity relating to sovereign functions of diplomatic missions and consular posts and of persons connected with them.

80. Accordingly, the EAT's interpretation would be contrary to the presumption that Parliament did not intend a statute to have consequences which are absurd, unworkable or anomalous.

81. Further, the interpretation would defeat Parliament's purpose in making the SIA and Remedial Order. The functions of diplomatic agents, as Lord Sumption in *Benkharbouche* explains at [55], "*are inherently governmental. They are exercises of sovereign authority*." There is no conceivable basis for concluding that it was the intention of Parliament to undermine clear rules of state immunity in such a manner. The importance of this immunity was recently reaffirmed in the Remedial Order by the amended wording at s.16(1)(a), where employment claims of a diplomatic agent are automatically excluded from section 4 without the further

[7] *Bennion* paragraph13.1 provides that "*The court seeks to avoid a construction that produces an absurd result …*", commenting that "*The presumption against absurdity is well established, and frequently referred to*".

analysis invited in relation to other embassy employees pursuant to s.16(1)(aa). Since the proper ambit of s.16(1)(a)(a) as a matter of international law has been narrowed in the context of the present claims by the decision in *Benkharbouche* and the Remedial Order, there is no justification for further narrowing it beyond that encompassed by the Supreme Court by reference to the personal injury exception at section 5 SIA.

Interpretation in light of International Law

82. UK legislation should be interpreted in a manner consistent with the UK's international obligations, and against the background of generally recognised principles of public international law as explained above at paragraphs 68 – 73. This was an important factor in this Court's analysis in *Shehabi* at [55]:

> "I consider that the claimants' interpretation of section 5 is in accordance with the fundamental principles of international law on which state immunity is based".

83. In that case, the Court noted that: "*a foreign state which hacks a computer located in the United Kingdom interferes with the territorial sovereignty of the United Kingdom even if some of the acts in question take place abroad. … if State A interferes with the territorial sovereignty of State B by doing an act in State B which is liable to cause death or personal injury to persons in State B, it takes the risk that it will be subject to civil proceedings in State B*".

84. None of those considerations apply in relation to claims against a state for employment practices within its embassy, in relation to contracts of employment of employees performing sovereign functions that would otherwise enjoy state immunity. This is not about conduct affecting civilians within the territory of the host state, but about contracts regulating sovereign functions. There is no question of interference with the territorial sovereignty of the United

Kingdom. On the contrary, this is conduct of the state in relation to employment by its embassy of an employee undertaking a sovereign function of the state.

85. There is moreover no basis in international law limiting the state's immunity in respect of sovereign activities within its embassy, whether customary international law, ECSI or UNCSI, and nothing express in the SIA that supports that conclusion. It is a fundamental principle of international law that embassies are not the subject of interference by the host state. That is reflected in the inviolability of an embassy pursuant to Article 22 VCDR, as well as state immunity. Allegations relating to personal injury arising from employment within an embassy, in the course of an employee performing sovereign activities, do not amount to an interference in the territorial sovereignty of the United Kingdom so as to be balanced against the immunity the state enjoys in respect of its embassy activity.

86. Firstly, as explained above, and as the EAT accepted at [EATJ/113] **[CB/164]**, section 5 SIA "*should be construed so far as possible to conform to any recognised international norm because Parliament intended it to conform in the relevant respects to the terms of ECSI*". Indeed, given that a purpose of the SIA was to enable the UK to ratify the ECSI (*Benkharbouche* at [9]-[10]), unless the SIA made an intentional departure from the approach taken in ECSI, there should be consistency between the ECSI and the SIA (*per Shehabi* [62]-[64] and Lord Diplock in *Alcom* at 600). The EAT's interpretation of the SIA is not consistent with ECSI.

87. Secondly, the SIA should be construed in accordance with international law, as *per* the Bennion extracts referred to above and the dictum of Lord Rodger at [45] of *Al Skeini* that "*every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law"*. 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 (see for example *Benkharbouche* at [17], [37], [53] and [55]). This general rule of international law is reflected in ECSI Article 32, the Explanatory Report on Article 32, and Article 3(1) UNCSI.

88. Bourne J was wrong to find at [EATJ/120] **[CB/165]** that there was a lack of consensus in international law that the territorial tort exception should not apply to an embassy employment dispute. The international materials, specifically UNCSI Article 3(1) and ECSI, both show that the *"privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them*" as *per* ECSI Article 32 are not limited, and that neither the employment exception nor the territorial tort exception displace state immunity in respect of the functioning of an embassy.[8]

89. Nor is there any evidence before this Court (or at all) of a consensus that the territorial tort exception does apply to embassy employment claims, or that there is a carve out in international law to the effect that if personal injury is claimed as a head of loss in an embassy employment claim, then this can overcome or trump state immunity. We have not found any example or authority where such a limit has been recognised. There is no consensus of judicial and learned opinion in support of this position.

90. Accordingly, in order to achieve conformity with international law, as reflected in ECSI Article 32 and Article 3(1) UNCSI, the Court must find as a matter of proper construction or implication that the language in section 5 SIA, "*proceedings in respect of…personal injury*", does not include 'proceedings relating to embassy employment contracts' as described in

[8] Bourne J was taken to UNCSI Article 3(1) and ECSI Article 31 in submissions. Neither are discussed in the Judgment.

s.16(1)(a) and s.16(1)(aa) SIA. [9] Alternatively, the Court should interpret s.16(1)(a) and s.16(1)(aa) SIA such that they disapply both ss.4 and 5 SIA.

91. The Embassy's interpretation of Part I SIA, even if a strained one, would conform with international law by promoting comity and good relations between states through the respect of another state's sovereignty in the important field of the function of its embassy, in respect of which immunities are universally respected. Provided the embassy function is a sovereign function, then customary international law recognises it *per Benkharbouche* [63] and it should be upheld and s.5 SIA construed accordingly. Such an interpretation would also give effect to the underlying purposes of the SIA and would implement those purposes, and avoid s.16(1)(a) and s.16(1)(aa) SIA being rendered nugatory where a personal injury may be advanced as part of an employment claim.

92. By way of contrast, the alternative interpretation would lead to a unilateral assumption of jurisdiction by the UK over the sovereign functions and activities within the embassy of the Kingdom of Saudi Arabia, and thus a clear violation of its sovereignty. Further, it would undermine section 16(1) SIA, and the immunity to which the state is entitled regarding the operation and function of their embassies.

93. The above line of argument does not appear to have been developed before Underhill P in *Federal Republic of Nigeria v Ogbonna* [2012] 1 W.L.R. 139, as he makes no mention of Article 32 ECSI or Article 3(1) UNCSI prior to concluding that sections 4 and 5 SIA were 'separate and freestanding exceptions' to s.1 SIA. It should be noted too that Underhill P did

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[9] This point is made without prejudice to the separate but related question whether discrimination claims properly fall within the employment exception in section 4 SIA (which does not arise in the present appeal).

not have the benefit of the judgment in *Benkharbouche* when he decided *Ogbonna*. This matters because the Supreme Court in *Benkharbouche* underscored the importance of ensuring that the SIA properly reflects the international law immunities it is intended to incorporate.

IMPLIED MEANING

94. It is submitted that the above result, the Embassy's interpretation of Part 1 SIA, can be achieved through a standard process of statutory interpretation, focusing on the meaning of the words used by Parliament, the context and purposes of the SIA, and the need for the SIA to conform with international law.

95. Further, or alternatively, limitations on the scope of s.5 SIA may properly be implied by the Court. The meaning to be attributed to an enactment consists not just of what is expressed, but also what may properly be implied: Bennion paragraph 11.5. As Bennion puts it: "*Implications may arise either because they are directly suggested by the words of the enactment or are indirectly suggested by rules or principles not disapplied by the words of the enactment*." Further "*[t]he possibility of implied meanings is sometimes acknowledged in an Act by a statement that a particular implication is not to be taken as intended*."

96. Whilst some judges - even very learned ones - have rejected an implied meaning on the basis that if Parliament had intended to include a qualification of the express words used in an Act it could easily have said so, as Bennion explains at paragraph11.5 *"[t]his is not a reliable test*". Rather, the drawing of implications when interpreting an enactment is a legitimate and quite proper exercise, and there is nothing new in it. As Bennion explains, Blackstone said of a seventeenth-century statute that it 'does not prohibit, but rather impliedly allows' innocent Sunday amusements after the time of divine service.

97. Examples of limitations which have properly been implied by a Court given by Bennion at 11.5 includes the power of a court to make an interim care order extending beyond a child's seventeenth birthday in *Re Q (A Child)* [2019] EWHC 512 (Fam), [2019] 2 W.L.R. 1161. It is also of note that in *Jones v Saudi Arabia* [2007] 1 A.C. 270, the House of Lords was asked to find (but did not so find) that the torture and other breaches of peremptory norms of international law constituted an implied additional limitation upon immunity under the SIA.

98. In this case, it is submitted, it would be proper for the Court to find the implication sought and/or alternatively that the interpretation sought is a necessary implication in order to give effect to Parliament's purpose when making Part 1 of the SIA. The effect of finding that express words of an enactment fall to be treated as enlarged by all proper implications is that the Court may treat the enactment as if it were worded accordingly (Bennion at 11.5).

Limitation on Armed Forces Exception in ECSI

99. There is a similar provision to Article 32 in ECSI that seeks to preserve immunity in respect of armed forces, namely Article 31 ECSI which provides as follows:

> "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State".

100. That provision is expressly and successfully reflected in the SIA by section 16(2) which provides:

> "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".

101. However, although there was no express provision to the same effect in the UNCSI, as noted by the EAT at [EATJ/125] **[CB/165]**, the International Law Commission's commentary on the territorial tort exception text of Article 12 UNCSI states that that provision does not apply to "*situations involving armed conflicts*". The EAT correctly noted at [125] **[CB/165]** that the ICJ at [78] of the *Jurisdictional Immunities* Case noted that such a contention was supported by the weight of judgments of national Courts on that question and represented a consensus of international law.

102. Fox and Webb in The Law of State Immunity (3rd ed, OUP) at p.479, note as follows: "Whilst there is no **express** exclusion in respect of Acts of armed forces, it is now clear from the ICJ Jurisdictional Immunities judgment that the territorial tort exception to immunity has no application to Acts performed in the course of international armed conflict by armed forces" (emphasis added).

103. In other words, there is an implied exclusion in UNCSI to the territorial tort exception for armed forces, despite the absence of express wording to this effect.

104. This should embolden the Court to find that, despite the absence of express wording in section 16(1) SIA or anywhere else excluding embassy employment claims from section 5, section 5 SIA should be construed as having no application to such claims, consistently with Article 32 ECSI and Article 3(1) UNCSI.

F. CLAIMANT'S FIRST GROUND OF APPEAL: THE OFFICIAL STATEMENT

Ground 1 is that 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).

105. Although C refers to an "unsigned statement", the ET (and EAT) were not in fact concerned with an unsigned witness statement as C's description might suggest. Rather, they were concerned with a stamped document from an Embassy (the "Official Statement", as defined at paragraph 14 above). The Official Statement stated *inter alia* that:

> "[N]either the Ambassador nor any one working on his behalf has given authority to Ms Amel Trabelsi or anyone at the Cultural Bureau to waive state immunity in the above matter."

106. The Embassy's Ground 1 before the EAT was:

> 'The ET erred in failing to take into account the official stamped statement from the Embassy (as set out at [J/82]) and/or give it any weight. Given the positive duty on the ET to satisfy itself that effect had been given to the immunity conferred by the State Immunity Act 1978 ("SIA") and given that this was an official sealed document from the Saudi Embassy, this was a clear error of law.' **[CB/176]**.

107. In support of Ground 1, the Embassy argued that an official sealed document from the Embassy should be given special weight, or held special evidential status (see the Embassy's arguments as recorded in the EAT's judgment at [EATJ/46 – 56 and 65] **[CB/154-156 and 157]**). The EAT found that the authorities discussed and referred to by the Embassy (see e.g. [EATJ/65]) were not decisive and declined to uphold the Embassy's Ground 1 on this basis [EATJ/57 – 64] **[CB/156-157]**.

108. However, the EAT nevertheless upheld Ground 1, finding that the ET had erred in law by failing to take the Official Statement into account, and "*not giving any weight, or any perceptible weight*" to the Official Statement [EATJ/76] **[CB/158]**, agreeing with the Embassy's arguments, canvassed by reference to the authorities discussed at [EATJ/46 – 56]

that "*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*" [EATJ/74] **[CB/158]**.

109. The Claimant, as she did below, (see [EATJ/66]) **[CB/157]**, seeks to portray the issue as a challenge to a close evaluative exercise performed by the ET on the evidence (see Claimant's skeleton argument for this Court at paragraphs 23-24) **[CB/110]**.

110. However, the issue before Mr Justice Bourne, was conceptually different. The issue raised by the Embassy was the ET's complete failure to take into account material evidence. Mr Justice Bourne accepted that this is what had happened. As he held at [EATJ/69] **[CB/157]**:

> 69. In my judgment, **the difficulty is that the EJ did not appear to give the certificate or unsigned statement any weight at all**. At any rate, nothing in her Reasons enables me to identify the weight that it was given. (emphasis added).

111. The ET's error in failing to take the Official Stamped Statement into account was clear from the ET's written reasons. Despite rehearsing the contents of the Official Statement in full at [ETJ/82] **[CB/193-194]**, the ET did not refer to back to [ETJ/82], or to the Official Statement in its deliberations on the issue of waiver at [ETJ/99-115] **[CB/197-199]**, save for a passing reference at [ETJ/102] **[CB/197]** which did not consider the implications of the document. Not only is there nothing to suggest that the ET took the Official Stamped Statement into account when reaching its decision on the submission issue, but the ET records at [ETJ/112-113] **[CB/199]** that in its (erroneous) view there was no "direct evidence" available to it on the submission issue.

112. For the reasons explained by Mr Justice Bourne at [EATJ/70 – 75] **[CB/157-158]**, the Official Statement was highly material to the question of whether the Embassy had submitted to the Employment Tribunal's jurisdiction and waived its immunity. While the EAT did not find them decisive, this conclusion is informed by and supported by the authorities discussed at [EATJ/46 – 56] **[CB/154-156]**. The doctrine of ostensible authority does not apply to steps taken by solicitors (in this case, the Embassy's former solicitors, Howard Kennedy) if they were not authorised in accordance with s.2(7) SIA.

113. A trial judge must consider all the material evidence. However, this is particularly important in state immunity cases, where a court or tribunal is subject to a duty of inquiry (s.1(2) SIA and *Aziz* at [38]-[51] and [61]-[62])).

114. A failure to take into account material evidence, or give it any weight whatsoever, can form an error of law that can and should be corrected by an appellate court. By way of example, Lord Reed held in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 W.L.R. 2600 at [67] that:

> 67. It follows that, 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.

115. See also *Re Sprintroom* [2019] B.C.C. 1031 at [76]. A gap in logic, or a failure to take account of some material factor which undermines the cogency of a judgment, is an error of law.

116. The EAT was referred to case-law to the effect that it was an error of law for the ET to fail to take into account material evidence in the Embassy's skeleton as follows:

> "See for example the judgment of the EAT (HHJ Auerbach) in *Hovis Limited v Louton* EA-2020-000973-LA and the cases cited therein (*Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 and *Farrar v Rylatt* [2019] EWCA Civ 1864, [2020] B.L.R. 42) at [21 – 22]."

117. The EAT was also referred to *Simetra Global Assets Ltd and another v Ikon Finance Ltd and others* [2019] 4 W.L.R. 112, and *SB (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 160.

118. Accordingly, consistent with the above authorities, the EAT correctly held that the ET erred in law in failing to give any weight to the Official Statement. Accordingly, the Claimant's Ground 1 should be dismissed.

G. THE CLAIMANT'S SECOND AND THIRD GROUNDS OF APPEAL – THE TEST FOR IMMUNITY AND ITS APPLICATION

119. The Claimant's Grounds 2 and 3 are:

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

120. The Embassy deals with Grounds 2 and 3 together, as set out below.

The Test under Section 16

121. The question before the ET and the EAT was the identification of the correct test to apply in order to determine whether what is now s.16(1)(aa) SIA applied. In other words, determining whether the Claimant's employment was within the exception to the exception, and therefore (subject to the personal injury exception issue) the Embassy had immunity in respect of the Claimant's claim. It was accepted before the EAT that there was no material difference in the test an ET should apply before and after the Remedial Order had effect when determining this issue.

122. The correct test was whether the functions performed by the Claimant fell within the sphere of governmental or sovereign activity. It was explained by Lord Sumption in *Benkharbouche* in [53]-[55], which the Court is invited to read.

123. The EAT correctly held that the ET had failed to apply the above test. As per *Benkharbouche* [55], the role of all technical and administrative staff is, by comparison with diplomatic agents i.e., the head of mission and the diplomatic staff, "*essentially ancillary and supportive*". Accordingly, as the EAT held at [EATJ/92] and [EATJ/99] **[CB/160-161]**, the ET had confused what Lord Sumption said at [55] about all technical and administrative staff with the correct test:

> "Applying Benkharbouche, **the test was not whether the Claimant's work was "ancillary and supportive" to the exercise of sovereign authority**. It was whether her ancillary and supportive work was "sufficiently close" to that exercise." (emphasis added)

124. The Claimant appears to accept at paragraph 31 of her skeleton for the Court of Appeal that the EAT correctly identified the legal test to apply at [EATJ/92] **[CB/160]**, and as such, it is

not understood how it can be said by the Claimant that the ET applied the correct legal test to the Claimant's employment claims against the Embassy. Further, the importance of assessing the employee's functions in context was entirely absent from the ET's consideration of the law at [ETJ/160- 178] **[CB/205-209]**, notwithstanding its prominence as part of the analysis in the decision of Lord Sumption in *Benkharbouche* at [53].

EAT Entitled to Decide the Issue

125. As Mr Justice Bourne pithily explained at [EAT/100] **[CB/161]** "*there can be only one correct legal outcome on the EJ's findings of fact*". This reflected long-established authority confirming that an appellate court may determine the issue of state immunity itself, rather than being confined a review of whether it was open to the first instance judge to find that the state was entitled to immunity. As Lord Hope in *Jones v Saudi Arabia* put it at [33]:

> 'Where applicable, state immunity is an absolute preliminary bar, precluding any examination of the merits. A state is either immune from the jurisdiction of a foreign court or it is not. **There is no half-way house and no scope for the exercise of discretion.** There may be dispute whether acts, although committed by an official, were purely private in character, but that is not a question which arises here.'

126. See also *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 at [1577A] where Lord Hope determined the issue of immunity himself based on the earlier findings of fact. Further, Lord Millet determined that the Court of Appeal had correctly designating the act complained of as being jure imperii [1585H] (i.e. not just that it was open to the Court of Appeal).

127. Accordingly, the EAT did not err by determining the issue itself as the Claimant suggests. Nor did the EAT in doing so wrongly interfere with the ET's factual findings as the Claimant

alleges. On the contrary, the EAT determined the issue by reference to the ET's factual findings, but (unlike the ET) applied the correct legal test to those findings of fact.

EAT's Own Assessment

128. As explained above, when determining whether the exception to the exception at s.16 SIA applied or not, the EAT had the correct 'context test' well in mind, alongside the distinction between governmental and private acts which is the correct starting point (see for example [EATJ/97]). The EAT did not seek to add a "gloss" to the test, as the Claimant suggests.

129. The EAT rightly held that had the ET applied the correct test to its own findings of fact [ETJ/118-158] **[CB/199-205]**, then the Claimant's claims against the Embassy fell within what is now s.16(1)(aa) SIA [EATJ/87 – 100] **[CB/160-161]**, and the Embassy was entitled to state immunity. In particular, the Embassy notes the following findings of fact by the ET:

    (1) The functions of the Embassy in respect of which the Claimant was employed were "*inherently governmental*" [ETJ/183] **[CB/210]** and the Claimant assisted with these [ETJ/188] **[CB/211]**;

    (2) The Claimant was engaged on behalf of the Embassy to make practical arrangements for Saudi nationals studying in the UK (see [ETJ/184] **[CB/210]**);

    (3) The Claimant's functions were broadly supportive of the Embassy's Article 3 VCDR functions [ETJ/193] **[CB/212]**.

130. It is plainly a part of the Embassy's governmental or sovereign functions to support its 20,000 recipients of education scholarships in the UK and their cultural activities. The Embassy's involvement in the educational activities of its citizens in the UK (which took place under the auspices of the Head of Cultural Affairs) is part of its sovereign activity: see *Holland v Lampen-Wolfe* 1 WLR 1573 at 1577B-G and 1580G-H, in which the House of Lords found that

educational activities for military personnel and their families in the UK was part of its sovereign activity. See also Article 3 of the VCDR to the same effect. Such activities cannot be commercial or trading activities or otherwise be of a private law character.

131. The ET had correctly found that the relevant functions of the Claimant were "*functional, practical, supportive duties*" of "*inherently governmental*" functions of the Embassy [ETJ/183] **[CB/210]**. On the ET's own findings, therefore the Claimant's role was intrinsically linked with the Embassy's public and governmental function of supporting, protecting and safeguarding the interests of students, being nationals of Saudi Arabia.

132. In particular, in finding that the Claimant's particular job involved her flagging academic issues [ETJ/151] **[CB/204]**, writing requests for state funding for cultural affairs [ETJ/153] **[CB/ 204]**, and editing articles for a cultural journal published quarterly by the Embassy [ETJ/154] **[CB/204]**, and that she was copied into emails with the Head of the Cultural Affairs Department in relation to her activities [ETJ/155] **[CB/205]**, the ET – had it applied the correct legal test – would have concluded that these were part of the Embassy's sovereign activities and thus that the Embassy enjoyed state immunity.

Further Factual Inquiry

133. There was no need for any further factual inquiry before the EAT applied the correct legal test to the ET's findings of fact. Further, the point now made by the Claimant in her skeleton argument at paragraph 41 concerning a factor said to be particularly relevant to this assessment, described as a 'period by period approach', was not part of the appeal before the EAT and the Claimant had not raised it by way of a cross-appeal. The EAT ruled in Reason (2) attached to its Order dated 11 January 2024 **[CB/140]** that it was not open to the Claimant to run this argument in the absence of such a ground of appeal. There remains no such ground of appeal

in the Claimant's present appeal to this Court, and therefore it is not open to the Claimant to advance such arguments before the Court of Appeal.

REMEDY SOUGHT

134. For the reasons set out above, the Court is respectfully asked to grant the appeal and hold that:

    (1) The EAT was right to find that the Claimant's employment claims against the Embassy fall within s.16(1)(aa) SIA, and accordingly s.4 SIA cannot apply to them.

    (2) The Claimant cannot rely upon s.5 SIA to pursue her employment claims against the Embassy, even though she has included a claim for damages for personal injury.

    (3) Accordingly, the general immunity from jurisdiction at s.1(1) SIA applies to the entirety of the Claimant's claims against the Embassy, and they should be dismissed on that basis.

135. The EAT remitted the issue of waiver/submission back to London Central ET [EATJ/144] **[CB/168]**, but to a different Employment Judge. However, this need not occur, if it has been rendered academic by this Court dismissing the Claimant's claims.

CLAIRE DARWIN KC
MATRIX

ANDREW LEGG
ESSEX COURT

5 February 2025