Neutral Citation Number: [2025] EWCA Civ 1162

Case No: CA-2024-000624 & CA-2024-000625

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HON. MR JUSTICE BOURNE
EA2022000096AP

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2025

Before:

THE PRESIDENT OF THE FAMILY DIVISION (SIR ANDREW McFARLANE)
LORD JUSTICE BEAN
and
LORD JUSTICE COULSON

- -

Between :

THE ROYAL EMBASSY OF SAUDI ARABIA (CULTURAL BUREAU)	**Appellant/ Respondent**
- and -	
MS ABIR ALHAYALI	**Respondent /Claimant**

- -
- -

Claire Darwin KC and **Andrew Legg** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant Embassy**
Madeline Stanley (instructed by **Anti-Trafficking and Labour Exploitation Unit**) for the **Respondent Ms Alhayali**

Hearing dates: 1 & 2 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 11 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. Ms Abir Alhayali was employed by the Royal Embassy of Saudi Arabia Cultural Bureau ("the Embassy") in London between January 2013 and 6 January 2018. Her work included processing requests from Saudi students studying in the UK and passing documents to her head of department for approval. On 30 January 2018, she lodged a claim in the employment tribunal ("ET") for unfair dismissal, breach of contract, unlawful deductions from wages, discrimination on the grounds of disability, sex or belief, harassment and victimisation. The claim was eventually served through diplomatic channels. In its grounds of resistance, the Embassy asserted state immunity.

2. At a preliminary hearing on 19 March 2019, the Embassy was ordered to make clear whether it conceded that the ET had jurisdiction over such claims as were derived from European Union law. Ms Alhayali withdrew the claims based only on domestic law, that is to say unfair dismissal, unlawful deductions and breach of contract.

3. By an email of 9 April 2019, Howard Kennedy LLP, the solicitors then acting for the Embassy, wrote to the ET confirming that the Embassy "accepts the Tribunal has jurisdiction over claims which are derived from EU law, as reflected in paragraph 8(c) of the existing Grounds of Resistance." Those Grounds of Resistance made reference to the decision of the Supreme Court in the *Benkharbouche* case, to which I shall come later.

4. Following this apparent submission to the jurisdiction and the withdrawal by the Claimant of her domestic law heads of claim, the ET case was progressed with substantial involvement from both sides for a period of over two years.

5. On 4 August 2021, Howard Kennedy wrote to the tribunal asking that the final hearing, then listed for 8 days from 21 February to 2 March 2022, should be vacated. The application stated that "our client is reasserting state immunity in these proceedings and we are instructed to engage for this purpose only." The Embassy contended that it had not submitted to the jurisdiction in the correspondence of 9 April 2019, nor by the numerous subsequent steps taken in the proceedings, since these actions had not 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 s 2(7) of the State Immunity Act 1978. It was argued that conduct on the part of a solicitor can constitute a waiver of state immunity only if it has as a matter of fact been authorised by the head or acting head of mission. Reliance was placed on *Republic of Yemen v Aziz* [2005] ICR 1391.

6. The result was that on 30 November and 2 December 2021 an open preliminary hearing was held before Employment Judge Brown sitting at Central London. This was to determine three issues:

    a) Whether the Embassy had submitted to the jurisdiction by the Howard Kennedy email of 9 April 2019 and/or by steps in the proceedings taken after that (the waiver issue);

    b) Whether the Embassy had the benefit of state immunity in relation to Ms Alhayali's EU law-derived employment claims as a whole pursuant to s 4 of the State Immunity Act 1978 (the section 4 issue);

c) If not, whether it had the benefit of state immunity in relation to the claim for compensation for psychiatric injury pursuant to s 5 of the 1978 Act (the section 5 issue);

7. By a reserved judgment promulgated on 7 January 2022, EJ Brown found in the Claimant's favour on all three preliminary issues and gave directions for a hearing on liability. The Embassy gave notice of appeal to the Employment Appeal Tribunal ("EAT") on all three issues. EJ Brown stayed the liability hearing while that appeal and any further appeals on the preliminary issues were pending and accordingly no liability hearing has yet taken place.

8. On the paper sift in the EAT, a deputy judge directed that the appeal had no real prospect of success and that no further action should be taken on it. The Embassy applied for a Rule 3(10) hearing which came before the President, Eady J. She allowed the appeal to proceed to a full hearing on five grounds. These were:

i) The employment tribunal ("ET") erred in law in failing to give due weight to the official stamped statement from the Embassy that no authority had been given to Howard Kennedy LLP to waive state immunity in this matter, and as a result the ET should not have found that there had been a waiver of state immunity.

ii) Having regard to *Benkharbouche v Embassy of Sudan* [2017] ICR 1327 and to the State Immunity Act 1978 (Remedial) Order 2023 ("the Remedial Order") which came into effect on 23 February 2023, the ET should have considered whether the functions performed by the Claimant fell within the sphere of sovereign activity, not (as the ET incorrectly considered) whether her role fell into the middle category of embassy employees (technical and ancillary) identified by Lord Sumption, a matter that was not in dispute.

iii) In applying *Benkharbouche* (and having regard to the Remedial Order), the ET failed properly to consider the context in which the Claimant carried out her functions.

iv) In finding that the Claimant was entitled to rely on the personal injury exception to immunity in section 5 of the SIA, and in placing reliance on *Federal Republic of Nigeria v Ogbonna* [2012] 1 WLR 139 (EAT), the ET took an overly literal approach to statutory construction and the interplay between sections 4, 5 and 16 of the SIA rather than a broader construction that took into account international law.

v) Alternatively, *Ogbonna* was wrongly decided and the ET erred by relying on it, because the EAT in that case was not referred to additional authorities and legal materials which support a construction of section 5 of the SIA that limits the exception to state immunity to physical or bodily injury rather than psychiatric injury.

9. The full hearing of the appeal came before Bourne J on 4 and 5 October 2023. By a reserved judgment handed down on 5 December 2023 he held that:

a) The ET had erred in finding that the Embassy had submitted to the jurisdiction. However, that issue was remitted to a freshly constituted ET for redetermination (Ground 1, the waiver issue);

b) The ET had also erred in rejecting the Embassy's claim to state immunity from the employment claims as a whole (Grounds 2 and 3, the section 4 issue);

c) However, the ET had been right to reject the claim to state immunity in respect of Ms Alhayali's claim for psychiatric injury. Bourne J followed the previous decision of the EAT in *Ogbonna* (Grounds 4 and 5, the section 5 issue).

10. On 14 February 2024, Bourne J granted Ms Alhayali permission to appeal to this court on the waiver and section 4 issues and granted the Embassy permission to appeal on the section 5 issue.

11. I will deal first with the s 4 and s 5 issues. In the section of her judgment headed "Findings of fact – Claimant's job functions", EJ Brown wrote:

> "150. I accepted the Claimant's evidence regarding her job responsibilities and found that that between January 2013 and 30 July 2015 she worked as an Academic Adviser in the Respondent's Academic Department, handling requests from Saudi students studying in the UK. She had access to a computer system called Safeer. Students would make requests, for example, for financial guarantee letters or travel tickets, through the system. The Claimant would consider the requests made through the Safeer system and check that the student had supplied the necessary supporting documentation. If the documentation was complete, the Claimant would forward the request and documentation to her head of department.
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> 151. During this period, the Claimant also received academic reports on students from their universities and uploaded these to the Safeer system. If a student was not obtaining good grades or had failed part of their course, the Claimant would report this to the Head of Department. The Claimant had access to the academic information in relation to students on Safeer, including their contact details and students' courses and universities.
>
> 152. From 30 July 2015 to September 2017 the Claimant worked in the Respondent's Cultural Affairs department. She no longer had access to the Safeer computer system, but worked on cultural projects which Saudi students at UK universities wanted to set up.
>
> 153. Students would make a request for funding and support (financial and otherwise) for their project to Dr Bin Ghali, Head of the Cultural Affairs Department. The Claimant would write a report for Dr Bin Ghali which summarised the project and

> outlined its requirements. The Cultural Attaché, who would then decide whether to support the project and offer funding. If a project was approved, the Claimant would ask various UK universities whether they would host the event and send out notifications to Saudi students about it. The Claimant also assisted with the practical arrangements for setting up and hosting these events.
>
> 154. Between 30 July 2015 to September 2017 the Claimant proofread articles submitted to the Al-Thaqafia magazine (a cultural journal), which the Embassy released every three months. Dr Bin Ghali, the Head of the Department, would decide which articles would be included in the magazine. The Claimant would then send the selected articles for publication.
>
> 155. The Claimant was copied into emails sent to Dr Bin Ghali which were directly relevant to her own work. When Mr Bin Ghali wrote to the Cultural Attaché, he did not copy the Claimant into that correspondence.
>
> 156. 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. The Ticketing Department arranged student travel through the Safeer system. The Claimant never worked in the Ticketing Department there because she was absent from work throughout the relevant period by reason of sick leave and annual leave.
>
> 157. The Claimant was not in a leadership or management role at any time during her employment at the Respondent. She had no ultimate decision making capacity in any of the roles she undertook.
>
> 158. Her roles involved providing information to her Heads of Department for them to make decisions. Her role in the Cultural Department also encompassed helping with practical arrangements for holding student events. She also attended these events and spoke with other attendees."

12. There was a good deal of argument before us about the distinction between findings of fact and evaluative decisions and the differing approaches of appellate courts to each of them, both generally and in the field of state immunity. However, what is beyond dispute, as Bourne J accepted at paragraph [89] of his judgment, is that findings of primary fact by the ET cannot be disturbed on appeal. These include findings as to what happened and what the Claimant's job actually involved. It is not suggested that this is a case where the findings of fact were perverse in the sense that there was no evidence at all to support them.

State Immunity Act 1978

13. At the time of the facts giving rise to the claim and of the ET decision, the State Immunity Act 1978 had not yet been amended by the Remedial Order. Counsel were agreed, however, that the amendments make no difference to the law to be applied in this case. I therefore set out the relevant provisions of the 1978 Act as they stood before amendment by the Remedial Order:

> "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.
>
> 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 the 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) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

(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.

…

4 **Contracts of employment.**

(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if—

(a) at the time when the proceedings are brought the individual is a national of the State concerned; or

(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or

c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2)(b) above "national of the United Kingdom" means—

(a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen; or

(b) a person who under the British Nationality Act 1981 is a British subject; or

(c) a British protected person (within the meaning of that Act).

(6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such

> a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee. [in the amended version subsection (6) is omitted]
>
> 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.
>
> …
>
> 16 **Excluded matters**
>
> (1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and—
>
> (a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;
>
> (b) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission."

Benkharbouche

14. The Supreme Court decision in *Benkharbouche v Embassy of the Republic of Sudan; Janah v Libya* [2019] AC 277; [2017] UKSC 62 in October 2017 concerned employment law claims by two employees of foreign embassies based in London. The central question was whether the provisions of the 1978 Act were incompatible with the right of access to a court under Article 6 of the European Convention on Human Rights. Giving a judgment with which all the other Justices agreed, Lord Sumption JSC explained that provisions giving immunity to foreign states would be incompatible with Article 6 unless they were justified because they gave effect to the requirements of customary international law.

15. Lord Sumption said:

> "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. It is not always easy to determine which aspects of the facts giving rise to the claim are decisive of its correct categorisation, and the courts have understandably avoided overprecise prescription.

The most satisfactory general statement is that of Lord Wilberforce in *The I Congreso* [1983 1 AC 244 at p 267:

> "The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

54. In the great majority of cases arising from contract, including 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.

55. 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 and Associated Islands v Sutton* [1995] 1 NZLR 426 (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."

16. Lord Sumption continued:

"56. This approach is supported by the case law of the European Court of Human Rights, which I have already summarised. In [four cases, including *Cudak v Lithuania*] concerning the administrative and technical staff of diplomatic missions, the test applied by the Strasbourg Court was whether the functions for which the applicant was employed called for a personal involvement in the diplomatic or political operations of the mission, or only in such activities as might be carried on by private persons. In *Mahamdia v People's Democratic Republic of Algeria* (Case C-154/11) [2013] ICR 1, para 55-57, the Court of Justice of the European Union applied the same test, holding that the state is not immune "where the functions carried out by the employee do not fall within the exercise of public powers." The United States decisions are particularly instructive, because the Foreign State Immunity Act of the United States has no special provisions for contracts of employment. They therefore fall to be dealt with under the general provisions relating to commercial transactions, which have been interpreted as confining state immunity to exercises of sovereign authority: see *Saudi Arabia v Nelson* 507 US 349, 360 (1993). The principle now applied in all circuits that have addressed the question is that a state is immune as regards proceedings relating to a contract of employment only if the act of employing the plaintiff is to be regarded as an exercise of sovereign authority having regard to his or her participation in the diplomatic functions of the mission…….Although a foreign state may in practice be more likely to employ its nationals in those functions, nationality is in itself irrelevant to the characterisation: *El-Hadad v United Arab Emirates* 216 F 3d 29 (DC Cir, 2000), at 4, 5. ……..

57. I would, however, wish to guard against the suggestion that the character of the employment is always and necessarily decisive. Two points should be made, albeit briefly since neither is critical to this appeal.

58. The first is that a state's immunity under the restrictive doctrine may extend to some aspects of its treatment of its employees or potential employees which engage the state's sovereign interests, even if the contract of employment itself was not entered into in the exercise of sovereign authority. Examples include claims arising out of an employee's dismissal for reasons of state security. They may also include claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which in the nature of things impinge on the state's recruitment policy. These particular examples are all reflected in the United Nations Convention and were extensively discussed in the preparatory sessions of the International Law Commission. They are certainly not exhaustive. ……

> 59. The second point to be made is that the territorial connections between the claimant on the one hand and the foreign or forum state on the other can never be entirely irrelevant, even though they have no bearing on the classic distinction between acts done jure imperii and jure gestionis. This is because the core principle of international law is that sovereignty is territorial and state immunity is an exception to that principle. As the International Court of Justice observed in Jurisdictional Immunities of the State, at para 57, the principle of state immunity
>
> > "has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.""

17. In *Benkharbouche* both the claimants were domestic staff. In the next case to come before the UK Supreme Court concerning state immunity of embassy employees, *Constatine v Royal Embassy of Saudi Arabia (Cultural Bureau)* [2025] 1 WLR 1207, the claimant was a member of the technical and administrative staff of the mission. The first issue before the Supreme Court was how the Court of Appeal should have proceeded in circumstances where the appellant state had not appeared at the hearing. The second issue was how the substantive appeal should be disposed of. On that issue, the court made it clear that they were applying the principles in *Benkharbouche* and were not departing from them. It is of interest that the ET hearing in *Constatine* had been before EJ Brown, whose decision, handed down on 30 June 2021, was approved by the Supreme Court.

The decision of EJ Brown on the s 4 issue

18. EJ Brown held:

> "181. I considered, first, whether the Respondent's employment of the Claimant was an exercise of sovereign authority. If it was not, the Tribunal has jurisdiction to hear her complaints against the Respondent based on EU law."
>
> 182. The Respondent contended that the functions performed by the Claimant in her role fell within the sphere of governmental or sovereign activity and included the exercise of sovereign authority which had been delegated to her by the Respondent's officials. It contended that the Claimant's role was intrinsically linked with and supportive of protecting and safeguarding the interests of student nationals of Saudi Arabia, being "functions that are inherently governmental" and, therefore, the exercise of sovereign authority. It contended that promoting the culture and traditions of a foreign State and protecting the interests of their nationals whilst studying abroad, are inherently part of the

mission's sovereign functions in promoting cordial relations between the Respondent and the United Kingdom and the Respondent's diplomatic life generally, Article 3 of the Vienna Convention on Diplomatic Relations.

183. On my findings of fact, while the functions of the Respondent itself may have been inherently governmental, I considered that all the Claimant's duties were truly ancillary and supportive to this, as described by Lord Sumption in *Benkharbouche*, at [55]. Essentially, the Claimant's role in the Education Department involved collating and recording documents which related to student nationals of Saudi Arabia and their studies in the UK. The documents she collated did not relate to government officials. She facilitated the studies of private citizens. The Claimant did not have any important decision-making functions, but referred any nonstandard matters to her Head of Department. In her Cultural Bureau role, she provided reports on proposals made by Saudi nationals for cultural events. Again, she had no decision-making role in whether to approve these projects, or make funding available for them. The Claimant also proof-read articles for journals and assisted in the practical arrangements for events. All these were functional, practical, supportive duties.

184. On my findings of fact, the Claimant provided information to her manager for him, or the Attaché, to make the relevant decisions. Her functions were indeed "essentially ancillary and supportive" to the governmental functions of the Respondent. The Claimant's correspondence with external bodies was confined to correspondence concerning students and their universities. This was not a governmental matter but involved making practical arrangements for Saudi nationals studying abroad.

185. Her role did not comprise "all typing and secretarial services necessary to operate" Dr Bin Ghali's office and did not include typing communications between him and government officials. It did not include typing his "official instructions", unlike in *Governor of Pitcairn and Associated Islands v Sutton*. Her role was not close to such governmental functions. The Claimant was copied into correspondence directly concerning her own role.

186. It is logical that the Claimant might have had access to some information about the children of government officials, or members of the Royal family, in her role student adviser role. However, her role was a purely administrative one, dealing with requests for letters of guarantee and funding for travel.

187. Likewise, her functions in the Ticketing Department were simply to arrange student travel through the Safeer system. The

Claimant never worked there because she was absent from work throughout the relevant period by reason of sick leave and annual leave. If she had worked, her functions would have been purely practical and administrative tasks arranging travel for Saudi student nationals. This had little connection with any governmental function of the mission.

188. I did not agree with the Respondent's submission that, because the Claimant's job role assisted the Respondent to carry out its governmental functions as described in Article 3 of the Convention on Diplomatic Relations, her employment was an exercise of sovereign authority.

189. The Respondent's submission appeared to be inconsistent with the dictum of Lord Sumption in *Benkharbouche,* at [55] and the approach of the ECHR in *Cudak v Lithuania*. Lord Sumption's words suggest that technical and administrative staff, in general, exercise ancillary and supportive functions. He does not suggest that their employment is an exercise of sovereign authority simply because they support or assist the governmental functions of the mission. Rather, he says 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 (emphasis added).

190. Lord Sumption's examples of such administrative staff, whose functions might be sufficiently close to the governmental functions of the mission, were cypher clerks and confidential secretarial staff. Such employees are necessarily privy to highly confidential governmental communications. On the agreed facts in *Governor of Pitcairn and Associated Islands v Sutton,* the secretary typed "all communications between the Governor, the Commissioner and Pitcairn, including the Governor's official instructions". Her role therefore encompassed typing governmental-level communications.

191. In *Cudak v Lithuania*, the applicant was employed at the Polish Embassy in Vilnius. The functions of an Embassy are defined in Art 3 VCDR. The functions of administrative staff at Embassies are inherently likely to be supportive of the activities set out in Art 3. However, the ECHR did not suggest that, because the applicant was employed in the Embassy, and carried out administrative functions there, that her employment should be considered to be an act of sovereign authority.

192. On the contrary, the ECHR in *Cudak* said that it had not been demonstrated how the administrative functions of the applicant in "recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of

> certain events" could objectively have been related to the sovereign interests of the Polish Government.
>
> 193. The Claimant's functions throughout her employment were similar to those of the applicant in *Cudak.* I did not consider that, because the Claimant's functions were broadly supportive of the Respondent's Article 3 VCDR functions, that meant that her employment was an act of sovereign authority.
>
> 194. On the facts, the Claimant's functions were not "close" to the governmental functions of the mission; they were relatively low-level ancillary and supportive functions.
>
> 195. The Claimant's employment was not an exercise of sovereign authority. The Tribunal has jurisdiction to hear her complaints against the Respondent based on EU law."

19. EJ Brown went on at paragraphs [196] to [202] to hold that there were no acts by the Embassy staff relevant to the present claim which constituted acts of sovereign authority. There has been no appeal from that part of her decision.

The EAT decision on the s 4 issue

20. On the s 4 issue, Bourne J said:

> "87. Whichever side of the line this case falls upon, it is close to the boundary. The answer is not obvious, as it would be for cleaning staff on the one hand or perhaps for some senior managers on the other. It was therefore a relatively difficult case to decide.
>
> 88. I also consider that, once a tribunal has made findings of fact about the duties of the employee in question, there can logically be only one right answer to the question as a matter of law. It has been suggested that two different EJs could validly arrive at different conclusions on the same facts, but in my judgment that cannot be right. Sovereign immunity removes the tribunal's jurisdiction. That cannot be done as a matter of individual impression, let alone discretion. So, although I agree that two EJs could reasonably disagree about the answer in a borderline case, it seems to me that one of those judges would be right, and the other wrong, as a matter of law.
>
> 89. I am therefore in no doubt that both grounds 2 and 3 raise a genuine issue of law. EJ Brown's findings of fact cannot be disturbed. Her conclusion based on those facts was either legally right or legally wrong.
>
> 90. It was first necessary to decide whether functions of a sovereign kind were being discharged at all. The EJ was slightly non-committal, saying at [183] that "the functions of the

Respondent itself may have been inherently governmental". That, with respect, was not entirely satisfactory, because the exercise of analysis necessitated the clear identification of any sovereign activity in order to decide whether the Claimant's work was sufficiently close to it.

91. I am in no doubt that the work of the Respondent's Academic and Cultural Affairs departments, looking after the interests of Saudi students in the UK and promoting Saudi academic and artistic work, involved the exercise of sovereign authority. Those are functions identified in Article 3.1(b) and (e) of the Vienna Convention.

92. Ground 2 focuses on whether the EJ then asked the right question. The use of terminology is of clear relevance to that ground. 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. In the passage quoted at the end of paragraph 39 above, those different tests appear to have been elided.

93. Ground 3 focuses on the application and outcome of that test. In that regard it may be helpful to consider what work would definitely not be sufficiently close. Leaving aside the terms "ancillary" and "supportive", work of an insufficient kind might be described as being purely collateral to the exercise of sovereign authority. So, whilst the Head of the Cultural Affairs department was exercising sovereign authority, a person who cleaned his office was not. Nor was a person who drove him to work. A person who merely typed documents was probably not, though the *Governor of Pitcairn* case shows that a certain degree of trust or confidentiality might carry that individual across the line.

94. Then there was the example to which the EJ referred, of *Cudak v Lithuania,* where the European Court of Human Rights ruled that sovereign immunity did not apply. The Court stated at [70]: "The Court observes in particular that the applicant was a switchboard operator at the Polish Embassy whose main duties were: recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events. Neither the Lithuanian Supreme Court nor the respondent Government have shown how these duties could objectively have been related to the sovereign interests of the Polish Government."

95. That bare description may invite some comparison with the present case but, given the lack of detail, caution is needed and previous cases should not simply be used as precedents (see

> *Holland* above). We do not know what "providing information" or assisting with event organisation actually consisted of. And the final sentence of the quotation above suggests that a lack of evidence was material to the outcome. So I am not convinced that the comparison with *Cudak* was directly helpful.
>
> 96. In fairness to the EJ, it seems clear that some of the Claimant's activities, such as inputting information to a computer system, were of a purely clerical nature and purely collateral to any exercise of sovereign authority.
>
> 97. However, on the EJ's findings of fact, I have concluded that when the correct test of "sufficiently close" rather than "ancillary and supportive" is applied, in the context of what was an exercise of sovereign authority by the Embassy of a kind contemplated by the Vienna Convention, some of the Claimant's activities throughout the period of her employment passed the test. 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. To put it another way (reflecting 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.
>
> 98. I therefore conclude that ground 3 succeeds although, as I have said, this was a borderline and difficult case and it appears that the EJ was not greatly assisted by witness evidence called on behalf of the Respondent which she found to be unreliable.
>
> 99. I also allow the appeal on ground 2 on the basis that a lack of precision in the terminology of the analysis contributed to what I have found to be a legally erroneous outcome.
>
> 100. For the reasons I have explained above, there can be only one correct legal outcome on the EJ's findings of fact, and therefore there is no scope for remitting this issue to the ET."

21. Ms Darwin relied on and supported the reasoning of Bourne J. Ms Stanley, by contrast, submitted that EJ Brown made no error of law and there was no proper basis for the EAT to take a different view.

Discussion

Did the ET apply the wrong test to the s 4 issue?

22. EJ Brown's carefully reasoned decision shows that she was well aware that the critical question on the s 4 issue was whether the Claimant's functions were sufficiently close to the exercise of sovereign authority, as opposed to being merely ancillary and

supportive. I have set out the relevant section of her decision at paragraphs [181]-[195]. Paragraph [183] includes findings that "all the Claimant's duties were truly ancillary and supportive" and that Ms Alhayali "did not have any important decision-making functions, but referred any non-standard matters to her Head of Department". She provided reports on proposals for cultural events but had no decision-making role in whether to approve them or make funding available for them. All these, said the judge, "were functional, practical, supportive duties". The judge develops these points further before saying at paragraph [188]:

> "I did not agree with the Respondent's submission that because the Claimant's job role assisted the Respondent to carry out its governmental functions as described in Article 3 of the Convention on Diplomatic Relations, her employment was an exercise of sovereign authority."

23. I am entirely satisfied that the employment judge was applying the correct test in accordance with the guidance given by Lord Sumption in *Benkharbouche.* By contrast, the relevant section of the judgment of Bourne J seems to accept the submission on behalf of the Embassy that once it is shown that the department or section of the Embassy in which the Claimant worked was exercising any of the functions listed in Article 3.1 of the Vienna Convention, that is sufficient to establish the defence of sovereign immunity. At paragraph [92] of his decision, Bourne J says that:

> "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."

I have to say, with respect, that this seems a very hairline distinction..

24. The examples given by Lord Sumption of employees in the category of technical and administrative roles which are sufficiently close to the exercise of sovereign authority for claims by them to attract immunity are very limited. At paragraph [55], he gives the example of cypher clerks and "certain confidential secretarial staff". At paragraph [58], having cautioned against "the suggestion that the character of the employment is always and necessarily decisive", he goes on to consider employment disputes, which engage the state's sovereign interests even if the contract of employment itself was not entered into the exercise of sovereign authority, giving examples of dismissals for reasons of state security or claims arising out of a state's recruitment policy.

25. The critical paragraph [97] of Bourne J's judgment states that "by sifting compliant and non-compliant guarantee requests, writing reports and funding requests and discussing art exhibits with visitors and British students and teachers she played a part, 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". He goes on to say that "she was participating in the public service of the Embassy and not merely in the private administration of the Embassy." This suggests that any outward-facing activity such as "discussing art exhibits with visitors" is sufficiently close to the exercise of sovereign authority to attract immunity. That seems to me to cast the net of immunity very widely indeed, certainly in comparison with the very specific examples given by Lord Sumption. The earlier reference to "sifting compliant and non-compliant guarantee requests" and

"writing reports on funding requests" gives no weight to the findings of fact by EJ Brown that the Claimant did not have a decision-making role and that her activities were relatively low-level.".

Can there only be one legally correct answer?

26. Where a state is entitled to assert diplomatic immunity, courts and tribunals in this jurisdiction are obliged to give effect to that immunity. A decision as to whether an employee is on the right or wrong side of the line for a claim by her to attract sovereign immunity is not a question of discretion. It is, however, an evaluative judgment by the fact-finder. I am doubtful about the bold proposition in paragraph [89] of the EAT judgment that, while the employment judge's findings of primary fact cannot be disturbed, her conclusion, based on those facts was "either legally right or legally wrong". The EAT has no jurisdiction except where the appellant has shown that the ET has made an error of law.

27. I agree with the observations of Judge Tayler in the EAT case of *Webster v USA* [2022] IRLR 836; [2022] EAT 92 where he said:

> "In *Benkharbouche* Lord Sumption distinguished between three types of employees in diplomatic missions; those who have inherently governmental function at one end and those whose domestic duties are inevitably private. In the middle there are technical and administrative roles that may, or may not, be sovereign or governmental. Determining which side of the line an employee in the middle category falls is inherently a matter of factual assessment that is for the employment tribunal."

I do not accept that sovereign immunity cases (in particular those involving employees in the middle category of Lord Sumption's classification) have become a unique category of case where the party losing before the ET can appeal as of right on the grounds that the conclusion of the tribunal is always a question of law. Moreover, if that is true of the appeal to the EAT, it must likewise be true of an appeal from the EAT to this court. Even if the question for us is whether, on EJ Brown's findings of primary fact, the Embassy has or has not established the defence of sovereign immunity under s 4 of the 1978 Act, I would answer that it has not, for the same reasons that she gave at paragraphs [181]-[195] of her judgment.

28. Accordingly, in what Bourne J himself described as a "borderline and difficult case", I consider that EJ Brown's decision on the s 4 issue involved no error of law. I would accordingly allow the appeal and restore the decision of the ET that the Embassy does not have state immunity by virtue of s 4.

29. That makes it strictly unnecessary to deal with the other two issues, but I will nevertheless refer to them briefly, and express my view on the first of them.

The s 5 issue: was this a personal injury claim to which state immunity does not apply?

30. In *Federal Republic of Nigeria v Ogbonna* [2012] 1 WLR 139, Ms Ogbonna, who was employed as a member of a diplomatic mission, brought a claim for associative disability discrimination in respect of her dismissal, which she said had occurred

because she sought time off to look after her sick daughter. She claimed to have suffered both physical and mental injuries as a consequence. The employer claimed state immunity, arguing that s 16(1)(a) of the 1978 Act prevented her from relying on s 4 to bring an employment claim, and that she could not rely on s 5, either (i) because s 16(1)(a) applied state immunity in respect of all employment claims by members of diplomatic missions regardless of s 5, or (ii) because s 5 applies only to a claim for damages for physical injury and not to harm to mental health unless it was consequent on a physical injury.

31. In the ET, the employer's claim to state immunity was dismissed by EJ Walker. On appeal to the EAT, this decision was upheld by the President, Underhill J (as he then was). He held that ss 4 and 5 of the Act were separate and free-standing exceptions to the general rule of state immunity even where, on a claim for personal injury by an employee, both exceptions might be engaged. He also held that the phrase "personal injury" in s 5 bore its normal meaning in domestic law so as to cover cases of psychiatric as well as physical injury.

32. The second of these two issues appears to have been the main focus of the submissions in *Ogbonna*. Underhill J's ruling to that effect has recently been shown to be correct by the decision of this court (Lady Carr CJ, Males and Warby LJJ) in *Shehabi v Kingdom of Bahrain* [2025] 2 WLR 467; [2024] EWCA Civ 1158. The claimants alleged that employees of the defendant state while located abroad had caused spyware to be installed remotely on the claimant's computers located in the UK, which had caused the claimants psychiatric injury when they discovered that the defendant had been spying on them in that way. The court held that a standalone psychiatric injury was a personal injury within the meaning of s 5 of the 1978 Act. *Ogbonna* was cited and approved on this issue: see paragraphs [96]-[107] of the judgment of Males LJ. Ms Darwin accepted that *Shehabi* resolves this issue authoritatively at the level of this court.

33. However, *Shehabi* was not an employment case and tells us nothing about the interaction of ss 4 and 5. There is no authority at the level of this court deciding whether *Ogbonna* was correct on the first issue. Although it is not necessary to determine the point, I consider that on the first issue *Ogbonna* is wrong. It would be very peculiar if an employee of an embassy, perhaps a very senior diplomatic agent, could be precluded from bringing any employment claim by virtue of ss 4 and 16, including a claim for compensation for discrimination, with the exception that if the discrimination caused psychiatric injury that element of the claim could not be defeated by state immunity. That would drive a coach and horses through the careful scheme of exceptions created under ss 4 and 16.

34. The exception created by s 5 is in my view linked to the cause of action, not the nature of the damage. If a chandelier at an embassy in London drops from the ceiling and causes injury to the person standing beneath it, there is no obvious rationale for conferring immunity on the state occupying the premises, whether the injured person is a diplomatic agent, a member of the technical and administrative staff, a member of the domestic staff, or simply a visitor to the premises. That would apply whether the injury caused was physical, psychiatric or both. But a claim by an employee that her employer had discriminated against her and thereby caused her harm of various kinds including psychiatric injury falls squarely within the scheme of ss 4 and 16.

The waiver issue

35. Since, if the President and Coulson LJ agree, we will be restoring the decision of the ET that the Respondent cannot claim state immunity in respect of the Claimant's EU-derived employment claims, the question of whether there was a valid waiver of immunity by an email sent by the Embassy's solicitors Howard Kennedy in April 2019 is academic, and for that reason I would set aside Bourne J's order remitting that issue for re-hearing. But I should set out briefly my concerns about the Embassy's argument and, in particular the decision of this court in *Republic of Yemen v Aziz* [2005] ICR 1391; [2005] EWCA Civ 745 on which Mr Andrew Legg, who presented this part of the Embassy's case with great skill, relied.

36. At a preliminary hearing in the ET on 19 March 2019, the Embassy was ordered to make clear whether or not it agreed that the tribunal had jurisdiction over claims derived from the European Charter, following *Benkharbouche.* On 9 April 2019, a partner in Howard Kennedy LLP wrote to the ET in the following terms:

> "... we confirm [that] the Respondent does not consider it necessary to amend the grounds of resistance, but accepts the Tribunal has jurisdiction over claims which are derived from EU law (as reflected in paragraph 8(c) of the existing Grounds of Resistance)."

37. I note that on the same date an email in effectively identical terms was sent to the ET by the solicitors acting for the Embassy in *Royal Embassy of Saudi Arabia (Cultural Bureau) v Costatine* [2025] 1 WLR 1207; [2925] UKSC 9: see paragraph [11] of the judgment of Lord Lloyd-Jones JSC in that case.

38. Courts and tribunals proceed on the basis that where parties are represented by solicitors on the record the solicitors act with the authority of their clients. The Howard Kennedy email was, or appeared to be, a clear submission to the jurisdiction. By s 2(1) of the Act, a state is not immune from proceedings in respect of which it has submitted to the jurisdiction of the courts of the UK.

39. During a period of more than two years following this email, the solicitors acting for the Claimant and for the Respondent respectively took numerous steps in the tribunal proceedings. Again, this appeared to come within s 2(3)(b), whereby a state is deemed to have submitted if it has taken any step in the proceedings (subject to subsections (4) and (5), which do not appear to be relevant in the present case). Section 2(7) provides that the head of mission or the person performing the functions of the head of mission for the time being shall be deemed to have authority to submit on behalf of the state in respect of any proceedings.

40. On 4 August 2021, Howard Kennedy, still on record as the Embassy's solicitors, made an application that the final hearing in the ET be vacated. The application stated that "our client is reasserting state immunity in these proceedings and we are instructed to engage for this purpose only". A few days before the tribunal hearing, a stamped but unsigned document was sent to the tribunal as an attachment to a witness statement. It is set out in full at paragraph [82] of the ET judgment. It asserted that neither the Ambassador nor anyone working on his behalf had waived state immunity in these proceedings, and that the Ambassador was the only person authorised to do so. This

applied in 2019, the time the email was "purportedly sent by Howard Kennedy on behalf of the Royal Embassy of Saudi Arabia (Cultural Bureau)".

41. A witness, Ms Trabelsi, was called to give evidence in the ET stating that she had been the person at the Cultural Bureau communicating with the firm of Howard Kennedy; that she had not been in a position to give authority to submit to the jurisdiction; and that only the Ambassador could do that. EJ Brown decided that Ms Trabelsi *had* been authorised by the Ambassador or his deputy to give instructions to Howard Kennedy. She said:

> "I cannot believe that the Respondent submitted to the jurisdiction on 9 April 2019 and continued to do so for more than two years without the ambassador being aware of this and having agreed to it. I decide that the Respondent submitted to the jurisdiction in respect of the Claimant's EU law derived claims and the head of mission or his deputy authorised this."

42. Bourne J held that the ET failed to give sufficient weight to the unsigned statement and accordingly remitted the issue of waiver for re-hearing. But suppose for the moment that the ET had accepted the truth of what was said in the unsigned statement, namely that Howard Kennedy had never been authorised to submit to the jurisdiction. There was no reason for Ms Alhayali or her advisors to know that the Embassy's solicitors were acting without the authority of the head of mission. Nevertheless, Ms Darwin relied on the decision of this court in *Republic of Yemen v Aziz* [2005] ICR 1391 to say that the point could be raised at any time.

43. *Aziz* was an employment case where solicitors for the respondent state entered notice of appearance and served grounds of defence on the instructions of an embassy attaché. The ET held that the state had submitted to the jurisdiction. On appeal, the embassy lodged a statement from the attaché that he had misunderstood the nature of the proceedings and a statement from the Ambassador that he had not authorised the attaché to instruct the solicitors. This court (Pill, Sedley and Gage LJJ) held that the rule against adducing new evidence on appeal had to give way to the right of a state to claim on appeal that it had not submitted to the jurisdiction. (That part of the decision was expressly approved by the Supreme Court in *Costatine*. The Supreme Court did not, however, consider issues of waiver: again, see paragraph [11] of the judgment of Lord Lloyd-Jones JSC, referred to above.)

44. On waiver, Pill LJ said:

> "56. ... the fact that the step in proceedings alleged to constitute the waiver is taken by solicitors instructed by the Embassy does not conclude the matter. A solicitor acting without authority cannot waive the immunity. A solicitor's actions establish a waiver only if they have been authorized by the state, which includes authority exercised or conferred by the State's diplomatic mission. That would include a step authorized by the head of mission himself or herself. Authority may be confirmed on the solicitors either directly or in my view indirectly by a member of the mission authorized by the head of mission to do so.

> ...
>
> 58. I do not consider that the doctrine of ostensible authority applies either to the solicitors or to Mr Alkhader or that jurisdiction can be created by an estoppel. The state has protection against unauthorised action taken by a solicitor or member of the mission. The respondents were entitled, in the circumstances, to assert before the EAT that there had been no waiver of immunity under section 2, and hence no jurisdiction because the earlier steps in the proceedings were not steps taken by the state. As already noted, it is necessary to determine the factual issue arising in order to decide whether there has been a waiver under section 2. It would be open to the fact-finding tribunal to infer from all the circumstances that Mr Alkhader was acting with the authority of the head of mission in his dealings with the solicitor and to infer that, through Mr Alkhader, the solicitor was authorised to act as he did. If that happened, the state has taken the step or steps and is deemed to have submitted. The same process of reasoning applies to the steps taken after the employment tribunal's decision as to jurisdiction as to the steps before the decision. The court is entitled to expect that a state which does not wish to have its authorisation procedures enquired into by the fact-finding tribunal will put in place readily ascertainable procedures for waiver."

45. In the earlier case of *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438, cited in *Aziz,* Parker LJ had referred to:

> "… the rather alarming prospect that a foreign sovereign may allow proceedings to continue for years in this country before taking the point; but for my part I think that is a theoretical difficulty. I do not think any person, even a foreign sovereign, would be likely to be believed if in such an extreme case he were to come forward and assert that he had had no knowledge whatever of the proceedings."

46. It is worrying to think that a claimant could be led on for years and incur substantial costs in litigation, only to be told that solicitors who had apparently submitted to the jurisdiction on behalf of the respondent state had no authority to do so. But that is a matter for another case and another day.

Conclusion

47. I would allow Ms Alhayali's appeal, set aside the decision of Bourne J and restore the order of the ET.

Lord Justice Coulson

48. I agree that, for the reasons given by my Lord, Lord Justice Bean, Ms Alhayali's appeal should be allowed. I also agree that, although it does not affect the outcome of Ms Alhayali's appeal, the decision in *Aziz* requires reconsideration. In my view, a result that encourages a state ostensibly to submit to the jurisdiction of the court, then change

its mind either at or even during the trial, is contrary to the CPR, and particularly the overriding objective. It appears to stem from the failure in *Aziz* to distinguish sufficiently between *actual* submission to the jurisdiction under s.2(2) of the State Immunity Act 1978, on the one hand, and *deemed* submission under s.2(3), on the other. The latter depends on the court's objective analysis of the events after the making of the claim, expressly including whether "[the state] has taken any step in the proceedings". That reflects precisely the language of s.4 of the Arbitration Act 1950 (still in force at the time of the 1978 Act). On the face of it, this exercise has nothing to do with actual authority or intention; it is all about whether the act of the defendant impliedly affirms the institution of proceedings in court: see *Skopes Design Group Ltd v Homelife Nursing Ltd* (The Times 24 March 1988, CA)."

The President of the Family Division (Sir Andrew McFarlane)

49. I am also in agreement with the judgment of Lord Justice Bean, and I too share the concerns expressed about *Aziz* for the reasons given in that judgment and in the concurring judgment of my Lord, Lord Justice Coulson.