THE PRECARIOUS POSITION OF EMBASSY AND CONSULAR EMPLOYEES IN THE UNITED KINGDOM

I. INTRODUCTION

Governments, in their diplomatic and consular establishments abroad, typically employ a wide range of people apart from career diplomats and civil servants. Translators, secretaries, drivers, clerks, technical support staff, librarians and chefs are among the jobs that are commonly performed in embassies and consulates. Significantly, many of these subordinate positions are filled by nationals and residents of the forum State, that is, the country in which the embassy or consulate is located. (By contrast, diplomatic or senior policy positions in the organization will almost always be held by nationals of the sending State.) The sending State, particularly if it is a developing country, will often have little choice but to employ local residents to perform many routine tasks given the exorbitant cost of importing a labour force from abroad. From the perspective of the employee of a mission, the nature of the work to be performed may be little different from that carried out for its own government or even the private sector.

Nevertheless the United Kingdom, almost alone among developed countries, continues to deprive such employees of rights of redress in the event of *any* dispute arising in respect of their employment. So, for example, while a driver working for the British Government or for a corporation in the United Kingdom would be entitled to sue to recover a pension entitlement or for compensation arising from an unfair dismissal, the employee of a foreign government embassy or consulate has no such rights. To understand how and why this extraordinary and inequitable situation exists requires some discussion of the law of State immunity.

II. BACKGROUND—THE UK POSITION

State immunity is a doctrine of public international law whereby a government may not be sued before the courts of another country without its consent. Originally, State immunity was 'absolute', meaning that no action could be brought against a foreign State entity. However, by the 1970s customary international law had changed and a principle of 'restrictive immunity' was recognized where a foreign State may be sued in respect of transactions of a commercial or private law character but not in respect of sovereign or uniquely governmental activities.[1] In 1978, the United Kingdom enacted the State Immunity Act ('the Act') which broadly embodies the principle of restrictive immunity. Under the Act a foreign State is presumptively granted immunity from civil proceedings in UK courts unless one of the express exceptions is satisfied. An exception for employment contracts is provided in section 4(1). This paragraph provides that 'a State is not immune in respect of proceedings relating to a contract of employment between the State and an individual where the contract was made in the UK or work is to be wholly or partly performed there'.

This provision appears to make a generous grant of rights to employees of embassies or consulates but the clauses in the Act which follow significantly alter this

[1] See eg *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356 (CA).

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position. First, under section 4(2), an employee cannot bring suit under (1) if he or she is a national of the foreign State or a third State unless he or she was habitually resident in the UK at the time when the contract was made. This requirement is relaxed slightly in paragraph (3) in the case of employment at an 'office, agency or establishment maintained by the State in the UK for commercial purposes'. In such a case, any national may bring a claim unless the person was habitually resident in the foreign State at the time the contract was made.

At this point it might be considered that the exception still has wide operation in the case of employment at embassies and consulates. Even assuming such bodies are not considered to be established 'for commercial purposes' (which, at least in the case of consulates, may be an arguable point),[2] the only employees clearly excluded from protection are nationals of the employer State or those from a third State not habitually resident in the UK at the time the contract was made. Given that the majority of mission employees holding the nationality of the employer State would have diplomatic or consular rank or be members of the State's civil service, it seems reasonable that immunity should apply to bar employment suits by such persons in the forum. Entertaining such actions would likely involve an investigation into sensitive matters of government policy and internal administration and since the employees are not local residents or nationals, no protective interests of the forum State are engaged. By contrast, locally recruited nationals or residents of the forum State typically occupy the more menial or subordinate posts in the mission and therefore have a stronger case for the exercise of local jurisdiction.[3]

However, under section 16 the rights of all embassy and consular employees are effectively eviscerated. This section excludes from the scope of section 4 claims concerning the 'employment of members of a mission'[4] as defined in the 1961 Vienna Convention on Diplomatic Relations and the 1964 Vienna Convention on Consular Relations. Under Article 1 of these instruments, a member of a mission includes not only diplomatic or consular officers but also low-level administrative and technical personnel, regardless of their nationality.

It is notable that the provision fails to take account of the different nature of employment within an embassy or consulate, in particular the degree of proximity to, or involvement with, uniquely 'sovereign' activities. Hence, for example, a butler is equally disentitled to sue as a personal assistant to the ambassador even though both may have had vastly differing exposure to sensitive government material.

[2] As one writer has noted, 'consuls are in principle distinct in function and legal status from diplomatic agents . . . [and] are not accorded the [same] type of immunity . . . Consular functions are very varied indeed and include the protection of the interests of the sending state and its nationals [and] the development of economic and cultural relations . . .' I Brownlie *Principles of Public International Law* (5th edn OUP Oxford 1998) 364. In *Arab Republic of Egypt v Gamal-Eldin* [1996] 2 All ER 237 the UK Employment Appeal Tribunal rejected an argument that a government administered medical office was 'maintained for commercial purposes'. The object of the office was to treat patients who had been referred by the Government and all expenses of the office were borne by the foreign State (at 247).

[3] Australian Law Reform Commission, Report on Foreign State Immunity No 24 (1984) 55, 58–9; H Fox *The Law of State Immunity* (OUP Oxford 2002) 309.

[4] The Courts will treat as conclusive a statement from the Foreign and Commonwealth Office as to whether a place of employment forms part of the premises of the mission; see *Arab Republic of Egypt v Gamal-Eldin* [1996] 2 All ER 237, 245 (UKEAT); *Glinoer v Greek School of London* [1998] UKEAT 1003–98–2004 (20 Apr 1998).

Further, the provision also draws no distinction between the types of claim that may be brought by an employee and in doing so again fails to recognize the varying impact on a State's sovereignty posed by different claims. For example, a claim by an employee for unpaid wages or for a redundancy payment may involve the court simply having to construe the parties' contract or assess the relevant statutory schedule. There need be no investigation into the circumstances of the claimant's work at all. A claim for reinstatement by contrast, based on an allegation of unfair dismissal or harassment obviously stands in a different category. In such a case, a forum State court may be required to inquire into the practices and procedures of staff organization of the foreign State and even order the State to reappoint the employee. By contrast, a claim for compensation (as opposed to reinstatement) for unfair dismissal or discrimination likely falls somewhere in the middle of the spectrum. The point to note, therefore, is that the UK Act appears to exclude all three types of relief in blanket fashion even though the impact on the foreign State's sovereignty in each case (and hence the UK Government's interest in comity) is not uniform.

Given that one of the often cited virtues of the common law is its sensitivity to individual fact patterns, it seems curious that the UK Parliament has enacted a provision which gives courts no flexibility or discretion whatsoever. The contrast with the doctrine of forum non conveniens, where an English court will only stay its proceedings where it is satisfied that a forum exists 'in which the case may be tried more suitably for the interests of all the parties and the ends of justice'[5] could not be more acute. Under the Act a mission employee's claim against a foreign State is dismissed perfunctorily without any regard for the circumstances of the claim or whether an action may even be brought in the courts of the foreign State itself. The consequence is that a foreign State employer is in a disproportionately privileged legal position compared to other defendants in UK litigation. Such a rule may of course be more defensible if it were an implementation of principles of public international law. However, as will be discussed later, it seems that the UK position is the harshest in the developed world as far as embassy and consulate employees are concerned and is therefore likely inconsistent with the international law standard. Moreover, and perhaps surprisingly, the Act is even less sympathetic to mission employees than the common law that preceded it.

An embassy employment case decided under the pre-statutory law of immunity was *Sengupta v Republic of India*.[6] This case concerned an action for unfair dismissal but it is not clear from the report whether the claimant was seeking reinstatement or compensation. In any case the Court held that, as an Indian national employed as a low-grade clerical officer at the Indian Embassy, he was barred by immunity from suing his employer.

The Court reached this conclusion for two specific reasons. First, the Court found that although a contract of employment by itself was a private act for which immunity should not be available, a contract to work in a diplomatic mission at however lowly a level was 'a contract to participate in the public acts of the foreign sovereign'. The critical question was whether the employee was 'carrying out the work of the mission', which would mean that virtually all administrative and technical staff would be included. However, the Court did admit that a person engaged in 'providing the physical environment in which the diplomatic mission operates' (eg a boiler operator or

[5] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 476.
[6] [1983] ICR 221 (UKEAT).

gardener) may be entitled to claim presumably on the basis that the activities of such persons are peripheral to the work of the mission.[7]

A comment should be made at this point that no such distinction can be made in proceedings under the Act—all persons employed at embassies or consulates are precluded from suing. As was noted in a recent decision,[8] the immunity under the Act also extends to 'service staff of the Mission', which would include boiler maintenance people and cleaners. In this respect, the *Sengupta* case imposes a more lenient standard in employment cases than the Act by recognizing an additional category of potential claimants.

The second basis of the decision in *Sengupta* arose from the nature of the employee's claim. The Court noted that the applicant's suit was for unfair dismissal and that any adjudication of such a claim would 'very likely' involve an investigation by the tribunal into the internal management of the embassy by the foreign State and would consequently amount to 'an interference with its sovereign functions'.[9]

Hence emphasis was laid on the particular action of the employee—seemingly had the claim been for a pension entitlement or for incorrect salary payments, there would have been less scope to argue that the claim constituted an intrusion on the foreign State's sovereignty. However, by comparison, under the Act, again no such line of argument is possible: all consular and embassy employee claims without exception are barred.

It seems therefore rather ironic that the Act, which was generally intended to liberalize the rules on State immunity in keeping with the liberalization of rules of customary international law, seems to have had the opposite effect, at least in the case of employment contracts.[10] However, it may be argued that even the position at common law, whereby unfair dismissal suits are barred, is too restrictive in its recognition of employee rights. It is true that entertaining such actions may involve some scrutiny of a foreign government's labour practices and impact on its capacity to organise its embassies and consulates. Yet, at least in the case of subordinate employees with limited access to sensitive material, these concerns are likely to be no greater than that confronting any other employer being sued. Moreover, such concerns have to be weighed against the interest of the aggrieved employee seeking redress and given that the current position provides no rights to such persons, it seems that the balance has been inappropriately struck. It should be remembered that from the point of view of the British employee who has been unfairly dismissed, the identity of the employer is likely irrelevant; what is of concern is the injury suffered and the redress available. If an employee performing essentially the same tasks but working for the British Government or the private sector is able to recover then it seems highly discriminatory to deprive an employee of a foreign State at an embassy or consulate of the same protection (or indeed *any* protection).

[7] [1983] ICR 221, 229.

[8] *Baz v Government of Kuwait* [2000] UKEAT 1234_99_1907 (19 July 2000) para 19.

[9] [1983] ICR 221, 229.

[10] Interestingly, the Court of Appeal has stated that the Act did not involve 'a different approach to sovereign immunity from that which has developed under the common law'; *Government of the Kingdom of Saudi Arabia v Nasser* unreported, 14 Nov 2000 para 15. While this observation may have been true on the facts of that case it is questionable as a general proposition given the differences between the Act and the common law referred to above.

This conclusion is supported by the fact that in other areas of the law it is recognized that employees generally are in a weaker bargaining position relative to employers and need special protection. Hence, for example, under the Brussels I Regulation[11] an employee is granted the right to sue his or her employer either in the country where the employee habitually carried out his or her work or the employer's country of domicile.[12] Additionally, any agreement conferring exclusive jurisdiction on the courts of the employer's domicile in an employment contract is null and void under the Regulation unless it was entered into after the dispute has arisen.[13] There is therefore clear recognition in other areas of English and European law of the need to protect employees' rights in adjudication against foreign-based defendants, in particular, to allow them access to their local courts.

III. DECISIONS UNDER THE UK ACT

It is important now to examine the decisions on consular and embassy employment under the UK Act to see if the operation of the legislation has in fact caused the injustice to employees suggested by its terms.

Almost all the cases have involved actions for unfair dismissal where the claimant has sought compensation rather than reinstatement. In all cases the claimants have been employed in low-level or subordinate positions in a mission, for example, drivers, interpreters, accountants, secretaries, and administrative assistants, and have held either British nationality or residency and appear to have been locally recruited. No case has been brought by a diplomatic or consular officer. In only one reported decision has a foreign State waived its entitlement to immunity and then, only in respect of part of the dispute, which suggests that employees can have little expectation that this will occur often.[14]

A variety of arguments have been raised by UK citizen or permanent resident employees to try to circumvent the exclusion of jurisdiction in section 16, but all have been unsuccessful. For example, it has been argued that the expression 'members of the mission' in section 16(1)(a) should be read to apply only to personnel holding diplomatic rank, entitled to diplomatic immunity or 'senior staff' closely involved in the running of the embassy or consulate, rather than to encompass administrative and technical staff as well. Yet given the express inclusion of such staff within the definition of 'members of the mission' in the Vienna Conventions, courts have consistently stated that all categories of occupation, whether diplomatic, consular, administrative, technical or service staff are caught on the basis that such persons are engaged in the 'running of the mission'.[15]

[11] Council Regulation (EC) no 44/2001 OJ L 12 16 Jan 2001.

[12] Art 19.

[13] Art 21.

[14] *Yendall v Commonwealth of Australia* 107 ILR 591 (UKEAT 11 Oct 1984). One judge recently noted that waiver of immunity is 'by no means a foregone conclusion, especially in politically sensitive employment cases'; *Matthews v Ministry of Defence* [2003] 1 AC 1163, 1208 (Lord Walker of Gestingthorpe).

[15] *Government of the Kingdom of Saudi Arabia v Nasser*, unreported, CA, 14 Nov 2000 para 15; *Al-Kadhimi v Government of the Kingdom of Saudi Arabia* [2003] EWCA Civ 1689 (interpreter, UK permanent resident); *Baz v Government of Kuwait* [2000] UKEAT 1234–99–1907 (19 July 2000) (patient coordinator, UK national/permanent resident); *United Arab Emirates v*

On a number of occasions, courts have expressed their frustration with this abrogation of employee rights and sympathy for the claimant, particularly where he or she is a UK national or resident. For example, the Court of Appeal has noted that the effect of section 16(1)(a) is 'almost completely to emasculate [the denial of immunity] in section 4'[16] and that 'a locally employed person of British nationality should be able to enjoy the rights and protection afforded by the Employment Protection (Consolidation) Act 1978'.[17] The Court therefore appears to suggest that the UK Government's interest in comity and good relations with foreign States has been excessively favoured at the expense of its interest in providing local employees with rights of redress.

Another argument raised by claimants has been that the foreign State has submitted to the jurisdiction by distributing information (often in the form of solicitors' letters) to the employee prior to entering the contract that he or she would have rights of action before English employment tribunals under English law. The problem for claimants in this situation has been the strict wording of section 2(2) of the Act and its requirement for a submission to jurisdiction by the foreign State. There must be a 'prior written agreement' between the parties in which the parties expressly confer jurisdiction on the English courts and an English choice of law clause is inadequate.[18]

While courts have found it difficult to find an agreement between the employee and the foreign State submitting to local jurisdiction, they have nevertheless found in a number of cases that claimants have been misled as to their legal status prior to entering their employment contract. Unfortunately neither the Act nor the general law seems to provide any mechanism for granting an employee redress in this situation, despite the clear justice of the case.

Very recently, one narrow exception to section 16 appears to have been recognized by the UK courts. In *Military Affairs Office of the Embassy of the State of Kuwait v Caramba-Coker*[19] the EAT accepted that a claim for racial or other discrimination in which personal injury in the form of physical or mental consequences is pleaded as opposed to injury to feelings is actionable. The basis of such a claim is section 5 of the Act which removes immunity for personal injury caused by an act in the UK.[20] However such an exception, given its narrow definition, is likely to be available in relatively few mission employment cases.

Another recent attempt by claimants to evade the strictures of section 16 of the Act has been to argue that the provision is inconsistent with other international instruments binding upon the United Kingdom, in particular the Equal Treatment Directive ('the Directive') and the European Convention on Human Rights ('the ECHR').

In relation to the Directive[21] the UK courts have taken the view that because the UK

Abdelghafar [1995] UKEAT 768–94–1007 (10 July 1995) (accountant and interpreter, both UK permanent residents); *McLaren v Bahamas High Commission* [1994] UKEAT 740–94–2410 (24 Oct 1994) (receptionist, UK permanent resident).

[16] *Ahmed v Kingdom of Saudi Arabia* [1996] 2 All ER 248, 256 (CA per Hutchison LJ).

[17] *Ahmed v Kingdom of Saudi Arabia* [1996] 2 All ER 248, 252 (CA per Peter Gibson LJ).

[18] *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] 2 All ER 248, 254-5 (CA); *Mills v Embassy of the United States of America*, unreported, CA, 9 Nov 2000; *Al-Kadhimi v Government of the Kingdom of Saudi Arabia* [2003] EWCA Civ 1689.

[19] [2003] UKEAT 1054–02–1004 (10 Apr 2003).

[20] See, for further support of this argument, *Government of the State of Kuwait v Fevzi* [1999] EWCA Civ 1507 where it was noted that a claim for personal injury under s 5 may be 'a means of avoiding [the] immunity' in s 16 (Ward LJ).

[21] European Communities Council Directive of 9 Feb 1976 76/207/EEC.

State Immunity Act is an implementation of the 1972 European Convention on State Immunity ('the ECSI'), another 'Community instrument', there can be no conflict between the Act and the Directive, presumably on the basis that the ECSI overrides the Directive in European law.[22] This observation is erroneous for at least two reasons. First, the ECSI is not a Community instrument but is a treaty concluded under the auspices of the Council of Europe and so does not form part of EU law (unlike the Directive). Secondly, and more importantly, there is serious doubt as to whether section 16 of the Act is in fact an implementation in the UK of the ECSI at all.

The ECSI was ratified by the United Kingdom in 1972 and came into effect on 11 June 1976. Under Article 5 of the Convention there is a general exclusion of immunity in employment contracts where the work is to be performed in the forum and the employee is a national or habitual resident of the forum State. Under Article 32 it is provided that 'nothing in the 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.' Article 32 therefore clearly preserves the rules of diplomatic and consular immunity which are found in the Vienna Conventions on Diplomatic and Consular Relations, that is, the rules governing when an employee of a foreign State may be personally sued, arrested or prosecuted in a forum State. The article appears to say nothing, on the other hand, about the rules of *state immunity* that may apply to claims *by* employees of diplomatic and consular missions against their foreign State employer. Section 16 of the Act, in laying down a rule of absolute immunity in such cases, therefore derives little support from the ECSI.

Assuming that section 16 is not an implementation of the ECSI, the issue arises as to whether the provision, by its imposition of absolute immunity in sex discrimination cases, is inconsistent with the terms of the Directive. The Directive requires Member States to implement the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions. Since there is no express exclusion of foreign State employers from the Directive, there is scope for argument that its provisions apply to such entities with the result that a statute of a Member State that imposed absolute immunity in sex discrimination actions would be inconsistent with European Union law.

In relation to the ECHR, the key provision is Article 6, which states that 'everyone is entitled to a public hearing by a tribunal in the determination of its civil rights'. This article has been interpreted to include a right to access to a Member State's courts.[23] While it had been argued in a number of cases that section 16 in its provision of absolute immunity in consular and employment suits is inconsistent with Article 6,[24] the issue was not squarely addressed until the European Court of Human Rights (ECtHR) decision in *Fogarty v The United Kingdom*.[25]

Fogarty concerned an Irish national who was employed as an administrative assistant at the United States Embassy in London in the Foreign Broadcasting Information Service. She was dismissed from employment and subsequently won compensation for

[22] *Government of the State of Kuwait v Fevzi* [1999] EWCA Civ 1507; *Baz v Government of the State of Kuwait* [2000] UKEAT 1234–99–1907 (19 July 2000) para 15.

[23] *Golder v UK* (1975) 57 ILR 200 (ECtHR).

[24] See eg *Jayetilleke v Bahamas* [1994] UKEAT 741–94–1412 (14 Dec 1994). The argument was rejected on the basis that, at that time, the Convention did not form part of English domestic law.

[25] (2002) 34 EHRR 12 (ECtHR).

sex discrimination in the UK courts. The United States waived its immunity in this litigation. Fogarty then applied for a further position at the Embassy for which she was rejected, a decision that she again challenged in the UK courts on the grounds of sex discrimination. On this occasion, however, the United States claimed immunity under section 16 of the Act. The claimant then brought an action in the ECtHR against the United Kingdom, arguing that the immunity in section 16 of the Act violated the employee's right of access to a court under Article 6.

The ECtHR rejected the argument. In broad terms, it found that where the grant of immunity to a foreign State is consistent with the principles of public international law, there is no violation of Article 6. In examining whether the grant of immunity in section 16 was consistent with customary international law, the court acknowledged that there was a general trend towards limiting immunity in employment-related disputes. However, national State practice was much more divided where the action involved employment at a diplomatic mission: while some States granted immunity in respect of all mission employee claims, others granted it only in respect of acts by senior staff. It was therefore not possible to conclude that the UK position was so clearly aberrant as to be in breach of international law.[26]

Secondly, the Court noted that questions relating to the *recruitment* of staff to missions may by their very nature involve sensitive and confidential issues relating to the diplomatic and organizational policy of a foreign State. The Court found that there was no international trend towards 'relaxation of the rule of State Immunity' in the context of recruitment to foreign missions.[27]

A number of comments may be made about the Court's decision. First, on the issue that recruitment or reinstatement questions remain barred by immunity in the majority of State practice, the Court is undoubtedly correct[28] although it must be said that such cases have arisen very rarely. Reinstatement claims have likely been few in number given the natural reluctance of employees to return to a place of employment in which they have been the subject of a dispute. In the case of recruitment it would be likely hard for a prospective employee to prove discrimination given the particular needs of a foreign State in staffing its embassies and consulates and its possible preference for certain persons over others, for example, for security reasons. Given these obstacles it is not surprising that such cases have been scarce. This paper is instead concerned with the more common type of employee action, such as unfair dismissal, where the position of the mission worker is arguably closer to that of employees in other areas.

Given the relative paucity of recruitment and reinstatement claims the *Fogarty* case was perhaps not the best 'vehicle' to challenge the consistency of section 16 with Article 6. On this issue, what is interesting is the more general statement by the ECtHR above regarding the status of mission employees, that is, the claim that there is no clear rule in international law that immunity does not apply in such cases. The Court, relying in part on an article written in 1997 by the present author,[29] found that a division

[26] *Fogarty v The United Kingdom* (2002) 34 EHRR 12 para 37.

[27] ibid para 38.

[28] Fox *The Law of State Immunity* 298, 534. Note that the remedy of reinstatement is expressly excluded from the Australian immunity legislation because of the perceived greater interference with a foreign State's organization and administration (Foreign States Immunities Act 1985 (Cth) s 29(2)).

[29] R Garnett 'State Immunity in Employment Matters' (1997) 46 ICLQ 81 cited by the Court at para 29.

of opinion existed in State practice as regards mission employment. Some countries imposed immunity in respect of all employee claims whereas others limited its scope to actions involving persons in senior posts.

IV. PRACTICE IN OTHER COUNTRIES

In the 1997 article, it was noted that a number of common law countries (for example, Pakistan and South Africa) had followed the English model by enacting identical versions of the UK State Immunity Act.[30] However, it is suggested that the weight to be attached to this practice in assessing the customary law position is limited. First of all, those countries have produced no reported judicial decisions in the area of embassy and consular employment either before or since their legislation. Secondly, their adoption of the UK provisions appeared to be a largely mechanical process, with little evidence of independent consideration of the issues.

In the article it was also noted[31] that common law countries such as New Zealand[32] and Ireland[33] had, in decisions of their highest courts, adopted an approach very similar to that taken by the EAT in *Sengupta*. Both cases involved actions for unfair dismissal by subordinate employees (a driver and a secretary) of an embassy. While the uniquely sovereign place of employment was emphasized as a factor in the decision to uphold immunity, it was also noted that, like *Sengupta*, the action in each case was for unfair dismissal. Such a claim necessarily implicates the sovereignty of a foreign State more acutely, particularly where the employees held positions of trust and confidentiality (as both were found to do here). As was noted by the New Zealand Court, 'the pursuit of an unjustifiable dismissal claim in the courts of New Zealand would be likely to involve exploring how the office was run. To expose the Crown to that risk would be an intrusion on the sovereign performance of those responsibilities'.[34] Presumably then a claim that focused entirely on the economic aspects of the employment relationship, such as for unpaid wages or a statutory pension or redundancy entitlement would be treated differently.[35]

In the 1997 article it was also noted that one civil law country, Germany, observed a policy of absolute immunity in respect of mission employment claims.[36] More recent practice reveals that this approach has been maintained, at least in respect of unfair dismissal actions.[37] It is not clear however whether Germany would exercise jurisdiction over an employee suit that related to wholly monetary issues such as a right to a pension as opposed to claims which may require an investigation into the organizational policy and administration of the foreign State. As was also mentioned in the article, Italy observes such a distinction with claims for wage increases, for example, being

[30] ibid 88.
[31] ibid 88–9.
[32] *Government of Pitcairn v Sutton* [1995] 1 NZLR 426 (NZCA).
[33] *Government of Canada v Employment Appeals Tribunal* [1992] IR 484.
[34] *Government of Pitcairn v Sutton* [1995] 1 NZLR 426, 437.
[35] Since 1997 there have been no further New Zealand decisions although in Ireland the approach taken by the Supreme Court in 1992 has been maintained; see *Geraghty v Embassy of Mexico* [1998] ELR 310 (Irish Employment Appeals Tribunal) and *O'Shea v The Italian Embassy* (Irish Office of the Director of Equality Investigations 20 Dec 2001) available at <http://www.odei.ie/2001/DEC-E2001.040.pdf>.
[36] Garnett, above n 29, 90.
[37] *X v Argentina* 114 ILR 502 (Federal Labour Court 3 July 1996); *Muller v United States of America* 114 ILR 513 (Regional Labour Court of Hesse 11 May 1998).

allowed to be brought, but not complaints of unfair dismissal.[38] This approach has been followed in recent practice.[39]

This discussion is important because it shows that, even in countries which purportedly impose absolute immunity in mission disputes, the reality is that it has only been in the context of unfair dismissal actions by employees in positions of trust and confidentiality that immunity has been confidently and clearly asserted. Other types of employees and other types of actions may not be so excluded, unlike the position under the UK legislation.

In the 1997 article it was also noted that a large number of countries now adopt a broad distinction between senior employees or diplomatic and consular staff on the one hand and subordinate mission employees on the other for the purposes of granting immunity to foreign States, at least where the employee is a local national or resident. States in this category include Austria, Australia, Belgium, Canada, Greece, The Netherlands, Spain, Switzerland, and the United States.[40] The practice of these countries since 1997 has generally been consistent with this approach.

For example, in Australia a gardener at the Kuwait Embassy[41] and a secretary/typist at the Indian Consulate,[42] both Australian permanent residents, were permitted to sue for damages for unfair dismissal. In Canada, a US citizen employed as an administrative assistant at the Embassy of the Holy See was held entitled to sue for moneys owed under her employment contract but not for unfair dismissal.[43] Such a claim was barred because it would involve an inquiry into the foreign State's personnel management practices at the embassy and its sovereign right 'to control and regulate its own workforce'.[44] Such an analysis is similar to the Italian approach above, in distinguishing purely economic and monetary claims from those which require an investigation into the conduct or labour practices of the State employer, with the latter perceived as having a greater impact on sovereignty.

However, the court in the *Greco* case may have exaggerated the degree of harm to the foreign State of entertaining an unfair dismissal claim given the relatively junior position held by the employee. Perhaps also it was the employee's lack of Canadian permanent residency or nationality in *Greco* that may have influenced the decision to uphold immunity. In this regard, it is notable that in a recent decision of a Quebec court an administrative assistant at the Moroccan Consulate was allowed to sue for unfair dismissal where she was a Canadian permanent resident and her work did not relate to sovereign functions.[45] Hence, while the Canadian position remains supportive of mission employees' right to sue, the precise limits are unresolved. It seems clear though, that where a sacked consul-general is suing for unfair dismissal, Canadian courts will unhesitatingly recognize immunity.[46]

[38] Garnett, above n 29, 98–100.
[39] *Canada v Cargnello* 114 ILR 559 (Court of Cassation 20 Apr 1998).
[40] Garnett, above n 29, 90–8.
[41] *Robinson v Kuwait Liaison Office* (1997) 145 ALR 68 (Industrial Relations Court of Australia).
[42] *Thomas and Consulate General of India* [2002] NSWIR Comm 24 (New South Wales Industrial Relations Commission 22 Feb 2002).
[43] *Greco v Holy See* (State of the Vatican City), unreported, Ontario Superior Court of Justice, Charbonneau J, 17 Nov 2000.
[44] ibid para 6.
[45] *El-Ansari c Maroc*, unreported, Court of Appeal of Quebec, 1 Oct 2003.
[46] *Butcher v Saint Lucia* 79 ACWS (3d) 815 (Ontario Court of Justice General Division 13

Swiss decisions since 1997 have confirmed that its courts continue to allow suits to be brought by locally recruited members of the administrative, technical or service staff of the mission[47] while Dutch courts still require a mission employee to have local citizenship or permanent residence at the time of entering the contract before allowing him or her to sue.[48] In the United States it has been recently confirmed that only employees in the diplomatic or civil service of the employer State are barred by immunity from suing but not persons engaged as 'laborers, clerical staff or public relations or marketing agents'.[49]

It is also significant to note that the group of countries favouring restrictive immunity in mission employment disputes has expanded since 1997 to include both France and Portugal, nation States which previously were reluctant to remove immunity from foreign State employers of consular and embassy staff. This approach therefore now has strong support among States and arguably represents the customary international law position.

In France, in a series of cases, a number of embassy employees including a nurse/medical secretary,[50] an assistant in the media section[51] and a caretaker[52] were all allowed by the French Cour de Cassation to bring suits for damages for wrongful dismissal on the basis that they 'had not been charged with any special responsibility for the performance of the public service of the Embassy'. In other words, because of their subordinate role and their functions, it could not be said that investigating the acts which led to their dismissal would implicate the sovereignty of the foreign State. Such an approach shows much greater concern for the welfare of the individual employee and recognizes that its rights have to be accommodated along with those of the foreign State. French scholars have strongly supported this approach.[53]

Portugal also very recently abandoned absolute immunity in mission employment disputes in favour of a restrictive test based on the position and duties of the employee. In a decision in 1984, the Portuguese Supreme Court refused to allow a Portuguese citizen employed as an administrative assistant at the Brazilian Embassy to sue for wrong-

May 1998) affirmed 87 ACWS (3d) 800 (Ontario Court of Appeal 15 Apr 1999). The Court noted that 'a Consul General represents a State in the same way as an Ambassador' and it would be a serious intrusion on the State's sovereignty if a local court were to adjudicate on the right of a State to determine who will be in charge of its missions.

[47] *Andora v Venezuela* [1998] Jahrbuch des Schweizerischen Arbeitsrechts 298 (Swiss Federal Tribunal 16 May 1997); *Ruiz v Nicaragua* (Swiss Federal Tribunal 22 Nov 2001), *A v Republic of X* (Swiss Federal Tribunal 17 Jan 2003) both available at <http://www.bger.ch> and *Driver X v Kuwait* [2003] Jahrbuch des Schweizerischen Arbeitsrechts 468 (Labour Court of Geneva 5 Dec 2002). I am grateful to Mr Werner Gloor, President of the Geneva Labour Court for these references.

[48] *Arias v Venezuela* (2000) 31 Netherlands Yearbook of International Law 262 (District Court of the Hague 4 Feb 1998).

[49] *El-Hadad v Embassy of the United Arab Emirates* 216 F 3d 29, 33-4 (DC Cir 2000); *Ferdman v Consulate General of Israel* 1999 US Dist LEXIS 1775 (ND Ill 17 Feb 1999). For a detailed discussion of the United States position see Garnett 'The Perils of Working for a Foreign Government: Foreign Sovereign Immunity and Employment' (1998) 29 California Western International Law Journal 133.

[50] *Barrandon v USA* 116 ILR 622 (Court of Cassation 10 Nov 1998).

[51] *Coco v State of Argentina* 113 ILR 491 (Court of Cassation 2 Apr 1996)

[52] *Saignie v Embassy of Japan* 113 ILR 492 (Court of Cassation 11 Feb 1997).

[53] See, eg, I Pingel 'Immunité de juridiction et contrat de travail: du nouveau' [2003] Journal de Droit International 1115.

ful dismissal[54] but in 2002, the Court changed its position allowing a housekeeper at the Israeli Embassy to seek damages for termination of her employment contract.[55] In its judgment, the Court relied strongly on the French authorities mentioned above.

Hence the trend in national State practice, at least in developed countries, does appear to be towards relaxing immunity in consular and embassy employment cases. This observation casts some doubt on the correctness of the ECtHR's statement in *Fogarty* that section 16 of the UK Act is consistent with international law. Indeed, by taking this view, the Court is possibly suggesting that the result in *Fogarty* would have been the same even if the action had been, for example, compensation for unfair dismissal or for unpaid wages or a redundancy entitlement. Such an approach effectively imposes absolute immunity as the norm in mission employment disputes which is both highly regrettable and inaccurate as a statement of the customary international law position.[56]

V. PRACTICE OF INTERNATIONAL ORGANIZATIONS

There has been some practice by international organizations in the field of State immunity and mission employment which was noted in the 1997 article including a set of draft articles prepared by the International Law Commission.[57] The practice is not particularly helpful as the text is often vaguely worded and capable of multiple and conflicting interpretations due to the differences of view among Member States. Since 1997 the United Nations has formed a committee to draft a convention on State immunity and the most recent report of the committee was released in March 2004.[58] Unfortunately, the lack of clarity and precision noticeable in earlier international instruments is evident in this draft as well.

Article 11 is the relevant provision for contracts of employment but is ambiguous on the status of embassy and consular employment disputes. While Article 11(1) provides for a general exception to immunity 'in a proceeding which relates to a contract of employment' for work performed in the territory of the forum State, immunity is then restored in a range of situations in paragraph (2). For example, immunity applies where the employee is a diplomatic agent or consular officer ((b)(i) and (ii)) and where 'the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual' (c).

Neither of these exceptions is controversial in international law since, as was noted above, very few, if any, nation States would admit such claims in their current practice.

[54] *Brazilian Embassy Employment Case* 116 ILR 625 (11 May 1984).

[55] *X v State of Israel*, 13 Nov 2002 extracted in Pingel n 53 above, 1127–9.

[56] It is interesting to note that in UK Government instructions to its missions abroad, mission heads are specifically requested to consider, when deciding whether to assert immunity from foreign jurisdiction in an employment suit, the position of the employee and in particular, whether he or she performs a 'public function'. See Fox 'Employment Contracts As an Exception to State Immunity: Is All Public Service Immune?' (1995) 66 British Yearbook of International Law 97, 167–8. Hence, there is some UK state practice in support of the distinction between superior and inferior mission personnel for the purposes of state immunity claims.

[57] (1991) II (2) YBILC 13.

[58] United Nations, Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property 1-5 March 2004 General Assembly Official Records Fifty-Ninth Session Supplement No. 22 (A/59/22) available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/275/41/PDF/N0427541.pdf>.

What are more contentious are subparagraphs (a) and (d). According to (a), immunity will apply if 'the employee has been recruited to perform particular functions in the exercise of governmental authority'. The application of this provision to mission employment is not immediately clear but a similar text in the ILC Draft Articles was interpreted to preclude suit by all persons 'entrusted with functions related to State security or basic interests of the State'.[59] Apart from persons in senior positions holding diplomatic or consular rank, 'private secretaries, code clerks, interpreters and translators'[60] at embassies and consulates were to be denied rights of action, although it is not clear whether all *types* of employee claims were to be covered. In particular, it is uncertain whether a purely economic claim such as for redundancy or insurance benefits would be permissible. Nevertheless, it is possible that all claims could be embraced by Article 11(2)(a), which would mean that absolute immunity would apply to mission employment disputes. In the absence of commentary on the Draft Convention, it is perhaps safest to say at this stage that no clear conclusions can be drawn.

Article 11(2)(d) also has the potential to impact upon the rights of mission employees. Under this provision, immunity is granted where 'the subject of the proceeding is the dismissal or termination of employment of an individual and as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State'. Such a provision effectively grants to the defendant employer State a broad discretion to characterize any unfair dismissal claim as one which interferes with its security interests and so remove the matter from the forum State's jurisdiction. In practical terms, again this provision has the potential of conferring absolute immunity in mission disputes, since the majority of such claims are unfair dismissal pleas.

Overall, the UN Draft Convention is disappointing in its failure to explicitly recognize the rights of mission employees, although its provisions may be broad and vague enough to offer some protection. It is odd though that States have been so reluctant to grant the same rights of action to persons employed at missions and consulates as they offer to other locally recruited employees within their territories. In addition, while the forum State's concern for good relations with foreign States is a legitimate and important interest, the irony is that it is the foreign States themselves that may suffer from the absolute immunity approach. It is possible that they may find it more difficult to recruit staff to their missions as prospective employees become aware of their diminished rights. While States could consider staffing their missions entirely with their own nationals, such an approach would be uneconomic for most countries.

VI. ALTERNATIVE FORUMS IN WHICH TO SUE?

A response occasionally made by foreign States to the suggestion that the imposition of State immunity is unjust for claimants is that the individual can always bring his or her action in the courts of the foreign State itself. Obviously such an argument ignores the very practical difficulties in terms of costs and gathering evidence that the average subordinate mission employee with local residence would face in bringing suit abroad. Secondly, the courts of some countries may not be as independent from government as would be expected in a democratic system and may consequently be unreceptive (if not hostile) to a claim by a foreign employee against their government.

[59] (1991) II (2) YBILC 13, 42–3. [60] ibid.

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However, a recent decision of the UK EAT shows that a UK court at least, may recognize limited rights of action for persons employed by the UK Government in missions abroad where the employee is a UK national and there is a risk that he or she would be barred by immunity in the courts of the foreign State. In *Bryant v The Foreign and Commonwealth Office*,[61] a British citizen employed at the British Embassy in Rome 'in a position of responsibility in respect of police and judicial liaison' was entitled to sue in England for breach of her employment contract which was governed by Italian law. However, she had no rights under UK employment legislation[62] because their sphere of operation was strictly territorial, that is, they only applied to employment taking place within the UK.

It should not be assumed from this decision, however, that UK nationals or residents employed in missions *in the UK* will have the resources or the opportunity to seek similar relief in the courts of other countries or that such courts would be willing to entertain such actions. Hence, this option is unlikely to be available in many cases.

VII. INDEPENDENT CONTRACTORS COMPARED

The injustice of the current position for UK-based employees is also borne out when the approach taken towards independent contractors is considered. Under the Act an independent contractor who provides services to an embassy or consulate will be entitled to sue the foreign State in the event of payment not being provided for the services or any other breach of contract. Under section 3(1) of the Act a State is not immune 'as respects proceedings relating to a commercial transaction entered into by the State' which is defined to include the 'supply of services' to such State.[63] While contractors would include persons retained to perform tasks such as repairs to the mission, they would also likely embrace consultants and advisers on sensitive government matters. It seems extraordinary that all such persons, without restriction, can sue their foreign State contracting partner yet all mission *employees*, regardless of rank or function, are denied such rights.

VIII. CONCLUSION

While the international law trend appears in favour of loosening immunity in the majority of mission employment disputes, the UK position remains excessively protective of foreign State employer interests. It is frankly hard to understand why the British Government places so little weight on protecting its own local labour force as against the need for comity and good relations with foreign States. Moreover, it could be argued that the current approach will ultimately harm foreign States themselves by deterring potential British applicants for mission positions. It is not clear whether the existing law has as yet had this effect but it is hoped that by publicizing the plight of such employees, both the British Government and foreign States with missions in the UK will recognize that it is in their interest to change the current regime.

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[61] [2003] UKEAT 174–02–1003 (10 Mar 2003).
[62] Sex Discrimination Act 1975 (UK); Equal Pay Act 1970 (UK); Employment Rights Act 1996 (UK); Employment Tribunals Act 1996 (UK).
[63] State Immunity Act 1978 (UK) s 3(3)(a).

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