Cambridge Law Journal, **73(1)**, March 2014, pp. 1–37

THE
CAMBRIDGE LAW JOURNAL

VOLUME 73, PART 1 MARCH 2014

CASE AND COMMENT

THE STATE IMMUNITY ACT AND THE RIGHT OF ACCESS TO A COURT

IN the joined appeals of *Benkharbouche v Embassy of the Republic of Sudan* and *Janah v Embassy of the Republic of Libya* UKEAT/0401/12/GE, UKEAT/0020/13/GE (4 October 2013), the President of the Employment Appeals Tribunal (EAT) held that the application of sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 (SIA) in two Employment Tribunal cases brought by embassy employees violated the right of access to a court guaranteed by the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights. To the extent that the claims involved EU law and availability of immunity violated the EU Charter, Langstaff J. held that both sections of the SIA should not be applied.

Section 1 of the SIA provides that states are immune from the jurisdiction of UK courts, but section 4(1) removes that immunity for proceedings relating to a contract of employment that is made or is due to be performed in the UK. Subparagraph 4(2) contains exceptions to the exclusion of immunity in 4(1), including where, if at the time the contract was entered into, the employee was neither a national of the UK nor habitually resident in the UK. Section 16(1)(a) SIA also provides that the exception to immunity in section 4(1) does not apply to proceedings concerning the employment of the members of a diplomatic mission, which is defined by the Vienna Convention on Diplomatic Relations as including the domestic staff of a mission. The first Employment Tribunal dismissed claims brought by Ms Benkharbouche, who was a cook at the Sudanese embassy in London, on the basis that she was a member of the domestic staff of a mission for the purposes of section 16(1)(a) SIA; the second Tribunal dismissed the claims brought by Ms Janah, who was a member of the domestic staff at the Libyan embassy in London, on the

basis that she fell within both section 16(1)(a) and section 4(2)(b) of the SIA.

Langstaff J. found that both ET decisions violated the appellants' right of access to a court as guaranteed by Article 6 ECHR. In reaching this conclusion, he relied on the decisions of the Grand Chamber of the European Court of Human Rights in *Sabeh El Leil v France*, App No 34869/05, 29 June 2011 and *Cudak v Lithuania*, App No 15869/02, 23 March 2010. In these cases, the Grand Chamber found that adherence to the international rules on immunity was a legitimate aim of the state and would be proportionate to the restriction on the employees' rights, but a grant of immunity not required by international law was a disproportionate restriction, overstepping the state's margin of appreciation and impairing the essence of the right to access a court. The Grand Chamber had relied on the employment contract exception in Article 11 of the UN Convention on State Immunity (not yet in force) on the basis that it reflected customary international law. Article 11 grants immunity to the state where the employee is "recruited to perform particular functions in the exercise of governmental authority." The head accountant at the Kuwaiti embassy in Paris (*Sabeh El Leil*) and a Lithuanian switchboard operator at the Polish embassy in Vilnius (*Cudak*) fell outside of these exceptions because their main duties did not "objectively" relate to the sovereign interests of the state. These decisions have been criticised for asserting, without supporting evidence, that Article 11 of the Convention is customary law, and for giving the exceptions in Article 11 a narrow and restrictive interpretation, especially as the law on immunity in this area is evolving and unsettled.

Nevertheless, Langstaff J. relied on these cases for the proposition that, in recent years, the plea of state immunity had been increasingly restricted in cases involving employment contracts and that its application depended on "whether the proposed claim involved any public aspect of the employee's work", and not necessarily on whether the individual was a member of a particular group of persons. From the factual findings of the ETs, Langstaff J. was "satisfied that to render their employment dispute with Sudan and Libya amenable to a decision of the court would not appear to interfere with any public government function of those states." Consequently, the restriction imposed by Article 16(1)(a) could not be justified because the SIA no longer strikes "an appropriate balance" between the competing interests of state immunity and "the importance of access to court for employees with functions such as those of the claimants". Langstaff J. expressed "much greater hesitation" in reaching the same conclusion for section 4(2)(b) SIA because, at least during the negotiation of the 1991 draft of what is now the UN Convention on Immunity,

"it was considered, as a matter of customary international law, that a rational distinction could properly be drawn between nationals of the host country, and others with no connection by residence with the host country." Somewhat surprisingly, he was nevertheless prepared to "assume for the purpose of argument" that the application of section 4(2)(b) SIA breached Article 6 ECHR. However, neither conclusion could help the appellants, because it "would cross the critical line between interpretation and legislation" to interpret the SIA to allow the claims to proceed.

In the second half of the judgment, Langstaff J found that, to the extent that the appellants' claims involved rights derived from EU law, the application of sections 16(1)(a) and 4(2)(b) SIA violated the EU Charter. Although the UK had agreed an opt-out to the Charter when it was made binding in the Lisbon Treaty 2009, the Court of Justice had subsequently concluded that the Charter makes rights, freedoms and principles of the EU "more visible, but [it] does not create new rights or principles" (*NS v Secretary of State for the Home Department* [2013] QB 102), and therefore the UK's opt-out only confirmed the already existing position in Article 51 of the Charter that the provisions of the Charter are applicable "with due regard for subsidiarity" and "only when [states] are implementing Union law"; the opt-out did not exempt the UK or its courts from ensuring compliance with the Charter provisions. The UK Supreme Court had then made it clear that the Charter has direct effect in UK law and applies when the UK implements EU law (*RFU v Consolidated Information Service*s [2012] UKSC 55, [2012] 1 W.L.R. 3333).

Article 52(3) of the Charter provides that if a Charter right corresponds to an ECHR right, the meaning and scope of the Charter right is to be the same as the meaning and scope of the ECHR right. Consequently, Langstaff J. was prepared to accept that Article 47, which also guarantees the right to a fair trial, was coterminous with Article 6 and violated by the ET decisions to apply sections 16(1)(a) and 4(2)(b) of the SIA. Although Article 47 could not be directly applied in a dispute between private parties, the decisions of the Court of Justice in *Mangold v Helm* (Case C-144/04 [2005] ECR I- 9981) and *Kucukdeveci v Swedex* (Case C-555/07 [2010] ECR I- 365) mean that a national court must, "within the limits of its jurisdiction", give effect to the general principles of EU law, including disregarding contrary provisions of national law. As section 2(1) of the European Communities Act provides that the rights and obligations created by or arising under EU treaties are to be given legal effect in UK law, and Article 47 affirms, but does not establish, the general principle of the right of access to a court, the underlying principle of access to a court must be given effect in proceedings involving private parties.

Langstaff J. therefore ruled that section 16(1)(a) of the SIA should not be applied to the extent it prevents Ms Benkharbouche's claim of a breach of the Working Time Directive (WTD) (Directive 2003/88/EC, O.J. [2003] L 299/9) and sections 16(1)(a) and 4(2)(b) of the SIA should not be applied to the extent that they prevent Ms Janah's claim for a breach of the WTD and the Race Discrimination Directive (Directive 2000/43/EC, O.J. [2000] L 180/22), despite "the uncomfortable recognition that the domestic legislature took care in the Human Rights Act not to allow the courts to disapply any domestic statute which was in conflict with the European Convention on Human Rights". As their claims of unfair dismissal and non-payment of the minimum wage were not within the material scope of EU law, these could only be pursued via an appeal for a declaration of incompatibility under the Human Rights Act.

Benkharbouche presents a conflict between international rules incorporated into domestic law and fundamental EU principles incorporated into domestic law, which has arisen because both the Strasbourg court, in its interpretation of the customary international law exception to immunity in employment disputes, and the Luxembourg court, in its interpretation of the UK's opt-out clause and the horizontal effect of EU general principles, extended the reach of EU law through the "back door". The Court of Appeal will now have to decide whether the application of sections 16(1)(a) and 4(2)(b) of the SIA is a violation of the right of access to a court, and if it is, whether the EAT was correct to find that, for the claims based on EU law, the SIA should not be applied. If it upholds the EAT decision, it will further entrench the ECtHR's controversial interpretation of the customary international law exception to immunity in employment disputes and widen the employment law exception to immunity under the SIA. More importantly, because many of the EU Charter rights are coextensive with ECHR rights, upholding the EAT decision would endorse an arbitrary distinction between human rights claims that involve EU law, where domestic law that prevents individuals from realising their rights under the EU will not be applied, and human rights claims that "only" come within the ECHR, where, if a compatible interpretation between the domestic law and the ECHR right cannot be found, the only "remedy" would be a declaration of incompatibility under the HRA. Such a distinction is not only difficult to justify in its own right, but it also circumvents the constitutional division of competence in the HRA between the judiciary and Parliament.

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https://doi.org/10.1017/S0008197314000063 Published online by Cambridge University Press