Cambridge Law Journal, **77(1)**, March 2018, pp. 1–39

THE
CAMBRIDGE LAW JOURNAL

VOLUME 77, PART 1 MARCH 2018

CASE AND COMMENT

THE LIMITS OF STATE AND DIPLOMATIC IMMUNITY IN EMPLOYMENT DISPUTES

TWO decisions of the Supreme Court – *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2017] 3 W.L.R. 957, and *Reyes v Al-Malki* [2017] UKSC 61, [2017] 3 W.L.R. 923 – demonstrate the limitations of state and diplomatic immunity in employment disputes, and raise important questions concerning the interaction between immunity and other rules of international law.

In *Benkharbouche*, Ms. Benkharbouche and Ms. Janah had brought employment claims against Sudan and Libya respectively, alleging wrongful dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998. Ms. Janah also claimed racial discrimination and harassment. The Court of Appeal ruled that their claims were not barred by state immunity. Neither state appeared before the Supreme Court: Sudan had previously elected not to participate in the proceedings before the Court of Appeal, and Libya had failed to comply with an order for security for costs and was therefore prevented from pursuing the appeal. Instead, the Foreign Secretary argued that both states were entitled to immunity under the State Immunity Act 1978 (SIA). Section 1 confers on foreign states immunity from the jurisdiction of UK courts; s. 4(1) provides an exception to that immunity for contracts of employment where the contract is made, or where the work is to be wholly or partly performed, in the UK; and s. 4(2)(b) reinstates immunity if, at the time when the contract is made, the employee is neither a national of nor habitually resident in the UK. Section 16(1) also reinstates immunity for proceedings concerning the employment of the members of a diplomatic mission, which are defined by the Vienna Convention on Diplomatic Relations (VCDR) as including the domestic staff of a mission. Benkharbouche and Janah were members of the respective missions for the purposes of s. 16(1), with Janah also falling within s. 4(2)(b). Lord Sumption, writing the sole judgment for the

Supreme Court, held that, because neither s. 4(2)(b) nor s. 16(1) distinguishes between acts of a sovereign and acts of a private law character, they went beyond what is required by customary international law. Accordingly, their application would breach the right of access to a court in Article 6 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights.

The central point of contention in *Benkharbouche* concerned the correct starting point: is state immunity absolute except for recognised customary international law exceptions, or is a state entitled to immunity only in respect of sovereign acts? After an extensive review of international law, jurisprudence and state practice, Lord Sumption concluded (1) that there has "probably never been a sufficient international consensus in favour of the absolute immunity to warrant treating it as a rule of customary international law"; and (2) that for two centuries there has been a consensus among states in favour of a restrictive doctrine, the "true basis" of which "was and is the equality of sovereigns, and that never did warrant immunity extending beyond what sovereigns did in their capacity as such" (at [52]). Although a "substantial" number of states has at some point subscribed to the absolute doctrine, according to Lord Sumption "some of them did so on the assumption that it represented international law, but without any real investigation of the rule recognised in other states" (ibid.). From this starting point – and relying on state practice and the *travaux préparatoires* of the 2004 UN Convention on Jurisdictional Immunities for States – Lord Sumption concluded that there is "no basis in customary law for the application of state immunity in an employment context to acts of a private law character" (at [63]). Although s. 4(2)(b) SIA is derived from Article 5(2)(b) of the European Convention on State Immunity 1972, not only does this provision not reflect customary law, but there is extensive practice indicating that "unless constrained by a statutory rule the general practice of states is to apply the classic distinction between acts *jure imperii* and *jure gestionis*, irrespective of the nationality or residence of the claimant" (at [66]). Similarly, the only rule of international law that might justify the application of s. 16(1)(a) SIA is Article 11(2)(b) of the UN Convention, which at least arguably requires the grant of immunity in employment claims by embassy staff. However, Lord Sumption found this provision to be "legislative rather than declaratory of existing international law" (at [72]).

The decision is a welcome development, as the SIA has long been out of step with the majority of other state practice in embassy employment cases. The judgment is also notable for what was not decided. In only a few lines, Lord Sumption noted that "a conflict between EU law and English domestic law must be resolved in favour of the former", meaning that, as ss. 4(2)(b) and 16(1)(a) SIA are in violation of Article 47 of the Charter, they must be disapplied for claims based on EU law. This disapplication of national law had been one of the most controversial aspects of the Court of Appeal's

decision; it is therefore surprising that it is dealt with in such a cursory manner. In particular, it is uncertain whether the Supreme Court subscribes to the Court of Appeal's reasoning that Article 47 has horizontal effect. It is far from clear that the right of access to a court is generally capable of being enforced against a private party, let alone that it is required to be understood as having horizontal effect in the present case. Article 47 is better characterised as having *indirect effect*: it modifies the scope of the SIA, the consequence of which is to enable a private party to bring a claim against another private party. Perhaps the reason for the limited discussion is the uncertainty surrounding the Charter's future application in UK law. The EU (Withdrawal) Bill stipulates that the Charter "is not part of domestic law on or after exit day" and that "there is no right of action in domestic law on or after exit day based on failure to comply with any of the general principles of EU Law". In other words, after Brexit day, the Charter-based remedy in *Benkharbouche* will no longer be available. Lord Sumption also explicitly declined to resolve the divergence of opinion between UK courts and Strasbourg as to whether immunity deprives the courts of jurisdiction *ab initio*, or whether – as is the preferred view – it is merely a *bar* to jurisdiction (at [30]). If there is no jurisdiction capable of being exercised, it is not clear whether the right of access to a court is even engaged.

In *Reyes v Al-Malki*, Ms. Reyes, a Philippine national, was employed as a domestic servant by Mr. and Mrs. Al-Malki, a Saudi Arabian diplomat and his wife. Ms. Reyes alleged that she had her passport confiscated and was forced to work excessive hours, not given proper accommodation, prevented from leaving the house and communicating with others, and not paid until her employment was terminated upon her escape. The Supreme Court proceeded on the basis that these allegations also amounted to trafficking in persons as defined by the International Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children 2000 (the "Palermo Protocol"). Lord Sumption, who gave the leading judgment with which all their Lordships agreed, held that employment of a domestic worker did not constitute exercise of the functions of a diplomatic mission. Accordingly, once he had left his post, Mr. Al-Malki could not rely on Article 39(2) VCDR as incorporated into UK law by the Diplomatic Privileges Act 1964, which confers on former diplomats a residual immunity for "acts performed by such a person in the exercise of his functions as a member of the mission". Although domestic assistance could be viewed as "conducive" to the performance of official functions, this could also be said about "almost anything that made the personal life of a diplomatic agent easier" (at [48]). Lord Sumption's reasoning is surely correct: the employment of Ms. Reyes was clearly not done for or on behalf of Saudi Arabia.

The case is also notable for its extensive discussion of Article 31(1)(c) VCDR, which grants complete immunity from civil jurisdiction to diplomats in post, except in relation inter alia to "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions". From the VCDR's *travaux préparatoires*, state practice and the jurisprudence of US federal courts, Lord Sumption concluded that the words "professional or commercial activity" meant "practising the profession or carrying on the business" (at [21]), rather than any transaction involving the exchange of money. This interpretation is buttressed by the French version of the Convention and is consistent with Article 42, which provides that a "diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity". On this interpretation, had Mr. Al-Malki still been in post, he would have been entitled to immunity. However, the exploitation of migrant domestic workers by foreign diplomats is a significant problem in the UK, in part because "[t]he perceived immunity makes trafficking with a view to domestic servitude a low risk, high reward activity for diplomats" (at [59]). The international community is committed to combating human trafficking, as evidenced by the 2017 *Call to Action to End Forced Labour, Modern Slavery and Human Trafficking* signed by 37 states, as well as the Palermo Protocol and the Council of European Convention on Action Against Trafficking in Human Beings 2005 (CAATHB), both of which require states to criminalise trafficking and ensure that victims have access to a remedy. Ms. Reyes argued that these obligations meant that Article 31(1)(c) VCDR should be interpreted in a way that recognises human trafficking as an inherently commercial activity, one where the employer benefits financially by paying the trafficked person less or nothing at all.

For Lord Sumption (with whom Lord Neuberger agreed), the rules of treaty interpretation do not permit interpreting Article 31(1)(c) VCDR so as to encompass human trafficking. Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires account to be taken of "any relevant rules of international law applicable in the relations between the parties", but, according to Lord Sumption, it applies only where a treaty provision is "ambulatory": that is, capable of evolving in content or meaning. Lord Sumption concluded that not only is Article 31(1)(c) VCDR "not ambulatory", but that it does not follow from an international policy against human trafficking that "diplomatic immunity cannot be available in cases of trafficking" (at [44]). Lord Sumption was perhaps too quick to reach this conclusion, the International Court of Justice having previously held that states may be *presumed* to have given certain generic terms – such as "commerce" – a meaning capable of evolving and not one that is "fixed once and for all" (*Costa Rica v Nicaragua* [2009] I.C.J. Reports 213, at [64]). Furthermore, while a strictly positivist approach would suggest that there

is no rule stipulating that diplomatic immunity should not be available in cases of trafficking, states – including the UK and Saudi Arabia – are required by international law to criminalise trafficking and to ensure that "its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered" (Article 6(6), Palermo Protocol; see also Article 15 CAATHB).

Lord Sumption also concluded that, although employing someone who had been trafficked could result in the employer being liable for human trafficking, this alone does not turn the employer into a "practitioner[ ] of a commercial activity" for the purposes of 31(1)(c) VCDR: "if I knowingly buy stolen property from a professional fence for my personal use, both of us will incur criminal liability for receiving stolen goods and civil liability to the true owner for conversion. The fence will also be engaging in a commercial activity. But it does not follow that the same is true of me" (at [45]). As pointed out by Lord Wilson (with whom Lady Hale and Lord Clarke agreed), this analogy is far from instructive: trafficking in individuals means that a person is being treated as a commercial product. The Palermo Protocol and CAATHB both define trafficking as constituting the "recruitment, transportation, transfer, harbouring or receipt of persons" and as thereby encompassing "the whole sequence of actions that leads to the exploitation of the victim" (Explanatory Report to CAATHB). This sequence includes the victim's so-called "employment", as the employer "knowingly effects the 'receipt' of the migrant and supplies the specified purpose, namely that of exploiting her, which drives the entire exercise from her recruitment onwards" (at [62], per Lord Wilson). The divergence of (admittedly obiter) judicial opinion is yet another example of the challenge of accommodating the international prohibition of egregious conduct with the grant of immunity.

ANDREW SANGER

Address for Correspondence: Newnham College, Cambridge, CB3 9DF, UK. Email: as662@cam.ac.uk

THE RULE OF LAW AND ACCESS TO JUSTICE: SOME HOME TRUTHS

MISAPPREHENSIONS about the UK's constitution are ten-a-penny. Most prominent among them, perhaps, are the notions that the UK "has no constitution" and that fundamental rights cannot meaningfully exist without an "entrenched" or "written constitution". To that list of misunderstandings can now be added the ideas – brought to light by the Supreme Court's judgment in *R. (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 W.L.R. 409 – that the judicial system, far from being a non-negotiable feature of any constitutional democracy, is nothing more than a public service,

https://doi.org/10.1017/S0008197318000120 Published online by Cambridge University Press