EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs A Muda	**v**	**Malaysia**

PUBLIC PRELIMINARY HEARING

Heard at: **Central London Employment Tribunal (By CVP)**

On: **24 & 25 June 2024**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **Ms N Hart & Ms L Aboagye**
For the Respondent: **Mr O Jackson, Counsel**

JUDGMENT

The Judgment of the Tribunal is that :

1. The Claimant's employment was not an act of sovereign authority.

2. The Claimant's claim does not involve an act engaging sovereign authority.

3. The Respondent has State Immunity in respect of the Claimant's claim because she is a citizen of Malaysia. It is not possible to read down s4(2)(a) SIA 1978 so that it does not apply to individuals who are permanent residents of the UK.

4. The Claimant's claim is therefore dismissed.

REASONS

1. By a claim form in claim number **2203623/2021**, presented on 7 June 2021, the Claimant brought complaints of unlawful deductions from wages against the Respondent.

2. The Respondent defended the claim, asserting state immunity.

3. The claim had previously been stayed pending the implementation of the *State Immunity Act 1978 (Remedial) Order 2023.*

4. This Public Preliminary Hearing was listed to determine the state immunity issues in the case.

5. (This case was listed to be heard at the Public Preliminary Hearing sequentially with the case of another Claimant, Mr Onurcan. His claim, number 2203565/2021, presented on 2 June 2021, brought complaints of breach of contract and unlawful deductions from wages against the same Respondent. The cases were not linked, nor were they factually, nor legally, similar, but it was convenient for the Respondent for the cases to be heard and decided at the same time.)

6. This judgment relates to Mrs Muda's case only.

7. I heard evidence from the Claimant.

8. I read the witness statement of Ahmad Fadhlizil Ikhram Abdullah, First Secretary (Bilateral) at the Malaysian High Commission in London. He did not give evidence. His statement pointed out that, as a diplomat, he could not be compelled to give evidence. I took his evidence into account when making my findings of fact. However, as I will explain below, in the absence of clarification from him in live evidence, I did not find his evidence on a number of points to be clear or illuminating.

9. There was a bundle of documents and both parties made written and oral submissions. I reserved my judgment.

The Issues

10. The parties had agreed the state immunity issues in the case as follows:

    1. Ms Muda was a Malaysian national at all material times. Read according to conventional principles of statutory construction, her claim is barred by section 1(1) and section 4(2)(a) SIA 1978. Accordingly the Tribunal must determine:

    a. whether section 4(2)(a) SIA 1978 goes beyond what is required under customary international law, such that it is incompatible with Article 6 of the European Convention of Human Rights ("ECHR") as incorporated into UK law by section 1 of the Human Rights Act 1998 ("HRA 1998"); if so,

    b. whether section 4(2)(a) SIA 1978 can and/or should be 'read down' to be compliant with Article 6 ECHR pursuant to section 3 HRA 1998.

2. The Tribunal must also determine:

a. whether Ms Muda's employment contract with the Respondent was entered into in the exercise of the Respondent's sovereign authority within the meaning of section 16(1)(aa)(i) SIA 1978; and/or

b. whether the Respondent engaged in the conduct complained of by Ms Muda in the exercise of its sovereign authority within the meaning of section 16(1)(aa)(ii) SIA 1978.

3. If the Tribunal determines any of the issues at paras 1(a), 1(b), 2(a) of 2(b) above in the Respondent's favour then Ms Muda's claim is barred by section 1(1) SIA 1978.

11. The Claimant noted that the existing List of Issues referred only to Article 6 ECHR and not to Article 14 ECHR. She said that this was an oversight. It was not in dispute that the Claimant had raised Article 14 as part of her defence to the Respondent's assertion of immunity, as early as 8 August 2023, pp 57, 59. It was not in dispute that the issues of incompatibility and/or reading down were to be considered in relation to both Art 6 and Art 14 of the ECHR.

12. It was agreed that I should consider only the functions of the Claimant's most recent post in relation to the issues arising under *s16(1)(aa)(i) SIA 1978*.

13. The Claimant has issued new grounds of complaint relating to claims for unfair dismissal, breach of contract, unlawful deduction from wages, direct and indirect age discrimination and direct sex discrimination. The Tribunal has sent the Respondent's solicitors a copy of this claim. It was agreed that I should not consider those at this hearing.

The Facts

The Claimant's Nationality and Residence Status in the UK

14. The Claimant was born in Malaysia and is a national of Malaysia. She holds a Malaysian passport, p77. She moved to the United Kingdom (UK) on 1 April 1991 and she has lived in the UK since then.

15. The Claimant was granted indefinite leave to remain in the UK on 8 September 1995, p79-80. She was given a residence permit on the same day, which she has held since then. She is a UK taxpayer.

16. The Claimant commenced employment at the Respondent's High Commission in London in 1992, as a Clerical Assistant in the Finance Division of the High Commission, p114. It is not in dispute that her employer was, at all times, the Respondent State of Malaysia.

17. The Claimant's employment was, at all times, on the terms and conditions of service of Locally Recruited Staff, p84.

18. The Claimant underwent promotions and transfers and, from 2014, she was employed as secretary to the High Commissioner, p122. The High Commissioner asked her to take on this role, acting as his social secretary. In this role, the

Claimant reported to the High Commissioner and worked with his PA, who was not a member of the diplomatic staff of the mission, but held an official passport. The three had separate offices.

19. A Schedule of Duties recorded the Claimant's role as having the following duties, p123-125:

> "1. To assist and arrange the High Commissioner's and his wife's social functions and calls by
>
> i) Preparing Guest Lists as directed and details of acceptances and regrets
>
> ii) sending and replying to invitations
>
> iii) Arranging appointments and visits, booking of Air/train tickets, accommodation and cars.
>
> iv) organising/arranging office Function/Meeting room
>
> v) arranging appointments for visitors calling on High Commissioner and wife
>
> vi) arranging refreshments for the High Commissioner and Guests in the High Commissioners room whenever required
>
> vii) Preparing and safekeeping of the necessary Catering equipments or crockery for any function.
>
> 2. Prepare invitations for the High Commissioner and other Officers for the Queen's Garden Parties, Royal Ascot, The Queen's Evening reception, Trooping of the Colours etc.
>
> 3. To coordinate with The High Commissioner's Personal Assistant with regards to the weekly programme.
>
> 4. To set out table plans for Lunches or Dinners, arrange table cards and Menus and also to arrange and supervise outside official functions including receiving guests
>
> 5. To prepare venues, conferences, meetings and other functions and to make arrangements for refreshments, lunches tea, coffee etc
>
> 6. To coordinate with other Officers on the High Commissioners appointments, visits.
>
> 7. Assist at the Residence for morning coffees, Lunches, tea, dinners, Receptions etc during and after office hours.
>
> 8. Assist in correspondence, invitations etc of the wife of the High Commissioner including Perwakilan.
>
> 9. Preparing claims, duty free orders.

> 10. To undertake any other duties as may be directed from time to time by Deputy High Commissioner/Head of Chancery and any other Home."

20. There was another list of duties in the Bundle, which Mr Jackson suggested, in cross examination, was the Claimant's accurate schedule of duties, p140. The duties in that included, "Receiving the High Commissioner's incoming telephone calls and connecting or taking messages accordingly. Making and connecting telephone calls for and to the High Commissioner."

21. The Claimant said that this was not an accurate list of her duties. On the evidence, I accepted that High Commissioner's PA, in fact, carried out many of the duties which were contained in the list at p140. I accepted that the Claimant did not handle the High Commissioner's incoming and outgoing telephone calls. When the Claimant received a telephone call for the High Commissioner, she would transfer it directly to his PA.

22. I also accepted the Claimant's evidence that she did not, as set out at p142, "…answer enquiries and reply in form of letter or email to all enquiries regarding information on Malaysia and consular matters, in London." I accepted that she did not have the authority to do that and that the High Commissioner's PA carried out such functions.

23. On all the evidence, I was satisfied that the Claimant carried out social secretary-type functions only, so that the list of duties at pp123-125 and reproduced at paragraph [21] above reflected the true functions which the Claimant was required to undertake.

24. I found that the High Commissioner's PA kept his diary and that the Claimant was told about his social engagements and booked rooms for events. She did not have knowledge of all his engagements.

25. Mr Abdullah's witness statement said that the Claimant was "expected to have a thorough knowledge of diplomatic protocol to ensure the smooth running of such events." It also said, at paragraph 16, that the Claimant needed to be aware of, and observe, formalities and protocols in diplomatic correspondence and diplomatic visits. It said that the Claimant was required to be aware of diplomatic sensitivities specific to each of the High Commission's stakeholders.

26. Mr Abdullah did not give examples of such diplomatic protocol and none were put to the Claimant in cross examination. I found Mr Abdullah's generalized assertions to be unconvincing.

27. I noted that, in a grievance letter written on 10 July 2020, p148, the Claimant had said, "Apart from secretarial experience, I am also a very experienced staff in Protocol and Consular matters. As such, I am able to guide and advice colleagues on these matters." Elsewhere in the letter, the Claimant had listed her previous secretarial duties as being 'protocol' from 1996 – 2002 and 'consular' from 2002 – 2014. It had been agreed that these posts were not to be taken into account in deciding whether her functions were sufficiently close to the sovereign functions of the mission for state immunity to apply under s16 SIA in this claim. I accepted the Claimant's evidence that her 'protocol' duties in this role involved sending applications on behalf of diplomats for TV licence and council tax exemptions. The

Claimant's knowledge of 'protocol' or 'consular', referred to in this letter, did not extend to awareness, or application, of the "formalities and protocols in diplomatic correspondence and diplomatic visits", referred to by Mr Abdullah.

28. Following her cross examination, I accepted the Claimant's evidence that she was not familiar with diplomatic protocol and that, in her role, she was not expected to know and act in accordance with diplomatic protocol when facilitating High Commission functions.

29. At these functions, her interaction with guests extended to ushering people to the relevant room and serving drinks. She managed the events themselves, designing invitation cards, menus, labels for food dishes, and preparing seating plans, all for approval by the Head of Chancery. The Claimant's role also involved preparing the venue; booking rooms; ordering food; organizing the table and chair layout; fitting tablecloths and table settings; shopping for flowers and decorating the room; ordering hand towels and soaps; supervising waiters and colleagues and telling them when to start serving and when to tidy up . She helped with tidying and cleaning up afterwards. She was not present during occasions when confidential information was discussed. I accepted her evidence that, if the Mission did not have enough staff for the function, it would hire staff from outside.

30. When managing these events, she supervised a team of one cleaner, one security guard - for assistance with moving heavy items such as furniture - and administrative assistants from the administration department.

31. The Claimant was responsible for sending invitations to people on the guest lists for High Commission functions. However, she did not draw up the guest lists. The High Commissioner's PA would write to the Mission's heads of departments, asking them to provide their requested invitees. The PA then provided the Claimant with a list of people to invite. If the Claimant needed to check the name of the holder of a diplomatic post, the Claimant would "Google" the relevant Diplomatic Mission.

32. I accepted her evidence that she simply inserted the names of guests onto invitations. She could not herself decide, for example, whether to invite partners with the relevant guests. She did what she was told on each occasion, rather than using her own initiative.

33. When sending invitations, the Claimant gave her Social Secretary email and telephone number for RSVPs, p135. She kept a record of acceptances and those who had declined.

34. When organising functions, the Claimant was not responsible for the security arrangements and was not told these.

35. The Claimant communicated with employees at 10 Downing Street, and the Royal Household, regarding invitations to official events. For example, she would reply to the Events and Visits Office of Number 10 Downing Street, confirming whether the High Commissioner would be attending Trooping the Colour, pp126, 131. Her communications were polite and formal, using the High Commissioner's full name and title and those of his wife and family members.

36. The Claimant sent out invitations to stakeholders such as Malaysian Airlines, inviting them to events such as Craft Week, hosted at the High Commission by the Queen of Malaysia, p127.

37. She sent email invitations to other Missions to receptions at the Malaysian High Commission, p132. She sent formal invitation cards to, for example, the Minister of Foreign Affairs of Brazil, to receptions at the High Commission, p136.

38. The Claimant assisted with the visits of individuals to the High Commission, including VIPs and members of the diplomatic corps. She would meet guests and usher them to the High Commissioner's Guest Room; arrange for the in-house photographer to attend when required; prepare and serve tea/coffee/biscuits to guest(s); after the event, clear the room, wash up and clean the pantry; look after the inventory of fine bone china, /silverware, crystal glass and other valuable items at the High Commissioner's office; and wrap gifts.

39. The Claimant also assisted the High Commissioner's wife with correspondence and administrative tasks for the Perwakilan club. This is a club formed by the wives of High Commissioners and Ambassadors from around the world which meets regularly and undertakes fundraising, for example, for hospitals. The Claimant would reserve the room for their meetings, set out plates and cups and help serve food. Another secretary would send out invitations, but if they were not available, the Claimant would do so. She did not attend the meetings herself.

40. In addition, the Claimant booked hotels, train tickets and flight tickets for the High Commissioner and the High Commissioner's family, p128-129.

41. The Claimant did not handle any official files. The PAs of the High Commissioner and Deputy High Commissioner had clearance to do this. The Claimant did not have clearance for handling official files or sensitive matters.

42. The PAs of the High Commissioner and Deputy were not locally recruited staff, but were Home-Based Staff from Malaysia.

43. If a member of the diplomatic staff had a leaving party or welcoming party, the Claimant was not invited, whereas the two PAs were.

44. Secretaries are the fourth highest ranking members of the Mission's staff in terms of pay.

The Claimant's Claim

45. The Claimant's claim is for unlawful deductions from wages. In her claim form, she said that she was also complaining about, "Doing a senior role but receiving junior pay." She said that she sought, by way of remedy, "To be paid on a Social Secretary Salary Scale accordingly and to be remunerated in arrears for the difference that I should have received since then."

46. At this hearing, the Claimant confirmed that she does not seek appointment to the Social Secretary's role.

47. The Claimant attached a grievance letter, dated 7 June 2021, to her claim. In it, she said that, on 13 May 2014, following a meeting with the High Commisssioner,

she was instructed to take on the position of Social Secretary to the High Commissioner, p13, taking over from a Ms Locke. She said, on agreeing to take the post in May 2014, the High Commissioner promised her that the promotion to social secretary would be made formal on Ms Locke's retirement. She said that this had not happened and that, since May 2014, she had been doing the job of Social Secretary but only being paid a Secretary's pay.

48. She also said that, on 1 July 2020 a new Salary Scale Review for the Locally Recruited Staff (LRS) had been introduced with effect from 1 January 2019. She said that, "the main objective of this government exercise was to stream-line the salary scale of all Malaysian civil servants in Malaysia with those of the Malaysian Overseas Missions and Government Agencies."

49. She said that, following its implementation, her position was now categorised as an 'Office Secretary'. She said that the effect was to downgrade her to the level of a Clerical Assistant.

50. The Claimant referred to the Salary Scale of administrative positions within the London Malaysian High Commission, following the review. She highlighted the post of "Social Secretary to the High Commissioner", which she said had been published in the Official Lists of Posts approved by the Malaysian Parliament for the Malaysian Ministry of Foreign Affairs in 2020 at Volume 6.

51. The Claimant also said that her many years of experience merited a higher grade than she had been appointed to under the pay review.

52. In conclusion, the Claimant said that her grievances were, "1. I would like to be officially appointed as the Social Secretary to the High Commissioner as promised way back in 2014 when I was transferred from the Consular Department to the High Commissioner's Office to take on this position. … 3. In the recent salary review of 2019, not only have I not been remunerated correctly but I have been 'downgraded'. I am currently receiving the salary scale of a Clerical Assistant even though I am undertaking the duties of a Social Secretary as per my job specification."

Additional Context to Claim

53. On 1 November 2020, employees at the High Commission were informed that the Ministry had decided to review all Locally Recruited Staff (LRS)'s salary scale, p150. This applied to all locally recruited staff in all its Missions around the world.

54. In an email, dated 17 July 2019, p166, the London High Commission was told that the salary review had been approved by the Ministry of Finance -

"As you all have been informed, the LRS Salary Review in 78 Missions was approved by the Ministry of Finance via Letter ref: MOF.Ds(S).600-32/3/1 JId.2 (37) dated 20th March 2019, effective 1 st January 2019.

To date, 49 approvals have been submitted for implementation whereas 29 missions are still in the process of finalising the salary restructuring schedule for submission to the mission in the near future."

55. An explanatory note attached said that the new starting salaries applied to posts were calculated taking into account the following factors: Equivalent Starting Salary in Malaysia; Fixed Remuneration for Equivalent Post in Malaysia; Foreign Currency Exchange Rates; Cost of Living Index and House Rental Rates in the relevant City, in comparison to the same costs in Malaysia, p168.

56. I accepted Mr Abdullah's evidence that the Malaysian government sets roles and pay for Civil Servants and Mission employees in line with their national and political priorities. It is a decision of the Malaysian Parliament and Government (the Public Service Department and the Ministry of Foreign Affairs). The High Commission is told of the structure, roles and pay grades which are to be used at the Mission.

57. On the facts, therefore, I accepted that, if, for example, an employee brought a claim challenging the pay which the Malaysian government had set for a particular role – such as an equal pay claim – that could involve hearing direct evidence from politicians and officials from the Malaysian Parliament and government.

Law - State Immunity in Employment Contracts

58. Foreign states enjoy a general immunity from the jurisdiction of the courts in the UK, pursuant to the State Immunity Act 1978. By SIA 1978 s 1(1): 'A state is immune from the jurisdiction of the courts of the UK, except as provided in the following provisions of this Part of this Act'.

59. The Tribunal is required to give effect to state immunity even if the State does not appear in the proceedings, *s1(2) State Immunity Act 1978*.

Regarding employment claims, *s4 SIA* provides,

"**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) the State concerned is a party to the European Convention on State Immunity and] 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."

60. Regarding diplomats and those employed by diplomatic missions, *s16* further provides,

"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 relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a diplomatic agent or consular officer;

(aa) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a member of a diplomatic mission (other than a diplomatic agent) or as a member of a consular post (other than a consular officer) and either—

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

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

…"

61. These provisions of *ss4 and 16 State Immunity Act 1978* are as amended by the *State Immunity Act 1978 (Remedial) Order 2023*, which came into force 23 February 2023.

62. The amendments were intended to give effect to the Supreme Court judgement in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah*, [2018] IRLR 123, [2017] ICR 1327. In that case, the Supreme Court decided that the doctrine of state immunity in international law applied only sovereign acts, not private acts, of the foreign state concerned.

63. As a result of the amendments to *s16 SIA*, employees of a foreign Embassy in the UK are generally no longer be barred from bringing any type of employment claim against their employing State, so long as the employee is not a diplomatic agent or consular officer, or the employment was not entered into in the exercise of sovereign authority, or the conduct complained of was not an act of sovereign authority.

Law - Employment Entered into in the Exercise of Sovereign Authority

64. As stated, in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*; *Secretary of State for Commonwealth Affairs and Libya v Janah*, [2018]

IRLR 123, [2017] ICR 1327, the Supreme Court decided that the doctrine of state immunity in international law applied only sovereign acts, not private acts, of the foreign state concerned. “The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority” [37].

65. In general, whether there has been such an act will depend on the nature of the relationship between the parties, and this in turn will depend on the functions that the employee was employed to perform [54].

66. At [55] Lord Sumption distinguished between the three categories of embassy staff as follows: “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 (1994) 104 ILR 508 (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.”

67. Article 3 VCDR sets out the essential functions of a diplomatic mission, and performance of any of the Article 3 functions constitutes acts done in the exercise of sovereign authority

68. “Article 3

1. The functions of a diplomatic mission consist, inter alia, in:

(a) Representing the sending State in the receiving State;

(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

69. In *The Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali* [2023] EAT 149 per Bourne J, the EAT said that, in deciding whether employment of a member of embassy staff was an exercise of sovereign authority, the Tribunal must clearly identify any sovereign activity in order to decide whether the Claimant's work was sufficiently close to it [90].

70. The EAT also held that the test for *s16(1)(aa)(i)* was whether the employee's work was *"sufficiently close"* to the exercise of sovereign authority, which could be contrasted with work which was *"purely collateral to the exercise of sovereign authority"*: [92]-[93]. It held that not all of an employee's tasks have to meet the section 16(1)(aa)(i) test. It is sufficient if *"some of the claimant's activities throughout the period of her employment passed the test"*: [96]-[97].

Acts Engaging Sovereign Interests

71. However, Lord Sumption also cautioned that the character of the employment would not always be decisive. At [58], he made clear that state immunity may extend to some aspects of its treatment of its 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 and the introduction of a no-strike clause for civilian staff at a US military base in Canada, which had been deemed to be essential to the military efficiency of the base.

72. Lord Sumption commented, of the latter, "In these cases, it can be difficult to distinguish between the purpose and the legal character of the relevant acts of the foreign state. But as La Forest J pointed out, at p 70, in this context the state's purpose in doing the act may be relevant, not in itself, but as an indication of the act's juridical character." [58].

Human Rights Law; Incompatibility; Reading Down

73. In *Benkharbouche,* the Supreme Court considered 2 terms of the State Immunity Act, as they were then drafted:

    73.1. The s4(2)(b) carve-out to the s4(1) permission for employment claims barred a person who, at the time they entered into the contract of employment, was neither a national of the UK nor habitually resident there, from bringing an employment claim; and

    73.2. The s16(1)(a) carve-out to the s4(1) permission for employment claims barred employment claims by employees who were employed as a member of a diplomatic mission, irrespective of the functions they performed.

74. The Court found that both of those provisions amounted to disproportionate interferences with Articles 6 and 14 ECHR.

75. The Court held that Article 6 ECHR confers on individuals a right to a fair hearing of their civil claims. This provision "implicitly confers a right of access to a court to determine a dispute and not just a right to have it tried fairly" ([14]). Any measures which interfere with the right of access to a court will be compatible with Article 6 only if they "pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right" ([14]).

76. Regarding Article 6, "[w]hat justifies the denial of access to a court is the international law obligation of the forum state to give effect to a justified assertion of immunity" ([34]). Conversely, a conferral of immunity will be incompatible with Article 6 to the extent that it represents "a discretionary choice on the part of the forum state" ([34]).

77. Lord Sumption said at [34],

    "[I]f the legitimate purpose said to justify denying access to a court is compliance with international law, anything that goes further in that direction than international law requires is necessarily disproportionate. I conclude that unless international law requires the United Kingdom to treat Libya and Sudan as immune as regards the claims of Ms Janah and Ms Benkharbouche, the denial to them of access to the courts to adjudicate on their claim violates article 6 of the Human Rights Convention."

78. With regard to customary international law, the 'restrictive doctrine' of State immunity prevails. That is, unless a countervailing customary international law rule can be established, a State is entitled to immunity before another State's courts only in respect of conduct of a sovereign character (acts jure imperii), but not in respect of acts of a private law nature (acts jure gestionis) ([8], [10], [17].

79. In order for a State to prove the existence of such a countervailing rule of customary international law (one that provides an exception to the restrictive doctrine), "it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (opinio juris)" ([31]). Although there is no bright line as to the degree of uniformity required, it is "clear … that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law" ([31]).

80. In *Benkharbouche*, the Supreme Court decided that *s4(2)(b) SIA* (as it was then drafted) was incompatible with Article 6 ECHR because it failed to distinguish between sovereign and non-sovereign acts ([65]). There was not sufficient evidence of State practice and opinio juris to establish a rule of customary international law justifying this departure from the restrictive doctrine of State immunity, notwithstanding that section *4(2)(b)* reflected the terms of the European Convention on State Immunity ([66]).

81. Similarly, *s16(1)(a) SIA* (as then drafted) was incompatible with Article 6 ECHR because it "extend[ed] state immunity to the claims of any employee of a diplomatic mission, irrespective of the sovereign character of the employment or the acts of the state complained of", and thus could not "be justified by reference to any general principle of immunity based on the restrictive doctrine" ([69]).

82. Thus, *s4(2)(b)* "unquestionably discriminate[d] on grounds of nationality" and was thus incompatible with Article 14 ECHR (read in conjunction with Article 6) because the discrimination was not "justifiable by reference to the international law" for the same reasons as pertained to Article 6 alone ([77]).

83. In addition, for the reasons that those provisions were incompatible with Article 6 ECHR, they were incompatible with Article 47 EU Charter and were disapplied to the extent that they prevented the Claimants from pursuing their claims derived from EU law ([78]-[79]).

84. *Benkharbouche* was concerned with the terms of s4(2)(b) SIA and not s 4(2)(a). S4(2)(a) remains now as it was drafted at the time of the judgment in *Benkharbouche.* However, Lord Sumption did make comments relevant to *s4(2)(a) SIA*, at [59]:

> "The whole subject of the territorial connections of a non-state contracting party with the foreign or the forum state raises questions of exceptional sensitivity in the context of employment disputes. There is a substantial body of international opinion to the effect that the immunity should extend to a State's contracts with its own nationals irrespective of their status or functions even if the work falls to be performed in the forum state; and correspondingly that it should not extend to staff recruited from the local labour force in whose protection the forum state has a governmental interest of its own. Both propositions received substantial support in the preparatory sessions leading to the United Nations Convention and were reflected in the final text of article 11. Both receive a measure of recognition in the Vienna Convention on Diplomatic Relations which carefully distinguishes between the measure of immunity accorded to the staff of a diplomatic mission according to whether they are nationals of the foreign state or nationals or permanent residents of the forum state: see articles 33(2), 37, 38, 39(4) and 44. In a practical sense, it might be thought reasonable that a contract between a state and one of its own nationals should have to be litigated in the courts of that state under its laws, but unreasonable that the same should apply to locally recruited staff. There is, however, only limited international consensus on where the boundaries lie between the respective territorial responsibilities of the foreign and the forum state, and on how far the territorial principle can displace the rule which confers immunity on acts jure imperii but not on acts jure gestionis."

85. *S3 Human Rights Act 1998* provides

> " **3 Interpretation of legislation**
>
> (1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

86. Regarding the interpretative obligation required by s3 HRA, *in Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 558, Lord Nicholls said, at [30]-[32]:

> "From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from

the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. …

From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation."

87. Lord Rodger in his concurring judgment said, at [121]:

"… it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is 'amending' the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation."

88. *Benkharbouche* in the Employment Appeal Tribunal, [2014] ICR 169 and in the Court of Appeal, [2015] EWCA Civ 33 both held that *s3 HRA* could be used to read down *s4(2) SIA.* Both Courts held that the requirements of s 3 Human Rights Act 1998 to read legislation so as to be compatible with Convention rights did not extend to modification inconsistent with the essential principles of the legislation; and that, since the intent expressed in the *1978 Act* was to confer immunity subject to specific exceptions framed in a careful and detailed pattern, to alter the list by moving an employee, from the category of not being entitled to pursue a claim, to being so entitled, would affect the overall balance struck by the legislature and was not permissible under *s3 HRA*.

89. The Court of Appeal held at [67]:

"67. The President of the Employment Appeal Tribunal considered that the wording of sections 4 and 16 SIA could not be read down pursuant to the interpretative obligation imposed by section 3(1) HRA. That subsection provides […] The judge considered (at [40]) that the Parliamentary intent expressed in the SIA was to confer immunity subject to specific exceptions. In his view the Act was framed so as to create a careful, detailed and clear pattern which balances considerations known to the legislature. He considered that if a court or tribunal were to alter the width of a provision limiting an exception to immunity (section 4(2)) or of a clear statement that section 4 does not apply to particular people (section 16) there would be a danger of its affecting the overall balance struck by the legislature

whilst lacking Parliament's panoramic vision across the whole of the landscape. We agree. Any attempt to read down these provisions so as to remove immunity would be to adopt meanings inconsistent with fundamental features of the legislative scheme."

90. Pursuant to section *4 HRA*, a court may make a declaration of incompatibility if it is satisfied that the provision of primary legislation is incompatible with a Convention right. However, this power is vested only in certain courts — in England consisting of the High Court and the Court of Appeal (section 4(5)(e)).

Decision

91. The Claimant contended that the Tribunal should address the *s16 SIA* issue first, to decide whether the Claimant's employment and the acts complained of in this case concern private and not public acts.

92. She contended that how *s16 SIA* is resolved has a bearing on the Tribunal's interpretation of *s4* – if the Claimant succeeds on s16 SIA then it is for the Respondent to persuade the Courts that there is a rule of customary international law requiring the UK to grant immunity in respect of national who is also a UK resident.

93. I considered that I ought to make a decision on the Claimant's employment and whether it was an exercise of sovereign authority because that would be relevant to the correct interpretation of s4.

Issue: S 16 (1) (aa) The Claimant's Claim – Acts Engaging Sovereign Authority a. whether Ms Muda's employment contract with the Respondent was entered into in the exercise of the Respondent's sovereign authority within the meaning of section 16(1)(aa)(i) SIA 1978

94. On all the facts that I have found, I concluded that the Claimant's relevant role was that of social secretary to the High Commissioner, executing that role according to instructions she was given.

95. Her role was strictly that of a social secretary - broadly:

95.1. Inviting guests to functions; scheduling the food and staff for these; organising decorations, table allocation, table service and cleaning afterwards; ushering guests at the functions;
95.2. Declining or accepting invitations sent to the High Commissioner from the UK government and other Missions, on instruction from the High Commissioner;
95.3. Assisting with the correspondence and invitations of the wife of the High Commissioner including the Perwakilan Ambassadors' wives social and charitable group;
95.4. Organising travel documents for the High Commissioner and his family.

96. On my findings, her functions did not call for personal involvement in the diplomatic or political operations of the mission. The High Commissioner's PA handled the High Commissioner's telephone calls and messages, not the Claimant. If the Claimant ever received such a call, she transferred it to his PA.

97. The Claimant did not herself analyse requests, produce reports, or decide who to invite to High Commission functions. She followed instructions on whom to invite, and undertook administrative tasks in this regard, designing menus and sending invitations.

98. Her duties were functional clerical tasks, supportive to the High Commissioner and his duties, but collateral to his functions.

99. I did not find that she had any knowledge of diplomatic protocol. Her 'protocol' duties were clerical, forwarding applications on behalf diplomats for their exemptions from council tax and television licences.

100. The Claimant's duties were activities as might be carried on by a private persons acting as a social secretary for a business person in a private company.

101. She acted as the "public face of the mission" as a point of liaison only, administering information for official events and ushering guests into function rooms.

102. I found, on the facts, that there was a separation between the Claimant's functions and those of the High Commissioner's PA. The Claimant did not have access to the High Commissioner's messages and official files, whereas his PA did. The PA was invited as a guest to diplomatic leaving parties, but the Claimant was not.

103. Applying *Alhayali*, which I am required to do, the Claimant was working in an administrative role for the High Commissioner, who, it is to be assumed, performed all of the functions set out in Article 3 VCDR. The Claimant herself was most closely associated with "(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations." That was because she was involved with High Commission social functions, and invitations to and from the High Commissioner to Mission and Government events.

104. I did not find that any of the Claimant's functions in this case were "sufficiently close" to any of the governmental functions of the High Commissioner or the Mission, so as to be an exercise of sovereign authority.

105. Even in respect of her communications with 10 Downing Street, her tasks were purely collateral to the functions of the Mission. She was the administrative conduit through which communications regarding non-confidential, social engagements were sent. They were such as a private person could do in private employment.

106. Regarding events at the Mission, the Claimant made the practical arrangements for these. She was a public face only insofar as she greeted guests for the purpose of ushering them to the function.

107. Many of her tasks were hands-on tasks, organising function rooms, decorations, table service and cleaning up.

108. She did not see and was not involved with governmental-level communications. She was excluded from such governmental functions: she did not handle the High Commissioner's telephone calls and messages and she did not have access to official files.

109. On the facts, her duties were far removed from the relevant governmental functions.

b. whether the Respondent engaged in the conduct complained of by Ms Muda in the exercise of its sovereign authority within the meaning of section 16(1)(aa)(ii) SIA 1978.

110. The Claimant made clear that she does not seek reinstatement. It was not in dispute that, if she was, the Respondent would be entitled to immunity in respect of that claim: at [70] in *Benkharbouche*, Lord Sumption stated that "the right freely to appoint embassy staff means that a court of the forum state may not make an order which determines who is to be employed by the diplomatic mission of a foreign state", and thus the forum State "may not specifically enforce a contract of employment with a foreign embassy or make a reinstatement order in favour of an employee who has been dismissed",

111. I accepted the Claimant's contention that her claim is for financial remuneration for the social secretary role that she contends she was appointed to by the High Commissioner.

112. The relevant decision which she challenges was made by the High Commission and not by the Malaysian Parliament. She contends that the High Commissioner made the decision to appoint her to the social secretary role in 2014 and orally promised her that she would be paid for performing that role. She says that she did perform that role but was not given the pay applicable. I considered that a claim for pay agreed under a contract relates to an act of a commercial, or private, nature, and not a sovereign act.

113. I agreed with the Respondent that the setting of paygrades for all staff of its Missions, by the Malaysian government, was in the nature of a sovereign act, so that the Respondent would have immunity in respect of a challenge to the setting of those paygrades.

114. However, I found that, on a true construction of her claim, the Claimant does not challenge those paygrades, but the failure to pay her at the relevant pay grade for the social secretary job she was appointed to in 2014. Lord Sumption stated that there is a need to identify the juridical nature of the act. The relevant act in this instance is the private act of (alleging) breaching the terms of a contract agreed between the High Commissioner and the Claimant in 2014.

S4 SIA : Issue 1. Ms Muda was a Malaysian national at all material times. Read according to conventional principles of statutory construction, her claim is barred by section 1(1) and section 4(2)(a) SIA 1978. Accordingly the Tribunal must determine:

a. whether section 4(2)(a) SIA 1978 goes beyond what is required under customary international law, such that it is incompatible with Article 6 of the European Convention of Human Rights ("ECHR") as incorporated into UK law by section 1 of the Human Rights Act 1998 ("HRA 1998"); if so,
b. whether section 4(2)(a) SIA 1978 can and/or should be 'read down' to be compliant with Article 6 ECHR pursuant to section 3 HRA 1998.

115. The Claimant accepts that, on its face, *s4(2)(a) SIA* places her claim outside the exception to immunity for employment claims set out in section 4(1) SIA because she is a national of Malaysia.

116. However, she argues that *s4(2)(a)* should be "read down" *under s3 HRA 1998*, so that it does not apply to individuals who are permanent residents of the UK. She suggested that the words "unless the individual has permanent residence in the United Kingdom" should be read into the provision, to give effect to *s4(2)(a)* in a way which is compatible with the Claimant's Convention rights.

117. I did not accept that it was possible to read down *s4(2)(a) SIA,* notwithstanding the breadth of the power under *s3 HRA 1998*, in this way.

118. The words of *s4(2)(a) SIA* are in plain terms and make no exceptions. To read *s4(2)(a) SIA* in order to carve out an exception to it, for residents of the host state, does not "go with the grain of the legislation." I consider that I am bound by the EAT and CA in *Benkharbouche* on this point. I note, in particular, that the Court of Appeal said, of *s4(2) SIA,*

"Any attempt to read down these provisions so as to remove immunity would be to adopt meanings inconsistent with fundamental features of the legislative scheme."

119. The Claimant contended that the Court of Appeal and EAT decisions reflected the law under the previous version of the SIA 1978. She contended that the SIA 1978 has now been amended in accordance with *Benkharbouche* SC, so that s4(2)(b) SIA has been realigned, and is no longer absolute, but more nuanced, and the statutory intention in the amendment is to abide by international law.

120. However, I agreed with the Respondent that *s4(2)(b) SIA* had been amended and *s4(2)(a) SIA* had not. The amendment went precisely as far as the ruling in *Benkharbouche* and no further. I did not accept that s4 SIA had been more fundamentally altered, so as to make the CA ruling in *Benkharbouche* not binding on me. The effect of *s4 SIA* is still to delineate precisely between employees in respect of whose claims the State is immune, and those in respect of whom it is not.

121. The Claimant accepted that, if the Tribunal identifies that the unamended text of *s4(2)(a)* is incompatible with the ECHR, but does not consider itself able to read down the provision to be compatible with the Claimant's Convention rights, it does not itself have the power to make a declaration of incompatibility. The Claimant contended that, in those circumstances, the Tribunal should: (i) explain the basis of this incompatibility; and (ii) grant permission to appeal to the EAT such that the claim can be heard by the Court of Appeal and a declaration of incompatibility granted.

122. However, the Tribunal does not have power to grant permission to appeal. The Claimant is free to appeal to the EAT on questions of law.

123. Regarding the potential basis for incompatibility, however, I make the following comments. In *Benkharbouche* Lord Sumption said, at [59]: "There is a substantial body of international opinion to the effect that the immunity should extend to a State's contracts with its own nationals irrespective of their status or functions even if the work falls to be performed in the forum state; and correspondingly that it should not extend to staff recruited from the local labour force in whose protection the forum state has a governmental interest of its own. Both propositions received substantial support in the preparatory sessions leading to the United Nations Convention and were reflected in the final text of article 11. Both receive a measure of recognition in the Vienna Convention on Diplomatic Relations which carefully distinguishes between the measure of immunity accorded to the staff of a diplomatic mission according to whether they are nationals of the foreign state or nationals or permanent residents of the forum state: see articles 33(2), 37, 38, 39(4) and 44. In a practical sense, it might be thought reasonable that a contract between a state and one of its own nationals should have to be litigated in the courts of that state under its laws, but unreasonable that the same should apply to locally recruited staff."

124. Article 11(2)(d) of the International Law Commission's Draft Articles 1991 provide that the state is immune from suit where "the employee is a national of the employer State at the time when the proceedings is initiated". The commentary on the Draft Articles in the ILC yearbook, 1991, VIL II, Part 2, page 44, paragraph 12, says:

"The fact that the employee has the nationality of the employer State at the time of the initiation of the proceeding is conclusive and determinative of the rule of immunity from the jurisdiction of the courts of the State of the forum. As between the State and its own nationals, no other State should claim priority of jurisdiction on matters arising out of contracts of employment. Remedies and access to courts exist in the employer State. Whether the law to be applied is the administrative law or the labour law of the employer State, or of any other State, would appear to be immaterial at this point."

125. That commentary also says at paragraph 14 that "The rules formulated in article 11 appear to be consistent with the emerging trend in the recent legislative and treaty practice of a growing number of states".

126. However, the 1999 Report of the Chairman of the Working Group of the ILC Sixth Committee, noted the following:

"As regards subparagraph (d) of paragraph 2 of draft article 11, a number of delegations expressed the view that the provision might also present some problems with regard to the principle of non-discrimination based on nationality, in particular regarding employees permanently residing in the forum State. There was general agreement, however, that paragraph (d) should be retained but that wording should be added to meet the concerns of delegations regarding

employees residing permanently in the forum State." 12 November 1999, A/C.6/54/L.12 [34]

127. A customary international law principle requires "a widespread, representative and consistent practice of states on the point in question": *Benkharbouche* at [31].

128. As Lord Sumption noted at [29], not everything in Draft Article 11 may be declaratory of Customary international law: *Benkharbouche* at [29].

129. Following the 1999 Report of the ILC Sixth Commmittee, Article 11(e) of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004) (the "2004 Convention") was drafted. Unlike Draft Article 11(d), Article 11(e) of the 2004 Convention provides that a state is immune from suit where "the employee is a national of the employer State at the time when the proceedings is instituted, unless this person has the permanent residence of the State in the forum".

130. That new draft indicates that the unvarnished terms of Article 11(2)(d) of the International Law Commission's Draft Articles 1991 do not represent "a widespread, representative and consistent practice of states on the point in question".

131. However, the new Article 11(e) does not itself yet embody any customary international law principle. The 2004 Convention "has attracted limited support. 28 states had signed it, including the United Kingdom." Of these, the Respondent agrees that 23 have now ratified it. Malaysia has neither signed nor ratified it. It will not come into force until it has been ratified by 30 states. Article 11(e) is therefore "an article of a treaty which is not in force and which a large majority of states have neither signed nor ratified": Benkharbouche at [29]. In itself, it is insufficient foundation for a customary international law principle.

132. Neither Art 11(2)(d) of the International Law Commission's Draft Articles, nor Article 11(e) of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004), were confirmed by Lord Sumption as stating principles of Customary International Law, [29] of *Benkharbouche.*

133. The upshot of all this, including the new Article 11(e), is that I do not consider that either that article, or art 11(2)(d) International Law Commission's Draft Articles, states a principle of customary international law, according to the requirement in [31] *Benkharbouche*.

134. In the present case, the Claimant was a member of the High Commission's locally recruited staff. She was not recruited in Malaysia. She was not posted from Malaysia to the High Commission in London. While she is a Malaysian citizen, she has lived in the United Kingdom (UK) since 1 April 1991, has had indefinite leave to remain in the UK, and a residence permit, since 8 September 1995 and is a UK taxpayer.

135. She therefore appears to fall into a hybrid category of employees who are both citizens of the sending State and locally recruited residents of the UK. She does not fall cleanly into either of the categories which Lord Sumption identified, in

respect of which there is a "substantial body of international opinion" as to the application of state immunity.

136. That being so, the Respondent is unable to show that *s4(2)(a),* as applied to her, a locally recruited resident of the UK, is justified by a rule of customary international law. Its terms appear to be incompatible with the Claimant's article 6 ECHR right to a fair hearing of her civil claims.

Conclusion

137. The Claimant's employment was not an act of sovereign authority.

138. The Claimant's claim does not involve an act engaging a sovereign interest.

139. The Respondent has State Immunity in respect of the Claimant's claim because she is a citizen of Malaysia. It is not possible to read down s4(2)(a) SIA 1978 so that it does not apply to individuals who are permanent residents of the UK.

140. The Claimant's claim is therefore dismissed.

Dated: 16 July 2024

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Employment Judge Brown

ORDERS SENT TO THE PARTIES ON

23 July 2024

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M PARRIS

.....

FOR THE TRIBUNAL OFFICE

Other matters

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Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

You may apply under rule 29 for this Order to be varied, suspended or set aside.