Appeal No. UKEAT/0424/11/ZT

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 3rd December 2012
Judgment handed down on 20th December2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR J MALLENDER

MS P TATLOW

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1) DR H A ABUSABIB
2) MRS R M EL-TERAIFI

APPELLANTS

MISS G TADDESE

RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellants	MR J HOLMES-MILNER (of Counsel) Instructed by: Freeman Solicitors Ltd 60 Bell Street London
For the Respondent	MR P MANT (of Counsel) Instructed by: Anti Trafficking and Labour Exploitation Unit Islington Law Centre 232 Hornsey Road London N7 7LL

SUMMARY

DIPLOMATIC IMMUNITY

The First Respondent, who had been found liable together with the Second Respondent for acts of discrimination against the Claimant in a hearing of which he said he had not been aware, asserted on appeal that he was entitled to diplomatic inviolability. Since he had ceased to occupy a diplomatic post in the UK, this depended on whether the employment by him of the claimant as a domestic at his home out of which the claims arose could be regarded as an exercise by him of his functions as a diplomat, and whether the alleged acts of discrimination likewise attracted immunity as having been such an exercise of his functions. It was **held** that employment of a domestic servant at the diplomat's residence would not normally be within those functions, and this case on its facts was not, nor were the acts complained of, done in the exercise of those functions.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal raises questions relating to diplomatic immunity in employment cases. The tale is a tangled one. The Claimant, of Sudanese origin according to her claim, but Ethiopian according to her witness statement, was employed by at least the male Respondent (though she said both) from September or October 2007 until May 2008. Nearly two years after she had ceased employment, on 9th March 2010, she brought a claim before the London Central Employment Tribunal. As it happened, the male Respondent was most probably a diplomat, as First Secretary to the Sudanese Embassy. When she brought her claim, she described the address of the Respondents as “currently unknown”. The claim raised serious allegations of direct discrimination and harassment under the **Race Relations Act 1976**, of harassment under the **Employment Equality (Religion or Belief) Relations 2003**, and of harassment under the **Sex Discrimination Act 1975**. It also maintained that no written particulars of her contract of employment had been given to her in breach of section 38 of the **Employment Act 2002** and that unauthorised deductions had been made from her wages. These allegations arose out of her mistreatment when she worked as a domestic servant for the Respondents, having been granted a visa at the embassy in Addis Ababa for that purpose.

2. The Claimant had plainly told those advising her that her male employer worked at the Sudanese Embassy. It seems that no enquiry was made at the Embassy to discover the current address of the Respondent. Instead, on the 19th October 2010 the question whether the proceedings had been duly served on the respondents was raised at a hearing at which, of course, the Respondents were not in attendance, before Regional Employment Judge Potter. Her order read, at paragraph 6:

> **"There was discussion as to whether service of the proceedings on the Respondents had been achieved: the Claimant's advisor's impression was that the Respondents might have left the country to avoid criminal prosecution. The file did not indicate that the ET1 had been returned undelivered."**

This contrasted with the position in relation to the Rule 9 Notice, which had been returned by Royal Mail – Addressee gone away. (A Rule 9 Notice is one informing a Respondent who has not presented a response to a claim that he shall not be entitled to take any part in the proceedings except for certain specified and limited purposes). Then the Judge added this: "service would be deemed effective."

3. On the basis therefore, that the Respondents had been properly served, had not entered a Respondent's notice, and were therefore debarred from taking further part in the proceedings, save for purposes set out in Rule 9, the matter came before Employment Judge Snelson on 19th November 2010. He held that the Tribunal had no jurisdiction to consider the Claimant's complaint of unauthorised deductions from wages and accordingly dismissed that claim, but thought it just and equitable despite the lapse of time to consider the balance of the Claimant's claims. He found them proved. He ordered just over £70,000 in total to be paid by way of compensation. It is clear that at some time within the next month that decision, which could only have been sent to the address used for service previously, came to the attention of the Respondents, for on the 14th December 2010 the Respondents appealed against the decision. The appeal raised the question of diplomatic immunity. It purported to have been drafted on 9th December 2010. However, though an application for review was apparently dated in December it was not received by the Tribunal until the following August. It was woefully out of time. Whereas any employment judge might be expected to extend time within which to hold a review, where one party had not been represented because they said they had not been served in fact with the proceedings, no litigant could reasonably expect such an indulgence where they

had actually known of the decision requiring review at least 8 months prior to the date upon which they asked for that review. Accordingly, Judge Snelson rejected the application. Undeterred, the Respondents asked the Judge to review his decision not to grant a review. That he did in November 2011, with the same result.

4. An Appeal against the decision in respect of review was attempted, but did not get beyond sift stage at the Appeal Tribunal.

5. No appeal, nor review, was ever sought in respect of the decision made by Regional Employment Judge Potter as to service. It therefore stands.

6. The Appeal against the decision on the claim also had a chequered history. At one stage struck out (in February 2011), it was reinstated following an appeal against the Registrar's order, and such were the issues that it was listed for a hearing in April this year. For logistical reasons it did not then take place but finally reached us on 3rd December 2012.

7. The sole ground of appeal was that the Tribunal erred in law in hearing and determining the claim against the Respondents when it had no jurisdiction to do so, by virtue of Section 2 of the **Diplomatic and Privileges Immunities Act 1964**, and Schedule 1 thereof, incorporating inter alia articles 1, 31 and 37 of the Vienna Convention. In other words, the Appellants claimed diplomatic immunity in respect of the acts complained of in the claim.

8. The procedural history runs in tandem with the history of the Appellant's movements.

9. There was no evidence before the Employment Tribunal sufficient to found a claim for diplomatic inviolability. However documents from the Embassy of the Republic of Sudan and an email from the Foreign and Commonwealth Office of the United Kingdom were put before us in a bundle agreed by both parties. It was accepted that if indeed the Respondent(s) had diplomatic inviolability, it could be asserted at any stage of the proceedings.

10. These documents showed that the first Respondent was a diplomat, being First Secretary to the Embassy from 29th June 2005 to 25th December 2007. A letter of 17th March 2008 from the Sudanese Embassy recorded that Dr Hassan Ali Abusabib left the United Kingdom on 25th December 2007 "upon completion of this posting". A subsequent letter (13th May 2008) recorded that the Claimant (the Respondent to this appeal) - who held an Ethiopian passport though claiming to be of Sudanese national origin - left her employment on 12th May 2008. That letter described her employment as being "housemaid at the residence of Mr Ahmad …Taboul, First Secretary". (He was the successor to the First Respondent as First Secretary). However, a later letter still from the Embassy (6th December 2010) recorded that the First Respondent was a Sudanese diplomat "until January 2008". The male Respondent himself said in a statement provided for the purposes of his appeal that he had not lived in the UK "since my completion of this post for which my visa ended in June 2008." At paragraph 8 of that statement he recorded that the Claimant had worked for him until 11th May 2008. He said he began a post as a Minister Plenipotentiary to the United Nations with effect from July 2009. Accordingly, as to the precise date on which his diplomatic status ended, and when the Claimant would have been working for him, there is conflicting material.

11. The papers suggest, and the parties appear agreed, that there is no conclusive evidence as to the precise movements of the Appellants into and out of the United Kingdom after 25th December 2007.

12. On the material before us, we consider it safe to conclude that, as both parties agree, the Claimant worked for the First Respondent until 11 May 2008; that his post as First Secretary ended on 25th December 2007; and that it is unclear if he left, or how often he left, the UK before in mid to late May or early June 2008 he finally did so.

The Law

13. The **Diplomatic Privileges Act 1964** provides by section 2 (1) that articles of the Vienna Convention on Diplomatic Relations signed in 1961 have the force of law in the UK.

14. Article 31 of the Convention, scheduled to the **1964 Act**, provides as follows:

> **"A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from a civil and administrative jurisdiction, except in the case of:**
>
> > **(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purpose of the mission;**
> >
> > **(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State**
> >
> > **(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."**

Article 37 extends the privileges and immunities specified in Articles 29 – 36 to the members of the family of a diplomatic agent forming part of his household. Accordingly, the second

Respondent was entitled to the self same immunities as her husband whilst he was First Secretary.

15. Article 39 provides as follows so far as material: -

> **"1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other ministry as may be agreed**
>
> **2. When the functions of a person enjoying privileges and immunities come to an end, such privileges and immunities shall normally cease at the moment he leaves the country or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect of acts performed by such a person in the exercise of his functions as a member of a mission, immunity shall continue to subsist."**

16. Accordingly, whilst in the country as First Secretary, the male Respondent had an immunity from suit. That persisted after the 25th December 2007 (the date which we take on the available evidence to be the date when his appointment ceased) until he left the UK. We do not know precisely when that was. It was, however, pleaded by the Claimant (paragraph 13 of "Statement of Claim") that in early 2008 he went on a trip to Sudan but returned before she left his employment.

17. It is thus a moot point whether, if proceedings had begun in early 2008, they could so far as the Respondents were concerned have been met by Article 32 (a complete freedom from suit, whatever the subject of the claim, save only for the exceptions specifically identified in the Article, none of which apply here) or by Article 39 as being an act in respect of which immunity continued to subsist. The distinction between the former and the latter is that only in

respect of ‘acts performed… in the exercise of his functions as a member of the mission” does a person who formerly served in the UK as a diplomat have such immunity.

18. It is accepted by Mr Holmes-Milner, who appears for the Appellants, that the male Appellant’s position at the United Nations does not attract an immunity from suit in the United Kingdom from which he can rely for the purposes of these proceedings. It would, however, entitle him to be free of the service of process emanating from the United States whilst he holds that accreditation.

19. The reference to the exercise of ‘functions’ as a member of the mission is illuminated by Article 3 of the Vienna Convention. That defines the functions of a diplomatic mission as consisting inter alia of:

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.

20. Finally, Article 32 provides materially as follows:

> “**1. The immunity from jurisdiction diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.**
> **2. The waiver must always be expressed…”**

There has been no express waiver here.

The Arguments

21. In an argument of subtlety and skill, Mr Holmes-Milner submitted that inviolability from suit was not waived. It therefore continued. The Employment Tribunal, though it did not know it when it made its judgment, committed an error of law. It regarded it as permissible that the Respondents should be parties to a claim, and that it was permissible for the Tribunal to make findings against them.

22 He accepted, realistically, that the Appeal could only be brought by the first Respondent since the protection by way of residual immunity contained in Article 39 applies only to the diplomatic agent: Article 37 which protected his wife whilst he was a diplomat in the UK in like manner to him, expressly limits the protections to those contained between Article 29 and 36, which do not include the protection in Article 39. It is however, in respect of the actions of the first Respondent that the real gravamen of the claim lies.

23. He noted the difference between Article 38 – which confers diplomatic immunity upon nationals of the receiving State who are employed in it as diplomats of another state which restricts immunity to "official acts performed in the exercise of his functions" – and Article 39. The word "official" does not appear in Article 39 (2). That might suggest that the expression "acts" which does appear, has a broader scope than those referred to in article 38 (1), and accordingly that a more liberal construction should be given in the identification of those matters which are "functions", in respect of which Article 3 does not purport to give a complete and comprehensive list.

24. The work which the Claimant did was as a domestic. She also undertook the care of the Respondents' children whilst the female Respondent went out to work. The visa to enable her to come to the United Kingdom was organised by the Sudanese Embassy: this was not in dispute. It was the Embassy which secured a domestic worker (diplomatic visa) for her, which included corresponding with the United Kingdom authorities when it became apparent that she had entered the country having been given the wrong form of visa by the British Embassy in Addis Ababa. (Mr Mant, who appeared for the Claimant, thought it may have been a visitor's visa).

25. The question whether the residual immunity conferred by the last sentence of Article 39(2) might apply to acts done in respect of domestic servants engaged to support a diplomat whilst in post in the United Kingdom had been considered in one recent case: that of **Wokuri v Kassam** [2012] EWHC105 (Ch) (Newey J.) The defendant, Ms Kassam, was deputy head of mission at the Ugandan High Commission. She had employed Ms Wokuri as her chef and housekeeper in Uganda. Her duties were said by Ms Kassam to include housekeeping and catering at the residence of the Deputy Head of Mission. By the time the matter came before Newey J Ms Kassam had left the country. The question of immunity arose. It was common ground that there was no English authority of much assistance, though three American cases were cited in which the Vienna Convention had been considered. The conclusion to which Newey J came explained the basis for the continuing immunity under Article 39 (2), at paragraph 23 as follows:-

> **"This immunity reflects the fact that acts so performed are in law the acts of the sending State. Denza "Diplomatic Law", third edition, explains the position as follows (at 439):**

> **'The acts of a diplomatic agent in the exercise of his official functions are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot at any time be sued in Britain in respect of such acts since this would be indirectly to implead a sending State.'**

He then concluded in two important paragraphs as follows:-

> **"25. A former diplomat will not necessarily have immunity in relation to claims by employees carrying out domestic duties. That view is supported by both *Baoanan v Baja* (627 F. Supp. 2d 155, decided by the United States District Court for the southern district of New York in 2009) and *Swarna v Al-Awadi* (622 F. 3d 123, a 2010 decision of the United States Court of Appeals, 2nd Circuit). The Court in *Swarna v Al-Awadi* was, as it seems to me, right to consider that the residual immunity "does not apply to actions that pertain to [a diplomat's] household or personal life and that may provide, at best, 'an indirect' rather than a 'direct… benefit to' diplomatic functions". Such actions do not 'indirectly… implead the sending State' (to use words from Denza, 'diplomatic law'). Neither do they relate to 'a) acts performed… in the exercise of [the diplomat's] functions as a member of the mission' (within Article 39(2)).**
>
> **26. Professor Sarooshi (the advocate for the defendant) placed particular reliance on the passage in *Tabeion v Mufti* (73 F. 3d 535, a 1996 decision of the United States Court of Appeals, 4th Circuit) in which the Court said "day to day living services such as dry cleaning, or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them." However, in *Tabeion v Mufti* the Court's concern was essentially as to the meaning of 'commercial activity' in Article 31 (1) (c) … as was pointed out in *Swarna v Al-Awadi… Tabieon v Mufti*" articulates the scope of acts as they relate to the term 'commercial activity' under Article 31 (1) (c) for sitting diplomats". It does not define 'official functions', much less define the official acts that are accorded for eventual immunity under Article 39 (2) to former diplomats."**

26. On the facts before him, which he then set out, Newey J decided that he could not be satisfied that Ms Wokuri's claims arose out of acts performed in the exercise of Ms Kassam's functions as a member of the mission.

27. As Mr Holmes-Milner rightly observes, cases decided in foreign jurisdictions have a greater significance in cases such as the present than they would in most 'ordinary' cases, for they are considering the terms of an international instrument which is law in the domestic

jurisdiction as it is in the foreign country. Accordingly, such interpretations should be given particular respect. **Tabion v Mufti** considered the extent of the exception under Article 31 (1) (c). It was not directly concerned with the extent of the expression "functions". The reason why professional or commercial activity is excluded is because it was not the purpose of admitting a diplomat into a jurisdiction to enable him to carry on trade there nor to pursue his own private gain in pursuing professional activity: his purpose is to advance the interest of and to represent the sending State, and it is for that purpose alone that inviolability is recognised.

28. Mr Mant submitted that although there were factual differences between the position of Ms Wokuri and Ms Kassam compared to those in the present cases, they did not affect the essential principle. He relied upon that decision, and upon the American jurisprudence underpinning it. He drew attention to the list of functions in Article 3 as indicating that any function not listed would have to be of the same general character as those that were. This did not and could not extend to the employment of a domestic servant. Thus, he submitted that the employment of a domestic servant in the private household of a diplomat was not capable, normally, if ever, of being an exercise of the functions of a diplomat. Moreover, Article 39 (2) places a further restriction upon those matters in respect of which immunity is provided. It is necessary to consider the "acts" which are said to be done in the exercise of the diplomatic function. It cannot be said that an act of racial or sexual discrimination (in the latter case the allegation being here that the male Respondent required the Claimant to massage his penis) could be regarded as any part of, or ancillary to any part of, the functions of a diplomat as a member of a mission.

Discussion

29. The starting point must be the wording of the Convention itself. It draws a clear distinction between functions performed as a member of the mission, and other functions performed by the individual diplomat in question whilst present in the receiving State. Since the immunity is no longer necessary to respect the diplomatic purpose of the mission once the diplomat has retired from that post, but continues by way only of a residual protection, it seems to us that it should be construed no more widely than the words require. Whatever is a "function" must be closely related to those matters specifically identified as functions in Article 3, as Mr Mant submitted. That leaves little scope for the act of employing a domestic servant to be part of the function of the diplomat in his mission.

30. However, we do accept that some matters ancillary to the central functions of the mission will be included in the protection. Entertaining nationals of the receiving State may not be part of the central function of a mission, but it is either a less central function or at least plainly ancillary to it, such that making arrangements for entertaining, such as employing staff to facilitate it, can be regarded as coming within the protection. Similarly, accommodating nationals of the sending State who pass through the territory of the receiving State in the diplomat's home, and generally equipping the diplomat with the ability to devote his full time and attention upon the mission all seem to us to be capable of being covered.

31. We consider that the employment by a diplomat of another to provide personal service to him whilst engaged in his mission may therefore attract protection as being a function of the mission. There is a spectrum. The employment of a domestic worker, who performs no task outside the diplomat's home, seems to us to have such little connection with the "functions of

his mission" that it will fall at the end of the spectrum which is not comprehended by that phrase – and it follows that the act of employing such a person is unlikely to be an act performed in the exercise of the functions as such. It might otherwise be difficult to see where the dividing line between the functions of the mission, and other functions might fall. A clear distinction might fall between the case of someone performing such services, and that of the P.A. whose job in replying to correspondence, both official and personal, and managing the diary, travel arrangements and the like of the diplomat would suggest employment toward the opposite end of the spectrum.

32. This approach is consistent with that adopted in **Baoanan v Baja**, which relied upon the decision in **Swarna** as demonstrating that acts taken in the regular course of implementing an official programme or policy of the mission (see **De Luca v United Nations** 841 F. Sup. 531 at 534-5) and the act of "hiring and employing an individual to work at the diplomatic mission" were acts which might be regarded as "official", whereas residual diplomatic immunity did not extend to law suits based on actions which were entirely peripheral to the diplomatic agent's official duties. The Court concurred with the functional approach adopted in **Swarna** – the distinction was between acts allegedly committed which were performed in furtherance of the diplomatic functions such that they were "in law the acts of the sending State" and other acts: they were official acts whereas all other acts were private acts for which residual immunity was not available. The judgment recognised the difference between a diplomat employing and paying staff to perform personal or private tasks for the diplomat or his family which the sending State would not recognise as ordinary or necessary to the official functioning of the mission and for which it would not provide compensation. The question was whether the act of employment was official or private.

33. In **Swarna** the Plaintiff brought an action against a diplomat serving at the United Nations. She had agreed to work in the United States at his home. She was forced to work 17 hours a day, seven days a week, and cared for the two children of the family, doing laundry, ironing, cleaning, cooking and cooking for and serving guests. While the Court acknowledged that the Kuwait mission received tangential benefits on the occasions when Al-Awadi entertained members of the mission at his home, that was not sufficient to make the Plaintiff an employee of the mission, and did not make his act in employing her an act of the sending State. Moreover, the acts of which she complained were entirely peripheral to his official duties, and were thus private acts.

34. This approach is also consistent with that taken by Newey J, as expressed at paragraph 25 in **Wokuri v Kassam**. Although the opening sentence of that paragraph suggests there may be occasions when a former diplomat has immunity in relation to claims by employees carrying out domestic duties he there adopted a principle which seems to us consistent with our view of the Convention and of the American cases to which we have been referred.

35. In the case of a claim made under the discrimination statutes the contract of employment (whether as employee or worker) is a necessary passport to the assertion of the rights relied on. The act complained of is centrally the act of discrimination alleged. We do not think it can sensibly be argued that acts of the nature which this case concerns could be regarded as acts carried out in the exercise of the functions of the mission. We reject Mr Holmes-Milner's argument that the fact that the employment contract said that the employer was the first Respondent, with the addition of "First Secretary", demonstrates that either the act of employment, or any act in relation to the employee thereafter, was in respect of his functions as such. It identifies him. It does not provide that the duties to which the contract relates are

official rather than private. Nor do we see that the issue of a domestic worker (diplomatic) visa alters the position: we had no explanation why this would characterise the domestic service she was to provide as any more a function of the mission than if the worker had been a UK national. The negotiation as to her immigration and employment status, and the suggestion that her services might be re-allocated to the successor to the Respondent as First Secretary, show an involvement of the mission in the arrangements. It does not in this case show that those arrangements were part of the functions of the mission as representing Sudan in the United Kingdom. We accept they are features of this case distinct from the facts in **Wokuri v Kassam**: they do not affect our overall evaluation.

36. Neither party has invited us to hear and determine evidence for ourselves. Accordingly we have taken the Appellants' case at its reasonable highest in favour of their contentions in concluding, for the reasons we have set out above, that the residual immunity would not extend to this particular case.

37. It follows that it is unnecessary in this case to consider the questions of service: an appeal against the adjudication by Judge Potter that service was deemed effective has not been advanced in this appeal. We therefore treat the proceedings as properly served.

38. Nor has it been necessary to determine a fall-back argument of Mr. Mant – that the acts in particular of sexual abuse which were alleged against the first Respondent occurred during 2008, and hence after the date the evidence shows he ceased to be fulfilling a diplomatic function in the UK. We would only observe that the resolution of this issue might depend on the precise facts, and the exact date, of any act which happened, its relationship to the date when the Respondent left the country and a view whether the complete immunity – which

persists for a “reasonable time” after the diplomatic mission ends – was persisting at the time or not.

39. It follows that this appeal must be dismissed. Finally we express our gratitude in writing as we did to Mr Holmes-Milner and Mr Mant at the conclusion of the argument, for the quality and industry of the arguments on both sides. We doubt that the case could have been better argued.