Appeal No. UKEAT/0401/12/GE
UKEAT/0020/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 30 April 2013
Judgment handed down on 4 October 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

UKEAT/0401/12/GE

MS F A BENKHARBOUCHE — APPELLANT

EMBASSY OF THE REPUBLIC OF SUDAN — RESPONDENT

UKEAT/0020/13/GE

MS M JANAH — APPELLANT

LIBYA — RESPONDENT

JUDGMENT

APPEARANCES

UKEAT/0401/12/KN

For the Appellant

MR PAUL LUCKHURST
(of Counsel)
Instructed by:
Anti-Trafficking and Labour Exploitation Unit
Islington Law Centre
232 Hornsey Road
London,
N7 7LL

For the Respondent

MR JAMES HOLMES MILNER
(of Counsel)
Instructed by:
Freemans Solicitors Ltd
60 Bell Street
London
NW1 6SP

UKEAT/0020/13/KN

For the Appellant

MR PAUL LUCKHURST
(of Counsel)
Instructed by:
Anti-Trafficking and Labour Exploitation Unit
Islington Law Centre
232 Hornsey Road
London,
N7 7LL

For the Respondent

MR OLIVER ASSERSOHN
(of Counsel)
Instructed by:
MS-Legal
88 Kingsway
London
WC2B 6AA

SUMMARY

STATE IMMUNITY

A cook at the Sudanese embassy, and a member of the domestic staff of the Libyan embassy, both made claims arising out of their employment. They were met with pleas of State Immunity, which were upheld by two separate ETs. They appealed on the basis that the plea of immunity denied them access to court to enforce their rights, relying upon the decisions of the ECtHR in **Cudak v Lithuania** and **Sabeh el Leil v France** to establish that this had been in breach of Art.6 ECHR. An argument that the judges (both of whom held there to have been such a breach) were wrong to hold that the **State Immunity Act 1978**, which provides for the immunity in UK law, could not be interpreted to permit the claims to proceed failed. A second argument, that to the extent the claims fell within the material scope of EU law the SIA should be disapplied, succeeded on the basis that although the HRA dealt with the approach of courts and tribunals to alleged breaches of the ECHR, the EU Charter was now recognised as applicable in the UK, and recognised general principles of fundamental importance to the EU where matters fell within the material scope of EU law. Art.47 of that Charter recognised the same principle as contained in Art.6 ECHR. The Tribunal was bound by EU law (following **Kucukdevici** and **Aklagaren**) to disapply domestic law in conflict with these principles even in a dispute between private litigants.

Permission to appeal was granted, since the matter would benefit from the consideration of a higher court.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. These appeals, heard at the same time, raise the question whether someone employed in the UK by a foreign diplomatic mission as a member of its domestic staff may bring a claim to assert employment rights against the country whose mission it is despite being met by an assertion of State Immunity.

2. The domestic law (subject to any interpretation or interpolation made necessary by the **Human Rights Act 1998** (HRA) or by European legislation and case-law) seems to say that such a person is barred from doing so. The **State Immunity Act 1978** (the **1978 Act**) provides, so far as material:

> **"1 General immunity from jurisdiction.**
>
> **(1)A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.**
>
> **(2)A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question**.
>
> ……..
>
> **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) 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…….

…..(6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

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 concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968…….;"

3. The **Diplomatic Privileges Act 1964** (the **1964 Act)** provides materially as follows:

"**2 Application of Vienna Convention.**

(1) Subject to section 3 of this Act, the Articles set out in Schedule 1 to this Act (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in the United Kingdom and shall for that purpose be construed in accordance with the following provisions of this section.

(2) In those Articles—

- **"agents of the receiving State" shall be construed as including any constable and any person exercising a power of entry to any premises under any enactment (including any enactment of the Parliament of Northern Ireland);**
- **"national of the receiving State" shall be construed as meaning citizen of the United Kingdom and Colonies;**
- **"Ministry for Foreign Affairs or such other ministry as may be agreed" shall be construed as meaning the department of the Secretary of State concerned"**

The Schedule provides**:**

"ARTICLE 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) the "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

> **(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;**
>
> **(e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;**
>
> **(f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;**
>
> **(g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;**
>
> **(h) a "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;**
>
> **(i) the "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."**

4. Accordingly, a member of the domestic staff of a mission is within the exclusion from section 4 of the **1978 Act**. Thus a cook of Moroccan nationality at the Sudanese Embassy in London, as was Ms Benkharbouche for several years until her dismissal in November 2010, or a Moroccan national employed by the Libyan embassy in London, as was Ms Janah, for several years before her dismissal in January 2012, could pursue no claim against their former employers.

5. Ms Benkharbouche argues, as does Ms Janah, that the statutes can be interpreted so that State Immunity does not bar a claim to enforce employment rights made by someone in domestic service in an embassy, or, if they cannot, that they should be disapplied insofar as they have that effect, at least insofar as the particular employment rights concerned are within the material scope of the law of the European Union.

6. The argument which Mr Luckhurst (who appears for both Ms Benkharbouche and Ms Janah) advances is that to deny the Claimants access to court to enforce their employment rights on grounds related to their national origin breaches the European Convention on Human Rights and Fundamental Freedoms (ECHR). If that is established, he then relies on the obligation of the court pursuant to section 3 of the **Human Rights Act 1998** (**HRA**) to interpret

the legislation to the fullest extent possible so as to comply with Article 14, read together with Article 6 ECHR or separately. If it cannot be, he argues that the legislation is incompatible with these fundamental rights, and pursuant to section 2 of the **European Communities Act 1972** can and should be disapplied insofar as necessary. He submits that this is because Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) creates rights which are directly effective in the UK; that as such it is supreme; and that where it is incompatible with domestic legislation the latter must yield.

7. If unsuccessful on those grounds, he seeks a declaration of incompatibility from the courts, though recognises (correctly) that I am not empowered in this jurisdiction to make one. Mr Holmes-Milner, for Sudan, does not resist permission to appeal so that such a declaration may be argued for, but intends to oppose it.

The Tribunal Decisions

8. Employment Judge Deol (at London Central) dismissed claims by Ms Benkharbouche for unfair dismissal, non-payment of the National Minimum Wage, unpaid wages and holiday pay and for a breach of the Working Time Regulations on the basis that the Respondent State was immune from suit. He thought that the claim was based on an employment relationship of a private, rather than public, nature, and therefore came potentially within the ambit of Article 6 ECHR. However, the definition of "members of the mission" in section 16 of the **1978 Act** could not be interpreted to permit a claim. He thought (at paragraph 75) that:

> "**The Claimant is seeking to use section 3 of the Human Rights Act 1978 to rewrite the State Immunity Act 1978, in particular the general immunity from employment related claims set out in section 16 of the Act. Section 3(2)(b) of the Human Rights Act 1988 makes it clear that the Tribunal's interpretation under that Act does not affect the validity, continuing operation or enforcement of any incompatible primary legislation"**

And at paragraph 77 he added:

> "**In summary, the case of *Secretary of State for The Home Department v MB [2008] 1 AC 440* is not an authority that a tribunal may use its powers under section 3 of the Human rights Act to rewrite a potentially incompatible statutory provision in a way that would completely change, even reverse, the meaning of it."**

9. Though accepting that there was potential inconsistency between Article 6 ECHR and the blanket immunity conferred by the **1978 Act**, he rejected the argument that he should disapply that statute, since it would be beyond the powers of the Tribunal to do so (paragraph 88), and he did not consider that Article 47 of the Charter provided a means of enforcing EU rights over and above that provided for by the **HRA**:

> "**The recent ECJ cases do not suggest that the mechanism used by the UK is in conflict with the mechanism for enforcing and interpreting EU rights and neither do they extend the statutory powers and limits of the Employment tribunal."** (paragraph 91)

10. Employment Judge Henderson (also at London Central) dismissed claims by Ms Janah for unfair dismissal and arrears of pay, race discrimination and harassment, and for both holiday pay and a failure to provide regular breaks in contravention of the Working Time Regulations 1998, also on the basis that the Respondent was immune from suit. Ms Janah was conceded to be a member of the service staff of the mission, within Article 1(g) of the Schedule to the **1964 Act**, such that on a "technical reading" of the Act it would have immunity. It was conceded, further, that Ms Janah was not habitually resident in the UK, with the result that section 4(2) of the **1964 Act** disapplied the exception to immunity granted by section 4(1).

11. EJ Henderson felt unable to say whether following the provisions of s.4(2) of the **1978 Act** in Ms Janah's case constituted a breach of Art.6: there was no evidence, and insufficient argument by way of submission to determine if permitting the plea of State Immunity to be raised by virtue of that section was disproportionate to the legitimate aim which the grant of State Immunity more generally sought to pursue.

12. A different conclusion was reached so far as s.16 of the **1978 Act** was concerned. Though EJ Deol thought it was potentially the case, EJ Henderson concluded that the grant of immunity pursuant to s.16 actually did fall within the ambit of Article 6 ECHR, and that that right had been denied. She followed decisions of the European Court of Human Rights in **Cudak v Lithuania** (2010) 51 EHRR 15, and **Sabeh el Leil v France** (2012) 54 EHRR 14, in finding a breach: the Claimant had not herself participated in acts involving the governmental authority of Libya, and to invoke immunity would therefore be disproportionate to the aim of protecting its functions as a State. However, the statutory provisions could not be "read down" so as to be interpreted in accord with the ECHR, since to do so would effectively reverse the effect of the section and depart substantially from a fundamental feature of the **1978 Act**.

13. Nor, held the judge, could the Tribunal decline to give effect to the statutory provisions in the **1964** and **1978 Acts** which denied jurisdiction for hearing the claims. Though she accepted that Article 47 of the Charter was part of national law and directly effective, it was not for the Tribunal to consider what she regarded as a free-standing complaint under EU law (applying **Biggs v Somerset County Council** [1996] 2 All ER 734, and **Barber v Staffordshire County Council** [1996] 2 All ER 748). She held that, in effect, what Ms Janah sought to do was to make a "Francovich" claim (a reference to **Francovich v Italian Republic (**C-6/90; C-9/90 ECJ) [1995] ICR 722) which the Employment tribunal exercising a purely statutory jurisdiction had no power to determine; and there was significant doubt over the enforceability of the Charter in the UK courts following a reference on the point to the CJEU by the Court of Appeal on appeal from **R (Saeedi) v Secretary of State for the Home Department** [2010] EWHC 705.

14. She did however accede to a stay on the proceedings pending the decision on this appeal.

15. In neither case has the state concerned submitted to the jurisdiction.

16. The issue on appeal is thus not whether the statutes on their face appear to grant procedural immunity from suit – the opposite was not contended for below – but whether (a) the claims came within the ambit of Article 6 ECHR; (b) if so, whether (applying an approach to interpretation which ensures so far as possible the observance of European or fundamental rights) the statutory provisions were open to an interpretation which secured a fair trial of the claimants' civil rights and obligations, rather than prevented it; (c) if not, whether the statutory provisions could be set aside (with the effect that the rights guaranteed by Article 6 could be enjoyed notwithstanding that domestic statute provided the contrary).

17. The context within which these issues fall to be decided is one in which the 1964 and 1978 statutes recognise international obligations to other sovereign states, to observe which may place domestic courts in conflict with rights, regarded as fundamental, and recognised by the **HRA**, which also derive from international obligations, and vice versa. If there is such a conflict, and it is to be resolved not by asserting simply the primacy of one set of provisions over the other, but by applying an approach of proportionality so as to strike a proper balance, it becomes essential to identify the importance of the object sought to be achieved by each set of provisions.

18. State Immunity is in issue here. It is closely related to, but distinct from diplomatic immunity. In **Aldona S v Royaume Uni**, (JDI 1963) 191, a decision of the Poland Supreme Court of 14th December 1948, a typist in the editorial office of 'Voice of England', a

publication by the British Foreign Office, was dismissed without being paid arrears of salary due to her. She claimed in Poland against the United Kingdom. Her claim having been rejected on the basis of State Immunity by the District Court of Appeal, it came before the Supreme Court. It, too, dismissed the claim. It observed:

> **"…the legal basis of immunity from jurisdiction of a State is different from the immunity of diplomatic agents. Immunity of foreign representatives is meant to protect their freedom in exercising their functions – "*ne impediat legatio*" (Stefko-Ehrlich), whereas the basis of the immunity from jurisdiction of foreign states is the democratic principle of their equality, irrespective of their size and power, which, in consequence, excludes jurisdiction of one State over another ("*Par in parem non habet judicium*"), unless there has been voluntary submission to such jurisdiction either by a definite document or by a conclusive action (Ehrlich, Law of Nations, p.96). …in examining questions concerning immunity from jurisdiction of foreign States, one has to base oneself directly on general principles universally adopted in international relations. The most essential of these principles is the principle of reciprocity among States which results from the fundamental principle of their equality (this principle must govern diplomatic immunity as well, not withstanding its different aspect). The principle of reciprocity is based on recognition or non-recognition of the immunity from jurisdiction by one State of another in the same measure as the latter recognises or refuses to recognise immunity from jurisdiction of other States."**

Hazel Fox, in the second edition of her seminal text "The Law of State Immunity" not only cites **Aldona S** but notes that the German Federal Constitutional Court was of the same view in the leading case **Empire of Iran** (45 ILR 57). She recognises a purpose of State Immunity as being to give protection to the performance of the public functions of the State in the manner which international law requires in respect of independent and equal States.

19. Though at one time it was considered that no sovereign State could be subject of litigation, even if engaging in activities which were of a kind that might appropriately be undertaken by private individuals and had no obvious reference to the functions of the State itself (see **The Christina** [1938] AC485 per Lord Atkin at 490), a restrictive approach has since been taken – there are derogations from the immunity when a State engages in commercial or trading activities, and the act in question is within the scope of those activities

(see **I Congreso del Partido** [1983] 1 A.C. 244, at 267). A private law activity is not necessarily a governmental one. The principle of sovereign equality recognised by Fox, and expressed generally in **Aldona S** requires only that the latter be protected.

20. This restrictive approach to immunity is recognised in the formulation of the **1978 Act**. Thus section 4 removes immunity for actions concerning certain contracts of employment (see above). A balance, between respect for the rights of independent foreign sovereign States and their equality, on the one hand, and on the other the desirability of all individuals being able to assert rights of a private character, in relation to acts which have no essential State function, is thus drawn by the provisions of the **1978 Act**. Mr Assersohn, who appears for Libya, makes the point that Parliament has effectively performed the proportionality exercise for itself: the courts must assume that the balance is appropriately struck and it is for Parliament, not the courts, to adjust it if further adjustment is required to meet modern conditions.

21. Since the **1978 Act** the inter-relationship of State Immunity and Article 6 of ECHR has been explored by the European Court of Human Rights in **Fogarty v United Kingdom**; **Cudak v Lithuania** and **Sabeh el Leil v France**.

22. **Fogarty** concerned a claim by a former administrative assistant, who had successfully claimed that she had been unfairly dismissed as a result of sex discrimination at the United States Embassy, and who subsequently applied for two other positions within the Embassy. She was unsuccessful, and again commenced proceedings. At this stage, State Immunity was asserted as a bar, as it had not been for her earlier proceedings.

23. The Court held, at paragraph 32, that the procedural guarantee laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the precondition for the enjoyment of those guarantees, namely, access to court. The right (paragraph 33) was not absolute but might be subject to limitations. The court must nonetheless be satisfied that such limitations did not restrict nor reduce the access left to the individual in such a way or to such an extent that the very essence of the right was impaired:

> **"Furthermore, a limitation will not be compatible with Article 6 (1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aims sought to be achieved:**
>
> **"34. The Court must further examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in several proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of State's sovereignty.**
>
> **35. The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 (3) (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relationship between the parties". The Convention including Article 6 cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.**
>
> **36. It follow that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 (1). Just as the right of access to court is an inherent part of the fair trial guarantee and that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.**
>
> **37. The Court observes that, on the material before it, there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question of whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission. Certainly it cannot be said that the United Kingdom is alone in holding that immunity attaches to suits by**

> **employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.**
>
> **38. The Court further observes that the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, *inter alia* to the diplomatic and organisational policy of a foreign State. The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions."**

Accordingly, the Court considered that the United Kingdom had not exceeded the margin of appreciation allowed to States in limiting an individual's access to court by conferring immunity on the United States.

24. In a concurring opinion, Judges Caflisch, Costa and Vajic noted (paragraph O/I 3) that though immunity was complete when it came to selecting diplomatic and consular personnel, that might no longer be the case in certain situations once the individual concerned had been hired. That expression of view perhaps reflected draft articles on jurisdictional immunities of States and their property, adopted by the International Law Commission of the United Nations in 1991. Article 11 of the draft precluded the invocation of immunity from jurisdiction in proceedings which related to a contract of employment between the State concerned and an individual, for work performed or to be performed in whole or in part in the territory of the other State. It was subject to agreement between the States concerned, and to derogations in a second paragraph: thus the general abrogation of the right to claim immunity from jurisdiction in respect of contracts of employment did not apply if the employee had been recruited to perform functions closely related to the exercise of governmental authority (paragraph 2(a)), if the subject of the proceeding was the recruitment, renewal of employment or reinstatement of an individual (paragraph 2(b)); if the employee was neither a national nor an habitual resident of the State of the forum at the time when the contract of employment was concluded 2(c); or

if the employee was a national of the employer State at the time when the proceeding was instituted (2(d)).

25. On 2nd December 2004, the General Assembly of the United Nations adopted a Convention (the 2004 Convention) in respect of which the 1991 document had been a draft. Article 11 as agreed in the 2004 Convention reads materially as follows:

> **"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed in whole or in part in the territory of that other State.**
>
> **2. Paragraph 1 does not apply if:**
> **(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;**
> **(b) the employee is…**
>
> **(iv) (a)… person enjoying diplomatic immunity…**
>
> **……**
>
> **(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum"**

26. In **Cudak v Lithuania**, which post-dated the 2004 Convention as **Fogarty** did not, the applicant was hired as a secretary and switchboard operator by the Embassy of Poland in Vilnius. She complained to a Lithuanian ombudsman that she had been sexually harassed by one of her male colleagues and fallen ill in consequence. The ombudsman held an enquiry, and upheld her claim. When subsequently she was dismissed for failure to come to work (although she had not been allowed to enter the building on some days) she brought an action for unfair dismissal. The courts declined jurisdiction on the basis of State Immunity, which had been invoked by Poland. The European Court of Human Rights held that her complaint of a breach of Article 6 succeeded. Its reasoning was reflective of that in **Fogarty**, save that in place of paragraph 37 of that judgment, the Court said this:

> **"63. The Court found already in the Fogarty judgment, that there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies.**
>
> **64. In this connection, the Court notes that the application of absolute State immunity has, for many years, clearly been eroded. In 1979 the International Law Commission was given the task of codifying gradually developing international law in the area of jurisdictional immunity of States and their property. It produced a number of drafts that were submitted to states for comment. The draft articles it adopted in 1991 included one – Art. 11 – on Contracts of Employment. In 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property.**
>
> **65. The 1991 Draft Articles, on which the 2004 Convention was based, created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contract with the staff of its diplomatic missions abroad. However, that exception was itself subject to exceptions whereby, in substance, immunity still applied to diplomatic and consular staff in cases where the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual; the employee was a national of the employer State; or, lastly, the employer State and the employee had otherwise agreed in writing.**
>
> **66. The report appended to the 1991 Draft Articles stated that the rules formulated in Art. 11 appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of States. This must also hold true for the 2004 Convention. Furthermore, it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions insofar as that provision affects customary international law, either "codifying it or forming a new customary rule."**

27. On the basis that (a) the 2004 Convention applied to Lithuania, though since it had not ratified the Convention it had not voted against its adoption, and its domestic law restricted State Immunity to legal relationships governed by public law, thereby excluding private employment contracts; (paragraphs 67,68), (b) none of the exceptions set out in Article 11 applied, (c) she was a switchboard operator whose main duties were recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events, none of which could objectively have been related to the sovereign interests of the Polish Government (paragraph 70), (d) the decision to grant immunity by the Supreme Court had relied solely upon the title of the position she occupied, rather than any factual enquiry (paragraph 71) and (e) the acts of sexual harassment had been established by the ombudsman and could hardly been regarded as

undermining Poland's security interests, the Court concluded that there had been a breach of Article 6 ECHR.

28. **Sabeh el Leil v France** concerned an accountant to the Kuwaiti Embassy in Paris. He brought proceedings challenging the reasons for his dismissal. He was awarded damages by an Employment Tribunal in Paris. The Court of Appeal set aside the judgment, holding the claims inadmissible on the basis of sovereign immunity.

29. As with Lithuania in the case of **Cudak**, so, too, it was recognised in **Sabeh el Leil** in paragraph 57 of the judgment that France had not ratified the 2004 Convention, but had not opposed it either. Accordingly, the provisions of that Convention applied to France as customary international law. As in **Cudak**, domestic law was such that jurisdictional immunity from suit would not be applied in an absolute manner. So, too, the Claimant did not fall within any of the exceptions in Article 11 of the 2004 Convention. The Court accordingly held that there had been a violation of Article 6 (1) of the ECHR.

30. In Ms. Janah's case, the Tribunal found that she entered the contract of employment to work at the Libyan embassy when she was both a foreign national and was not habitually resident in the U.K. Accordingly, the terms of s.4(2)(b) of the **1978 Act** applied: her contract of employment was not one where the plea of immunity could be excluded. The draft of 1991 would not exclude the plea either (Article 11(2)(c)). However, the 2004 Convention does not contain any equivalent to draft Article 11(2)(c) - Art.11(2)(e) instead restricts immunity where the employee is a national of the employer State at *the time when the proceeding is instituted* (unless the employee has permanent residence in the State of the forum) – but provides that the plea may be made where the contract of employment is with a person enjoying diplomatic

immunity (Art. 11(2)(b)(iv)). She was a member of the staff of the mission within Art. 1 of the Vienna Convention, and as such entitled to the immunities provided for by Art. 37(3) of that Convention if she was not "permanently resident" in the UK. Thought EJ Henderson found that the somewhat different question whether she was "habitually resident" was answered in the negative at the time she entered her contract of employment, she made no finding as to the permanency of residence at the relevant time.

31. Ms Benkharbouche was in a similar factual position: she was of Moroccan nationality and resident in Iraq when it was agreed that she would be offered a contract of employment in the UK at the Sudanese embassy, and she entered the UK in order to enter into that contract. However, though within the terms of s. 4(2)(b) of the **1978 Act**, such that a plea of immunity would have effect, the Tribunal found that when the employment relationship concluded she was resident in the UK (she had been granted indefinite leave to remain), and therefore (assuming as may be implied, though not stated, by the judgment, that she was permanently resident) within the wording of Article 37(3) of the Vienna Convention (as scheduled to the Diplomatic Privileges Act 1964) was not someone who was covered by the protection of diplomatic immunity.

First Issue: Breach of Article 6?

32. Mr Holmes-Milner did not argue that there was no breach of article 6. He submitted that to interpret the **1978 Act** as the Claimant sought would be impossible, given its scheme and fundamental features. Mr Assersohn, whilst adopting the same approach to the interpretative obligation under section 3, argued that in any event neither the operation of section 16 nor section 4 of the **1978 Act** caused a breach of Article 6, since Article 6 created only a qualified

right, and the scope of those provisions lay within the boundaries of the qualification. Neither **Cudak** nor **Sabeh** was determinative, since each recognised that there was a margin of appreciation afforded the member state: in **Cudak**, paragraph 55:

> **"…the right of access by its very nature calls for regulation by the state. In this respect, the contracting states enjoy a certain margin of appreciation, although the final decision as to the observance of the Conventions requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access to the individual in such a way or to such an extent that the very essence of the right is impaired."**

In **Sabeh** the same words are repeated in paragraph 47. The measures taken in Lithuania and France respectively were not of the same carefully balanced nature as that enacted in the UK. In effect, domestic legislation had established where the balance should lie between the right to access the court on the one hand and the requirement implicit in State Immunity to recognise the sovereign equality of another state.

33. I do not accept this. The statement that there is a margin of appreciation cannot be taken in isolation from the expressions of principle contained in the four paragraphs which follow in **Cudak** (56-59) and the seven (48-54) in **Sabeh el Leil**. They emphasise that a court is to ascertain whether the circumstances of the case justify the restriction. The European Court of Human Rights recognised the recent and gradual erosion of absolute State Immunity, and the growing extent to which employment contracts could not be barred by the assertion of such immunity. Central to the application of the principle was the question whether the proposed claim involved any public aspect of the employee's work. Given the factual findings of the Tribunals in both the **Benkharbouche** and **Janah** case, I am satisfied that to render their employment dispute with the Sudan and Libya amenable to a decision of the court would not appear to interfere with any public governmental function of those states. Though the argument that the **1978 Act** struck an appropriate balance might at one stage in recent history

have provided a sufficient answer, it no longer does so in the light of the developing extent of restrictions on State Immunity. The principles on which State Immunity is based do not out-balance the importance of access to court for employees with functions such as those of the claimants; the converse is so.

34. In my view, therefore, a starting point can be that there was a breach of Article 6 insofar as section 16 of the **1978 Act** was applied. So much for section 16: what of section 4?

35. As to section 4 (2) (b) it was established that Ms Janah was not habitually resident in the UK when the contract was made. The effect of the section is to prevent those who have no citizenship or conventional link with the United Kingdom, who enter into a contract with a foreign state, from resisting the plea of State Immunity barring any claim they wish to bring in relation to that contract. Mr Luckhurst, for the Claimant, argues that to permit those who are nationals of the UK or are habitually resident within it to make a claim without being faced with the barrier of State Immunity, but not those who fall into neither category, is neither necessary nor proportionate to fulfilment of the aim of recognising sovereign equality. He points out that the plea of State Immunity would have been restricted under the provisions of Article 11 of the 1991 draft, but that the 2004 Convention conspicuously omitted a clause to that effect. To permit the plea to have effect for non-nationals would be to deny rights and freedoms on the basis of national or social origin or other status, and thus be contrary to Article 14 of the Convention with which Article 6 had to be read. No objective and reasonable justification for the differential treatment had been articulated by Libya in evidence or submission. Since the proportionality of the restriction, if in issue, fell upon Libya to establish, the argument should be rejected.

36. I have much greater hesitation in accepting the Claimant's argument on this point than I did in respect of section 16. That is because before and during the currency of the draft proposals of 1991 it was considered, as a matter of customary international law, that a rational distinction could properly be drawn between nationals of the host country, and others with no connection by residence with the host country, where the claim involved reliance upon a contract made between the claimant and a state foreign to the host country. A distinction between host nationals, and nationals of the mission state is logical where the context is the mission state being accorded equal status with the host nation, for the purposes of the mission state. A consequence will be that host nationals will be afforded access to court, whilst others will not. This is, however, not simply upon the basis of their national origin (though it is in part) but also their relationship with the mission state. Article 6 may apply to both, though the qualifications may have force only in respect of those who are not host nationals. This perhaps explains the uncertainty, reflected in the words of Fox, Law of State Immunity, at 549, which avoids a clear statement that the provision is discriminatory. It should be noted that the same discrimination would have occurred had the 1991 draft been given effect, but no one could then have argued that Article 6, read with Article 14, would have been breached, since the principles recognised in **Cudac** and **Sabeh el Leil** would have been qualified by what would then have been the Convention.

37. Like the Employment Judges, however, I am prepared to assume for the purpose of argument that Article 6 was breached by the Tribunals permitting Sudan and Libya respectively to assert State Immunity as a bar to the claims. This brings me to the question whether the **1978 Act** can be interpreted so as to permit the claims to proceed.

38. The width of the approach to be taken under section 3 of the **Human Rights Act 1998** is not in doubt. In **Ghaidan v Goidin-Mendoza** [2004] UKHL 30, 2 AC 557 the House of Lords addressed the question of the way in which the word 'possible' in the expression 'as far as possible' was to be interpreted. Lord Nicholls of Birkenhead rejected the interpretation that section 3 was confined to requiring the courts to resolve ambiguities. It was, rather, of "..an unusual and far-reaching character", so as to require a court on occasion to depart from the unambiguous meaning the legislation would otherwise bear. Words may be "read in" which change the meaning of the enacted legislation so as to make it Convention compliant (see paragraph 32): a court could modify the meaning and hence the effect, of legislation. However, he recognised important restrictions on this approach:

> **"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. …. the meaning imported by application of Section 3 must be compatible with the underlying thrust of the legislation being pursued. Words implied must '…go with the grain of the legislation'."**

Lord Millett, concurring, observed (at paragraph 63) that the exercise which the court is called on to perform remains one of interpretation, not legislation: "legislation must be '*read* and given effect to' " It is not a quasi-legislative power. If words are supplied they may not be

> **"inconsistent with a fundamental feature of the legislative scheme; nor.. repeal, delete or contradict the language of the offending statute."**

Lord Rodger of Earlsferry, concurring, observed in paragraph 121 that:

> **"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. By contrast, using a Convention right to read in words which are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."**

39. All parties for their own purposes relied upon **Ghaidan v Goidin-Mendoza**. The Claimants stressed that in **Secretary of State for the Home Department v MB** [2008] 1 AC 440, and in **Connolly v DPP** [2008] 1WLR 276 there were examples of the courts being willing to read words into legislation which substantially altered its effect. Mr Luckhurst argued that a similar reading to that performed in **MB** and **Connolly** should have been performed here, such that section 16 (1)(a) was to be read as providing that:-

> "**section 4 above does not apply to proceedings concerning the employment of members of a mission within the meaning of the Convention scheduled to the said Act of 1964… except where that non-application would be incompatible with the right of an employee of access to a court or tribunal under Article 6 ECHR".**

Section 4 of the **1978 Act** could also be re-written so that sub-section 4 (2) added the same new words at the end. These amendments would implement Parliament's intention to satisfy the UK's international obligation, which the **1978 Act** reflected. In respect of sub-section 4 (2) the impact would be limited, since it would restrict an exception to the general principle that employment claims were not barred by a plea of immunity.

40. I do not accept this. The Parliamentary intent expressed in the **1978 Act** was to confer immunity: the scheme was to do so generally, subject to specific exceptions. The sections of the **1978 Act** central to this case concern two of those exceptions. The Act is framed so as to provide a careful, detailed and clear pattern, which balances considerations known to the legislature. A danger of the Court altering the width of one exception viewed in isolation (in the case of section 4, to restrict the scope of an exception to sub-section 4 (1), which is itself an exception to the general principle of immunity; in the case of section 16 the clear statement that section 4, the restriction on immunity, does not apply to particular people, specified in a list) is

to affect the overall balance struck by the legislature whilst lacking its panoramic vision across the whole of the landscape.

41. The essential principle and scope of the Act is that it intends to restrict a right of access to the court in a situation in which that would otherwise be available. That is the inevitable effect of granting immunity from proceedings. Lord Rodger observed (at paragraph 110 of **Ghaidan**) that however powerful the obligation in sub-section 3 (1) of the **HRA** might be it did not allow the courts to change the substance of a provision completely, "to change a provision from one where Parliament says that *X* is to happen into one saying that *X* is not to happen". Where Parliament has set out a clear list of those in respect of whom a plea of immunity will fail, and those in respect of whom it will succeed, it would in my view cross the critical line between interpretation and legislation to alter the list by removing one category from the "yes" camp, so as to place it in the "no" camp. Given that the overall approach is deliberately to limit access to justice in certain cases, there seems to me to be no proper interpretative scope for altering the criteria defined. This is not a case in which the class identified in section 16 of the **1964 Act** as uncertain; nor one in which it would go with the grain of the legislation to limit it. Similar reasoning applies to sub-section 4 (2).

42. Accordingly, for essentially the same reasons, I have come to the same conclusion as did the Employment Judges.

Disapplication of the State Immunity Act

43. In what is a avowedly a "fallback" argument, the Claimants contend that insofar as the claims are employment claims within the material scope of EU law the principle of effectiveness requires the Tribunal to disapply provisions of legislation which are in conflict

with a fundamental right guaranteed by EU law. Though Article 6 relied on for the purposes of the primary argument is a provision of the ECHR, and is not an Article of a treaty of the European Union, the **Charter** is such a treaty. Article 47 of the Charter, headed 'Right to an Effective Remedy and to a Fair Trial', contains words which largely, though not entirely, echo those of Article 6 of the ECHR:

> **"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.**
>
> **Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.**
>
> **Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."**

44. Article 52 (3) provides as follows:

> **"Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."**

45. The conventional approach taken in UK law at least until 2009 is aptly summarised in paragraph 52 of the judgment of Elias P. as he was in **Bleuse v. MBT Transport Ltd & Anor** [2008] ICR 488:

> **"The last ground of appeal is that whatever the position with purely domestic rights, a different principle applies when directly effective Community rights are in issue. It is alleged that this principle plainly applies to the right to holiday pay. The decision of the European Court of Justice in R v Sec of State for Trade & Industry ex parte Broadcasting Entertainment Cinematograph & Theatre Union [2001] IRLR 559 confirmed that the rights conferred by Article 7 of the Directive are sufficiently precise and clear to be capable of having direct effect (see para.34). In a claim against the state or an emanation of the State the Directive can be directly relied upon and any incompatible domestic laws will simply have to be disapplied. There is, however, a limitation on the ability of the courts to give effect to directly effective rights in a case such as this because it is also well established that the direct effect of a Directive cannot be pleaded against private bodies: see Marshall v Southampton & South West Hampshire Area Health Authority (Teaching) [1986] ECR 723. However, that does not affect the principle of harmonious construction which gives indirect effect to the right. This requires that the domestic courts must, if at all possible, construe the relevant domestic laws so as to give effect to the EU right. This is the well known Marleasing principle: Marleasing SA v La Commercial Internacionale de Alimencation SA [1990] ECR I-4135. This principle applies not only to the law passed to give effect to the EU right, but to the body of**

domestic law as a whole: see Pfeiffer v Deutches Rotes Kreuz, Kreisferband Waldshut [2004] ECR I-8835. It is only if the domestic legislation cannot sensibly be construed compatibly with European law that the claimant will be denied his rights."

46. If these principles still hold good for a case such as the present, then since the claim is not made against an emanation of the State (the UK being the state for these purposes, not Libya nor Sudan) there is no scope to disapply the statute.

47. Moreover, it could not until recently have been contended that the Charter conferred any directly enforceable rights on anyone, for the CJEU had itself declared at para 38 of its judgment in **European Parliament v Council of the European Union** [2006] ECR I-5769, where the status of the Charter was discussed, that it was not a binding legal instrument.

48. Both these cases, and the principles they express, were decided before the adoption of the Lisbon Treaty in 2009, a consequence of which, as Mr Luckhurst pointed to in argument, was the declaration of the Supreme Court in **RFU v Consolidated Information Services** [2012] 1 WLR 3333, at paras. 26-28 that the Charter now has direct effect in national law, "binding member states when they are implementing EU law".

49. Since the Charter has direct effect in national law, the question arises whether insofar as national law is contrary to the Charter it must be disapplied in a claim litigated between private individuals.

50. Here, too, it is argued that the legal landscape has recently shifted. In **Kucukdeveci v Swedex GmbH and CO KG** [2011] 2 CMLR 27 the Court of Justice of the EU considered a case of someone who when dismissed at the age of 28 had served 10 years in the employment of the Defendant. The Defendant, however, calculated the notice period for the notice of

dismissal as if he had only 3 years service, because national legislation provided that periods of employment completed before the age of 25 were not to be taken into account in calculating the length of the notice period. The case was referred to the CJEU for a preliminary ruling as to whether the national legislation was discriminatory on the grounds of age, contrary to EU law, or whether it could be justified; and secondly, if it was discriminatory, whether in proceedings *between private individuals* the courts of a member state had to disapply the legislation, or whether there had first to be a ruling by the Court of Justice to determine whether it was necessary to take account of the legitimate expectation that national laws in force would be applied.

51. The Court repeated previous decisions to the effect that a Directive as such does not have direct effect as between individuals. Direct effect (of a Directive) could only apply as between citizen and state: where proceedings between individuals were concerned a Directive could not of itself impose obligations on an individual, and could not therefore be relied on as such against an individual. The national provision in question before it, because of its clarity and precision, could not be interpreted so as to conform with Directive 2000/78, which gave specific expression to the principle of non-discrimination on grounds of age. However, the CJEU held that the Directive merely gave expression to, but did not lay down, the principle of equal treatment in employment and occupation: the principle of non-discrimination on grounds of age was a general principle of EU law in that it constituted a specific application of the general principle of equal treatment. In those circumstances it was for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in the Directive, to provide "within the limits of its jurisdiction", the legal protection which individuals derived from EU law and to ensure the full effectiveness of that law,

disapplying if need be any provision of national legislation contrary to that principle (paragraph 51 of the Judgment). At paragraph 53, the Court said this:

> **"The need to ensure the full effectiveness of the principle of non-discrimination on the grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of EU law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the court for a preliminary ruling before doing so."**

52. The reference to "within the limits of its jurisdiction" in paragraph 51 of the judgment creates no difficulty in the UK, given the terms of the **European Communities Act 1972** section 2 (1) which provides that rights, powers, liabilities, obligations and restrictions from time to time created by or arising under the EU treaties are to be given legal effect.

53. In R **v Secretary of State for Transport ex p Factortame Ltd (Interim Relief Order)** [1990] UKHL 7, Lord Bridge of Harwich expressed the view of the House of Lords that where a right which was of direct effect was concerned, then under the 1972 Act:

> " **it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."**

54. Mr Luckhurst argued it was therefore a consequence of **RFU v Consolidated Information Services** and **Kucukdeveci v Swedex GmbH and CO KG** that the Charter has direct effect in national law, and that the State Immunity Act must be disapplied to the extent that in respect of rights within the material scope of EU law it breached Art. 47 of the Charter, the effect of which is coterminous with Art.6 ECHR.

55. Thus, he submitted, directly effective European Union legislation which was to be interpreted so as to conform with Art. 6 ECHR stood in the way of giving effect to employment rights within the material scope of EU law – so far as Ms Janah was concerned, at least in respect of claims for race discrimination and harassment, holiday pay and failure to provide regular breaks which fell respectively into the territory of the Race Discrimination Directive (2000/43/EC) and the Working Time Directive (2003/88/EC); so far as Ms. Benkarbouche is concerned, at least in respect of her claim for holiday pay and a breach of the Working Time Regulations, which fell into the territory of the Working Time Directive; though in both cases he argued also that a width should be given to the phrase "material scope", such that since much of European Union law was concerned with employment rights, any employment right should be held to fall within it.

56. I cannot accept that the material scope of EU law extends beyond rights under statutory provisions which implement the Directives mentioned to include the right not to be unfairly dismissed as expressed in domestic legislation, or other employment rights whose origin is in the Employment Rights Act 1996 or its predecessors. Those rights cannot be attributed to any European instrument and could give rise to no reference to the CJEU; and the fact that some aspects of employment regulation are subject to European Directives or Regulations cannot logically have the consequence that all aspects are within the scope of EU law.

57. Mr Holmes-Milner, appearing for Sudan, bore the brunt of the Respondents' responses on this issue. He argued that Article 1 (1) of Protocol 30 to the TEU ("Protocol No.30") provides that nothing in the Charter provides new rights. Secondly, the Charter is expressly addressed to "the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and the Member States only when they are implementing Union law" (Art. 51(1)),

whereas the parties here are in effect private parties. Thirdly, the Charter does not extend the ability of any court to strike down a statute. The **HRA** is therefore applicable as the mechanism for enforcing Charter rights. Enforcement extends only to interpretation, or if that is not possible (as here) to a declaration of incompatibility. It does not permit disapplication. So far as a declaration of incompatibility is concerned, the Appeal Tribunal cannot make it. He does not oppose the grant of permission to appeal so that that matter might be argued at a higher court, where Sudan proposes to resist it. Finally, the Claimant cannot establish that the Charter applies.

58. As to the first of these points, Protocol No.30 has two articles which read as follows:-

> **"Article 1**
> **The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. In particular, and for the avoidance of doubt, nothing in title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except insofar as Poland or the United Kingdom has provided for such rights in its national law. (***Title IV is not material here)***
>
> **Article 2**
> **To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom,"**

59. Article 52 of the Charter provides that rights recognised by the Charter for which provision is made in the Treaties should be exercised under the conditions and within the limits defined by those treaties. Accordingly, the right recognised by Article 47 is to be exercised within the terms of Protocol No. 30.

60. The effect of Protocol no. 30 was considered in **NS v Secretary of State for the Home Department** [2012] 2 CMLR 9 by the CJEU. In the UK the case had been known by its name

of 'Saeedi': it was to that case when it was before the Court of Appeal that Judge Henderson referred to in her judgment in **Janah** now under appeal here. Before the High Court, the Secretary of State had argued that the provisions of the Charter did not apply in the UK. By the time the case came to the Court of Appeal, sub. nom. **Saeedi,** that position had shifted, and applicability was not disputed: but the question still arose to what extent the Court of Justice or any court in the United Kingdom should find that its laws were inconsistent with the fundamental rights, freedoms and principles recognised by the Charter. At paragraph 119 in **NS** the Court of Justice said:

> **"Protocol No. 39 does not call into question the applicability of the Charter in the United Kingdom…, a position which is confirmed by the recitals in the preambles to that Protocol. Thus, according to the third recital in the preamble to Protocol No. 30, Art. 6 TEU requires the Charter to be applied and interpreted by the Courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article. In addition, according to the 6th Recital in the preamble to that Protocol the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights visible but does not create new rights or principles.**
>
> **120. In those circumstances, Art. 1 (1) of Protocol No. 30 explains Art. 51 of the Charter with regard to the scope thereof and does not intend to exempt the …United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions."**

61. Mr Holmes-Milner noted that in its fifth question to the Court of Justice, the Court of Appeal had asked whether the extent of the protection conferred by the general principles of EU law and in particular Article 47 concerning the right to an effective remedy was wider than the protection conferred by Article 3 of the ECHR. At paragraph 115, the CJEU determined that the Charter did not lead to a different answer from that given by the ECHR. Combining that, and the Court's conclusion at paragraph 122, to the effect that the answer to question 5 did not require to be qualified in any respect so as to take account of protocol No. 30, Mr Holmes-Milner would argue that the position endorsed by the Court of Justice was that the Charter had

made no difference to the approach which courts should take where a breach of Article 6 of the ECHR is identified.

62. Since the protection conferred by Art. 3 of ECHR is not widened by the Charter (per the answer to question 5 in **NS**) Mr Holmes-Milner argues that there can be no wider power to disapply the Charter right than applies to the Convention right.

63. I comment that the decision in **Kucukdeveci** is that general principles of EU law (and therefore EU fundamental rights) can have horizontal direct effect, although the specific provisions of Directives cannot in themselves do so. This is not an easy position to reconcile with principles of legal certainty, which are also important general principles of any system of law: for it means that general principles, recognised as such by a decision of the court, unwritten and unpublished by the legislature, which point in a certain direction rather than giving concrete rules of law, and which might not accord with the traditions of the domestic jurisdiction of a particular member state are to be applied – and are not merely to be applied in what might have been thought their natural territory, in disputes between citizen and state, to protect the former from the power of the latter, but as between private individuals who must derive their knowledge of the principle at best from its recognition in other court proceedings. Moreover, if Mr Luckhurst is right, the application of these general principles by re-statement in broad terms in the Charter (expressed to be binding on public authorities, and hence not expressly as between individuals) is to be sufficient to deprive specific and certain national provisions of their effect as between private litigants.

64. Critically, however, Mr Holmes-Milner did not argue that the principle in **Kucukdeveci** had been mis-stated by Mr Luckhurst, or that it was not applicable where principles of EU law

were concerned. Rather, he sees the principle in Art. 47 of the Charter as coinciding precisely with that in Art.6 ECHR, not simply as to the substance of the right but as to the means of giving effect to it.

65. No advocate founded an argument based on the terms of Art.6 TEU, despite the reference in para. 119 of NS to Protocol 30 having to be understood by reference to it. Article 6 of the consolidated TEU provides not only that the EU recognises the rights, freedoms and principles set out in the ECHR, which constitute general principles of EU law, but that the provisions of the Charter "shall not extend in any way the competences of the Union as defined in the Treaties".

66. Where a general and fundamental principle of EU law is concerned, it has been recognised since the decision in **Marshall** that the courts would disapply a provision of domestic law which stood in its way. Disapplying provisions of statute involves asserting no wider competence for the Union than it is already accorded by domestic law. Though the present case involves other international obligations, which are held in common by the member states, it cannot be considered that granting a State immunity from suit is itself a fundamental principle of the Union: accordingly, the context does not require a different approach. Nor, in theory, should the provisions of the **HRA** do so, since it is a domestic statute. Despite the difficulties set out at paragraph 49 above, and the uncomfortable recognition that the domestic legislature took care in the **HRA** not to allow the courts to disapply any domestic statute which was in conflict with the ECHR, the provisions of domestic statute are here in conflict not just with a right recognised in the ECHR, to which the court must pay regard according to the provisions of the **HRA**, but with that which has been recognised (by the UK as part of and as well as the Union) as a general principle of EU law, regarded as fundamental because it concerns access to

a court for the purpose of remedying unlawful discrimination, to which the court must apply EU law, to do its duty under the **European Communities Act of 1972**.

67. Mr Luckhurst refers to the recent decision of the Grand Chamber of the CJEU in **Aklagaren v Fransson** (Case C-617/10) a decision of 26 February 2013 to underpin his submissions to this effect. It concerned the right not to be tried twice for the same criminal offence. The Swedish court referred the question whether a provision of national law requiring there to be clear support in the ECHR or case-law of the European Court of Human Rights for disapplying national provisions which might infringe the "no double jeopardy" principle was compatible with EU law. At paragraph 45 of its judgment the Court confirmed that a

> **"national court which is called upon to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or to await the prior setting aside of such a provision by legislative or other constitutional means…"**

68. It added, at paragraphs 46 and 48 as follows:

> **"46 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (Melki and Abdeli, paragraph 44 and the case-law cited). …**
>
> **48 It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter."**

69. It is no sufficient answer to these submissions to hold (as Judge Deol did) that the mechanism of the **HRA** was not in conflict with the enforcement and interpretation of EU rights: the **HRA** does not permit the disapplication of any statutory provision, but EU law requires it where it concerns the material scope of EU law. EJ Henderson's response that there was no jurisdiction to consider a free-standing complaint under EU law is not sufficient either, for the complaint made is one which but for the assertion of State Immunity was within the jurisdiction of the Tribunal. Nor can the claimant's approach properly be characterised as making a "Francovich" claim, for this is not a claim for damages against the State for failing to implement a Directive: it is an argument that the practical exercise of a general and fundamental principle is blocked by the plea of immunity, contrary to EU law where it concerns claims within the material scope of that law. EJ Henderson placed reliance on **Saeedi** without recognising that **NS,** in which the Court did not share the doubts of the Court of Appeal to which she referred, was the same case decided at a higher level.

70. I see in their decisions an understandable reluctance to countenance a jurisdiction to disapply provisions of domestic statute, on a basis which if it fell within the **HRA** and not also within the material scope of EU law would not be permissible. I sympathise with that reluctance, but am bound by the current state of authority, in the light of the arguments addressed to me, to hold that so far as the claim by Ms Benkharbouche in respect of a breach of the Working time Regulations is concerned, and so far as claims by Ms Janah for racial discrimination and harassment, and breaches of the Working time Regulations, are concerned (these being their claims within the material scope of EU law) the provisions respectively of s.16 (Ms Benkharbouche) and ss. 16 and 4(2) of the **1978 Act** (Ms Janah) are to be disapplied. I allow the appeal to that extent and declare accordingly.

71. Since the law cannot necessarily be regarded as finally settled in this area; since it involves conflict between national provisions implementing the provisions of treaties reached by the international community, and those giving effect to EU principles; since it may be seen as undesirable that the regime for paying respect to the ECHR, which carefully balances the roles of the courts and legislature, does not operate where EU rights of a somewhat unspecific nature are concerned, because they are said to be general and fundamental principles of the Union, where the rights in question are precisely the same though the territories in which they operate are distinct, it is important that this decision be reviewed by a higher appellate court. I grant permission to appeal to both Libya and Sudan, and also to the claimants, so that for their part they may pursue a declaration of incompatibility insofar as domestic statute, not disapplied in consequence of my decision, affects their claims which fall outside the material scope of EU law as I have found it to be.