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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Ms J Wong	**AND**	**Mr Khalid Basfar**

PRELIMINARY HEARING

HELD AT: **London Central** **ON:** **14 May 2019**

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: Ms P Webb, Counsel
For Respondent: Mr M Sethi QC, Counsel

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

The Claimant's claim is not struck out on the grounds of diplomatic immunity. The Respondent is not immune from the civil jurisdiction of the courts and tribunals of the United Kingdom by virtue of *Article 31(1)* of the *1961 Vienna Convention on Diplomatic Relations* ("the Convention"), as enacted into English law by *s2(1) Diplomatic Privileges Act 1964.*

REASONS

This Hearing

1. The Claimant brings complaints of wrongful dismissal, failure to pay the National Minimum Wage, unlawful deductions from wages (failure to pay the National Minimum Wage and holiday pay), claims under the *Working Time Regulations 1998*, failure to provide written wage slips and failure to provide written employment particulars against the Respondent, her former employer.

2. This Preliminary Hearing was listed to determine the Respondent's application to strike out all the Claimant's claims on the grounds of diplomatic immunity.

3. It is not in dispute that the Respondent is and, at all material times has been, a member of the diplomatic staff of the mission of the Kingdom of Saudi Arabia.

4. The Respondent contends that he is immune from the civil jurisdiction of the courts and tribunals of the United Kingdom by virtue of *article 31(1)* of the *1961 Vienna Convention on Diplomatic Relations* ("the Convention"), as enacted into English law by *s2(1) Diplomatic Privileges Act 1964.*

The Facts

5. For the purposes of this Preliminary Hearing only, the Respondent agreed that the Claimant's pleaded case should be taken as its highest. I therefore did not admit into evidence a witness statement provided by the Claimant, but said that I would determine the case on the facts as set out in the claim form.

6. The facts, as pleaded in the Claimant's claim form, were as follows.

7. The Claimant, who is of Phillippina nationality, was employed by the diplomatic household of the Respondent in Saudi Arabia from November 2015.

8. On 1 August 2016, the Claimant was brought to the UK to continue working for the Respondent here. The Claimant was issued with an Overseas Domestic Workers visa as a private servant in a diplomatic household by the UK Border Agency ("UKBA") and has been lawfully present in the UK throughout her stay here.

9. In order to obtain a visa from the UKBA, the Claimant was provided with a contract, or statement of main terms and conditions of employment. The document stated that the Claimant was employed by the Respondent to work 8 hours a day, 50 hours per week, with 16 hours free time each day and 1 day off work each week and 1 month off each year; the Claimant was to be provided with sleeping accommodation and paid at the National Minimum Wage.

10. After arriving in the UK, the Claimant was not paid any pay for 7 months, until July 2017, when she travelled with the Respondent and his wife to Jeddah on their holiday. During this trip, the Claimant was paid for 6 months' work in the sum of 9000 Saudi Riyals, in cash. The Claimant has not been paid since that time.

11. The Claimant worked from 7am to around 11.30 pm each day, with no days off or rest breaks. When the Respondent's family were at home, the Claimant was only permitted to eat their leftover food. If the Respondent's

family were out, the Claimant was able to cook a meal for herself. She was made to wear a door bell day and night, so that she could be summoned 24 hours a day.

12. The Claimant was shouted at incessantly by the Respondent's family and called offensive names regularly. She was not allowed to leave the house apart from to take out rubbish unto the driveway. She was only permitted to call her family twice a year, using the Respondent's mobile telephone.

13. The Claimant brings complaints of wrongful dismissal, failure to pay the National Minimum Wage, unlawful deductions from wages (failure to pay the National Minimum Wage and holiday pay), claims under the Working Time Regulations 1998, failure to provide written wage slips and failure to provide written employment particulars against the Respondent, her former employer.

14. The Claimant is a victim of trafficking, who was exploited by the Respondent and his family. She has been recognised by the Home Office as a potential victim of trafficking on the basis of her experience with the Respondent.

The Parties' Arguments

15. The parties agreed that the question for the Tribunal was whether the Respondent's employment of the Claimant as a domestic servant (in assumed circumstances of modern slavery) was a commercial activity exercised by the Respondent outside his official functions.

16. They agreed that the Respondent was at all material times, and still is, a serving diplomat and that he employed the Claimant to work in his official diplomatic residence.

17. They agreed that the *Vienna Convention* forms part of the law of the UK and is contained in *Sch 1 Diplomatic Privileges Act 1964*. The nature of the immunity granted to diplomatic agents from the civil jurisdiction of the courts is set out in *Art 31(1)* of the *Convention*, which provides that a diplomatic agent shall enjoy immunity from the civil and administrative jurisdiction of the receiving state except in the case of:

> "(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions'.'

18. They also agreed that the case of *Reyes v Al-Malki* [2014] ICR 135, EAT, [2015] ICR 289, CA and [2017] ICR 1417, SC, had addressed the meaning of "commercial activity … outside his official functions" on facts which were almost identical to the facts of the current case; save that, by the time that case reached the Supreme Court, the employer was no longer a serving diplomat.

19. The Claimant contended that the facts of the current case were also slightly different to those in *Reyes v Al-Malki* because, in the current case, the Respondent had himself trafficked the Claimant whereas, in *Reyes*, it was not clear that the Respondent had trafficked the employee, rather than simply employing a person who had been trafficked.

The Respondent's Argument

20. The Respondent contended that the Court of Appeal judgment in *Reyes v Al-Malki* [2015] IRLR 289, CA, was binding on this Tribunal. The unanimous judgment of the Court of Appeal was that employment of individuals to provide domestic services in an official diplomatic residence was not an action relating to any "commercial activity", nor was it outside the employer's official functions – paragraphs [19] and [34] of the Court of Appeal judgment, per Lord Dyson MR.

21. While the Supreme Court had allowed the employee's appeal from the Court of Appeal, the facts had materially changed, in that the employer was no longer a diplomat, so that the Supreme Court was not seized of any decision in relation to *Art 31(1)(c)* – the issue before the Supreme Court was the correct interpretation of *Art 39(2)* of the *Convention,* which gave the employer diplomat continued immunity for acts done in the course of his official functions*.*

22. The Respondent contended that the Supreme Court took the opportunity to comment on the definition of "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions", but specifically stated that it was not making a binding decision in this regard. The Respondent contended that the Lords' conclusions were therefore obiter.

23. In any event, the Respondent said that two members of the SC, Lords Sumption and Neuberger gave confident answers, adamantly endorsing the Court of Appeal's conclusion that employment of domestic workers was not a commercial activity – paragraphs [45] and [51], per Lord Sumption (with whom Lord Neuberger agreed).

24. The Respondent contended that the remaining Law Lords merely expressed doubt as to Lord Sumption's conclusion, but did not come to any definitive conclusion themselves, paragraphs [55] and [67] - [69], per Lord Wilson.

25. The Respondent therefore contended that the claims should be struck out, as the Respondent enjoys diplomatic immunity, as at the date of the Preliminary Hearing.

The Claimant's Argument

26. The Claimant contended that this Tribunal was neither bound by the Employment Appeal Tribunal, nor the Court of Appeal in in *Reyes v Al-Malki.*

27. The meaning of "commercial activity" had been conceded by the Claimant employee in the EAT – paragraph [8] of that judgment, but was not conceded in the current case.

28. The Supreme Court had allowed the Claimant's appeal from the Court for Appeal's judgment. The Claimant contended that, where the Supreme Court had overturned the Court of Appeal's judgment, albeit on different grounds, the Court of Appeal's judgment was of persuasive authority only. The Claimant relied on *Iranian Offshore Engineering and Construction CO v Dean Investment Holdings SA* [2019] 1 WLR 82, at [12], per MrJustice Andrew Baker and *Brownlie v Four Seasons Holdings Incorporated* [2016] 1WLR 1814 at [89] per Arden LJ.

29. The Claimant contended that, even if a judgment of the Court of Appeal was not binding only in narrower circumstances in which that the Supreme Court had reversed a decision on different grounds and said that the issue that had been before the Court of Appeal did not arise for decision, those were indeed the circumstances in *Reyes v Al-Malki*. The employer's posting in London had come to an end on 29 August 2014. The Court of Appeal heard the appeal in November 2014. Therefore, the employer no longer enjoyed diplomatic immunity at the time of the Court of Appeal hearing, so that art 31 did not apply at that time.

30. The Claimant acknowledged that the Supreme Court said that it would not answer in any binding form the central question of whether a claim in the Tribunal by a former domestic servant against a foreign diplomat brought to the UK to work in the diplomat's home in assumed conditions of modern slavery relate to "any commercial activity exercised .. outside his official functions" within the meaning of *art 31(1)(c)* of the 1961 Convention, per Lord Wilson at [56].

31. However, she contended that Lord Wilson also said at [57], " I am pleased that the court will not answer that question in any binding form", para [57]. The Claimant contended that Lord Wilson could not have understood the Court of Appeal's judgment on the question to be binding on the lower courts, because it was the same as Lord Sumption's conclusion, which Lord Wilson was "pleased" was not binding.

32. The Claimant also contended that the Court of Appeal had decided against the employee in *Reyes v Al-Malki* on both limbs of the art 31(1)(c) test; both "outside his official functions" and "commercial activity". However, the Supreme Court had unanimously decided that employment of a domestic servant in an official residence did not come within a diplomat's official functions and had accordingly overruled the Court of Appeal is this regard.

33. The Claimant relied on the dicta of the Supreme Court in paragraphs [60] – [67] of Lord Wilson's judgment, with whom Lady Hale and Lord Clark agreed and contended that "commercial activity" must be interpreted taking into account the relevant rules of international law applicable in the relations between the parties, [67]. These include "the universality of the international

community's determination to combat human trafficking", the ratification of the Palermo Protocol 2000 by the UK and Saudi Arabia, the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (acceded to by the UK) and the Arab Charter on Human Rights 2004 (ratified by Saudi Arabia), [60]. Lord Wilson said that it was a rational view that the relevant activity for the purposes of art 31(1)(9) was not just the employment but the trafficking, [62].

34. She contended that, on the facts of the current case, the Respondent did not simply effect receipt of the Claimant, but himself transported her to the UK and exploited her.

35. Accordingly, the Claimant contended, the Respondent's activity, in transporting the Claimant to the UK and exploiting her in this country should properly be characterised as a commercial activity, applying the dicta of the majority of the Supreme Court in *Reyes v Al-Malki*.

The Relevant Law

36. Article 31(1) Vienna Convention 1961 provides, so far as is relevant:
"1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction except in the case of:
….
(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."

37. Article 39(2) Vienna Convention 1961 provides,

"2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time…. . However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

38. The Court of Appeal in *Reyes v Al-Malki* [2015] 2015] IRLR 289, CA, decided that employment of individuals to provide domestic services in an official diplomatic residence was not an action relating to any "commercial activity", nor was it outside the employer's official functions – paragraphs [19] and [34] of the Court of Appeal judgment, per Lord Dyson MR.

39. At the appeal hearing in the Supreme Court, [2017] ICR 1417, SC, the agreed facts were that the employer diplomat's posting had come to an end and he had left the UK. The Supreme Court held that he was no longer entitled to any immunity under art 31(1). The only immunity potentially available to him was the residual immunity under art 39(2), which gave him continued protection for acts done in the course of his official functions. The Supreme Court unanimously decided that the employment of the claimant

as a domestic servant did not fall into that category. It allowed the appeal and permitted the claims to proceed.

40. The Supreme Court did not have to decide whether the question of whether a claim in the Tribunal by a former domestic servant against a foreign diplomat brought to the UK to work in the diplomat's home in assumed conditions of modern slavery relate to "any commercial activity exercised .. outside his official functions" within the meaning of *art 31(1)(c)* of the 1961 Convention.

41. It nevertheless gave its views obiter. A minority of the Supreme Court, Lord Sumption (with Lord Neuberger agreeing), considered that, if the diplomat had still been in post, he would have been entitled to immunity under *art 32(1)(c).* In their view, the employment of a domestic servant to provide purely personal services is not 'a professional or commercial activity exercised by the diplomatic agent'; the fact that the employment of the claimant may have come about as a result of human trafficking made no difference to this [4]. Lords Sumption and Neuberger considered that, 'the mere employment of a domestic servant on exploitative terms is not a commercial activity, and the fact that it is unlawful, contrary to international policy and morally repugnant cannot make it into one', para [45].

42. A majority of the Supreme Court, Lord Wilson (with Lady Hale and Lord Clarke agreeing), did not think that the position was so obvious and, suggested that, the relevant 'activity' could include the trafficking, as well as the employment, of a migrant worker, paragraph [62]; They considered that the employer could be seen as an integral part of the chain of exploitation of the worker; and that 'the employer's conduct contains a substantial commercial element of obtaining domestic assistance without paying for it properly at all', para [62]. Lord Wilson considered that it might be appropriate to construe art 31(1)(c) in the light of the emergence of an international prohibition against trafficking, but that it would be far preferable to invite the International Law Commission to consider an amendment to art 31 which would put beyond doubt the exclusion of immunity in a case such as the present, paras [62], [68].

43. According to *Halsbury's Laws of England Civil Procedure Volume 11, 2015,* the decisions of the Court of Appeal upon questions of law must be followed by courts of first instance (*Trimble v Hill* (1879) 5 App Cas 342) and, as a general rule, are binding on the Court of Appeal until a contrary determination has been arrived at by the Supreme Court. There are exceptions to this rule – the Court of Appeal is bound to refuse to follow a decision of its own which, although not expressly overruled, cannot, in its opinion, stand with a subsequent decision of the Supreme Court, *Williams v Glasbrook Bros Ltd* [1947] 2 All ER 884 at 885. The Court of Appeal is not bound by one of its decisions if the Supreme Court has decided the case on different grounds, ruling that the issue decided by the Court of Appeal did not arise for decision. Halsbury's cites, *Al-Mehdawi v Sec of State for the Home Department* [1990] 1AC 876 as authority for that proposition.

44. In *R v Secretary of State for the Home Department, ex p Al-Mehdawi* [1990] 1 AC 876, at 883C, Taylor LJ had referred to an Essay entitled "Determining the Ratio Decidendi of a case" which contained a number of passages suggesting that the ratio of a court's decision remained binding even if the facts upon which the court based it subsequently turned out to be wrong. He said,

    "… But here, it is not merely that knowledge subsequent and extraneous to the proceedings shows the facts to be wrong; the House of Lords in the very case, giving its final opinion, has ruled that the issue determined below did not arise for decision .. In these circumstances, I consider that the reasoning of the Court of Appeal in *Ex parte Rahmani* is of powerful persuasive influence, this court is not bound by it."

45. Earlier in his judgment, Taylor LJ had addressed the House of Lords judgment in *ex parte Rahmani* [1986] AC 475. Lord Scarman (with whom all other Law Lords agreed) said that the lower Courts had proceeded on the basis that *rule 12 Immigrations Appeals (Procedure) Rules 1972* applied, but the House of Lords had decided that *rule 12* did not, in fact, apply. Lord Scarman had then said, regarding the point of principle on the interpretation of *rule 12,* "Your Lordships have not, therefore, considered, nor have they heard arguments upon, the point of principle which was the ground of decision in both courts below. Accordingly, I express no opinion on the point. I must not be understood to have indicated even a provisional view upon the soundness or otherwise of the alleged principle. Indeed, it would be dangerous, in my view, to discuss the point save in a case where the circumstances and the facts require it to be decided."

46. Having cited that passage of Lord Scarman's judgment, Taylor LJ said, 882E, "It would be strange indeed if despite those final words, the decision of this court is to be regarded as binding authority on the point of principle." That is, Taylor LJ stated that it would be strange if the Court of Appeal decision in *ex parte Rahmani* was to be regarding as binding authority.

47. There is authority for the proposition that, where a decision of the Court of Appeal is reversed by the Supreme Court on other grounds, the Court of Appeal's decision is not binding on the Court of Appeal, or lower courts, but is of persuasive authority. In *Iranian Offshore Engineering and Construction CO v Dean Investment Holdings SA* [2019] 1 WLR 82, at [12], Andrew Baker J said, of passages from two Court of Appeal judgments,

    "Each passage was obiter, as Arden LJ held in each case that the claimant had a sufficiently arguable case for the purpose of the decision then being taken that English law was the applicable law anyway …. Further, each decision was reversed by reference to other points in the Supreme Court.. so that even if those passages had been part of the ratio in the Court of Appeal they would not strictly bind me. However, with respect, I find Arden LJ's analysis compelling."

48. In *Brownlie v Four Seasons Holdings Incorporated* [2016] 1WLR 1814 at [89] Arden LJ referred to the judgment of the Court of Appeal in *OPO v MLA* [2014] EMLR 4, and said of that case,

> "This case went to the Supreme Court who [2015] 2 WLR 1373 reversed the decision of the Court of Appeal on the question whether there was a properly constituted tort under English law. Accordingly, the Supreme Court did not have to deal with the question whether the mandatory nature of article 4(1) of Rome II excluded the presumption that foreign law is the same as English law in the absence of proof to the contrary. … I accept Mr Palmer's submission that the ruling on the presumption is no longer binding under the doctrine of precedent, though it would constitute strong persuasive authority: see *R v Secretary of State for the Home Department, Ex p Al-Mehdawi* [1990] 1 AC 876, 883, per Taylor LJ with whom Nicholls and O'Connor LJJ agreed."

49. According to Halsbury's Laws of England Civil Procedure Volume 11, 2015, statements which are not necessary to a decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed "dicta". They have no binding authority on another court, although they may have some persuasive efficacy. Even dicta of individual members of the Supreme Court, although of great weight, are not of binding authority, *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398, CA.

Discussion and Decision

The Facts

50. The question for this Tribunal was whether the Respondent's employment of the Claimant as a domestic servant (in assumed circumstances of modern slavery) was a commercial activity exercised by the Respondent outside his official diplomatic functions within the meaning *of art 31(1)(c) Vienna Convention 1961*.

51. I decided that the assumed facts of the current case are, in all material respects, identical to assumed the facts of *Reyes v Al-Malki* when it was heard in the Court of Appeal.

52. I rejected the Claimant's argument that facts of the current case were different to the assumed facts in *Reyes,* because the Respondent in the current case was the trafficker. I considered that the Court of Appeal had proceeded on the basis that the employment relationship itself in *Reyes* met the international definition of trafficking. Dyson LJ described the issue which the Court of Appeal was deciding as follows, "I need to address the submission that, as a matter of ordinary language, engagement by a diplomatic agent in an employment relationship which meets the international definition of trafficking can constitute commercial activity on the part of the diplomatic agent..." [33]. Dyson LJ said that the Claimant's argument in *Reyes* was that, "…the phrase "commercial activity" is, as a matter of ordinary language, wide enough to embrace an employment

relationship at least, where elements of that relationship meet the international definition of trafficking…" [33].

53. It was clear that the Court of Appeal made its decision on the basis that the employment relationship itself, in that case, involved trafficking – the employment relationship was not treated as arising only after the trafficking had taken place. There was no material difference on the assumed facts of the two cases.

54. The decision of the Supreme Court in *Reyes v Al-Malki* was made on different facts, in that the employer was no longer a member of a diplomatic mission.

The Status of the Court of Appeal Decision in *Reyes v Al-Malki*

55. An important question for me, therefore, was the status of the Court of Appeal decision in *Reyes v Al-Malki.*

56. The Supreme Court in *Reyes v Al-Malki* allowed the employee's appeal the Court of Appeal judgment in that case, but on different grounds.

57. However, in allowing the appeal, the Supreme Court decided that employment of a domestic servant in an official residence to clean, help in the kitchen and look after children did not come within the diplomat's official functions under *art 31(1)(c) Vienna Convention* and therefore could not attract the residual immunity, per Lord Sumption at [48]; or were not "acts performed by such a person in the exercise of his functions as a member of the mission" under *art 39(2) Vienna Convention*, per Lord Wilson at [55]. Lord Wilson also adopted Lord Sumption's conclusion at [66].

58. It appeared that "official functions" under *art 31* and "acts performed by such a person in the exercise of his functions as a member of the mission" under *art 39*, were interpreted by the Supreme Court in the same way. Lord Sumption specifically applied the "official functions" test, paragraph [48], and said that, because the employment had been outside the diplomat's official functions, it could not attract the residual immunity under art 39.

59. The wording of arts 31 and art 39 are different but have materially the same meaning. There is no apparent difference in their scope.

60. The Court of Appeal had decided *Reyes v Al-Malki* [2015] ICR 931, at [19], that employment to provide domestic services in an official diplomatic residence was conducive to the performance of diplomatic functions and was within a diplomat's official functions, "The employment of individuals to provide domestic services in diplomatic mission or an official diplomatic residence in the receiving state is conducive to the performance of diplomatic functions. It is not an action relating to any "commercial activity" undertaken for the financial benefit of the diplomatic agent; still less is it an action relating to any commercial activity "outside his official functions"".

61. I decided, accordingly, the Supreme Court had unanimously overruled the Court of Appeal's interpretation of "outside his official functions", which was one part of the two-part test in *art 31(1)(c).*

62. I also considered that it was arguable that the Court of Appeal had addressed the two parts of *art 31(1)(c)* in a composite way. In both [19] and [34] of its judgment, it ran the two parts of the test together when giving its judgment. In both paragraphs, the Court of Appeal appeared to treat the two factors together, as complimenting each other, when answering the question it addressed. Lord Dyson MR used a very similar formulation in [34] to the one he had used in [19], "The fact that an employer derives economic benefit from paying his employee wages that are lower than the market rate does not mean that he is engaging in a commercial activity. Still less does it mean that he is engaging in an activity outside his official functions," [34].

63. Insofar as the Supreme Court had overruled the Court of Appeal on the "official functions" test, it was arguable that the Court of Appeal's composite interpretation of *art 31(1)(c)* was overruled in its entirety.

64. Further, I was persuaded by the Claimant that more recent authority from the Court of Appeal indicated that, where a Court of Appeal judgment had been overturned by the Supreme Court on different grounds, the Court of Appeal judgment was advisory only, *Brownlie v Four Seasons Holdings Incorporated* [2016] 1WLR 1814, at [89] per Arden LJ. That rule was also applied in *Iranian Offshore Engineering and Construction CO v Dean Investment Holdings SA* [2019] 1 WLR 82, at [12], by Mr Justice Andrew Baker.

65. If that is the correct test to be applied, then the Court of Appeal's judgment in *Reyes v Al-Malki* could be of persuasive authority only.

66. It might be said that LJ Arden's statement, that a Court of Appeal's judgment was advisory, only, when it had been overturned by the Supreme Court on different grounds, went beyond Taylor LJ's statement in *R v Secretary of State for the Home Department, Ex p Al-Mehdawi* [1990] 1 AC 876, 883, on which LJ Arden relied.

67. However, there are features of the *Reyes v Al-Malki* case which make it very similar to *R v Secretary of State for the Home Department, Ex p Al-Mehdawi.*

68. In the *Ex p Al-Mehdawi* case, LJ Taylor had addressed the House of Lords judgment in *ex parte Rahmani* [1986] AC 475. Lord Scarman (with whom all other Law Lords agreed) said that the lower Courts had proceeded on the basis that *rule 12 Immigrations Appeals (Procedure) Rules 1972* applied, but the House of Lords had decided that *rule 12* did not, in fact, apply. Lord Scarman had then said, regarding the point of principle on the interpretation of *rule 12,* "Your Lordships have not, therefore, considered, nor have they heard arguments upon, the point of principle which was the ground of decision in both courts below. Accordingly, I express no opinion on the point.

I must not be understood to have indicated even a provisional view upon the soundness or otherwise of the alleged principle. Indeed, it would be dangerous, in my view, to discuss the point save in a case where the circumstances and the facts require it to be decided."

69. Having cited that passage of Lord Scarman's judgment, Taylor LJ said, 882E, "It would be strange indeed if despite those final words, the decision of this court is to be regarded as binding authority on the point of principle." That is, Taylor LJ stated that it would be strange if the Court of Appeal decision in *ex parte Rahmani* was to be regarding as binding authority.

70. In the *Reyes v Al-Malki* case, the Supreme Court had reversed the Court of Appeal's decision on the grounds that the employer no longer enjoyed diplomatic immunity under art 31 because he was no longer a diplomat. On the facts, the employer's posting in London had come to an end on 29 August 2014 and the Court of Appeal heard the appeal in November 2014. Accordingly, the employer no longer enjoyed diplomatic immunity at the time of the Court of Appeal hearing, so that *art 31* did not apply at that time.

71. Further in the Supreme Court Lord Wilson said, at paragraphs [56] and [57]

"56 It follows that this court will not answer in any binding form the central question presented to it in such detail and with such conspicuous ability: does an action instituted in the tribunal against a foreign diplomat in the UK by his former domestic servant brought to the UK to work in his home in (assumed) conditions of modern slavery relate "to any … commercial activity exercised by [him here] outside his official functions" within the meaning of article 31(1)(c) of the 1961 Convention?

57 I am pleased that the court will not answer that question in any binding form. Lord Sumption JSC's emphatic answer to the question is "no". His answer is (if he will forgive my saying so) the obvious answer. It may be correct. But my personal experience has been that, the more one thinks about the question, the less obviously correct does his answer become."

72. It would seem inconsistent with Lord Wilson's dicta if the Court of Appeal's judgment on the interpretation of "commercial activity" was binding on the lower courts, when the Court of Appeal's judgment on the matter was the same as Lord Sumption's conclusion, which Lord Wilson was "pleased" was not binding.

73. Taking all the factors together:

73.1. The Supreme Court overturned the Court of Appeal's decision in *Reyes v Al-Malki,* on different facts*;*
73.2. In doing so, it disagreed with the Court of Appeal's conclusion on one part of a two part test applied by the Court of Appeal;
73.3. The Court of Appeal gave a composite answer to that two part test in any event, treating the 2 factors as complimenting each other;

73.4. The facts which gave rise to the Supreme Court's judgment also pertained at the time of the Court of Appeal hearing, so the Court of Appeal was not required it to make the judgment it did. In *ex parte Rahmani* [1986] AC 475 Lord Scarman said, ".. it would be dangerous, in my view, to discuss the point save in a case where the circumstances and the facts require it to be decided."

73.5. Lord Wilson, giving the judgment of the majority in the Supreme Court, was pleased that the Supreme Court was not giving a binding interpretation of "any commercial activity exercised by him outside his official functions," in circumstances that Lord Sumption had given an emphatic answer, to the "commercial activity" test. Lord Sumption's interpretation was the same as the Court of Appeal's, but Lord Wilson stated that Lord Sumption's interpretation was not binding.

I considered that the Court of Appeal's judgment in *Reyes v Al-Malki* was not binding on me. At most, it was persuasive.

Decision in this Case

74. The result is that the relevant dicta of both the Court of Appeal and the Supreme Court in *Reyes v Al-Malki* are not binding on me, but persuasive.

75. I accepted the Claimant's argument that the "outside official functions" test was conceded by the employee in the EAT in that case, but was not in the current case, so that the EAT decision in *Reyes v Al-Malki* on that issue did not bind me.

76. The judgments of the Court of Appeal and Supreme Court in *Reyes v Al-Malki* set out the background, law and their decisions with far greater detail and lucidity than I can attempt to do. I have not heard arguments from intervenors; the arguments of the parties were clearly not presented at such length in this tribunal as they were before the Appeal Courts in *Reyes v Al-Malki*. It would not be appropriate for me to embark on a fresh exposition of the legal principles and arguments applicable to similar cases.

77. The correct approach for me is to decide which of the non-binding dicta of the superior Courts I should follow.

78. The Respondent points out that the conclusions of the minority in the Supreme Court were set out in clear, unambiguous form. The Respondent contends that the dicta of the majority of the Supreme Court merely doubted the conclusions of the minority and suggested that the International Law Commission be invited to consider the acceptability of an amendment of article 31, which would put beyond doubt the exclusion of immunity in a case such as *Reyes v Al-Malki.*

79. No amendment has been made to article 31 Vienna Convention 1961 since the *Reyes v Al-Malki* case was judgment was given by the Supreme Court in October 2017.

80. Ordinarily, a lower court would be likely to follow the dicta of the majority of the Supreme Court in another case brought on identical facts.

81. I have concluded that I should assume that, had the Supreme Court been required to make a decision on the correct interpretation of article 31 Vienna Convention 1961, the majority would not have adopted the construction proposed by Lord Sumption in *Reyes v Al-Malki.* The majority did not agree with that construction.

82. I adopt the reasoning of Lord Wilson at paragraphs [57] – [68] and Baroness Hale and Lord Clarke at [69] of the Supreme Court judgment.

83. *Article 31(1)(c*) must be interpreted taking into account the relevant rules of international law applicable in the relations between the parties, per Lord Wilson [67]. These include "the universality of the international community's determination to combat human trafficking", the ratification of the Palermo Protocol 2000 by the UK and Saudi Arabia, the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (acceded to be the UK) and the Arab Charter on Human Rights 2004 (ratified by Saudi Arabia), [60].

84. It is a rational view that the relevant activity for the purposes of *art 31(1)(c)* is, not just the employment, but the trafficking; that the employer of the migrant is an integral part of the chain, who knowingly effects receipt of the migrant and supplies the specified purpose, namely that of exploiting her, which drives the entire exercise from her recruitment onwards; that the employer's exploitation of the migrant has no parallel in the purchaser's treatment of the stolen goods; and that, in addition to the physical and emotional cruelty inherent in it, the employer's conduct contains a substantial element of obtaining domestic assistance without paying properly for it or at all, per Lord Wilson [62].

85. It would be difficult for a court to forsake what it perceived as a legally respectable solution (that is, to interpret the trafficking and employment of a domestic servant in conditions of modern slavery as coming within the article 31(1)(c) exception to diplomatic immunity) and instead to favour a conclusion that the legal system cannot provide redress for an apparently serious case of domestic servitude, per Lord Wilson [68].

86. Baroness Hale and Lord Clarke said, at [69] of the judgment, "It follows that the proper construction of *article 31(1)(c)* does not arise. However, had it arisen, we would associate ourselves with the doubts expressed by Lord Wilson JSC as to whether the construction adopted by Lord Sumption JSC in this particular context is correct especially in the light of what we would regard as desirable developments in this area of law."

87. I conclude that a claim instituted against a foreign diplomat by his domestic servant in relation work in his home in (assumed) conditions of human trafficking and modern slavery relates to "commercial activity exercised …

outside his official functions" under article 31(1)(c) Vienna Convention 1961. It comes within the exception to diplomatic immunity in that article.

88. Accordingly, the Respondent employer does not have diplomatic immunity and the case against him is not struck out.

89. A Preliminary Hearing will be listed to make directions for the future conduct of the case.

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Employment Judge Brown

Dated: 11 June 2019

Judgment and Reasons sent to the parties on:

13 June 2019

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For the Tribunal