Case Numbers: 2204921/2012

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**

BETWEEN:

Mr N Buttet
Claimant

AND

Ambassade de France Au Royaume Uni
Respondent

ON: **22 August 2019**
Appearances:
For the Claimant: **Mr A Rhodes, counsel**
For the Respondent: **Mr B Tompkins, counsel**

JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that the respondent has state immunity and the tribunal has no jurisdiction to hear the claim for holiday pay. The claim for holiday pay is dismissed.

REASONS

The issues

1. This was listed as a hearing to determine not just the jurisdictional issue of state immunity but also depending on the outcome of that issue, the full merits issue of the claimant's holiday pay. Both sides were in agreement that only the jurisdictional issue should be dealt with at this hearing and I agreed with that approach. This was therefore a preliminary hearing on the issue of state immunity.

2. The respondent only participates in these proceedings for the purpose of claiming state immunity. It does not otherwise submit to the jurisdiction.

The background

3. These proceedings were issued on 23 November 2012. The claimant Mr Nicolas Buttet worked as a security guard at the French Ambassador's

residence by the Ambassade de France au Royaume Uni, "The French Embassy" from 1 September 2008 to 12 October 2012. He claimed both automatic and ordinary unfair dismissal.

4. The respondent asked the tribunal to dismiss the claim because they were the French Government and covered by state immunity. The claimant disputed that state immunity applied. There was substantial correspondence on the point in early 2013.

5. A hearing was listed for September 2013 to consider whether state immunity applied. The respondent applied for a stay pending the determination of two cases before the EAT, or in the alternative, a postponement. The hearing was vacated. A stay was ordered by the President of the Tribunals in October 2013.

6. In October 2015 a letter was sent to the parties with the approval of the President asking for the parties comments on whether a stay should continue based on the ongoing test case of *Benkharbouche*

7. In February 2016 the tribunal wrote to the parties saying that the claim would not be listed until the appeal to the Supreme Court in *Benkharbouche* was decided. By October 2017 that decision had been handed down and the tribunal was in a position to case manage this claim.

8. In February 2018 Employment Judge Wade listed a case management hearing to deal with a number of cases affected by the *Benkharbouche* decision.

9. On 4 July 2018 Judge Wade heard a preliminary hearing following which a letter was sent to the parties in this case on 6 August 2018 setting out a number of general points arising from the position on *Benkharbouche.*

10. At a hearing before Judge Wade on 17 September 2018 the claims for unfair dismissal, automatically unfair dismissal and breach of contract were dismissed because the tribunal did not have jurisdiction by reason of the State Immunity Act.

11. Judge Wade dismissed the claims on the basis that the respondent had (a) not submitted to the jurisdiction of the tribunal (b) defended all claims on the basis of sections 4(2) and 16 of the State Immunity Act (SIA) because the claimant is a national of the respondent and (c) the respondent did not concede that the tribunal had jurisdiction under section 4(2)(b). The respondent continues to maintain those positions.

12. The only remaining claim was one of holiday pay, with Judge Wade giving the claimant leave to plead this, although the relevant box had not been ticked in the original ET1, with leave to the respondent to respond. Both parties have done this.

13. Judge Wade said that there would be an open preliminary hearing to

consider the question of jurisdiction. On 15 October 2018 the claimant filed particulars of his holiday pay claim and the respondent filed a response on 16 November 2018 asserting state immunity.

14. A hearing was listed to take place on 17 June 2019. The claimant attended but the respondent did not as it did not receive the Notice of Hearing. It was relisted for this hearing.

15. On 21 June 2019 the claimant's solicitors asked if the hearing was solely to decide jurisdiction or to determine the holiday pay claim as well.

16. Employment Judge Brown directed on 5 July 2019 that the tribunal would determine the holiday pay claim along with matters of jurisdiction. As set out above, by consent, only the jurisdictional matter was dealt with at this hearing.

Documents

17. The claimant produced a witness statement on the morning of this hearing. It had some documents attached. The claimant was not present. I accepted that the claimant was not clear until the morning of this hearing that the tribunal was not going to deal with the full merits holiday pay issue and he says that is why he produced a witness statement.

18. The statement was not given to the respondent until a few minutes before the start of this hearing. It had not been served on the solicitors. The respondent had no client present from whom to take instructions on the content of the statement. Counsel for the respondent said that "*being generous*" the witness statement had been handed to him about 12 minutes before the commencement of this hearing.

19. I was told that in addition to the holiday pay point, the claimant wished to rely on the statement on the issue of how many days he spent in the UK. It was on the point as to permanent residence in the UK. I was told that the claimant was in France at the date of this hearing. I was not told why he had not travelled to the UK to give evidence based on his witness statement.

20. I asked the claimant's counsel why it had been served so late and only at the start of the hearing and without the presence of the witness. I reminded the claimant's counsel that only very limited weight could be given to a statement where the witness was not called to swear to its truth and be cross-examined. I was told that his absence was because he was in France.

21. I asked why this had not been considered earlier and why for example there had been no postponement application, or if the claimant was not able to travel to London for some reason, an application made to take his evidence by video link?

22. In those circumstances the claimant said that they were content for the witness statement not to be relied upon and as a result I did not need to hear

any submissions from the respondent on its admissibility. The significance of this statement became clear as the hearing progressed and this is referred to below.

23. I had written submissions and a bundle of authorities from each party to which counsel spoke for the full day of the hearing. The written submissions are not replicated here. There is reference made below to the oral submissions which were based on the written submissions.

Agreed matters

24. It was agreed that the claimant is a French national. It was not agreed that he is permanently resident in the UK when the contract with the respondent was entered into or when proceedings were issued. It was agreed that he worked as a security guard.

25. It was agreed that *Benkharbouche* did not make a determinative ruling on the application of section 4(2)(a) of the State Immunity Act where the individual concerned is a national of the state concerned. The comments in *Benkharbouche* on that matter were obiter.

26. It was agreed that immunity is not engaged where the individual is employed as purely domestic staff. There is a dispute as to whether the claimant's role was purely domestic.

Relevant law

27. Section 1 of the State Immunity Act 1978 provides that:

> *(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.*

28. As to contracts of employment, section 4 SIA provides:

> *(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*

29. Section 14 SIA provides:

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

30. Section 16 SIA provides that the limitation on immunity in section 4 does not apply to proceedings concerning the employment of members of a mission as defined in Article 1 of Schedule 1 of the Diplomatic Privileges Act 1964.

31. Section 2 of the European Communities Act 1972, in force at the date of this decision, provides as to the general implementation of Treaties of the European Union:

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.

32. The status granted to ambassadorial residences is set out in Articles 1(i) and 22(1) and (2) of the Vienna Convention on Diplomatic Relations and is incorporated into UK law by section 2(1) of the 1964 Act:

Article 1

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

(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 service staff" are the members of staff of the mission in the domestic service of the mission;

(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.

Article 22

1 The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

> *2. The receiving State is under a special duty to take all appropriate sets to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.*

33. The Charter of Fundamental Rights of the European Union ("the Charter") at Article 47 provides at section VI on "Justice" and in relation to the right to an effective remedy and to a fair trial:

> *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.*

34. Article 21 of the Charter deals with the principle of non-discrimination and provides:

> *1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
>
> *2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.*

35. Article 6 of the European Convention on Human Rights provides the Right to a Fair Trial. It is set out in Schedule 1 to the Human Rights Act 1998.

36. Article 11 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIJS), adopted by the General Assembly of the UN in December 2004 but not yet in force, deals with Contracts of Employment. Paragraph 1 of Article 11 provides:

> *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.*

37. Paragraph 1 above does not apply if (as set out in paragraph 2(e) of paragraph 1 of UNCJIS) 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. The State of the forum is in this case is the UK.

38. In ***Benkharbouche v Embassy of Sudan 2017 UKSC 62*** the Supreme Court dealt with the interplay between section 4(2)(b) and section 16(1) of the SIA and Article 47 of the Charter and Article 6 of the European Convention on Human Rights. It was held, in summary form, that:

    a. The test of compatibility of the provisions of the SIA with Articles 47 of the Charter and Article 6 of the Human Rights Convention was whether or not they were consistent with a rule of customary international law;

b. The international consensus as to the scope of State immunity was in favour of a restrictive doctrine of immunity, "*whereby immunity was limited to acts by a state in the exercise of sovereign authority, as opposed to acts of a private law nature*";

c. The employment of purely domestic staff in a diplomatic mission was not an inherently sovereign act and could not be other than a private act;

d. Sections 4(2)(b) of the SIA under which immunity depended on the nationality and residence of the claimant at the date of the employment contract and which drew no distinction between sovereign and private acts was not justified by any binding principle of international law and section 16(1) which extended state immunity to the claims of any employee of the diplomatic mission, irrespective of whether the relevant act was in exercise of sovereign authority, could not be justified by reference to any rule of customary international law.

e. Accordingly, sections 4(2)(b) and 16(1) were incompatible with Article 6 of the Convention and Article 47 of the Charter and the respondent States were not entitled to immunity in respect of the claimants' claims.

39. *Benkharbouche* dealt with section 4(2)(b) and this case in question deals with section 4(2)(a) so it is accepted that any comments in *Benkharbouche* are obiter in relation to section 4(2)(a). Section 4(2)(b) goes beyond customary international law because there is no immunity if you are third state national not permanently resident in the forum State. It did not make a distinction between sovereign and commercial acts.

The submissions

<u>The claimant's submissions</u>

40. The claimant set out his reasons why section 4(2)(a) of the State Immunity Act (SIA) should be disapplied pursuant to Article 47 of the Charter of Fundamental Rights of the European Union (the Charter). The claimant recognised that this tribunal could not make a declaration of incompatibility but it remained the claimant's case that it is incompatible with Article 6 of the European Convention on Human Rights (the Convention).

41. The claimant submitted that the question of whether the provisions should be disapplied by Article 21 of the Charter on non-discrimination and Article 14 of the Convention on the prohibition of discrimination. The claimant's submission on the burden of proof was based on paragraphs 37 to 39 of *Benkharbouche* referred to in more detail below.

42. It was submitted that the only basis on which a state could invoke immunity in respect of an employment claim by a national, is where there is a separate principle of customary international law which permits such immunity in

employment claims by state nationals. If there is not, then section 4(2)(a) should be disapplied on the same basis as section 4(2)(b) and section 16(1)(a) were in *Benkharbouche*, since it does not distinguish between acts which are an exercise of sovereign authority and acts which are purely of a private law nature.

43. The claimant submitted that the burden was on the party asserting state immunity to show that the relevant statutory provision is consistent with customary international law, as they said the default is that such immunity does not exist (*Benkharbouche* paragraph 37).

44. The claimant relied upon the final sentences of paragraph 37: *"The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority. In the absence of a special rule to some different effect applicable to employees in the position of Ms Janah and Ms Benkharbouche, that is the default position*". The claimant submitted that Article 47 of Charter and Article 6 of the Convention provide for a right for a court to determine disputes and it is for the party asserting that immunity applies to show that it does and in the absence of a special rule, the default is that immunity does not apply.

45. This is not decided in *Benkharbouche* in relation to section 4(2)(a) SIA. The point decided in *Benkharbouche* is that a state is only entitled to immunity in relation to acts of sovereign immunity and not acts which could be carried out by a private citizen. It is referred to in *Benkharbouche* (paragraph 65) as the restrictive doctrine of immunity. *Benkharbouche* decides that for section 4(2)(b), because it made no such distinction between acts of sovereign immunity and private acts, it was incompatible with customary international law and was therefore a disproportionate interference with the claimant's Article 47 rights in the Charter and Article 6 rights in the Convention. The claimant submitted that section 4(2)(a) also makes no such distinction.

46. The claimant said that applying the same logic as in *Benkharbouche*, it is prima facie incompatible for the same reasons. The question was addressed within *Benkharbouche*, obiter, at paragraph 59 judgment: *"The whole subject of the territorial connections of a non-state contracting party with the foreign or the forum state raises questions of exceptional sensitivity in the context of employment disputes. There is a substantial body of international opinion to the effect that the immunity should extend to a state's contracts with its own nationals irrespective of their status or functions even if the work falls to be performed in the forum state".*

47. The claimant submitted that from a policy perspective, where an individual is engaged on a long term contract in the UK and is living in the UK during the contract, it is logical that he should be able to pursue any claims he should have within the forum state (the UK). Otherwise it was not clear what remedy he would have in the employing state, so the dispute should be resolved in the forum where his employment took place.

48. The claimant also submitted that in relation to section 4(2)(a), based on

paragraph 66 of *Benkharbouche*, that sections 4(2)(a) and 4(2)(b) SIA are derived from the Article 5(2)(a) and (b) of the European Convention on State Immunity 1972 and that six other countries have enacted provisions similar to section 4(2) SIA. Lord Sumption said about this at paragraph 66: *"this is hardly a sufficient basis on which to identify a widespread, representative and consistent practice of states, let alone to establish that such a practice is accepted on the footing that it is an international obligation. The considerable body of comparative law material before us suggests that, unless constrained by a statutory rule the general practice of states is to apply the classic distinction between acts jure imperii and jure gestionis, irrespective of the nationality or residence of the claimant."*

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49. There were 7 signatories to the European Convention on State Immunity, including the UK, so there were only six other countries with similar provisions. The claimant argued that by the same logic, section 4(2)(a) also does not correspond to customary international law.

50. The claimant responded to paragraph 18 of the respondent's skeleton argument on section 4(2)(a) where they said that the tribunal should avoid finding that state immunity did not apply because it would involve an international law wrong against the respondent. The claimant said it is within the tribunal's jurisdiction to decide whether section 4(2)(a) applies and there is an appellate jurisdiction to correct any error. The respondent clarified that it was not saying that the tribunal could not determine the point.

51. In relation to Article 11(2)(e) of UNCJIS the claimant says that France does not have immunity unless this provision applies. The respondent said this is on the issue of diplomatic law and on a different instrument dealing with the Vienna Convention on Diplomatic Relations 1961. The claimant accepted that it relates to a different Treaty but said that the SIA at section 16 referred to the Vienna Convention in relation to members of a mission and expected some uniformity of definitions between the two. The claimant submitted that he was living in the UK whilst working for the respondent. There were no documents to support this because he is French and entitled to free movement and he was connected to the UK by the payment of tax.

52. The claimant said section 4(2)(a) is inconsistent with customary international law because it is unqualified. The claimant said that because section 4(2)(a) was incompatible it was an unjustified interference with the claimant's Article 47 rights and therefore should be disapplied. It prevents the claimant bringing his holiday pay claim and the claimant says it is for the respondent to show it reflects customary international law.

53. The claimant says it is not necessary to determine whether he is a permanent resident, because section 4(2)(a) is unqualified and does not reflect customary international law, it should therefore be disapplied. Section 4(2)(a) is an exception which the claimant says should not apply, so that he can bring his claim.

54. The claimant said that because section 4(2)(a) does not deal with permanent

residence, it is unqualified and goes further than customary international law allows and therefore it is an immunity that should not be relied upon. The claimant submitted that the UK statutory provision should not therefore stand and the respondent should not be allowed to rely on the immunity.

55. The claimant, at paragraph 23 of submissions, cited other examples under the Vienna Convention. In each of these where nationality is mentioned it is qualified thus the immunity is narrower. The claimant's position is that for Article 47 the immunity needs to be qualified so that it does not go further than customary international law permits.

56. Paragraph 56 of *Benkharbouche* confines the immunity to the exercise of sovereign authority, Lord Sumption stating: *"The principle now applied in all circuits that have addressed the question is that a state is immune as regards proceedings relating to a contract of employment only if the act of employing the plaintiff is to be regarded as an exercise of sovereign authority having regard to his or her participation in the diplomatic functions of the mission".*

57. Thus the claimant submits the respondent has to show either that the claimant's role involved some form of sovereign function of the State or that there is a separate rule of customary international law justifying section 4(2)(a) in its unqualified (current) form. The claimant says if the respondent cannot show this, then section 4(2)(a) should be disapplied.

58. The claimant's position was that in the absence of a clear accepted practice amongst states, recognising absolute immunity in respect of employment claims by nationals of a foreign state, it cannot be said that section 4(2)(a) is consistent with customary international law. The respondent's position was that in any event they still have immunity under section 4(2)(b) notwithstanding *Benkharbouche*. The claimant says that *Benkharbouche* rules directly on the point, with the conclusion at paragraph 67 saying "*I conclude that s 4(2)(b) of the State Immunity Act 1978 is not justified by any binding principle of international law".* The claimant said therefore section 4(2)(b) goes too far and is not consistent with customary international law. The reason for disapplying it was the lack of a distinction between acts which are sovereign acts or private/commercial acts. The claimant submits that the same applies to section 4(2)(a).

<u>The claimant's job role</u>

59. The claimant said that the respondent argued that the functions he performed were such that he was exercising sovereign authority – because he was a security guard and premises relating to a diplomatic mission have a unique character under international law. The claimant dealt with the respondent's reliance on Denza on Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (4th edition 2016) pages 139-140 and the issue of Article 1 of the Vienna Convention paragraphs (f) and (g) – (set out above).

60. The claimant submitted that what was alluded to in the text book was private

military contractors whose employment is of a military and high level security nature. The claimant's submission was that the burden was on the respondent to show that the exception applied and the default was that there should be access to the court for the claimant. The claimant's role was not analogous to those specific roles in conflict zones and private military companies. The claimant said he was not a member of the administrative and technical staff, he was a member of the service staff, paragraph (g) of Article 1 of the Vienna Convention.

61. The claimant said even if he was a member of administrative and technical staff it did not follow that his employment was an exercise of state authority. The examples given by Lord Sumption at paragraph 55, such as cypher clerks or confidential secretarial staff, concern sensitive information peculiar to the State's function. The claimant's role was not administrative or technical and the examples in the text book were of high level protection in conflict zones. The claimant says he is the same as service and domestic staff and in relation to whom Lord Sumption said, he found it difficult to conceive of cases where the employment of purely domestic staff could be anything other than an act jure gestionis. He said that the employment of such staff is not inherently governmental. The claimant says he was in a role that he could easily have undertaken for a private business and there was nothing inherently governmental about it. There was nothing in his employment that involved dealing with the inner workings of the French Embassy.

<u>Discrimination point on grounds of nationality</u>

62. The claimant said that sections 4(2)(a) and 4(2)(b) discriminate on grounds of nationality. It was covered in *Benkharbouche* briefly at paragraph 77 where Lord Sumption said that section 4(2)(b) unquestionably discriminates on grounds of nationality. The only question was whether the discrimination was justifiable by reference to international law. The claimant submitted that section 4(2)(a) discriminated even more than section 4(2)(b) on grounds of nationality and was contrary to Article 21(2) of the Charter and Article 14 of the Convention.

63. The claimant concluded by saying that the distinction in *Benkharbouche* was between sovereign acts and acts of a private character, and section 4(2)(b) was held to be contrary to customary international law because it did not reflect this distinction. The claimant submitted that section 4(2)(a) also fails to reflect this distinction so it was submitted that for the same reason it should also be taken as not reflecting customary international law. The claimant says it is for the respondent to show that immunity applies because of *Benkharbouche* paragraphs 37-39 and the default position is that immunity does not apply. Therefore the respondent has to show there is a separate rule of customary international law justifying immunity solely on nationality. The claimant's acts were said not to be acts of sovereign authority, he was part of the service staff.

64. Finally sections 4(2)(a) and 4(2)(b) were said to be discriminatory on grounds

of nationality and contrary to Article 21(2) of the Charter and Article 14 of the Convention and should be disapplied on that basis.

The respondent's submissions

65. The respondent made 3 preliminary points, then addressed discrimination, the burden of proof and sections 4(2)(a) and 4(2)(b).

Preliminary points

66. The first preliminary point was to refer the tribunal to the SIA. It is a primary Act of Parliament applied by Employment Judge Wade at the hearing on 17 September 2018 when she found that the statute applied and the domestic claims were dismissed. The holiday pay claim is founded in EU law and the claimant had to satisfy the tribunal that it had to disapply a primary Act of Parliament and that was said to be a strong matter. The respondent noted that the claimant had *Benkharbouche* behind him but the proposition in that case was said to be narrow in reasoning and effect.

67. The respondent said not only was the claimant asking the tribunal to disapply a primary Act of Parliament, but the tribunal "*sits on the edge of a knife*" because if the case proceeded to a full merits hearing wrongly, it would be the UK committing an international wrong against France in this tribunal and not just a case of being correctable on appeal because France would be made subject to a trial in breach of international law.

68. The second preliminary point was in relation to section 4(2)(a) and the decision of *Benkharbouche*. The respondent did not dispute the obiter nature of Lord Sumption's remarks on section 4(2)(a). *Benkharbouche* is a unanimous decision of the Supreme Court and the claimant infers that they just got it wrong and this tribunal should apply the unanimous decision of the Supreme Court even though part of it is obiter. Given the legal material and submissions that were before the Supreme Court, the respondent says that this tribunal should agree with those obiter comments.

69. The third point, in relation to sections 4(2)(a) and 4(2)(b), the claimant submitted that because section 4(2)(a) is unqualified and because it makes no reference to permanent residence it goes further than customary international law and therefore it falls. The respondent submitted that this was "*fundamentally wrong*". They say that is not the result that follows. If it does, following *Benkharbouche*, it is disapplied only in so far as it goes beyond customary international law. The respondent submits it is *"surgery"* on the section, not "*blowing it out of the water*".

70. The respondent said that the claimant accepted that customary international law is as stated in Article 11(2)(e) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCJIS). Article 11 deals with contracts of employment. The claimant accepted it is a statement of customary international law – Article 11(2)(e) adds the words "*unless this person has permanent residence in the State of the forum*". Customary

international law has a narrower application where States are immune. If section 4(2)(a) is too wide, it can be disapplied to the extent that it is too wide.

71. The respondent said there is no evidence and none provided that the claimant has permanent residence in the UK. If Lord Sumption was wrong and the claimant is a permanent resident of the UK, then section 4(2)(a) might be disapplied based on customary international law. There was no evidence and the claim has not been advanced that he is a permanent resident of the UK, so the tribunal cannot make that finding. That being so, even on the claimant's view of what the law should be, and applying *Benkharbouche*, there is nothing to disapply. The claimant falls within the narrower category and is barred, he is a national of France who does not have permanent residence of the UK.

72. The claimant had said that the respondent did not assert that he was not a permanent resident. I clarified with the claimant that he had never asserted that he was a permanent resident of the UK.

73. The respondent said that following the preliminary hearing before Judge Wade on 17 September 2018 everyone was aware of the issue that was to be determined. The claimant has solicitors and counsel and there could not be any suggestion that if he wished to advance the argument that he was a permanent resident of the UK, he could not have advanced it. The claimant had been on notice to the issue and had every opportunity to advance the arguments that he wished.

Substantive points

74. Discrimination: The respondent drew attention to paragraph 77 of *Benkharbouche* which says: *"The only question is whether the discrimination is justifiable by reference to international law. If state immunity is no answer to the claim under art 6 alone, then it is no answer to the claim under the combination of art 6 and art 14."* If immunity is an answer to the Article 6 and Article 47 point, it is also an answer to the discrimination claim. The respondent agreed that the claimant has two reasons why he says State Immunity should be disapplied, incompatible with customary international law and discrimination, but the respondent argued that the answer was the same.

75. On customary international law, there is a justified limitation on his Article 47 rights and his right not to be discriminated against. If immunity applies, the respondent says it applies to the entire claim. The ratio in *Benkharbouche* is, if the limit on the discrimination principle is consistent with customary international law on state immunity, then it is justified. The respondent said there was no need to address discrimination at any length, the outcome was the same on both points.

76. Burden of proof: The respondent submitted that, all said and done, there was only one factual issue that applied. The burden is on the claimant not on the respondent State. The respondent said that the burden of proof is on

the claimant in relation to jurisdiction on the permanent residence point which is the disputed question of fact.

77. The respondent said that there was no issue on the law in relation to the burden of proof. It is for the Tribunal to determine the law and that is what stands. The respondent relied upon the textbook by Fox and Webb said to be the leading text book, titled The Law of State Immunity (revised and updated 3rd edition). This was produced in the respondent's authorities bundle giving page 238 of the textbook. This is an extract titled "Burden of proof" which says "*The burden of proof under the SIA is upon the claimant, not the defendant state".* The respondent relies on this. They say it is for the claimant to show that an exception to state immunity applies. The respondent considered that the claimant was submitting that *Benkharbouche* had changed that.

78. The claimant relied upon *Benkharbouche* paragraph 37 which says: "*The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority. In the absence of a special rule to some different effect applicable to employees in the position of Ms Janah and Ms Benkharbouche, that is the default position."* The law of state immunity has undergone three stages: at its first stage, it was absolute; at the second stage there was a restricted doctrine of immunity and a dividing line between acts done in the exercise of sovereign authority and acts in of a private/commercial character – with the SIA and a two tier system, section 1(1) states universally a state is immune - except as provided and the a range of exceptions; the third stage was *Benkharbouche* paragraph 37 (as quoted) so that stage two could be misunderstood. The claimant said there was only one position: some acts give rise to immunity others do not.

79. The respondent said that the claimant seemed to throw the burden of proof onto the respondent and the respondent said there was no burden on them; it lay on the claimant. The respondent said based on paragraph 37 (quoted above) that Lord Sumption was discussing the architecture of the law not the burden of proof.

80. The respondent said section 1(2) of the SIA was not affected by *Benkharbouche*. As a matter of English law under this statute, any court has to, of its own motion, make a determination as to immunity whether or not the State appears in the proceedings. The respondent says because of this even if they did not appear, the tribunal would have to make the same decision. Thus the burden is not on the respondent.

81. Customary international law: The claimant submitted that the burden was on France to prove that there was a customary international law supporting immunity. The respondent submitted that customary international law is law in this tribunal. It is law and not fact so it was "*nonsensical*" to say there is a burden to prove anything. The respondent said it is wrong to say under Article 6 of the Convention or Article 47 of the Charter that there was some prima facie right to access a court. If access to a court is wrongly declined, that is a limitation of that right and it had to be justified. A litigant cannot go

to any court and assert jurisdiction asking the defendant or respondent to show why there should not be jurisdiction. The only area in which there is a burden of proof is on facts. For example whether the individual is a national of a country is a question of fact – admitted in this case.

82. The factual issue that arose at this hearing was whether the claimant was a permanent resident of the UK. The claimant said that the respondent relied on section 4(2)(a) and that relies on wider matters than customary international law allows. Section 4(2)(a) is narrower, it only applies to nationals of France and not to permanent residents of the UK and to the extent that section 4(2)(a) goes beyond that, it must be disapplied. The submission by the claimant is made – "*I am a permanent resident of UK and France is not immune*". The claimant appeared to be asserting that the respondent must disprove that he is a permanent resident of the UK. The respondent said that cannot be right. The respondent said that the only factual issue that bites in this case, is whether the claimant is a permanent resident of the UK. For the purposes of these proceedings they say he has not shown this and on the respondent's submission, "*that is the end of it*".

83. The respondent said there is state immunity, the claimant is a French national and he has not alleged, let alone proven, that he is a permanent resident of the UK. Section 4(2)(a) can only be disapplied to the extent it goes beyond the customary international law rule. Article 11(2)(e) UNCJIS gives immunity if the employee is a national of France when proceedings are instituted unless he has permanent resident in the UK. It was common ground that Article 11(2)(e) UNCJIS is what amounts to customary international law and gives immunity. The claimant is a national of France and the proviso does not apply because it has not been pleaded or argued, let alone proven, that he is a permanent resident of the UK.

84. In relation to section 4(2)(a) the respondent, relying on *Benkharbouche*, said Lord Sumption said section 4(2)(a) was not too wide (see paragraph 64). It was not in dispute that <u>if</u> section 4(2)(a) was consistent with customary international law it would stand. In clear obiter statements in *Benkharbouche* the Supreme Court indicated that section 4(2)(a) does reflect customary international law.

85. At paragraph 62, the Supreme Court referred to the "*impressive body of legal materials assembled by the parties to this appeal"* which were considered and the respondent submitted that this tribunal should be slow to disagree with the obiter comments of the Supreme Court. The respondent also took the tribunal to paragraph 59 of *Benkharbouche "There is a substantial body of international opinion to the effect that the immunity should extend to a state's contracts with its own nationals irrespective of their status or fucntions even if the work falls to be performed in the forum state..".* International opinion is constitutive of customary international law, this is equivalent to a body of case law. At paragraph 64 the Lord Sumption said "*Section 4(2)(a) extends the immunity to claims against the employing state by its own nationals. As I have said, this may have a sound basis in customary international law, but does not arise here".* The respondent said this is a

high hurdle for the claimant to overcome. The respondent accepted that Lord Sumption used the word "may".

86. The respondent submitted that even if the claimant was correct and section 4(2)(a) did not represent customary international law, it is only because permanent residence was not there in the section and the respondent said even if you apply that test, the immunity still stands. Applying *Benkharbouche*, the respondent said there was no European law reason to disapply the statute.

87. Finally as a footnote on applying the customary international law rule, the respondent pointed out that Article 11(2)(e) of UNCJIS was a Treaty not in force because it has not reached the required number of ratifications. The UK signed it in 2005. It is subject to the Treaty coming in to force, but the signing the Treaty gives rise to international law obligations.

88. The Vienna Convention on the Law of Treaties of 1969 at Article 18 sets out the "*Obligation not to defeat the object and purpose of a Treaty prior to its entry into force*". It says that where a State has signed subject to ratification (which the UK has done) it has expressed its consent to be bound pending the entry in to force of the Treaty. That State is therefore obliged to refrain from acts which would defeat the object and purpose of such a Treaty prior to its entry into force. That is, on the respondent submission, another basis upon which Article 11(2)(e) applies, because the UK should not act in a way which defeats its objects and purposes. When dealing with immunity the respondent submitted that it is not to subject States to the jurisdiction of UK Courts.

<u>The claimant's job role</u>

89. On section 4(2)(b) the respondent submitted that straightforwardly applying *Benkharbouche* the immunity stands. If the work or engagement involved the exercise of sovereign authority then the immunity stands. This is the effect under sections 4(2)(a) and 4(2)(b). If the claimant's work is the exercise of sovereign authority then the respondent has immunity, and the claimant agrees with this.

90. In paragraphs 53 and 54 of *Benkharbouche* the Supreme Court found incompatibility between section 4(2)(b) and Article 47 only insofar as section 4(2)(b) departed from customary international law. In turn, it identified the primary dividing line in customary international law as "*the classic distinction between acts done jure imperii and jure gestionis*" (paragraph 59). Further guidance on that distinction in the context of employment contracts was given at paragraphs 53 and 54:

> *As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune. It is not always easy to determine which aspects of the facts giving rise to the claim are decisive of its correct categorisation, and the courts have understandably avoided over-precise prescription. …*

> *In the great majority of cases arising from contract, including employment cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. This will in turn depend on the functions which the employee is employed to perform.*

91. The respondent said that the tribunal should take the Particulars of Claim as pleaded and this is enough. Paragraph 1 of the Particulars pleads that the claimant was employed as a security guard at the French Ambassador's residence by the French Embassy. The respondent said the tribunal can take it that these facts are correct for this purpose. At paragraph 53 of *Benkharbouche* (above), the courts are to avoid over prescription and it depends on the functions which the claimant was employed to perform. The respondent said that the engagement of a security guard to secure a diplomatic premises falls on the sovereign authority side of the line.

92. The respondent relied upon the textbook, Denza on Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (4th edition 2016) pages 139-140 under the heading "*Protection by forces or contractors of the sending State*". In saying that when French Embassy engaged the claimant to patrol the building it involves the security of diplomatic premises, the respondent was not suggesting that the claimant sitting in South Kensington was in any way analogous to a US Marine sitting outside an Embassy in Iraq. However, the respondent submits that in both cases it involves the security of diplomatic premises which have a unique character in international law and are inviolable. The Vienna Convention deals with this at Article 1(i) "*The "premises of the mission" are the buildings or 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."* It therefore includes the Ambassador's residence.

93. States take very seriously the security of their premises. The respondent submitted that what States do in this respect is governmental. The respondent did not argue that the claimant was technical or administrative staff under the Vienna Convention. The respondent's point was that diplomatic premises are special and that in the arrangements for their security they are acting in sovereign power and not in general private or administrative capacities. The respondent said it was not like security at a supermarket. It is security for diplomatic premises. To allow this claim to proceed would be to breach international law.

94. The respondent summarised by saying that in their submission there were three routes through this case: (i) the Supreme Court has indicated that section 4(2)(a) has a sound basis in international law and that as a French national the claimant cannot bring a claim against France in the UK, (ii) even if section 4(2)(a) goes beyond customary international law rule as per Article 11(2)(e) of UNCJIS, he cannot show he is a permanent resident of the UK under section 4(2)(a) and (iii) the job role he carried out is an exercise of sovereign authority.

<u>The claimant in reply</u>

95. In respect of the respondent's first point, section 4(2)(a) having a sound basis in international law, the claimant replied that it is very much qualified and it was not an issue to be determined. The rule of customary international law is broader. Section 4(2)(a) is broader and unqualified.

96. On the second point on Article 11(2)(e) UNCJIS, the claimant said the general principle under EU law is that there is supremacy of EU law over UK law and section 2 of the European Communities Act 1972 provides that EU law, which includes the Charter, has supremacy over UK law and therefore there should be a disapplication of UK law where it comes into conflict. It is not in the purview of the tribunal to rewrite legislation by adding additional wording, the power is only to disapply and therefore the tribunal has to disapply section 4(2)(a) and not rewrite it. The claimant submits that the tribunal is empowered to do that under the European Communities Act 1972 (set out above). The claimant says the conflict is Article 47 of the Charter of the Fundamental Rights of the European Union which gives a right to an effective remedy and a fair trial, therefore access to a court and Article 21 which provides for non-discrimination. They are in conflict, on the claimant's submission, with section 4(2)(a) and therefore the Charter prevails except where it can be shown that there is a proportionate restriction which requires public international law.

97. On the respondent's third point about the claimant's job role, the claimant submits that the functions that he was employed to perform are more analogous to a private commercial contract, rather than an exercise of sovereign authority. Taking the Particulars of Claim as the basis, there is no suggestion that his functions guarding the door were any different from those of private premises such as a supermarket. The claimant accepts there are public international law aspects to Embassies, but submits a closer nexus is needed to the Ambassador or State's functions themselves, and that a bodyguard might come closer. The claimant's submission was that the functions did not differ from those carried out with a private employer.

<u>The respondent in conclusion</u>

98. The respondent replied on section 2 of the European Communities Act. The respondent agreed with what the claimant said on the status of European law but said that the claimant was not correct in relation to Articles 47 and 21(2). The respondent said that there is only incompatibility if the limitation is not justified. The fundamental premise of *Benkharbouche*, was that if immunity is consistent with customary international law there is no incompatibility with the Charter. The respondent relied on paragraph 76 of *Benkharbouche,* final 2 sentences: *"As a matter of customary international law, therefore, their employers are not entitled to immunity as regards these claims. It follows that so far as sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 confers immunity, they are incompatible with article 6 of the Human Rights Convention."*

99. The respondent submitted that as a matter of customary international law France is entitled to immunity, (Lord Sumption paragraph 64), or under

Article 11(2)(e) which it is agreed represents customary international law. On either of those routes, the respondent said that France is entitled to immunity and that means if France is entitled to immunity under those provisions, this is not incompatible with Article 47 of the Charter and therefore section 2 of the European Communities Act is not engaged. It is only where UK law is incompatible with customary international law, that section 2 of the European Communities Act allows the UK Courts to disapply a Statute. The difference between the parties was one of compatibility. If it is compatible with customary international law, then there should be no disapplication of section 4(2)(a) as a result of section 2 of the European Communities Act.

Conclusions

Customary international law

100. In order for the provisions of the SIA to stand and give immunity to the respondent, I have to find that section 4(2)(a) is consistent with a rule of customary international law. There is no express finding on section 4(2)(a) in *Benkharbouche,* only obiter comments from Lord Sumption. It is a restrictive doctrine of immunity and does not apply to acts of a private law nature. It applies to the exercise of sovereign authority. This was therefore the subject of submissions in this case in relation to the job role carried out by the claimant.

101. It is common ground that the employment of domestic staff in a diplomatic mission, at an Embassy, did not involve an inherently sovereign act.

102. *Benkharbouche* found that section 4(2)(b) of the SIA, which on the face of it grants immunity if at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there, was not justified by any rule of customary international law. Section 16 did not "rescue" it. This meant that in *Benkharbouche,* state immunity could not be relied upon.

103. Before looking at this in more detail, I deal with the claimant's submission that there is a burden of proof on the respondent to show they have immunity.

104. In submissions the respondent took the tribunal to the leading text book, Fox and Webb, which said in terms that the burden is on the claimant to show that immunity should be denied, not on the defendant state. The footnote to the text referenced the case of ***J H Rayner (Mincing Lane) Ltd v Department of Trade***, a case which went to the House of Lords. At Court of Appeal level, case reference ***1989 1 Ch 73***, the CA dealt with immunity and international law. Obiter comments from Kerr LJ in that case (report page 194 under the heading "State Immunity") concerned the State Immunity Act. The CA said that when a claim for immunity is made by a state defendant, the Court then is required not merely to determine that there is a good arguable case for the plaintiff's contention that immunity should be denied, but must determine the issue itself at that preliminary stage of the proceedings. Kerr LJ commented on the difficulties for such respondents in

submitting to the jurisdiction.

105. I find based on the above, that the respondent does not have a burden of proving that state immunity applies. It lies on the claimant.

106. The claimant submits that section 4(2)(a) is incompatible with customary international law. As with section 4(2)(b), as ruled upon in *Benkharbouche,* it does not draw any distinction between sovereign and private acts. The claimant's position is that it goes too far and therefore should be disapplied.

107. I am persuaded in my findings by the obiter comments of Lord Sumption at paragraph 64 of *Benkharbouch* when he said of section 4(2)(a) that it "*extends the immunity to claims against the employing state by its own nationals"* and *"may have a sound basis in customary international law".* I acknowledge that he said it "may" and not that it "does" have a sound basis in customary international law*.* I use this as a starting point and agree with the respondent's submission that given the wealth of legal materials and submissions before the Supreme Court in *Benkharbouche,* it is a high hurdle and I would need a strong basis for finding otherwise.

108. I have to consider whether section 4(2)(a) goes too far and is inconsistent with customary international law. It was common ground that Article 11(2)(e) UNCJIS, dealing with contracts of employment, represented customary international law and there is immunity. I accept that it is not in force but by reason of Article 18 of the Vienna Convention on the Law of Treaties of 1969, the UK should act consistently with it and not defeat its objects or purposes.

109. Article 11 provides that a State cannot invoke immunity unless it falls within one of the exemptions in Article 11(2). Paragraph (2)(e) provides an exemption when the employee is a national of the employer State at the time when the proceeding is instituted (which is not in dispute in this case), unless this person has the permanent residence in the State of the forum.

110. Whilst the claimant submitted that he was living in the UK when working for the respondent, there were no documents to support this – I accepted that this was because he is French and entitled to free movement. It was also submitted that he was connected to the UK by the payment of tax. I had no evidence as to where he was living or what tax he paid so could make no finding of fact as to this.

111. The respondent was correct that the issue of permanent residence was not pleaded. It is not for the respondent to answer a case that has not been pleaded, particularly when the claim has been prepared by solicitors and/or counsel. The issue of state immunity was raised in these proceedings as early as February 2013 and there was no application, at any time, to amend to plead permanent residence, whether in the light of the developing case law or otherwise.

112. I make the observation that it is not acceptable for a litigant who has representation from competent solicitors and counsel to choose to submit a

witness statement within a few minutes of the start of a hearing, to fail to call the witness with no explanation as to why he did not attend other than saying that he is "in France" and to expect the tribunal to accept that statement in evidence. The respondent has no opportunity to deal with any factual arguments that might be raised on the issue of permanent residence, from matters they may know about or have been told by the claimant. They need an opportunity to take instructions and to consider calling witness evidence in response. The issues for this hearing had been known for eleven months. There was ample time to raise the point and prepare and serve such evidence. Sensibly the claimant withdrew reliance upon the statement.

113. For the above reasons I cannot and do not make any finding as to whether the claimant was a permanent resident of the UK. Had he wished to rely upon this, he had to plead the point. As he has not pleaded it or evidenced it, he has not shown this tribunal that he was a permanent resident at the point when proceedings were instituted.

114. Thus so far as Article 11(2)(e) is concerned, the exemption applies providing the respondent with immunity. It represents customary international law.

Job role

115. One the question of the claimant's job role, I took account of the extract from Denza on Diplomatic Law, produced by the respondent, under the heading "*Protection by forces or contractors of the sending State*".

116. The claimant accepted in submissions there are public international law aspects to Embassies, but submitted that there should be a closer nexus to the Ambassador or State's functions themselves and that a bodyguard might come closer to performing state functions. The claimant said that his functions did not differ from being a security guard with a private employer. The respondent's position was that what the claimant did could not be regarded in the same way, for example as a security guard at a supermarket.

117. Article 22 of the Vienna Convention makes clear that the premises of the mission are inviolable. Article 1 makes clear that the premises of the mission includes the residence of the Ambassador and Article 22 makes clear that the receiving State is under a "special duty" to take all appropriate steps to protect the premises against intrusion or damage and to prevent any disturbance of the peace of the mission. I agree with the respondent's submission that the security of diplomatic premises has a unique character in international law.

118. Whilst most of the examples in Denza related to military and high level security in conflict zones, I noted that it referred to the UK entrusting "*the security of its diplomats in Iraq to a private security firm*" and that a British private security firm provided protection for both British and US Embassies in Afghanistan, Namibia, Jordan, Rwanda, Uganda and Ecuador. The authenticity of this information was referenced in footnotes to the text book. Although under Article 22 the receiving State has the primary responsibility

for protection, the sending State (in this case France) may wish to add additional protection. I find that there is a unique character to the work of providing security at an Embassy and private non-military security guards may and often are involved in the function of guarding the premises of the mission.

119. Following *Benkharbouche,* there is a restrictive doctrine, whereby immunity is limited to acts by a state in the exercise of sovereign authority and not acts of a private law nature. The claimants in *Benkharbouche* were engaged in duties such as housekeeping, cooking and cleaning and the Supreme Court was clear that there was nothing inherently governmental about this. The claimant said it required a closer nexus to the Ambassador or State's functions and considered that a bodyguard might come closer to this.

120. I find that providing security and protection to the inviolable and unique character of mission premises is not a purely domestic function. The question of security of such premises may involve dealing with confidential security information particular to that state. It is not the same as providing security services for any private company, such as in the example given of a supermarket.

121. My finding is that there is enough for the respondent to show that the claimant was performing state functions and therefore a sovereign act in the guarding of the mission premises.

Discrimination

122. This issue was dealt with under paragraph 77 of *Benkharbouche* as set out above. The Supreme Court said that section 4(2)(b) unquestionably discriminated on grounds of nationality. The question was whether it was justifiable by reference to international law. The claimant said section 4(2)(a) was contrary to Article 21(2) of the Charter and Article 14 of the Convention.

123. Lord Sumption went on to say: *"If state immunity is no answer to the claim under art 6 alone, then it is no answer to the claim under the combination of art 6 and art 14."* The respondent submitted that if immunity is an answer to the Article 6 and Article 47 points, it is also an answer to the discrimination argument.

124. The question on this point, as identified in *Benkharbouche,* is whether any discrimination is justifiable by reference to international law. I agree with the respondent's submission that if the section is consistent with customary international law on state immunity, then it is justified from the discrimination perspective.

125. In any event as the claimant in this case does not establish permanent residency, he is at no disadvantage in the application of section 4(2)(a).

European Communities Act 1972

126. I was also asked to consider whether by virtue of section 2 of the European Communities Act, section 4(2)(a) should be disapplied because where there is conflict with European law such as the Charter, European Law should take supremacy.

127. I have found, taking into account Article 11(2)(e) of UNCJIS, which was agreed represented customary international law, that there was no incompatibility with section 4(2)(a). As such section 2 European Communities Act is not engaged. It is only where UK law is incompatible with customary international law, that section 2 can be used disapply the provisions of a UK Statute. On my findings this is not the case.

128. I find for the above reasons that section 4(2)(a) is not incompatible with Article 47 or Article 6.

129. I expressed my gratitude to both counsel for the hard work that had clearly gone into their submissions and the high standard of their work.

Employment Judge Elliott

Date: 29 August 2019

Judgment sent to the parties on:29/08/2019