

6. I proceeded with the hearing in the absence of the parties.
7. The hearing today was conducted by CVP videolink. Members of the public were entitled to attend the hearing, and 2 did.

Tribunal Required to Give Effect to State Immunity

8. Foreign states enjoy a general immunity from the jurisdiction of the courts in the UK, pursuant to the State Immunity Act 1978. By *SIA 1978 s 1(1)*: 'A state is immune from the jurisdiction of the courts of the UK, except as provided in the following provisions of this Part of this Act'.
9. Courts and Tribunals are required to give effect to this immunity, even if the Respondent foreign state does not appear in the proceedings. The Tribunal in this case is therefore required to give effect to state immunity, even though the Respondent state has not appeared in these proceedings.
10. State immunity does not apply in the case of proceedings relating to a contract of employment between the state and an individual where the contract was made in the UK or the work is to be wholly or partly performed there, *s 4(1) SIA*. On the other hand, *s4(1)* itself does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Vienna Convention on Diplomatic Relations or the members of a consular post within the meaning of the Vienna Convention on Consular Relations, *s 16(1)(a) SIA*.
11. Art 1 VCDR defines: (1) The “members of the mission” as including “members of the staff of the mission”: art 1(b); (2) The “members of the staff of the mission” as including “members ... of the administrative and technical staff ... of the mission”: art 1(c); and (3) “The “members of the administrative and technical staff of the mission” are the members of the staff of the mission employed in the administrative and technical service of the mission”: art 1(f).
12. Thus, where the provisions of *s 16(1)(a) SIA* apply, state immunity can operate to prevent employees from bringing claims relating to their contract of employment. Lord Sumption in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah Benkharbouche v Republic of Sudan* ors [2018] IRLR 123, [2017] ICR 1327 SC, said, at [1]: “the effect of section 16(1)(a) is that a state is immune as respects proceedings concerning the employment of members of a diplomatic mission, including its administrative, technical and domestic staff.”
13. In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah*, [2018] IRLR 123, [2017] ICR 1327, the Supreme Court decided that the doctrine of state immunity in international law applied only sovereign acts, not private acts, of the foreign state concerned. Whether there has been such an act will depend on the nature of the relationship between the parties, and this in turn will depend on the functions that the employee was employed to perform. With regard to purely domestic staff employed in a diplomatic mission, their employment is not an inherently governmental act, but is an act of a private law character, and there is no basis in customary international law for the application of state immunity in an employment context to such acts. The wider immunity conferred in such

employment cases by ss 4(2)(b) and 16(1)(a) *State Immunity Act 1978* was therefore inconsistent with art 6 of the European Convention on Human Rights, and art 47 of the Charter of Fundamental Rights of the EU.

14. Following *Benkharbouche*, Tribunals do have jurisdiction to hear complaints brought by domestic staff against foreign states based on EU law, if the employment relationship is of a purely private law character. Art 47 of the Charter of Fundamental Rights of the EU provides for the right to an effective remedy and a fair trial. The Supreme Court decided that the Charter of Fundamental Rights of the EU therefore provided the power to disapply the provisions of the SIA 1978 to ensure that the Claimants were able to pursue an effective remedy for the alleged contravention of their EU law rights.
15. However, under the *State Immunity Act 1978*, Tribunals still do not have jurisdiction to hear complaints based on national law only.
16. While a Declaration of Incompatibility was made in *Benkharbouche*, domestic law claims remain barred by the SIA 1978 because the Supreme Court decided that neither s 4(2)(b) nor s 16(1)(a) SIA could be read down, pursuant to the HRA 1998 s 3(1), in such a way as to make them compatible with the Convention rights.
17. The UK Government has not taken any action following the declaration of incompatibility in *Benkharbouche*. The SIA has not been amended or repealed in any way. The effect of s16(1)(a) SIA is still that a state is immune regarding UK domestic law employment claims brought by members of a diplomatic mission, including its administrative, technical and domestic staff.

This case

18. All the Claimant's claims in this case are claims based on UK law only. On the face of it, all his claims are barred by state immunity. The Claimant did not attend the hearing today to argue otherwise.
19. I decided that all the Claimant's complaints are barred by state immunity, so that the Tribunal has no jurisdiction to hear them. The Claimant's claim is therefore struck out.

Dated: 7 June 2021

Employment Judge Brown

SENT TO THE PARTIES ON

07/06/2021.....

FOR THE TRIBUNAL OFFICE