Appeal No. EA-2019-001045-RN
(previously UKEAT/0087/20/RN)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING,7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 23 July 2021
Judgment handed down on 15 September 2021

Before

CLIVE SHELDON QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

NIGERIAN HIGH COMMISSION — APPELLANT

MISS M E IHEME — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EMEKA PIPI (of Counsel) Instructed by: Fairview Solicitors Ltd Romer House 132 Lewisham High Street London SE13 6EE
For the Respondent	No appearance or representations by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

RELIGION OR BELIEF, AND SEX, DISCRIMINATION

In respect of the three grounds of appeal brought by the Appellant:

Ground 1

Appeal dismissed: the Federal Republic of Nigeria was effectively served. Employment Tribunal proceedings brought against the Nigerian High Commission were properly served on the Federal Republic of Nigeria even though the name of the Respondent was that of the High Commission and not the Federal Republic.

Ground 2

Appeal dismissed: bringing a claim against the Nigerian High Commission was tantamount to bringing a claim against the Federal Republic of Nigeria, as the High Commission is the manifestation in this country of the state of Nigeria. This acknowledges the substantive reality of the Claimant's case, and does not contravene principles of international law, and does not contravene Article 22(2) of the Vienna Convention (incorporated into domestic law by the Diplomatic Privileges Act 1964).

Ground 3

Appeal allowed: the Employment Tribunal misdirected itself by failing to consider whether or not the Claimant's employment at the diplomatic mission involved an inherently sovereign or governmental act or was a purely private act. This was a misapplication of the approach set out by the Supreme Court in *Benkharbouche v. Secretary of State for Foreign Affairs* [2017] ICR 1327.

Disposal

The case should be remitted to the same Employment Tribunal that considered the Claimant's claim to consider whether or not the Claimant's employment involved inherently sovereign or governmental acts in accordance with the judgment in *Benkharbouche* or was a purely private act. If the former, the Claimant's claims should be dismissed as state immunity applies. If the latter, the Claimant's claims that she was discriminated against because of her sex and religion and was victimised, and was entitled to compensation in the sum of £70,747.06 should be allowed.

CLIVE SHELDON QC, DEPUTY JUDGE OF THE HIGH COURT

1. The Nigerian High Commission (which I shall refer to as "the Respondent") appeals from the decision of the Employment Tribunal (Employment Judge Brown at London Central) that (a) Miss M E Iheme (who I shall refer to as "the Claimant") was discriminated against because of her sex and religion and she was victimised, and (b) the Respondent should pay the Claimant the sum of £70,747.06 in compensation.

2. The appeal concerns a number of issues relating to state and diplomatic immunity, following on from the Supreme Court's judgment in *Benkharbouche v. Secretary of State for Foreign Affairs* [2017] ICR 1327.

Factual Background

3. On 21st February 2014, the Claimant lodged her claim form (ET1), identifying the Respondent as her employer. The Claimant complained that she had been unfairly dismissed, had been discriminated against because of her race and religion and had been victimised, and that she was entitled to unpaid notice pay. At paragraph 1 of her Particulars of Claim, it was stated that "The Claimant was originally employed by Nigeria High Commission, London on the 7th of April 2010 until she was dismissed on the 6th of January 2014". In her ET1, the Claimant identified her job as having been a "Schedule Officer/Receptionist".

4. The Claimant's claim was stayed pending the outcome of litigation concerning the ability of staff employed at diplomatic missions to pursue employment tribunal claims. The cases of *Benkharbouche v. Embassy of the Republic of Sudan* and *Janah v. Libya* were decided by the Employment Appeal Tribunal (Langstaff P) on 4th October 2013: see [2014] ICR 169. These cases were appealed to the Court of Appeal, at which stage the Secretary of State for Foreign Affairs intervened, but the Republic of Sudan did not take part: see [2015] ICR 793. The appeals were finally determined by the Supreme Court on 18th October 2017. In the Supreme Court, the case name was described as *Benkharbouche v Secretary of State for Foreign Affairs; Secretary of State for Foreign Affairs and Libya v Janah*: see [2017] ICR 1327.

5. On 4th July 2018, Employment Judge Wade chaired a preliminary hearing at which a representative sample of parties whose cases had been stayed behind *Benkharbouche* appeared. On 19th February 2019, the parties to this appeal were sent correspondence in which it was stated that (i) the Respondent was given 28 days to file an ET3 and participate in the proceedings; and (ii) if the Respondent files an ET3, declines to participate or does not respond, the Claimant needed to inform the tribunal as to the next steps she wished to take.

6. An ET3 was filed by the Respondent. In its response, it was stated that:

> "a. The UK Courts have no jurisdiction to hear this matter before it by virtue of the State Immunity Act 1978.
>
> b. The procedure for service of documents on a State in accordance with s.12 of the State Immunity Act 1978 had not been complied with by the Claimant. A Diplomatic Mission's premises is inviolable in accordance with the Vienna Convention on Diplomatic Relations 1961.
>
> c. Furthermore, the Respondent asserts that the party to the claim had been erroneously stated in the Claim form (ET1) as the Nigerian High Commission. A Diplomatic Mission cannot be sued or be made a party to proceedings because it has no corporate existence in international law."

7. On 15th July 2019, solicitors for the Respondent wrote to the Employment Tribunal to say that they were aware of a notice of hearing, and wished to raise some preliminary issues:

> "In accordance with Section 1 of the State Immunity Act 1978 . . . the Nigerian High Commission is immune from the jurisdiction of this Court.
>
> We also note that the Nigerian High Commission has been named as the party to the claim erroneously, as opposed to the Federal Republic of Nigeria. In any event, the High Commission has not been served with any documents in relation to this matter save for the Notice of Hearing.
>
> We further refer the Court to S.12 [of the State Immunity Act] for the procedure of service of process on a State. Instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State in question. The process has not been adhered to by the Tribunal.
>
> . . .

A

> Please note this letter in accordance with S.2(4)(a) [of the State Immunity Act] and should not be construed as submission to these proceedings."

8. On 16th July 2019, solicitors for the Respondent wrote to the Employment Tribunal to say that it was wrong for the Nigerian High Commission to be named as a part and for the Notice of Hearing to be posted directly to the Mission:

B

> "i. a Diplomatic Mission cannot be sued so although the Nigerian High Commission is named as a party, it does not regard itself as a party to the proceedings under International Customary law.
>
> C
>
> ii. a Diplomatic Mission is inviolable, see Article 22 of the Vienna Convention on Diplomatic Relations 1961 which reads, '*The premises of the mission shall be inviolable . . .* '. This means, inter alia, that serving court proceedings directly on a mission is a violation of Article 22 which is why Parliament decreed a specific procedure for serving proceedings in a way that would not offend Article 22.
>
> D
>
> For the above reasons, we are instructed to respectfully inform the court that the Nigerian High Commission will not take any part in the proceedings."

9. A preliminary hearing was held on 29th July 2019 before Employment Judge Wade. The Respondent did not appear and was not represented. A record of the preliminary hearing quotes from the letter to the tribunal dated 16th July 2019 (paragraph 8 above) in which the Respondent's solicitors said that the High Commission did not regard itself as a party. The Employment Judge referred to the decision in *Benkharbouche* and noted that the Claimant was not pursuing her claims which arise under domestic law (unfair dismissal and wrongful dismissal) but was pursuing her claims derived from European law: sex and religious discrimination.

E

F

10. The Employment Judge noted that the Respondent had said that the tribunal should not serve proceedings directly on a mission. The Employment Judge recorded that the proceedings were not served directly but had been served through "the Diplomatic Channel".

G

The Employment Tribunal's decision

H

11. At a hearing on 30th September 2019, the Employment Tribunal decided that the Claimant's claims for direct sex and religious discrimination and victimisation succeeded.

The Employment Tribunal decided to award the Claimant £70,747.06 compensation for loss of earnings and injury to feelings. The Respondent did not appear and was not represented at the hearing.

12. In its judgment, the Employment Tribunal stated at paragraph 7 that:

> "I was satisfied that it was appropriate to enter judgment r21 ET Rules of Procedure 2013 in [the Claimant's] remaining claims based on EU law – the claims of direct sex discrimination, direct religion discrimination and victimisation. As stated, the Respondent had failed to present a response to the claims based on EU law, despite having been given a number of opportunities to do so. The Supreme Court in *Benkharbouche v Sudan* [2017] UKSC 62 decided that states do not have immunity from claims based on Article 47 of the European Charter of Fundamental Rights. The Respondent did not have immunity from the Claimant's remaining claims based on EU law."

13. In the "Findings of Fact" section of the judgment there was no discussion or analysis by the Employment Tribunal of the work that the Claimant did for the Respondent.

The Appeal

14. The Respondent has appealed from the decision of the Employment Tribunal. The Respondent's grounds of appeal are as follows:

(i) The Federal Republic of Nigeria has not been lawfully served in accordance with section 12 of the State Immunity Act 1978 ("the 1978 Act"): the Nigerian High Commission was named on the claim form, and the High Commission is not the state;

(ii) The Nigerian High Commission was not a proper party to the claim. It has no corporate existence in international law.

(iii) The Employment Tribunal's decision was based on a misunderstanding of the Supreme Court's judgment in *Benkharbouche*. The Supreme Court did not decide that, in all cases, there was no diplomatic immunity for claims brought by

administrative and technical staff of a mission, irrespective of the nature of their work. The Employment Tribunal did not ascertain whether the work performed by the Claimant was private in nature or involved an exercise of state sovereign authority.

15. The Claimant has not participated in the appeal and was not represented before me. She did, however, respond to the Employment Appeal Tribunal following notification of the appeal. The Claimant explained that she put "Nigeria High Commission, London" as the name and address of her employer on the ET1 because the High Commission "was my employer as confirmed on my letter of appointment. I could not put the Federal Republic of Nigeria because I was not directly employed by the Federal Republic of Nigeria. If I was directly employed by the Federal Republic of Nigeria then my letter of employment should have said the Federal Republic of Nigeria and not the Nigeria High Commission London."

16. The Claimant stated that "the Nigeria High Commission London is the representative of the Federal Republic of Nigeria in the United Kingdom and this is generally known and understood by everyone." Further, the Claimant contended that the International Law Commission states that the functions of a diplomatic mission are to represent the sending state. Therefore, a case against a diplomatic mission is really a case against the state.

17. With respect to the question of service of the proceedings, the Claimant stated that on 13th March 2014, the British High Commission in Abuja issued a "Certificate of Successful Service under the State Immunity Act (1978)", and certified that copies of documents were served upon the Ministry of Foreign Affairs of the Government of the Federal Republic of Nigeria by the delivery of those documents to the consular department of that Ministry.

18. In a helpful skeleton argument prepared on behalf of the Respondent, Mr. Emeka Pipi has explained that there are six issues in this appeal, namely:

(i) Does a diplomatic mission have a legal personality capable of suing or being sued?

(ii) Is a diplomatic mission immune from suit either under Article 22(2) of the Vienna Convention 1961, or customary international law?

(iii) If a diplomatic mission is named as the respondent on the claim form, has the State in fact been sued: in this case, by naming the Nigerian High Commission on the Claim Form as the respondent, has the Federal Republic of Nigeria been sued or made a party to the proceedings?

(iv) Does service of a claim form on the Federal Republic of Nigeria, which does not name it on the Claim Form, constitute effective service under section 12(1) of the 1978 Act?

(v) Did the Employment Tribunal consider or properly consider its statutory duty under section 1(2) of the 1978 Act? and

(vi) Did the Employment Tribunal apply or properly apply the principles set out in *Benkharbouche* regarding the nature of work done by administrative and technical staff of the mission and whether it could attract immunity. In other words, did it consider whether the act complained of was an exercise of sovereign authority or private in nature.

19. Mr. Pipi made submissions with respect to each of these issues at an oral hearing before me. He also made further submissions in writing on 6th August 2021. Taking each of the issues in turn.

(i) <u>Does a diplomatic mission have a legal personality capable of suing or being sued?</u>

20. Mr. Pipi submits that a diplomatic mission is not an entity. The proper meaning and understanding of an "embassy" or "mission" is that it is the "right of sending or receiving public ministers" (described by (Professor Alberto Gentili in *De Legationibus Libri Tres* (1595) as the "legates") or that it is a "public function".

21. Even if it is an entity, Mr. Pipi contends that a diplomatic mission it is not a legal entity capable of being sued. He supports this argument by referring to the commentary of Hazel Fox QC and Philippa Webb in *The Law of State Immunity* (3rd ed), where they wrote at p.342-3 that:

> "*The proper party to proceedings where the State is involved*
>
> ILC Commentary Article 2(b)(i), para. 9
>
> *A State is generally represented by the Government in most, if not all, of its international relations and transactions. Therefore, a proceeding against a Government nominee is not distinguishable from a direct action against the State. State practice has long recognized the practical effect of a suit against a foreign Government is identical with a proceeding against a State.*
>
> Confusion as to the correct party to proceedings may arise, particularly where diplomatic immunities are involved. This is a confusion contributed by the 1961 Vienna Convention on Diplomatic Relations which does not make clear who is the beneficiary of the immunities it establishes. However, both theory and practice recognize the State and/or the individual diplomat as the proper party to proceedings; the mission, though it may have some sort of corporate existence under internal law of the sending State, is not recognized in international law to have a personality separate or distinct from that of its State. Thus the Croatian Supreme Court in the *Federal Republic of Yugoslavia*[1] explained the matter:
>
> > "In the present case the defendant is a foreign embassy in the Federal People's Republic of Yugoslavia … Embassies and other diplomatic agencies are only representatives of foreign States and only such foreign States (not their representatives) may be parties to judicial proceedings. Therefore in the present case the real defendant is not the embassy of the foreign state; it is the foreign State which the embassy represents."

22. Mr. Pipi also refers to Eileen Denza's book: *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations* (4th ed.), where it is said at p.235-6 that

> "The justifications for diplomatic immunity and for state immunity are different, as are now to an increasing extent the detailed rules and exceptions in the two areas. For this reason . . . it is increasingly common for a plaintiff to sue both the ambassador or another member of a diplomatic mission and the relevant sending State. Provided that the defendant is correctly impleaded, given the facts and the narrow nature of the law, there is no reason why this should not be done. Where, for example, a contract is concluded by 'the Embassy of X' which has no legal personality, it may be unclear whether the proper defendant to an action to

[1] Claim against a Foreign Embassy, Yugoslavia, Supreme Court of People's Republic of Croatia, 30 August 1956: (1956) 23 ILR 431.

> enforce the contract is 'the State of X' or 'the Ambassador of X', and it may be necessary to bring proceedings against both in order to clarify the issue[2]. . . . In the case of *Bah v Libyan Embassy*[3] … where a dismissed employee of the embassy claimed for severance pay and unlawfully withheld wages, the Industrial Court in Botswana failed to distinguish clearly between State and diplomatic immunity, but in effect decided correctly on the basis of rules of State immunity that the claim could proceed."

23. Mr. Pipi accepts that in the *Benkharbouche* case, the Sudanese embassy was named in the claim form before the ET1 and was named as the Appellant before the Employment Appeal Tribunal, and that this does not appear to have been commented upon by any of the Courts dealing with the claim. However, Mr. Pipi contended that the present argument (that a diplomatic mission cannot be sued) was not raised in that case, and the academic materials that he referred me to were not shown to the Courts. Those materials, he argues, represent a consensus that the diplomatic mission cannot be sued as it does not have a corporate existence.

(ii) <u>Is a diplomatic mission immune from suit under Article 22(2) of the Vienna Convention 1961 or under customary international law?</u>

24. Mr. Pipi contends that the diplomatic mission enjoys diplomatic immunity anyway under Article 22(2) of the Vienna Convention on Diplomatic Relations 1961 or under customary international law.

25. Article 22 states that:

> "1. The premises of the mission shall be inviolable. The agents of the receiving State many 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 steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace or impairment of its dignity.

[2] Citing *Kramer Italo Limited v Government of Kingdom of Belgium; Embassy of Belgium, Nigeria* 103 ILR 299, and commenting that "The suit was correctly dismissed on grounds of state immunity as well as the diplomatic immunity of the mission staff, but the court expressed concern (at 310) that it would 'destroy the basis of diplomatic immunity . . . if a foreign sovereign is made answerable in court for the action of his envoy who enjoyed diplomatic immunity.' It is submitted that this concern was not justified."

[3] Reported at 141 ILR 167.

> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

26. Mr. Pipi contends that pursuant to Article 22(2) the United Kingdom is under a "special duty to . . . prevent" the impairment of the mission's dignity (Article 22 of the Vienna Convention has the force of law by virtue of section 2 of the Diplomatic Privileges Act 1964). Mr. Pipi argues that anything that involves an investigation into the internal management of a diplomatic mission offends its dignity. Further, if a mission can be sued and therefore be liable to scrutiny or inquiry by the receiving state into its internal management, this will not ensure the efficient performance of the mission's duties, but will interfere with it and therefore amount to an impairment. The same point, Mr. Pipi contends, can be made under customary international law.

(iii) <u>If a diplomatic mission is named as the respondent on the claim form, has the State in fact been sued: in this case, by naming the Nigerian High Commission on the Claim Form as the respondent, has the Federal Republic of Nigeria been sued or made a party to the proceedings?</u>

27. Mr. Pipi contends that a claim against a diplomatic mission is not a claim against the state. He says that state immunity usually applies when a state is named as a party (relying on *Re P (Diplomatic Immunity: Jurisdiction)* [1998] 1 FLR 1026 at 1034 F-G). There are exceptions where a State takes a step in the proceedings or applies for permission to intervene. In the instant case, however, Mr. Pipi points out that the state did not apply for permission to intervene and took no steps in the proceedings.

28. In addition, Mr. Pipi contended that a state cannot be made a party to proceedings by implication: to sue a state, it must be referred to explicitly and not by implication by referring to something else.

29. Mr. Pipi also argues that a diplomatic mission does not fall within the definition of the state at section 14 of the 1978 Act. Section 14 provides that:

> "(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. Mr. Pipi argues that a diplomatic mission is not a government department. It is a "public function", and its "legates" are agents of the State, but they have not been sued.

(iv) Does service of a claim form on the Federal Republic of Nigeria, which does not name it on the Claim Form, constitute effective service under section 12(1) of the State Immunity Act 1978?

31. Section 12(1) of the 1978 Act provides that:

> Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State and Service shall be deemed to have been effected when the writ or document is received at the Ministry.

32. Mr. Pipi contends that this provision requires the state to be the party named on the document being served. It cannot be implied by naming some other entity. Mr. Pipi argues further that the diplomatic mission is not the state's "agent" for the purposes of legal proceedings against the state. He contends that the mission does not have a legal personality, and so cannot be an agent in any event.

33. Furthermore, Mr. Pipi argues that the mere fact that the claim was served on the Ministry of Foreign Affairs in Nigeria does not mean that the state was the party being sued, especially where the state was not named in the claim form.

(v) Did the Employment Tribunal consider or properly consider its statutory duty under section 1(2) of the State Immunity Act 1978?

34. Section 1 of the 1978 Act 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."

35. Mr. Pipi submits that this provision required the Employment Tribunal to give effect to state immunity even if, as in the instant case, the state did not appear in the proceedings. Furthermore, Mr. Pipi contends that the Employment Tribunal was put on notice of the requirement to apply the immunity as this was raised in the correspondence with the Employment Tribunal. This was not done.

36. In the instant case, Mr. Pipi argues that the Employment Tribunal erroneously proceeded on the basis that the Respondent did not have immunity from the Claimant's claims which arose under EU law. This was, he submitted, a misunderstanding of the Supreme Court's decision in *Benkharbouche*, which he said required a careful evaluation of the nature and character of the Claimant's job before deciding whether or not immunity applies.

(vi) Did the Employment Tribunal apply or properly apply the principles set out in *Benkharbouche* regarding the nature of work done by administrative and technical staff of the mission and whether it could attract immunity. In other words, did it consider whether the act complained of was an exercise of sovereign authority or private in nature?

37. Mr. Pipi contended that in *Benkharbouche*, the Supreme Court made clear that a state can claim immunity in relation to the exercise of its sovereign authority. In order to ascertain whether or not a state is exercising its sovereign authority, the Supreme Court classified staff of a diplomatic mission as (i) diplomatic agents (the head of the mission and the diplomatic staff); (ii) administrative and technical staff; and (iii) staff in the domestic service of the mission. The first category always exercise sovereign authority; the third category rarely do. The second category may do: but this depends on a careful evaluation of their work. In the instant case, the Claimant fell within the second category – as a Schedule Assistant/Receptionist.

38. Mr. Pipi contends that the Employment Tribunal made no attempt to ascertain the nature of the Claimant's job and did not consider whether it involved the exercise of sovereign authority. Indeed, Mr. Pipi pointed out that the Claimant gave no evidence regarding the nature of her work which would have enabled the Employment Tribunal to make an appropriate assessment.

Discussion

39. I shall address each of the issues raised by the Respondent in considering the various grounds of appeal. It seems to me to make more sense to deal first with Ground 2, as this raises the most fundamental ground of appeal.

(i) Ground 2: Was the Federal Republic of Nigeria sued by the Claimant?

40. The party named by the Claimant in the ET1 as her employer and as the Respondent to her claim was the Nigerian High Commission. In her correspondence with the EAT, the Claimant said that she named the High Commission as her employer, as that was the name of her employer on her letter of appointment.

41. In my judgment, the Nigerian High Commission is not a corporate or legal entity which is itself capable of being sued. This is reflected in the academic commentaries that I have been referred to, which states that an embassy or diplomatic mission does not have a corporate existence in international law.

42. I consider, however, that naming the Nigerian High Commission as the Respondent in this case was tantamount to naming the Federal Republic of Nigeria as the Respondent. That is, by referring to the Nigerian High Commission the Claimant should be treated as though she was referring to the Federal Republic of Nigeria. That is because the High Commission of Nigeria is the manifestation in this country of the state of Nigeria. It is the representative of the state of Nigeria in this country: see article 3(1)(a) of the Vienna Convention which states that the "The functions of a diplomatic mission consist, inter alia, in: Representing the sending State in the receiving State."

43. This is, in my judgment, consistent with the academic commentaries that I have been referred to, as well as the previous practice within the domestic court system. It also acknowledges the substantive reality of the Claimant's case. To decide otherwise would be to put form over substance and would be contrary to the interests of justice, especially where there is no doubt that the Federal Republic of Nigeria was aware of these proceedings and, as

Mr. Pipi accepted during the course of oral argument, the Federal Republic of Nigeria was the Claimant's employer.

44. I note, in this regard, that in *The Law of State Immunity* Fox & Webb have stated that the diplomatic mission "is not recognized in international law to have a personality separate or distinct from that of its State." I take that to mean that the diplomatic mission is properly to be regarded as part of the state whose mission it is. That makes sense, because the diplomatic mission is made up of the diplomatic representatives sent by a state to act in its interests, and take care of its business, in receiving countries.

45. I appreciate that Fox & Webb and Eileen Denza (in *Diplomatic Law*) say that the "proper" party to proceedings involving an embassy or diplomatic mission should be the state itself, or the relevant diplomat. They do not say, however, that if the embassy or diplomatic mission are named instead, then this cannot or should not be treated *as if* the state which they represent has been sued. Indeed, in the Croatian Supreme Court case (*Federal Republic of Yugoslavia*), it was stated that "the real defendant is not the embassy of the foreign state; it is the foreign state which the embassy represents."

46. This appears to be how domestic Courts have dealt with this matter in employment cases. Thus, in the initial stages of the claim brought by Ms. Benkharbouche, who had been employed at the embassy of the Republic of Sudan, no point appears to have been taken by anyone, including the employment tribunal or the Employment Appeal Tribunal that the wrong Respondent had been named, and that the claim could not proceed.

47. I note also that in *Embassy of Brazil v de Castro Cerqueira* [2014] ICR 703, the Employment Appeal Tribunal accepted that a claim against the embassy was in reality a claim against a foreign state.

48. In that case, the claimant was employed at the Brazilian Embassy in the United Kingdom. He was dismissed when he was 70 and, believing that his dismissal was unfair and discriminatory on the ground of his age, he presented a claim form via the Foreign and Commonwealth Office to the Ministry of Foreign Affairs in Brazil, in accordance with section 12(1) of the 1978 Act. Service was rejected as not being in accordance with Brazilian

law. A preliminary issue arose as to whether service was effective. The employment tribunal held that service had been effective. Lewis J. upheld that decision on an appeal by the Brazilian Embassy to the Employment Appeal Tribunal. In the course of his judgment, Lewis J. explained that "the tribunal found that a claim form had been effectively served on the respondent employer, the Embassy of Brazil". Lewis J. observed that "Mr de Castro Cerqueira, the claimant, was employed at the Brazilian Embassy in the United Kingdom". At [3], Lewis J. stated that:

> "*As the employer was a foreign state*, the claim form was sent to the Foreign and Commonwealth Office."
>
> (emphasis added).

49. It was obvious to Lewis J. that employment at the Embassy of Brazil amounted to employment by a foreign state, and that naming the Embassy of Brazil as the Respondent was the same as naming "a foreign state". I see no reason to depart from that proposition in the instant case.

50. It does not seem to me that this conclusion in any way contravenes Article 22(2) of the Vienna Convention, which is incorporated into domestic law by the Diplomatic Privileges Act 1964. As already set out above at paragraph 25, that article provides that "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace or impairment of its dignity." Mr. Pipi argues that a claim against the High Commission contravenes Article 22 as it impairs the dignity of the High Commission; Mr. Pipi contends that the Courts should not investigate the inner workings and arrangements of the High Commission.

51. In my judgment, that is not a required reading of Article 22(2). Article 22(2) concerns the physical protection of the premises "against any intrusion or damage", prevention of "any disturbance of the peace of the mission" which means ensuring that the business of the mission is not unduly or improperly disturbed (this could be the case if, for instance, loud protests were allowed to take place outside of the mission which impeded the work of the mission, or if demonstrations prevented access to and from the mission for those

who had business there). Similarly, "impairment of its dignity", involves any other measures that affect the dignity of the mission physically or the business that takes place on the premises. Litigation concerning the treatment of employees working on those premises does not, in my judgment, impact on the "dignity" of those premises.

52. In any event, even if it did, Article 22(2) would need to be disapplied so as to conform with the Supreme Court's judgment in *Benkharbouche* (discussed in more detail below). In that case, the Supreme Court held that certain employment law claims (those derived from EU law) could be brought by certain embassy staff.

53. During the course of oral argument, Mr. Pipi made reference to the decision of Evans J. in the case of *Kuwait Airways Corporation v Iraqi Airways Company* (16th April 1992, unreported)[4]. That case concerned service of proceedings on the Iraqi Government at a time when there was no British diplomatic presence in Iraq. Instead, of serving the proceedings on the Iraqi Ministry of Foreign Affairs via the British Embassy, service was made on the Iraqi Embassy in London with a request for them to forward the documents to Iraq. It was argued that service on the Iraqi Embassy in London took effect as service on the Republic of Iraq or, more particularly, as service on the Ministry of Foreign Affairs as required by section 12 of the 1978 Act. The submission was that an embassy is regarded as the "emanation" of the sending state, and in particular was "the emanation of its State for all purposes of dealings with foreign powers by its foreign ministry". Evans J. rejected this submission, stating that:

> "In my judgment, the requirement of service at, not merely "on", the foreign Ministry of the defendant State is no more and no less than the plain words of section 12(1) demand. Service is effected by transmission to the Ministry and takes effect when the document is received at the Ministry. In no sense is a diplomatic mission in a foreign State the same as the Ministry of Foreign Affairs of the sending State. . . . [A] clear distinction is drawn between the foreign Ministry which is situated outside the jurisdiction and the London embassy of the foreign State which, subject only to a legal fiction, is situated within the jurisdiction."

54. It seems to me that the decision of Evans J. does not assist either way in dealing with the issues in the present appeal. That case does not decide that the embassy of a foreign state

[4] [1992] Lexis Citation 2317.

is or is not an "emanation" of the sending state. What that case decided was that an embassy of a foreign state is not the same as the Ministry of Foreign Affairs of the sending state.

(ii) Ground 1: Was the Federal Republic of Nigeria properly served?

55. Given that I consider that the naming of the Nigerian High Commission was, in substance, to be treated as naming the Federal Republic of Nigeria as the Respondent to these proceedings, I see no reason why the state was not properly served with the Claimant's proceedings. There is no dispute that service was effected through the correct channels, as required by section 12 of the 1978 Act.

56. The point made by Mr. Pipi was that the service could not have been effective on the state, because the Federal Republic of Nigeria was not named in the claim. However, that point disappears once one accepts that naming the High Commission on the claim form is equivalent to naming the state itself. The High Commission is, as I have already explained, a manifestation of the state.

57. Mr. Pipi contended that this was contrary to the scheme of section 14 of the 1978 Act, as the diplomatic mission is not (a) the sovereign or other head of that state in his public capacity; (b) the government of that state; or (c) any department of that government. It does not seem to me that this matters. Section 14 identifies a number of entities and/or persons which are included within the definition of the State for the purposes of 'this Part' of the 1978 Act. However, this definition is not exhaustive. It is specifically inclusive. The state can, in my judgment, include other entities which are properly understood as manifestations of the state: that would include a diplomatic mission.

(iii) Ground 3: Did the Employment Tribunal misapply *Benkharbouche*?

58. The Supreme Court in *Benkharbouche* considered whether sections 4(2)(b) and 16(1)(a) of the 1978 Act which conferred immunity on states in respect of employment claims brought by embassy staff were consistent with Article 6 of the European Convention of Human Rights ("the ECHR") and article 47 of the European Charter of Human Rights.

59. Section 4(1) of the 1978 Act provides that:

> "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."

Section 4(2)(b) provides that:

> " . . . this section does not apply if at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there".

The effect of section 4(2)(b) is that a state is immune with respect to proceedings relating to a contract of employment between a state and a person who at the time of the contract is neither a national of the United Kingdom nor resident there.

60. Section 16(1)(a) provides that:

> "This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968".

The effect of section 16(1)(a) of the 1978 Act is that a state is immune with respect to proceedings concerning the employment of members of a diplomatic mission, including its administrative, technical and domestic staff.

61. The Supreme Court held that customary international law contained a rule that a state was entitled to immunity only in respect of "an inherently sovereign or governmental act", as opposed to acts of a private law character: see Lord Sumption at [54], and [63]. As the employment of both of the claimants in that case were held not to be exercises of sovereign authority (Ms Janah was employed as a domestic worker: her duties were cooking, cleaning, laundry, shopping and serving at meals; Ms Benkharbouche worked as a housekeeper and cook to the ambassador), and nothing about their alleged treatment engaged the sovereign interests of their employers, nor were they seeking reinstatement in a way that would restrict

the right of their employers to decide who was to be employed in their diplomatic missions, their states were not entitled to immunity from claims under customary international law. As a result, it was held that the provisions of the 1978 Act which purported to confer immunity more generally – and were not limited to inherently sovereign or governmental acts – they were incompatible with article 6 of the ECHR.

62. With respect to claims derived from EU law (discrimination, harassment and breach of the Working Time Regulations), as a result of the application of Article 47 of the European Charter of Human Rights[5], the Supreme Court held that the provisions of the 1978 Act which purported to confer immunity had to be disapplied.

63. Lord Sumption observed that it was "not always easy to determine" how to categorise cases that were and were not those involving an "inherently sovereign or governmental act of the foreign state". In the great majority of cases, Lord Sumption stated that this would 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."

64. At [55], Lord Sumption stated the following:

> "The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, i e the head of mission and the diplomatic staff; (ii) administrative and technical staff; and (iii) staff in the domestic service of the mission. Diplomatic agents participate in the functions of a diplomatic mission defined in article 3, principally representing the sending state, protecting the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state. These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority. The role of technical and administrative staff is by comparison essentially ancillary and supportive. It may well be that the employment of some of them might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission. Cypher clerks might arguably be an example. Certain confidential secretarial staff might be another: see *Governor of Pitcairn and Associated Islands v Sutton* (1994) 104 ILR 508 (New Zealand

[5] "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".

> Court of Appeal). However, I find it difficult to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act *jure gestionis*. The employment of such staff is not inherently governmental. It is an act of a private law character such as anyone with the necessary resources might do."

65. In accordance with *Benkharbouche*, therefore, in any claim involving a diplomatic mission careful consideration needs to be given to the particular employment situation of the claimant: whether their employment situation involved an inherently sovereign or governmental act, or a purely private act. In the instant case, the Employment Tribunal did not consider this matter at all. Rather, the Employment Tribunal proceeded on the assumption that the Claimant was entitled to pursue her claims that derived from EU law simply as a result of the judgment of the Supreme Court in *Benkharbouche* without exploring further her particular employment situation. In my judgment, this was a misdirection by the Employment Tribunal.

66. In the circumstances, I should allow the appeal on this ground, unless I consider that the Employment Tribunal would have been bound to conclude that the Claimant's employment did not involve inherently sovereign or governmental acts. I am unable to reach this conclusion. Although the Claimant described herself as a Schedule Officer/Receptionist, and it may well be that her roles were of a purely clerical nature, I cannot be sure. The Claimant did not give any evidence as to this matter, her job functions were not set out in any detail in the ET1, and there was no exploration of the facts by the Employment Tribunal. In my judgement, therefore, the matter cannot be decided either way, and it needs full and proper consideration by an Employment Tribunal. Accordingly, I allow the appeal on ground 3.

Disposal

67. I have considered the scope of remittal, and the identity of the Employment Tribunal to whom the case should be remitted. It seems to me that there is only one matter that requires consideration: whether or not the Claimant's employment with the Respondent involved inherently sovereign or governmental acts, in accordance with the judgment of the Supreme Court in *Benkharbouche*. If the Employment Tribunal decides that the Claimant's employment did involve inherently governmental acts, then her claims must fail as state

immunity applies. If the Employment Tribunal decides that her employment did not involve inherently sovereign or governmental acts, then state immunity does not apply, and the Employment Tribunal has already decided that her claims have succeeded and that she is entitled to an award of compensation of £70,747.06. These latter matters would not need to be considered again.

68. I consider that it would be appropriate and proportionate for the matter to be remitted to the same Employment Tribunal that considered the claim initially. This is not a case where either bias or partiality was involved, as Mr. Pipi correctly acknowledged. There was not a "complete mishandling of the case", albeit there was a failure to consider the question that went to state immunity. I am confident, that the Employment Tribunal will approach that question, on remittal, free of preconceptions and with an open mind. The Employment Tribunal's conclusion could go either way, depending on the evidence that is presented.

69. In oral argument, Mr. Pipi said that he would adopt a neutral position if I sought to exercise the power of the Employment Tribunal to amend the name of the Respondent, as part of my disposal of this appeal, to refer to the Federal Republic of Nigeria instead of the Nigerian High Commission. I do not consider that it is necessary for me to take this step. For the reasons explained above, I consider that naming the Nigerian High Commission as the Respondent was the equivalent of naming the Federal Republic of Nigeria.