A proposal for a Remedial Order to amend the State Immunity Act 1978

Presented to Parliament pursuant to paragraph 3(1) (a) of Schedule 2 to the Human Rights Act 1998 and subsequently under paragraph 2(a) of that schedule.

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Background to the proposed Remedial Order

Introduction

This paper presents a draft of a proposed Remedial Order to amend the State Immunity Act 1978 (c. 33) (the "SIA") to allow a category of claimants to bring employment claims against their diplomatic mission or consular post employers. This is to implement the Supreme Court judgment in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, ("*Benkharbouche")*. This paper sets out the reasons for the proposed order – the "required information" referred to in paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998 (c.42) (the "HRA").

The Incompatibility

The SIA governs the immunities to be afforded to any state in proceedings before the courts of the United Kingdom. In *Benkharbouche*, the Supreme Court considered two employment claims from respondent foreign national employees claiming damages against their foreign embassy employers. The Supreme Court found that two provisions of the SIA, section 4(2)(b) and section 16(1)(a) are incompatible with Article 6, including as read with Article 14, of the European Convention on Human Rights (the "ECHR") and, on the basis of the incompatibility identified, it was conceded that those sections were also incompatible with Article 47 of the Charter of Fundamental Rights of the European Union.

Section 4(2)(b) SIA confers immunity on a state 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 UK national nor UK resident.

Section 16(1)(a) confers immunity on a state in respect of proceedings concerning the employment of members of a diplomatic mission or consular post, including its administrative, technical and domestic staff.

In *Benkharbouche* the Supreme Court, whilst emphasising that a foreign state is immune where a claim is based on a sovereign or governmental act, held that whether the employment of an individual constituted a sovereign act would depend on the employer-employee relationship. The Supreme Court held that employment of purely domestic staff in a consular post or diplomatic mission was a private act, rather than a sovereign act. The Supreme Court also held that a person's nationality and residence at the date of the employment contract are not proper grounds for denying a person access to the courts in respect of their employment in the UK.

Reasons for amending SIA

Legislative change is required to address the finding of an incompatibility with Article 6 ECHR in *Benkharbouche* as it results in the denial of access to courts in the UK in respect of certain employment claims. Until this incompatibility is remedied, employees' rights under Article 6 ECHR will continue to be violated. Ministers propose to implement the judgment by amending the SIA to remove the incompatibility identified.

Ministers propose to amend section 4(2)(b) SIA to restrict the immunity of states in relation to employment claims brought by individuals who were neither a UK national nor UK resident at the time the contract was made to cases involving a state that is party to the European Convention on State Immunity, as is required by the UK's obligations as a party to that Convention.

Ministers also propose to amend section 16(1) SIA to limit the immunity of states in relation to employment claims brought by the staff of diplomatic and consular missions to the immunities required under customary international law. Such immunities are for claims involving the contracts of employment of an individual as a diplomatic agent or consular officer, or claims involving the contracts of employment of other members of a diplomatic mission or consular post, where the State entered into the contract in the exercise of its sovereign authority or where the conduct complained of was undertaken in the exercise of sovereign authority.

Furthermore, the Government proposes to amend section 13 SIA to ensure that a court hearing proceedings that it would not have been able to hear under the un-amended section 16(1)(a) is prevented from making an order that would infringe on a State's right to freely appoint members of its diplomatic or consular staff.

These are the most appropriate provisions to amend, as it is from these provisions that the incompatibility identified by the Supreme Court stems.

<u>Reasons for proposing a Remedial Order</u>

A Remedial Order is an order made under section 10 HRA that amends primary or subordinate legislation that has been found by domestic courts to be incompatible with Convention rights under the HRA, or the European Court of Human Rights (ECtHR) in specified circumstances. Under section 10(2) HRA, Ministers are required to have compelling reasons for making an amendment by way of a Remedial Order. Ministers have considered the best way to do this taking into account likely timescales, the impact of any long delay and the nature of the breach identified by the Supreme Court.

The declaration of incompatibility does not create legal obligations for the Government. However, as long as the incompatibility remains, similar cases may be brought against the UK before the ECtHR, giving rise to risk that the Government will be required to compensate individuals whose real complaint lies against another State. At present, there are three active appeals before the ECtHR on this issue, including the cases of the two individuals in the *Benkharbouche* judgment. The Government is aware of approximately 55 employment claims against diplomatic missions in London working their way through courts, and 12 that have been decided. Any one of these may give rise to an ECtHR application in future. To date, 30 States[1] have claimed immunity.

The alternative approach to a Remedial Order would be to make the amendment by way of primary legislation. However, Ministers consider that the current pressure on the legislative timetable means there is little prospect of finding suitable primary legislation to make an amendment in the near future. For these reasons, Ministers consider that there are compelling reasons for making the amendments

1 Algeria, Angola, Bahrain, Brunei, Burundi, Cyprus, Denmark, Egypt, France, Ghana, Guyana, Haiti, India, Kenya, Kuwait, Libya, Malaysia, Myanmar, Nigeria, Qatar, Saudi Arabia, South Africa, Spain, Trinidad and Tobago, Yemen, and Zambia.

by way of a Remedial Order. A Remedial Order is the most appropriate legislative vehicle for implementing this judgment while allowing parliamentary scrutiny of the measures proposed.

The terms of the Remedial Order

The proposed Remedial Order would make targeted amendments to the SIA to ensure that certain categories of claimants are able to exercise their rights under Articles 6 and 14 ECHR by bringing claims against their diplomatic mission or consular posts employers. The amendments are limited to the incompatibility identified by the Supreme Court in the *Benkharbouche* judgment.

Article 3 of the proposed Remedial Order amends section 4(2)(b) SIA by limiting the circumstances whereby a state is immune in relation to employment claims brought by individuals who were neither a UK national nor UK resident at the time the contract was made. Whether a foreign state is immune in respect of an employment claim would no longer be dependent entirely on the nationality and residence of the claimant at the date of the employment contract. State immunity is nevertheless, retained in relation to cases involving a state that is party to the European Convention on State Immunity, as is required by the UK's obligations as a party to that Convention. The impact of the amendment to section 4(2)(b) SIA ensures that employees who were neither a UK national nor UK resident at the time the contract was made would be permitted to bring claims for damages before employment tribunals, unless the state concerned is party to the European Convention on State Immunity.

Article 5 of the proposed Remedial Order amends section 16(1) SIA by removing the provision that extends state immunity to the employment of all members of a diplomatic mission. The immunity of states in relation to employment claims brought by the staff of diplomatic and consular missions is amended to reflect the immunities required under customary international law. These immunities are limited to claims involving the employment contracts of an individual as a diplomatic agent or consular officer, or claims involving the employment contracts of other members of a diplomatic mission or consular post where the State entered into the employment contract in the exercise of its sovereign authority, or where the conduct complained of was undertaken in the exercise of sovereign authority. In other cases, employment claims may be brought.

In light of the amendments to section 16(1) SIA limiting state immunity by virtue of Article 5 referred to above, Article 4 of the proposed Remedial Order amends section 13 SIA in order to provide that remedies in the event of a breach are limited to damages and that a UK court cannot order a foreign state to employ a specific person in its embassy. This is to ensure adherence to the UK's obligations under the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations which prevent a foreign court from making an order that would infringe on a state's right to freely appoint members of its diplomatic or consular staff.

Reasons for using the non-urgent procedure

The Government does not consider it necessary to make use of the urgent procedure under paragraph 4 of Schedule 2 to the HRA to remedy the incompatibility more swiftly. The importance of the right affected by the incompatibility and the potential impact on individuals have been considered against the need to allow the opportunity for parliamentary scrutiny of the proposed changes and to legislate in an open and transparent manner. The Government is aware of a number of individuals who are currently affected by the incompatibility which this proposed Remedial Order seeks to remove, but does not anticipate any similar cases in the near future. Ministers therefore consider that it is appropriate to allow the opportunity for parliamentary scrutiny of this proposal under the non-urgent procedure.

Remedial Order process

Schedule 2 to the HRA sets out the parliamentary process for Remedial Orders. Under the non-urgent procedure, a proposal for a draft order is laid before Parliament for 60 days during which time representations may be made. Following this the draft order, with any revisions the Government wishes to make in light of any representations received, must be laid for a further 60 days. It then needs to be approved by a resolution of each House of Parliament before it can be made.

Draft of the proposed Remedial Order

Draft Order laid before Parliament under paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998 and subsequently under paragraph 2(a) of that Schedule, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2022 No. 0000

INTERNATIONAL IMMUNITIES AND PRIVILEGES

The State Immunity Act 1978 (Remedial) Order 2022

Made - - - - ***

Coming into force in accordance with article 1(1)

The immunity of a state in 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 here, as well as in proceedings concerning the employment of members of a diplomatic mission (including its administrative, technical and domestic staff) has been declared(**2**) under section 4 of the Human Rights Act 1998(**3**) to be incompatible with a Convention right(**4**).

The Secretary of State considers that there are compelling reasons for proceeding by way of remedial order(**5**) to make such amendments to the State Immunity Act 1978(**6**) as she considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State, in exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a), 1(b) and (3) of Schedule 2 to, the Human Rights Act 1998, makes the following Order:

Citation, commencement, extent and application

1.—(1) This Order may be cited as the State Immunity Act 1978 (Remedial) Order 2022 and comes into force 21 days after the day this Order is made.

(2) This Order extends to England and Wales, Scotland and Northern Ireland.

(**2**) By the Supreme Court in the case of Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62.
(**3**) 1998 c. 42.
(**4**) See section 1(1) of the Human Rights Act 1998 for the definition of "the Convention rights" and section 21(1) of that Act for the definition of "the Convention".
(**5**) See section 21(1) of the Human Rights Act 1998 for the definition of "remedial order".
(**6**) 1978 c. 33.

(3) This Order applies in relation to proceedings in respect of a cause of action that arose on or after 18 October 2017 (whether those proceedings were initiated before, on or after the day on which this Order is made).

Amendments of the State Immunity Act 1978

2. The State Immunity Act 1978 is amended as follows.

3. In section 4 (State not immune as respects proceedings relating to certain contracts of employment)—

(a) in subsection (2) (exceptions) in paragraph (b) at the beginning insert "the State concerned is a party to the European Convention on State Immunity**7** and", and

(b) omit subsection (6).

4.—(1) Section 13 (other procedural privileges) is amended as follows.

(2) After subsection (2) insert—

"(2A) Subject to subsection (3) below—

(a) where, on a complaint under section 111 of the Employment Rights Act 1996(**8**), an employment tribunal finds that a member of the staff of a diplomatic mission or a member of the consular staff of a consular post was unfairly dismissed, relief shall not be given against the State concerned by way of an order under section 113 of that Act; and

(b) where, on a complaint under Article 145 of the Employment Rights (Northern Ireland) Order 1996(**9**), an industrial tribunal finds that a member of the staff of a diplomatic mission or a member of the consular staff of a consular post was unfairly dismissed, relief shall not be given against the State concerned by way of an order under Article 147 of that Order."

(3) In subsection (3) for "Subsection (2) above does" substitute "Subsections (2) and (2A) above do".

(4) After subsection (6) insert—

"(7) In subsection (2A) above—

"member of the consular staff of a consular post" is to be construed in accordance with Article 1(h) of the Vienna Convention on Consular Relations done at Vienna on 24 April 1963; and

"member of the staff of a diplomatic mission" is to be construed in accordance with Article 1(c) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961."

5.—(1) Section 16 (excluded matters) is amended as follows.

(2) In subsection (1) for paragraph (a) substitute—

"(a) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a diplomatic agent or consular officer;

(aa) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a member of a diplomatic mission (other than a diplomatic agent) or as a member of a consular post (other than a consular officer) and either—

(i) the State entered into the contract in the exercise of sovereign authority; or

(ii) the State engaged in the conduct complained of in the exercise of sovereign authority;"

.

(3) After subsection (1) insert—

"(1A) In subsection (1)—

"consular officer" is to be construed in accordance with Article 1(d) of the Vienna Convention on Consular Relations done at Vienna on 24 April 1963;

(**7**) Cm. 7742.
(**8**) 1996 c.18.
(**9**) S.I. 1996/1919 (N.I. 16).

"diplomatic agent" is to be construed in accordance with Article 1(e) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961;

"member of a consular post" is to be construed in accordance with Article 1(g) of the Vienna Convention on Consular Relations done at Vienna on 24 April 1963;

"member of a diplomatic mission" is to be construed in accordance with Article 1(b) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961."

6. In section 17 (interpretation of Part 1) after subsection (4) insert—

"(4A) In sections 4 and 16(1) above references to proceedings relating to a contract of employment include references to proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee."

Name
Minister of State
Foreign, Commonwealth and Development Office

Date

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the State Immunity Act 1978 (c. 33) (the "1978 Act") to remove the incompatibility, identified in sections 4(2)(b) and 16(1)(a) of that Act, with a Convention right.

Section 4(2)(b) of the 1978 Act provides that States are immune from UK jurisdiction in relation to employment claims brought by individuals who were neither a UK national nor resident in the United Kingdom at the time the contract was made. Section 16(1)(a) of the 1978 Act provides that States are immune from UK jurisdiction in relation to employment claims brought by the staff of diplomatic and consular missions.

In the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, the Supreme Court affirmed the Court of Appeal's finding that sections 4(2)(b) and 16(1)(a) of the 1978 Act were incompatible with Article 6 and Article 14, of the European Convention on Human Rights because they prevented the claimants from bringing their employment claims and those sections of the 1978 Act were not consistent with the UK's international law obligations.

In order to remedy the incompatibility, Article 3 amends section 4(2)(b) of the 1978 Act by restricting the immunity of States in relation to employment claims brought by individuals who were neither a UK national nor resident in the United Kingdom at the time the contract was made to cases involving a State that is party to the European Convention on State Immunity, as is required by the UK's obligations as a party to that Convention.

Article 5 amends section 16(1) of the 1978 Act by limiting the immunity of States in relation to employment claims brought by the staff of diplomatic and consular missions to the immunities required under customary international law. These are claims involving the contracts of employment of an individual as a diplomatic agent or consular officer, or claims involving the contracts of employment of other members of a diplomatic mission or consular post where the State entered into the contract in the exercise of its sovereign authority or where the conduct complained of was undertaken in the exercise of sovereign authority.

Article 4 amends section 13 to address the consequence of restricting the immunity provided in section 16(1) of the 1978 Act on the UK's obligations under Article 7 of the Vienna Convention of Diplomatic Relations, which provides that a State may "freely appoint the members of the Staff of the mission", and the obligation in Article 19 of the Vienna Convention on Consular Relations, which provides that a State may "freely appoint the members of the consular staff". The current version of section 16(1)(a) of the 1978 Act gives effect to these international obligations, as it provides that a State is immune in all proceedings concerning the employment of the members of a diplomatic mission or consular post, so that a court cannot enforce a contract of employment or make a reinstatement order in favour of a member of a mission or consular post. The amendment to section 16(1)(a) of the 1978 Act in Article 5 restricts the immunity in that provision (as

described above), and the amendments to section 13 ensure that a court hearing proceedings that it would not have been able to hear under the un-amended section 16(1)(a) is prevented from making an order that would infringe on a State's right to freely appoint members of its diplomatic or consular staff.

The amendments made in this Order will apply in relation to proceedings in respect of a cause of action that arose on or after the date of the Supreme Court judgment in the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs,* 18 October 2017.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

Explanatory Memorandum to the Proposed Remedial Order

EXPLANATORY MEMORANDUM TO

THE STATE IMMUNITY ACT 1978 (REMEDIAL) ORDER 2022

[2022] NO. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Foreign Commonwealth and Development Office ("FCDO") and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

2.1 This Remedial Order will amend the State Immunity Act 1978 (c. 33) ("SIA") to allow a category of claimants to bring claims against their diplomatic mission or consular post employers. This is to implement the Supreme Court judgment in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, ("*Benkharbouche*").

2.2 This Remedial Order will remove the incompatibility identified by the Supreme Court between Article 6 of the European Convention of Human Rights ("ECHR") (right to a fair trial), including as read with Article 14 ECHR (protection from discrimination), and the SIA.

2.3 The Order has retrospective effect from the date of the *Benkharbouche* decision in the Supreme Court on 18 October 2017.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

3.1 This instrument is being laid in Parliament pursuant to the power in section 10 of the Human Rights Act 1998 ("HRA").

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 Lord Ahmad of Wimbledon, Minister for South and Central Asia, North Africa, United Nations & the Commonwealth has made the following statement regarding Human Rights:

"In my view the provisions of the State Immunity Act 1978 (Remedial) Order 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument is being laid in response to the declaration of incompatibility by the Supreme Court in *Benkharbouche,* which determined that the statutory limits to the availability of bringing an employment claim under the existing sections 4(2)(b) and 16(1)(a) SIA are incompatible with Article 6 ECHR, including as read with Article 14 ECHR. The Government proposes to implement the judgment by amending the SIA to remove the incompatibility.

6.2 Section 10 HRA provides that if a provision of legislation has been declared under section 4 to be incompatible with a Convention right, and the Minister considers there are compelling reasons to do so, the Minister may proceed by way of Remedial Order to amend the legislation in order to remove the incompatibility. It appears to Ministers that the amendments to the SIA proposed in the Remedial Order are necessary to remove the incompatibility identified by the Supreme Court and that there are compelling reasons to proceed by way of Remedial Order. Current pressures on the legislative timetable means there is little prospect of using primary legislation to remove the incompatibility.

7. Policy background

What is being done and why?

7.1 The proposed Remedial Order would make targeted amendments to the SIA to ensure that certain categories of claimants are able to exercise their rights under Article 6, including as read with Article 14, ECHR by bringing employment claims against their diplomatic mission or consular posts employers.

7.2 The Government proposes to amend section 4(2)(b) SIA to restrict the immunity of states in relation to employment claims brought by individuals who were neither a United Kingdom national nor resident in the United Kingdom at the time the contract was made. State Immunity will be retained where the case involves a state that is party to the European Convention on State Immunity as is required by the United Kingdom's obligations as a party to that Convention.

7.3 The Government also proposes to amend section 16(1) SIA to limit the immunity of states in relation to employment claims brought by the staff of diplomatic and consular missions to the immunities required under customary international law. These are claims involving the contracts of employment of an individual as a diplomatic agent or consular officer, or claims involving the contracts of employment of other members of a diplomatic mission or consular post, where the State entered into the contract in the exercise of its sovereign authority or where the conduct complained of was undertaken in the exercise of sovereign authority.

Explanations

<u>What did any law do before the changes to be made by this instrument?</u>

7.4 Section 4(2)(b) SIA confers immunity on a state 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 in the United Kingdom.

7.5 Section 16(1)(a) confers immunity on a state in respect of proceedings concerning the employment of members of a diplomatic mission or consular post, including its administrative, technical and domestic staff.

Why is it being changed?

7.6 The Supreme Court found that section 4(2)(b) and section 16(1)(a) SIA, are incompatible with Article 6, including as read with Article 14, ECHR and it was conceded that as a result, there was a breach of Article 47 of the Charter of Fundamental Rights of the European Union.

7.7 The declaration of incompatibility does not create legal obligations for the Government. However, as long as the incompatibility remains, similar cases may be brought against the United Kingdom before the European Court of Human Rights, giving rise to risk that the Government will be required to compensate individuals whose real complaint lies against another State.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Government does not intend to consolidate the legislation.

10. Consultation outcome

10.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for a targeted amendment, which is required in order to implement a court judgment.

11. Guidance

11.1 The Government will not be publishing guidance on this amendment.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because we have assessed the likely impact to be too small to justify preparing a full Impact Assessment for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The effect of this amendment will be monitored on an ongoing basis by the Foreign Commonwealth and Development Office. Any declarations of incompatibility made by the domestic courts and judgments of the European Court of Human Rights on

related matters will be included in the Government's annual reports to the Joint Committee on statutory Instruments.

15. Contact

15.1 Dr Rob Daniel at the FCDO, telephone: 07464989845 or email: Rob.daniel@fcdo.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Richard Wildash, Deputy Director for Protocol, at the FCDO can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Ahmad of Wimbledon, Minister for South and Central Asia, North Africa, United Nations & the Commonwealth, at the FCDO can confirm that this Explanatory Memorandum meets the required standard.