



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Jeralyn Alicante

AND

Ahmad Abdulhameed Ahmad E M H Alfailakawi

OPEN PRELIMINARY HEARING

Heard via CVP on: 4 June 2021

Before: Employment Judge Nicolle

For the Claimant: Mr A Buchan, of Counsel

For the Respondents: Mr D Day, of Counsel

JUDGMENT

1. The Judgment of the Tribunal is that The Claimant's claim is not struck out on the ground of diplomatic immunity. The Respondent is not immune from the civil jurisdiction of the Courts and Tribunals of the United Kingdom by virtue of Article 31(1) of the 1961 Vienna Convention on Diplomatic Relations ("the Convention"), as enacted into English Law by S2(1) Diplomatic Privileges Act 1964.

REASONS

Hearing

2. The Claimant brings complaints of unfair constructive dismissal, unlawful deduction from wages and breach of the Working Time Regulations 1998 with respect to rest breaks.

3. This preliminary hearing was listed to determine the Respondent's application to strike out all the Claimant's claims on the grounds of diplomatic immunity.

4. The Respondent contends that he is immune from civil jurisdiction of the Courts and Tribunals of the United Kingdom by virtue of Article 31(1) of the

Convention, as enacted into English Law by S2(1) Diplomatic Privileges Act 1964.

Procedural History

5. The Open Preliminary Hearing took place using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

6. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Court Serve.Net. No members of the public attended the hearing.

7. The parties were able to hear what the Tribunal heard.

8. The participants were told that it is an offence to record the proceedings.

9. From a technical perspective, there were no difficulties.

10. No live witness evidence was given at the hearing.

11. Counsel produced skeleton arguments. There was also a short witness Statement from the Respondent.

12. At the hearing it was apparent that a referral in a similar case had been made to the Supreme Court in Basfar v Wong in respect of which the Employment Appeal Tribunal [2020] ICR 1185 had allowed Mr. Basfar's appeal against the first instance Employment Tribunal's decision but then issued a certificate that the case was suitable for an appeal by Ms Wong directly to the Supreme Court "leapfrogging" the Court of Appeal.

13. Given this I decided that it would be inappropriate for the provisionally listed full merits hearing from 12-17 August 2021 to remain. Further, in an email to the parties subsequent to the Open Preliminary Hearing on 4 June 2021 I advised them that the balance of advantage was in my deferring my decision pending the Supreme Court's judgment.

14. The judgment of the Supreme Court was given on 6 July 2022 following a hearing on 13-14 October 2021. However, there has been a further delay in my promulgating this judgment given that I was on long term sick leave during 2022 and have only recently returned to active judicial duties.

The Facts

15. For the purposes of this preliminary hearing only the Claimant's pleaded case should be taken at its highest.

16. Between 12 September 2016 and 25 January 2019, the Claimant lived with and worked for the Respondent and his family in their private residence in Kuwait.

17. The terms and conditions of the Claimant's employment were set out in a document dated 14 August 2018 (the Contract). This gave the address of the Respondent, the Claimant's employer as 2 Albert Gate, London SW1X 7JU (the Premises). At clause 4 her job title was Stated to be domestic worker undertaking housekeeping duties. The Contract Stated that the Respondent's wife also resided at the Premises.

18. The Contract provided for a wage of £7.50 per hour and 30 days' holiday entitlement per year. It is Stated to be governed by the law of England and Wales.

19. The Claimant says that she escaped from the Respondent with the assistance of a UK charity that supports migrant workers on 25 June 2020.

20. The Respondent says that the Claimant was free to come and leave as she wanted.

Jurisdiction – Time limit

21. The Respondent had originally contended that the Tribunal did not have jurisdiction because the claim was lodged out of time. However, this claim was subsequently discontinued and need not be considered.

The Parties' Arguments

22. The parties agreed that the question for the Tribunal was whether the Respondent's employment of the Claimant as a domestic servant (in assumed circumstances of modern slavery for the purposes of determining this application, but without making any finding as to whether the factual circumstances as claimed by the Claimant constituted modern slavery, was a commercial activity exercised by the Respondent outside of his official function.

The Respondent's Diplomatic Status

23. Further to the hearing on 4 June 2021 the Respondent was ordered to produce a further witness Statement confirming his diplomatic status. He Stated that at the time of the Claimant's claim and on the date when she says she was unfairly dismissed by him he was working as an Attaché with diplomatic status for the State of Kuwait posted in the Embassy of Kuwait in London. He said that as of 4 June 2021 and ongoing he was working as an Attaché with diplomatic status for the State of Kuwait posted in the Embassy of Kuwait in London.

24. The Claimant says that the original witness Statement of the Respondent dated 6 April 2021 was not accompanied by a Statement of truth. Mr Buchan argues that there is uncertainty as to whether the Respondent was still employed as a diplomat by the Kuwait Government. He says that there was a failure to provide contemporaneous documentary proof. He says that this is relevant given that the Respondent relies on Reyes v Al-Malki and another [2017] UK SC6

which held that a diplomat cannot rely upon immunity, in cases such as this, where there diplomatic status ends.

The Respondent's Argument

25. That members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36 of the Convention.

26. The highest degree of protection is conferred on diplomatic agents.

27. If the relevant acts were within the scope of the diplomat's official functions, the enquiry ends there. He is immune.

28. Diplomatic immunity is a procedural immunity.

29. In accordance with the analysis in Reyes (Supra) the Respondent would be immune from the proceedings unless the exception under Article 31(1)(c) applies.

30. The property in which the Respondent and his family lived, and where the Claimant was employed and lived, is owned by the State of Kuwait not by the Respondent.

31. There was an overlap between work that the Claimant did for the Respondent at the Premises and that which related to the Respondent's capacity as a diplomat in that she attended and helped at diplomatic functions, went to the Kuwait Embassy with the Respondent and his family, and received transportation from staff employed by the Embassy.

32. My Day accepted that the burden of proof was on the Respondent that he fell within diplomatic immunity but that the burden of proof was on the Claimant that the potential exemption applied.

The Claimant's Argument

33. That an application to strike out should not be granted unless the Tribunal is certain that the claim is bound to fail: Hughes v Colin Richards & Co [2004] EWCA Civ 266. In accordance with the Supreme Court's judgment in Reyes official functions could not have extended to the employment of domestic staff to do the cleaning, help in the kitchen, and look after children.

34. The allegations of the Claimant amounting to trafficking had not been rebutted by the Respondent.

35. To strike out the case without a hearing on the merits is arguably a breach of ECHR Article 6 (right to a fair trial). Any duties performed by the Claimant at the Embassy were not undertaken pursuant to her contract of employment. The

reality was that she was a domestic worker and housekeeper only and that any duties performed at the Embassy were peripheral to her principal function.

The Relevant Law

36. Article 31(1) of the Convention provides, so far as is relevant:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction except in the case of:

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

37. Article 39(2) of the Convention provides:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall not cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but which shall subsist until that time. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Supreme Court's Judgment in Basfar v Wong [2022] UKSC 20

38. The facts pertaining to Ms Wong are ostensibly very similar to those of the Claimant. Ms Wong was a migrant domestic worker who worked in the household of Mr Basfar, a member of the diplomatic staff of the mission of the Kingdom of Saudi Arabia in the United Kingdom. Ms Wong claimed that she was a victim of human trafficking who was exploited by Mr Basfar and his family by being forced to work in circumstances of modern slavery. Mr. Basfar applied to have Ms. Wong's claim struck out on the grounds that he is immune because of his diplomatic status.

39. In *Reyes* the Supreme Court had unanimously held that the employment and alleged acts of ill treatment of the claimant by the Respondent diplomat were not performed "in the exercise of his functions as a member of the mission" within the meaning of Article 39(2). The acts alleged in *Reyes* were plainly not done for on behalf of Saudi Arabia and the same is equally true here (see paragraph 48).

40. At paragraph 27 the Court agreed with Mr Basfar's contention that employing a domestic worker does not itself constitute the exercise of a "commercial activity" by a diplomatic agent within the meaning of the exception.

41. At paragraph 37 the Court held that ordinary contracts incidental to daily life in the receiving State do not constitute "commercial activities", within the meaning of Article 31(1)(c).

42. At paragraph 41 the Court concluded that it was satisfied that, on the assumed facts, Mr Basfar's exploitation of Ms Wong was undertaken for his personal profit.

43. And at paragraph 43 "we cannot accept that exploiting a domestic worker by compelling her to work in circumstances of modern slavery is comparable to an ordinary employment relationship of a kind that is incidental to the daily life of a diplomat (and his family) in the receiving State.

44. At paragraph 52 the Court considered that Mr Basfar and his family had gained a considerable commercial benefit by the employment of Ms Wong with a fraction of her contractual entitlement to wages and latterly for no pay at all.

45. And at paragraph 57 the Court held that "unlike such day to day living services, such exploitation is an abuse of the diplomat's presence in the receiving State and falls far outside the sphere of ordinary contracts incidental to the daily life of the diplomat and family members which immunity serves to protect.

46. At paragraph 101 the Court held that the allegations made in this case, and in other cases of alleged exploitation of domestic workers by diplomats, may be disputed in which event an evidential hearing is likely to be needed to determine whether or not the action falls within the Article 31(1)(c) exception to immunity.

Discussion and Decision

The Facts

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

48. I decided that the assumed facts of the current case are, in all material respects, substantially similar to the facts of Basfar.

49. I conclude that a claim instituted against a foreign diplomat by his domestic servant in relation to work in his home, in (assumed) conditions of human trafficking and modern slavery constitutes "commercial activity exercised outside his official functions" under Article 31(1)(c) of the Convention. It therefore comes within the exception to diplomatic immunity in that Article.

50. In reaching this conclusion I am conscious that the burden of proof is on the Respondent to demonstrate why I should exercise my discretion to strike the claim out and on the facts presented I do not consider that the Respondent has satisfied me that the claim as presented is bound to fail. That is, of course, not the same as saying that the claim is bound to succeed on its substantive merits, but rather that on the assumed facts as presented, and in the light of the

Supreme Court's decision in Basfar, the Respondent has not satisfied the relatively high hurdle for a strike out.

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

52. A preliminary hearing will be listed to make directions for the future conduct of the case.

Employment Judge Nicolle

Dated: 03/03/2023

Sent to the parties on:

06/03/2023

For the Tribunal Office