EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr S B Ali	**v**	**The Government of Kuwait**

Heard at: **Central London Employment Tribunal**

On: **31 March & 1 April 2025**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **In Person**
For the Respondent: **Mr E Kemp KC, Counsel**

JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The Judgement of the Tribunal is that:

1. **The correct Respondent is the Government of Kuwait.**

2. **The Claimant's functions were sufficiently close to governmental functions of the missions so that his employment was an exercise of sovereign authority.**

3. **Accordingly, the Claimant's claim is barred by state immunity and the Tribunal has no jurisdiction to consider it. His claim is dismissed.**

REASONS

Preliminary

1. By a claim form, presented on 28 April 2022, the Claimant brought complaints of unfair dismissal and race discrimination against the Kuwait Cultural Office.

2. The claim was served by the FCDO diplomatic channel on 14 July 2023. The Respondent had 2 months and 28 days from then to present a Response. The Respondent presented a Response to the claims, asserting state immunity pursuant to *ss1, 14 & 16 State Immunity Act 1978.*

Immunity Issues in this Case

3. This Public Preliminary Hearing was listed to determine the following issues of state immunity in the case:

   3.1. Who is the correct Respondent? Is it the State of Kuwait or the Kuwait Cultural Office?

   3.2. Whether the Claimant's claims are barred by State Immunity pursuant to s1 Statute Immunity Act 1978 on the basis that the State of Kuwait entered into the Claimant's contract of employment in the exercise of sovereign authority (ss.14(1)(b) and s16(1)(aa)(i) SIA 1978) having regard to::

      3.2.1. What functions was the Claimant employed to perform?
      3.2.2. Were the functions which the Claimant was employed to perform sufficiently close to the governmental functions of the mission that his employment was an inherently sovereign or governmental act?

4. I heard evidence from the Claimant. He relied on, both, his witness statement and his skeleton argument, as his evidence in chief. For the Respondent, I heard evidence from Mustafa Agbawy, Academic Advisor and, subsequently, HR officer and Management Assistant to the Head of Office; and Tahani Jarrar, Academic Advisor. There was a bundle of documents. Page numbers in this judgment refer to page numbers in the bundle.

5. Both parties made written and oral submissions. I reserved my judgment.

Findings of Fact

6. The facts were not significantly in dispute. Having heard evidence, I found the following facts:

7. The Kuwait Cultural Office ("KCO") in the UK represents the Kuwaiti Ministry of Higher Education, and other Kuwaiti Ministries, as part of the Kuwaiti Diplomatic Mission in the UK, headed by the Head of Mission, the Kuwait Ambassador to the UK. The KCO is listed in the London Diplomatic List as part of the State of Kuwait's foreign mission in the United Kingdom.

8. The KCO deals, amongst other things, with the education and supervision of Kuwaiti students in the UK. Its aim is to support Kuwaiti students in their studies in the UK and to ensure that the students adhere to applicable rules and regulations during their stay in the UK. It is the primary link between the student, the sponsor (most frequently the Ministry of Higher Education) and the relevant UK academic institution.

9. The Claimant was employed by the Respondent for 2 separate periods. The more recent, which is the relevant period for the Claimant's claim, began on 8 December 2014. On that date, the Claimant was employed, pursuant to a contract of employment as Director of Academic Affairs at the Embassy of the State of Kuwait by "the Government of Kuwait", p54.

10. As Director of Academic Affairs, the Claimant was a Head of Department.

11. Between about September 2016 and August 2018, there was no Cultural Attaché in post at the KCO. In evidence, the Claimant agreed that, during that period, he performed some of duties of Cultural Attaché and reported directly and solely to the Head of the Cultural Office.

12. From 2018 the KCO adopted an online process for staff to request leave of absence, p85. The Claimant had authority to approve or disapprove these requests. When he did so, the Claimant was acting under guidance of the Head of Office or Cultural Attache.

13. The Claimant wrote and signed "To Whom it May Concern" letters from the KCO to Universities, confirming details of scholarships and financial guarantees from the Government of Kuwait, for students studying at the Universities, p64 – 68. The Claimant confirmed, in evidence, that he held delegated authority from the Head of Office to sign such letters on behalf of the KCO.

14. The Claimant designed and had access to KSIMS, the KCO's online portal for students, containing each students personal and medical information.

15. One of the Claimant's responsibilities was to negotiate with UK universities and qualifications providers, on behalf of the KCO. For example, he conducted negotiations with the UK provider of Civil Aviation Training regarding the payment of VAT on fees, p230 - 234. (The KCO placed Kuwait Airways Cadets with this provider for training.)

16. The Claimant agreed, in evidence, that, in doing this, he was negotiating on behalf of the Kuwaiti Mission in the UK and was authorised to do so by the Cultural Attaché and Head of Office. He told the Tribunal, "I have done many negotiations and many deals on behalf of the KCO – that is my work."

17. The Claimant also went on visits to UK universities, representing the KCO, to solve students' problems, or to negotiate an agreement for accepting students. He agreed that, in doing so, he was representing the interests of Kuwaiti nationals or of the State of Kuwait. He agreed that these were official visits and that he was expected to write up reports after them.

18. For example, the Head of the Cultural Office instructed the Claimant to conduct an "urgent unscheduled visit to Manchester University's "Into Manchester" foundation year facilities, in 2016, "to closely examine student conditions and issues, inspect Into Manchester's educational facilities, and assess its capacity to accommodate … numbers." P269. The Head of Office requested approval for the "disbursement of official visit allowances" for the Claimant, from the Kuwaiti Ministry of Higher Education, p269. The Claimant agreed, in evidence, that the purpose of his visit was to protect the interests of Kuwaiti nationals.

19. The Claimant went on another "official visit" in September 2017, to a London institution, p57.

20. The Claimant also negotiated a refund of fees with the University of Leeds on behalf of a Kuwaiti PhD student, and negotiated the placement of that student, instead, at the University of Manchester.

21. In 2019 the Claimant arranged the visit programme for a "high profile delegation" from Kuwait to UK Universities. He accompanied the delegation to a number of the Universities.

22. He also received members of the Kuwait Institute for Medical Studies accompanied them, on behalf of the KCO, on visits to Universities, to meet the Deans of the Universities, in 2018, p227 - 228.

23. The Claimant was a member of the Hiring Committee at the KCO and he contributed to the Mission's decisions to hire new staff

State Immunity Relevant Legal Provisions

24. 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'.

25. The Tribunal is required to give effect to state immunity even if the State does not appear in the proceedings, *s1(2) State Immunity Act 1978*.

26. Regarding employment claims, *s4 SIA* provides,

"**4 Contracts of employment.**

(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there. …"

27. Regarding diplomats and those employed by diplomatic missions, *s16 SIA 1978* further provides,

"16 Excluded matters.

(1) 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—

(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;]

28. Employees of a Diplomatic/Consular Mission in the UK are therefore not barred by s16 SIA from bringing any type of employment claim against their employing State, so long as:

28.1. the employee is not a diplomatic agent or consular officer, or
28.2. the employment was not entered into in the exercise of sovereign authority, or
28.3. the alleged unlawful conduct complained of was not an act of sovereign authority.

29. These provisions of *ss4 and 16 State Immunity Act 1978* are as amended by the *State Immunity Act 1978 (Remedial) Order 2023*, which came into force 23 February 2023.

30. The amendments were intended to give effect to the Supreme Court judgement 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. In that case, 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.

31. As a result of the amendments to *s16 SIA*, employees of a foreign Embassy in the UK are generally no longer be barred from bringing any type of employment claim against their employing State, so long as the employee is not a diplomatic agent or consular officer, or the employment was not entered into in the exercise of sovereign authority, or the conduct complained of was not an act of sovereign authority.

Employment Entered into in the Exercise of Sovereign Authority

32. As stated, in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*; *Secretary of State for 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. “The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority” [37].

33. Lord Sumption explained, the ‘restrictive doctrine’ of state immunity, which applies, is that, unless a countervailing customary international law rule can be established, a State is entitled to immunity before another State’s courts only in respect of conduct of a sovereign character, but not in respect of acts of a private law nature, as described by Lord Sumption at [8] [10], [17] *Benkharbouche.*

34. Whether the employment in a Mission is an act of sovereign authority 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 [54].

35. At [55] Lord Sumption distinguished between the three categories of embassy staff as follows: "The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, ie 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 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."

Vienna Convention on Diplomatic Relations

36. Article 3 VCDR sets out the essential functions of a diplomatic mission. The performance of any of the Article 3 functions constitutes acts done in the exercise of sovereign authority.

"Article 3

1. The functions of a diplomatic mission consist, inter alia, in:

(a) Representing the sending State in the receiving State;
(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) Negotiating with the Government of the receiving State;
(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

UK Appeal Decisions Following Benkharbouche

37. In *Royal Embassy of Saudi Arabia v Al Hayali* [2023] EAT 149 Bourne J, overturning the ET's judgment, decided that the Claimant's claims were barred by state immunity. He held, amongst other things:

37.1. A Tribunal must first establish whether the employer was performing sovereign functions: [90]. On the facts in that case, the work of the Academic

and Cultural Affairs department aligned with the functions at Articles 3(1)(b) and (e) VCDR and so involved the exercise of sovereign authority: [91].

37.2. Applying Benkharbouche SC [55], the test for section 16(1)(aa)(i) was whether the employee's work was "sufficiently close" to the exercise of sovereign authority. That could be contrasted with work which was "purely collateral to the exercise of sovereign authority": [92]-[93].

37.3. Comparisons with previous cases (such as Cudak v Lithuania (2010) 51 EHRR 15) may be of limited assistance depending on what is known about the facts of those cases: [94]-[95].

37.4. Not all of an employee's tasks have to meet the section 16(1)(aa)(i) test. It is sufficient if "some of the claimant's activities throughout the period of her employment passed the test": [96] –[97].

38. On the facts, although it was a "borderline and difficult case" [98], the "sufficiently close" test was met.

39. At [97] he said,

> "…in the context of what was an exercise of sovereign authority by the Embassy of a kind contemplated by the Vienna Convention, some of the Claimant's activities throughout the period of her employment passed the ['sufficiently close'] test. By sifting compliant and non-compliant guarantee requests, writing reports on funding requests and discussing art exhibits with visitors and British students and teachers, she played a part, even if only a small one, in protecting the interests of the Saudi state and its nationals in the UK and in promoting Saudi culture in the UK. To put it another way (reflecting French case law to which Lord Sumption referred in *Benkharbouche* at [56]), she was participating in the public service of the Embassy and not merely in the private administration of the Embassy."

40. In *Al Hayali* EAT addressed the new wording of *section 16(1)(aa*) as inserted by the Remedial Order.

41. *The Royal Embassy of Saudi Arabia (Cultural Bureau) v Costantine* [2025] UKSC 9, also addressed the new wording of *section 16(1)(aa) SIA*.

42. Lord Lloyd-Jones, delivering the Judgment of the Court (with whom Lord Briggs, Lord Hamblen, Lord Leggatt and Lord Burnett agreed), approved paragraphs [54] and [55] of *Benkharbouche*, saying that the approach to immunity set out in them, "accurately reflects the position in international law" ([62] of *Costantine*).

43. Lord Lloyd-Jones in *Costantine* (at [61]) also specifically disapproved an observation of Browne-Wilkinson J, delivering the judgment of the EAT in *Sengupta v Republic of India* [1983] ICR 221, EAT, (at p 228 F-G) upon which the Appellant Embassy in the Supreme Court had relied in argument), that,

> "… when one looks to see what is involved in the performance of the applicant's contract, it is clear that the performance of the contract is part of the discharge

> by the foreign state of its sovereign functions in which the applicant himself, at however lowly a level, is under the terms of his contract of employment necessarily engaged. One of the classic forms of sovereign acts by a foreign state is the representation of that state in a receiving state."

44. At [61] Lord Lloyd-Jones observed that the decision in *Sengupta* had been expressly disapproved in *Benkharbouche,* on the ground that it took an over-expansive view of the range of acts relating to an embassy employee which could be described as an exercise of sovereign authority. Lord Lloyd-Jones noted that Lord Sumption observed (at para 73) that *Sengupta* was decided at an early stage of the development of the law and that the test applied was far too wide.

45. At [62] *Costantine,* Lord Lloyd-Jones referred to the extensive citation of foreign authority in *Benkharbouche* at para [56] and said,

> "I would draw attention in particular to a line of authority in the European Court of Human Rights, all cases concerning the administrative and technical staff of diplomatic missions and cited with approval in *Benkharbouche,* where the test applied by the Strasbourg court was whether the functions for which the applicant was employed called for a personal involvement in the diplomatic or political operations of the mission, or only in such activities as might be carried on by private persons."

46. Protecting and furthering the educational interests of a state's citizens can only be the exercise of sovereign authority. In *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL), the House of Lords held that the provision of an educational programme to US personnel on a military base was an exercise of sovereign authority [1577E-F] [AB/64].

Discussion and Decision

47. For the purposes of this claim, the Claimant was employed, pursuant to a contract of employment as Director of Academic Affairs at the Embassy of the State of Kuwait by "the Government of Kuwait", p54. His employer was the Government of Kuwait.

48. The state immunity issue in this case was whether the functions which the Claimant was employed to perform were sufficiently close to the governmental functions of the mission that his employment was an inherently sovereign or governmental act.

49. It was not in dispute between the parties that the KCO's work, in which the Claimant was engaged, involved at least the following functions under the VCDR:

> "(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law."

50. As the KCO represents the Kuwaiti Ministry of Higher Education through the Kuwaiti Mission in the UK, and is responsible for supporting Kuwaiti students in their studies in the UK, as well as being is the means of interaction between students, their sponsor (most frequently the Ministry of Higher Education) and the relevant UK

academic institutions, it was clearly responsible for furthering the educational interests of its citizens, as well as protecting the interests of the sending State in this regard.

51. I further decided that, in doing so, its work also involved, "(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

52. The correct test under international law for deciding whether the Claimant's employment at the KCO was an act of sovereign authority is set out by Lord Sumption in [54] and [55] of *Benkharbouche*. The issue depends 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. Regarding administrative and technical staff, in particular,

> "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".

53. This was reiterated in *Royal Embassy of Saudi Arabia (Cultural Bureau) v Costantine* [2025] UKSC 9. At [62] *Costantine,* Lord Lloyd-Jones said, "I would draw attention in particular to a line of authority in the European Court of Human Rights, all cases concerning the administrative and technical staff of diplomatic missions and cited with approval in *Benkharbouche*, where the test applied by the Strasbourg court was whether the functions for which the applicant was employed called for a personal involvement in the diplomatic or political operations of the mission, or only in such activities as might be carried on by private persons."

54. Accordingly, *Costantine* reiterated the distinction between private acts and conduct of a sovereign character, as explained by Lord Sumption at [8] [10], [17], [54] and [55] of *Benkharbouche*.

55. I also noted that *Costantine* disapproved the passage in *Sengupta v Republic of India* [1983] ICR 221, EAT, at p 228 F-G. I considered that the EAT's decision in *Alhayali* at [97] appeared uncomfortably close to the wording in that passage of *Sengupta*. Accordingly, I treated *Alhayali's* assessment of the employee's functions in that case with some caution.

56. However, applying [54] and [55] of *Benkharbouche,* I decided that a considerable number of the Claimant's functions in this case were sufficiently close to the governmental functions of the mission that his employment was an act of sovereign authority. Many of his functions were truly in the nature of governmental acts:

56.1. One of the Claimant's responsibilities was to negotiate with UK universities and qualifications providers, on behalf of the KCO. He told the Tribunal, "I have done many negotiations and many deals on behalf of the KCO – that is my work." He agreed, in evidence, that, in doing this, he was negotiating on behalf of the Kuwaiti Mission in the UK and was authorised to do so by the Cultural Attaché and Head of Office.

56.2. Negotiating contracts on behalf of a governmental body is not something which a private individual does.

56.3. Furthermore, the Claimant was instructed personally to undertake "official" visits by the KCO. This included visiting and reporting on Manchester University's "Into Manchester" foundation year facilities, in 2016, "to closely examine student conditions and issues, inspect Into Manchester's educational facilities, and assess its capacity to accommodate … numbers." P269. It was notable that the Head of Office requested approval for the "disbursement of official visit allowances" for the Claimant, from the Kuwaiti Ministry of Higher Education, p269.

56.4. I considered that, in undertaking "official visits" on behalf of the KCO, the Claimant was himself representing the Mission and was himself carrying out the functions of the Mission "(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law." As he was representing the KCO directly at Manchester University and was reporting back to the KCO and Kuwaiti government in relation to educational facilities for a number of Kuwaiti students, this was a public, governmental function.

56.5. The Claimant also personally organised and accompanied delegations from Kuwaiti public bodies, such as the Kuwait Institute for Medical Studies, to Universities around the UK. I agreed with the Respondent that this was a public function, on behalf of the Embassy. It involved the Claimant himself "(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations." I considered that the Claimant was, in these occasions, carrying out an inherently sovereign function of the mission.

57. Accordingly, his functions were sufficiently close to governmental functions of the missions so that his employment was an exercise of sovereign authority.

58. The Claimant's claim is therefore barred by state immunity and the Tribunal has no jurisdiction to consider it. His claim is dismissed.

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Employment Judge Brown

Dated: 1 April 2025

JUDGMENT SENT TO THE PARTIES ON

.....11 April 2025.....

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FOR THE TRIBUNAL OFFICE