Neutral Citation Number: [2025] EAT 193

Case No: EA-2024-001116-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 December 2025

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MRS A MUDA

Appellant

- and –

MALAYSIA

Respondent

- -
- -

Naomi Hart and **Lorraine Aboagye** (instructed by Kilgannon & Partners LLP) for the **Appellant**
Oliver Jackson (instructed by Sheridans) for the **Respondent**

Hearing date: 02 December 2025

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JUDGMENT

SUMMARY

Jurisdictional

The claimant was employed at the respondent's High Commission in London. Her employer was the State of Malaysia. The Central London Employment Tribunal ("ET") dismissed her claim on the basis that the respondent had state immunity pursuant to section 4(2)(a) **State Immunity Act 1978** ("**SIA 1978**"), as she was a citizen of Malaysia and it was not possible to read down this provision so that it did not apply to individuals who are permanent residents of the United Kingdom. The ET rejected the other two grounds upon which the respondent had claimed state immunity, finding that the claimant's employment was not an act of sovereign authority within the meaning of section 16(1)(aa)(i) **SIA 1978** and that her claim did not involve an act engaging sovereign authority within the meaning of section 16(1)(aa)(ii) **SIA 1978**.

The claimant's appeal from the ET's conclusion in relation to section 4(2)(a) **SIA 1978** was stayed, pending the Government's response to the declaration of incompatibility made by the Court of Appeal in **Spain v Lorenzo** [2025] EWCA Civ 59, [2025] IRLR 296.

The respondent proposed that the Employment Appeal Tribunal ("EAT") should hear its cross appeal at this stage, challenging the ET's decision in respect of the section 16(1)(aa)(i) and 16(1)(aa)(ii) issues, and the claimant did not object. The EAT concluded that the ET did not err in law in finding that the claimant's employment was not an act of sovereign authority (within the meaning of section 16(1)(aa)(i)) or in finding that the claimant's claim did not involve an act engaging sovereign authority (within the meaning of section 16(1)(aa)(ii)). There was no challenge to the findings of primary fact made below and the ET had correctly applied the approach identified by the Supreme Court in **Benkharbouche v Embassy of the Republic of Sudan** [2017] UKSC 62, [2019] AC 777, more recently endorsed in **Royal Embassy of Saudi Arabia (Cultural Bureau) v Costantine** [2025] UKSC 9, [2025] 1 WLR 1207.

MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. I will refer to the parties as they were known below.

2. At all material times, the claimant was employed at the respondent's High Commission in London and it is accepted that her employer was the State of Malaysia. A public preliminary hearing was held on 24 – 25 June 2024 to determine the respondent's contention that it had state immunity in respect of her claim. By a judgment promulgated on 23 July 2024, Employment Judge Brown ("the EJ") sitting at the Central London Employment Tribunal ("ET") dismissed the claimant's claim on the basis that the respondent had state immunity pursuant to section 4(2)(a) **State Immunity Act 1978** ("**SIA 1978**"), as she was a citizen of Malaysia and it was not possible to read down this provision so that it did not apply to individuals who are permanent residents of the United Kingdom. However, the ET rejected the other two grounds upon which the respondent had claimed state immunity, finding that the claimant's employment was not an act of sovereign authority within the meaning of section 16(1)(aa)(i) **SIA 1978** and that her claim did not involve an act engaging sovereign authority within the meaning of section 16(1)(aa)(ii) **SIA 1978**.

3. The claimant appealed the ET's conclusion that it was unable to read down section 4(2)(a) **SIA 1978** and sought permission to appeal to the Court of Appeal in order to pursue a declaration of incompatibility under section 4 **Human Rights Act 1998** ("**HRA**"). By order dated 22 November 2024, the Employment Appeal Tribunal ("EAT") granted permission for each of her grounds of appeal to proceed. The respondent cross-appealed. The first ground of the cross-appeal related to the section 4(2)(a) issue, contending that the ET had wrongly concluded that there was no rule of customary international law which required the grant of immunity in the terms provided in that statutory provision. The second ground appealed the ET's conclusion that the claimant's employment contract was not entered into in the exercise of sovereign authority ("Ground 2") and the third ground appealed the ET's conclusion that the respondent's conduct which gave rise to the claim was not undertaken in the exercise of sovereign authority ("Ground 3"). By order of 31 December 2024, the

EAT permitted the cross-appeal to proceed.

4. On 20 December 2024, the Court of Appeal handed down judgment in **Spain v Lorenzo** [2024] EWCA Civ 1602, [2025] ICR 751 ("**Lorenzo 1**"). The Court concluded that, to the extent it relates to individuals who are both nationals of the respondent State and nationals or permanent residents of the United Kingdom, section 4(2)(a) **SIA 1978** was not justified by any binding principle of customary international law and was thus a breach of Article 6 **European Convention on Human Rights** ("**ECHR**") and Article 47 of the **EU Charter of Fundamental Rights** ("**EU Charter**") (the latter applying as the claim was brought before the United Kingdom's withdrawal from the European Union). In **Spain v Lorenzo** [2025] EWCA Civ 59, [2025] IRLR 296 ("**Lorenzo 2**") the Court of Appeal made a declaration of incompatibility pursuant to section 4 HRA, declaring that section 4(2)(a) **SIA 1978** is incompatible with Article 6 **ECHR**.

5. The respondent accepts that the consequence of **Lorenzo 1** is that the first ground of its cross-appeal must fail at this level, as the EAT is bound by the Court of Appeal's decision that section 4(2)(a) **SIA 1978** is not justified by any binding principle of customary international law. The claimant accepts that the Court of Appeal's decision to grant a declaration of incompatibility in **Lorenzo 2** means that her challenge to the ET's finding that section 4(2)(a) could not be read down, cannot succeed either. The Government has yet to address the incompatibility identified by the Court of Appeal and it is not currently known whether and when a remedial order will be promulgated and, if it is, whether it will be given retrospective effect so as to impact on the claimant's appeal.

6. Given these developments, the parties agreed a way forward that was approved by Recorder Fraser Butlin KC in her order of 6 November 2025: (i) staying the claimant's three grounds of appeal pending further order; (ii) recording that the first ground of the cross-appeal is conceded at EAT level only; and (iii) listing the hearing of the substantive appeal on Ground 2 and Ground 3 of the cross-appeal for 2 December 2025.

7. Accordingly, the only matters before me at this hearing were Ground 2 and Ground 3 of the cross-appeal. The respondent wished the appeal to proceed in respect of these grounds (and the

claimant did not object to this course), as if either ground was decided in the respondent's favour, then (subject to any further appeal to the Court of Appeal) the claimant's claim would be barred irrespective of any remedial order made by the Government in respect of section 4(2)(a). If, on the other hand, both Ground 2 and Ground 3 are rejected by the EAT, it is agreed that the remaining parts of the appeal will remain stayed to await any remedial order to be made by the Government.

The ET's decision

8. The EJ described the claimant's claim as one for unlawful deduction from wages (paragraph 1). She had heard evidence from the claimant and had read the witness statement of Ahmad Fadhlizil Ikhram Abdullah, First Secretary (Bilateral) at the Malaysian High Commission in London. The EJ said she had taken the latter into account when making her findings, but she had not found his evidence on a number of points to be clear or illuminating (paragraph 8).

9. The EJ recorded that the parties had agreed the state immunity issues in the case to be as follows:

> "1. Ms Muda was a Malaysian national at all material times. Read according to conventional principles of statutory construction, her claim is barred by section 1(1) and section 4(2)(a) SIA 1978. Accordingly, the Tribunal must determine:
>
> a. whether section 4(2)(a) SIA 1978 goes beyond what is required under customary international law, such that it is incompatible with Article 6 [ECHR] as incorporated into UK law by section 1 of the [HRA]; if so
> b. whether section 4(2)(a) SIA 1978 can and/or should be 'read down' to be compliant with Article 6 ECHR pursuant to section 3 HRA 1998.
>
> 2. The Tribunal must also determine:
> a. whether Ms Muda's employment contract with the Respondent was entered into in the exercise of the Respondent's sovereign authority within the meaning of section 16(1)(aa)(i) SIA 1978; and/or
> b. whether the Respondent engaged in the conduct complained of by Ms Muda in the exercise of its sovereign authority within the meaning of section 16(1)(aa)(ii) SIA 1978.
>
> 3. If the Tribunal determines any of the issues at paras 1(a), 1(b), 2(a) or 2(b) above in the Respondent's favour then Ms Muda's claim is barred by section 1(1) SIA 1978."

10. The EJ recorded that it was agreed that she should only consider the functions of the claimant's most recent post in relation to the issues arising under section 16(1)(aa)(i) **SIA 1978.**

Findings of fact

11. The EJ then set out her findings of fact, making detailed findings regarding the nature of the claimant's duties. The respondent does not challenge any of her findings of primary fact in this appeal. The EJ's findings included the following (with the pagination references to the bundle below omitted):

> "14. The Claimant was born in Malaysia and is a national of Malaysia. She holds a Malaysian passport. She moved to the United Kingdom (UK) on 1 April 1991 and she has lived in the UK since then.
>
> 15. The Claimant was granted indefinite leave to remain in the UK on 8 September 1995. She was given a residence permit on the same day, which she has held since then. She is a UK taxpayer.
>
> 16. The Claimant commenced employment at the Respondent's High Commission in London in 1992, as a Clerical Assistant in the Finance Division of the High Commission. It is not in dispute that her employer was, at all times, the Respondent State of Malaysia.
>
> 17. The Claimant's employment was, at all times, on the terms and conditions of service of Locally Recruited Staff.
>
> 18. The Claimant underwent promotions and transfers and, from 2014, she was employed as secretary to the High Commissioner. The High Commissioner asked her to take on this role, acting as his social secretary. In this role, the Claimant reported to the High Commissioner and worked with his PA, who was not a member of the diplomatic staff of the mission, but held an official passport. The three had separate offices.
>
> 19. A Schedule of Duties recorded the Claimant's role as having the following duties:
> '1. To assist and arrange the High Commissioner's and his wife's social functions and calls by
> i) preparing Guest Lists as directed and details of regrets
> ii) sending and replying to invitations acceptances and
> iii) arranging appointments and visits, booking of Air/train tickets, accommodation and cars.
> iv) organising/arranging office Function/Meeting room
> v) arranging appointments for visitors calling on High Commissioner and wife
> vi) arranging refreshments for the High Commissioner and Guests in the High Commissioners room whenever required
> vii) preparing and safekeeping of the necessary Catering equipments or crockery for any function.
>
> 2. Prepare invitations for the High Commissioner and other Officers for the Queen's Garden Parties, Royal Ascot, The Queen's Evening reception, Trooping of the Colours etc.
>
> 3. To coordinate with The High Commissioner's Personal Assistant with regards to the weekly programme.
>
> 4. To set out table plans for Lunches or Dinners, arrange table cards and Menus and also to arrange and supervise outside official functions including receiving guests.
>
> 5. To prepare venues, conferences, meetings and other functions and to make arrangements for refreshments, lunches tea, coffee etc.
>
> 6. To coordinate with other Officers on the High Commissioners appointments, visits.

> 7. Assist at the Residence for morning coffees, Lunches, tea, dinners, Receptions etc during and after office hours.
>
> 8. Assist in correspondence, invitations etc of the wife of the High Commissioner including Perwakilan.
>
> 9. Preparing claims, duty free orders.
>
> 10. To undertake any other duties as may be directed from time to time by Deputy High Commissioner/Head of Chancery and any other Home.'

.....

23. On all the evidence, I was satisfied that the Claimant carried out social secretary- type functions only, so that the list of duties [reproduced above] reflected the true functions which the Claimant was required to undertake.

24. I found that the High Commissioner's PA kept his diary and that the Claimant was told about his social engagements and booked rooms for events. She did not have knowledge of all his engagements.

.....

28. Following her cross examination, I accepted the Claimant's evidence that she was not familiar with diplomatic protocol and that, in her role, she was not expected to know and act in accordance with diplomatic protocol when facilitating High Commission functions.

29. At these functions, her interaction with guests extended to ushering people to the relevant room and serving drinks. She managed the events themselves, designing invitation cards, menus, labels for food dishes, and preparing seating plans, all for approval by the Head of Chancery. The Claimant's role also involved preparing the venue; booking rooms; ordering food; organizing the table and chair layout; fitting tablecloths and table settings; shopping for flowers and decorating the room; ordering hand towels and soaps; supervising waiters and colleagues and telling them when to start serving and when to tidy up . She helped with tidying and cleaning up afterwards. She was not present during occasions when confidential information was discussed. I accepted her evidence that, if the Mission did not have enough staff for the function, it would hire staff from outside.

30. When managing these events, she supervised a team of one cleaner, one security guard - for assistance with moving heavy items such as furniture - and administrative assistants from the administration department.

31. The Claimant was responsible for sending invitations to people on the guest lists for High Commission functions. However, she did not draw up the guest lists. The High Commissioner's PA would write to the Mission's heads of departments, asking them to provide their requested invitees. The PA then provided the Claimant with a list of people to invite. If the Claimant needed to check the name of the holder of a diplomatic post, the Claimant would "Google" the relevant Diplomatic Mission.

32. I accepted her evidence that she simply inserted the names of guests onto invitations. She could not herself decide, for example, whether to invite partners with the relevant guests. She did what she was told on each occasion, rather than using her own initiative.

33. When sending invitations, the Claimant gave her Social Secretary email and telephone number for RSVPs. She kept a record of acceptances and those who had declined.

34. When organising functions, the Claimant was not responsible for the security arrangements and was not told these.

35. The Claimant communicated with employees at 10 Downing Street, and the Royal Household, regarding invitations to official events. For example, she would reply to the Events

and Visits Office of Number 10 Downing Street, confirming whether the High Commissioner would be attending Trooping the Colour. Her communications were polite and formal, using the High Commissioner's full name and title and those of his wife and family members.

36. The Claimant sent out invitations to stakeholders such as Malaysian Airlines, inviting them to events such as Craft Week, hosted at the High Commission by the Queen of Malaysia.

37. She sent email invitations to other Missions to receptions at the Malaysian High Commission. She sent formal invitation cards to, for example, the Minister of Foreign Affairs of Brazil, to receptions at the High Commission.

38. The Claimant assisted with the visits of individuals to the High Commission, including VIPs and members of the diplomatic corps. She would meet guests and usher them to the High Commissioner's Guest Room; arrange for the in-house photographer to attend when required; prepare and serve tea/coffee/biscuits to guest(s); after the event, clear the room, wash up and clean the pantry; look after the inventory of fine bone china, /silverware, crystal glass and other valuable items at the High Commissioner's office; and wrap gifts.

39. The Claimant also assisted the High Commissioner's wife with correspondence and administrative tasks for the Perwakilan club. This is a club formed by the wives of High Commissioners and Ambassadors from around the world which meets regularly and undertakes fundraising, for example, for hospitals. The Claimant would reserve the room for their meetings, set out plates and cups and help serve food. Another secretary would send out invitations, but if they were not available, the Claimant would do so. She did not attend the meetings herself.

40. In addition, the Claimant booked hotels, train tickets and flight tickets for the High Commissioner and the High Commissioner's family, p128-129.

41. The Claimant did not handle any official files. The PAs of the High Commissioner and Deputy High Commissioner had clearance to do this. The Claimant did not have clearance for handling official files or sensitive matters.

42. The PAs of the High Commissioner and Deputy were not locally recruited staff, but were Home-Based Staff from Malaysia.

43. If a member of the diplomatic staff had a leaving party or welcoming party, the Claimant was not invited, whereas the two PAs were."

The claimant's claim

12. The EJ next identified the claimant's claim which she characterised as a "claim for unlawful deduction from wages" (paragraph 45). She continued:

"45. ...In her claim form, she said that she was also complaining about, "Doing a senior role but receiving junior pay." She said that she sought, by way of remedy, "To be paid on a Social Secretary Salary Scale accordingly and to be remunerated in arrears for the difference that I should have received since then."

46. At this hearing, the Claimant confirmed that she does not seek appointment to the Social Secretary's role.

47. The Claimant attached a grievance letter, dated 7 June 2021, to her claim. In it, she said that, on 13 May 2014, following a meeting with the High Commissioner, she was instructed to take on the position of Social Secretary to the High Commissioner, taking over from a Ms Locke. She said, on agreeing to take the post in May 2014, the High Commissioner promised her that the promotion to social secretary would be made formal on Ms Locke's retirement. She said that this had not happened and that, since May 2014, she had been doing the job of Social Secretary but only being paid a Secretary's pay.

> 48. She also said that, on 1 July 2020 a new Salary Scale Review for the Locally Recruited Staff (LRS) had been introduced with effect from 1 January 2019. She said that, "the main objective of this government exercise was to stream-line the salary scale of all Malaysian civil servants in Malaysia with those of the Malaysian Overseas Missions and Government Agencies."
>
> 49. She said that, following its implementation, her position was now categorised as an 'Office Secretary'. She said that the effect was to downgrade her to the level of a Clerical Assistant.
>
> 50. The Claimant referred to the Salary Scale of administrative positions within the London Malaysian High Commission, following the review. She highlighted the post of "Social Secretary to the High Commissioner", which she said had been published in the Official Lists of Posts approved by the Malaysian Parliament for the Malaysian Ministry of Foreign Affairs in 2020.
>
> 51. The Claimant also said that her many years of experience merited a higher grade than she had been appointed to under the pay review.
>
> 52. In conclusion, the Claimant said that her grievances were, "1. I would like to be officially appointed as the Social Secretary to the High Commissioner as promised way back in 2014 when I was transferred from the Consular Department to the High Commissioner's Office to take on this position. … 3. In the recent salary review of 2019, not only have I not been remunerated correctly but I have been 'downgraded'. I am currently receiving the salary scale of a Clerical Assistant even though I am undertaking the duties of a Social Secretary as per my job specification."

13. The EJ then set out what she described as "Additional Context to the Claim". In light of Ground 3 of the respondent's grounds, it is important that I set this out too. The EJ said:

> "53. On 1 November 2020, employees at the High Commission were informed that the Ministry had decided to review all Locally Recruited Staff (LRS)'s salary scale. This applied to all locally recruited staff in all its Missions around the world.
>
> 54. In an email, dated 17 July 2019, p166, the London High Commission was told that the salary review had been approved by the Ministry of Finance -
> 'As you all have been informed, the LRS Salary Review in 78 Missions was approved by the Ministry of Finance via Letter ref: MOF.Ds(S).600-32/3/1 JId.2 (37) dated 20th March 2019, effective 1st January 2019.
> To date, 49 approvals have been submitted for implementation whereas 29 missions are still in the process of finalising the salary restructuring schedule for submission to the mission in the near future.'
>
> 55. An explanatory note attached said that the new starting salaries applied to posts were calculated taking into account the following factors: Equivalent Starting Salary in Malaysia; Fixed Remuneration for Equivalent Post in Malaysia; Foreign Currency Exchange Rates; Cost of Living Index and House Rental Rates in the relevant City, in comparison to the same costs in Malaysia.
>
> 56. I accepted Mr Abdullah's evidence that the Malaysian government sets roles and pay for Civil Servants and Mission employees in line with their national and political priorities. It is a decision of the Malaysian Parliament and Government (the Public Service Department and the Ministry of Foreign Affairs). The High Commission is told of the structure, roles and pay grades which are to be used at the Mission.
>
> 57. On the facts, therefore, I accepted that, if, for example, an employee brought a claim challenging the pay which the Malaysian government had set for a particular role – such as an equal pay claim – that could involve hearing direct evidence from politicians and officials from the Malaysian Parliament and government."

14. The EJ then identified the applicable legal principles. I return to this when I come to my analysis.

The EJ's conclusions

15. The EJ concluded that the claimant's employment contract with the respondent was not entered into in the exercise of the respondent's sovereign authority within the meaning of section 16(1)(aa)(i) **SIA 1978.** Her reasoning was as follows:

> "94. On all the facts that I have found, I concluded that the Claimant's relevant role was that of social secretary to the High Commissioner, executing that role according to instructions she was given.
>
> 95. Her role was strictly that of a social secretary - broadly:
> 95.1. Inviting guests to functions; scheduling the food and staff for these; organising decorations, table allocation, table service and cleaning afterwards; ushering guests at the functions;
> 95.2. Declining or accepting invitations sent to the High Commissioner from the UK government and other Missions, on instruction from the High Commissioner;
> 95.3. Assisting with the correspondence and invitations of the wife of the High Commissioner including the Perwakilan Ambassadors' wives social and charitable group;
> 95.4. Organising travel documents for the High Commissioner and his family.
>
> 96. On my findings, her functions did not call for personal involvement in the diplomatic or political operations of the mission. The High Commissioner's PA handled the High Commissioner's telephone calls and messages, not the Claimant. If the Claimant ever received such a call, she transferred it to his PA.
>
> 97. The Claimant did not herself analyse requests, produce reports, or decide who to invite to High Commission functions. She followed instructions on whom to invite, and undertook administrative tasks in this regard, designing menus and sending invitations.
>
> 98. Her duties were functional clerical tasks, supportive to the High Commissioner and his duties, but collateral to his functions.
>
> 99. I did not find that she had any knowledge of diplomatic protocol. Her 'protocol' duties were clerical, forwarding applications on behalf diplomats for their exemptions from council tax and television licences.
>
> 100. The Claimant's duties were activities as might be carried on by a private persons acting as a social secretary for a business person in a private company.
>
> 101. She acted as the "public face of the mission" as a point of liaison only, administering information for official events and ushering guests into function rooms.
>
> 102. I found, on the facts, that there was a separation between the Claimant's functions and those of the High Commissioner's PA. The Claimant did not have access to the High Commissioner's messages and official files, whereas his PA did. The PA was invited as a guest to diplomatic leaving parties, but the Claimant was not.
>
> 103. Applying *Alhayali*, which I am required to do, the Claimant was working in an administrative role for the High Commissioner, who, it is to be assumed, performed all of the functions set out in Article 3 VCDR. The Claimant herself was most closely associated with "(e) Promoting friendly relations between the sending State and the receiving State, and developing

> their economic, cultural and scientific relations." That was because she was involved with High Commission social functions, and invitations to and from the High Commissioner to Mission and Government events.
>
> 104. I did not find that any of the Claimant's functions in this case were "sufficiently close" to any of the governmental functions of the High Commissioner or the Mission, so as to be an exercise of sovereign authority.
>
> 105. Even in respect of her communications with 10 Downing Street, her tasks were purely collateral to the functions of the Mission. She was the administrative conduit through which communications regarding non-confidential, social engagements were sent. They were such as a private person could do in private employment.
>
> 106. Regarding events at the Mission, the Claimant made the practical arrangements for these. She was a public face only insofar as she greeted guests for the purpose of ushering them to the function.
>
> 107. Many of her tasks were hands on tasks, organising function rooms, decorations, table service and cleaning up.
>
> 108. She did not see and was not involved with governmental-level communications. She was excluded from such governmental functions: she did not handle the High Commissioner's telephone calls and messages and she did not have access to official files.
>
> 109. On the facts, her duties were far removed from the relevant governmental functions."

16. The EJ also concluded that the respondent did not engage in the conduct complained of in the exercise of its sovereign authority within the meaning of section 16(1)(aa)(ii) **SIA 1978**. Her reasoning was as follows:

> "110. The Claimant made clear that she does not seek reinstatement. It was not in dispute that, if she was, the Respondent would be entitled to immunity in respect of that claim: at [70] in *Benkharbouche*, Lord Sumption stated that "the right freely to appoint embassy staff means that a court of the forum state may not make an order which determines who is to be employed by the diplomatic mission of a foreign state", and thus the forum State 'may not specifically enforce a contract of employment with a foreign embassy or make a reinstatement order in favour of an employee who has been dismissed'.
>
> 111. I accepted the Claimant's contention that her claim is for financial remuneration for the social secretary role that she contends she was appointed to by the High Commissioner.
>
> 112. The relevant decision which she challenges was made by the High Commission and not by the Malaysian Parliament. She contends that the High Commissioner made the decision to appoint her to the social secretary role in 2014 and orally promised her that she would be paid for performing that role. She says that she did perform that role but was not given the pay applicable. I considered that a claim for pay agreed under a contract relates to an act of a commercial, or private, nature, and not a sovereign act.
>
> 113. I agreed with the Respondent that the setting of paygrades for all staff of its Missions, by the Malaysian government, was in the nature of a sovereign act, so that the Respondent would have immunity in respect of a challenge to the setting of those paygrades.
>
> 114. However, I found that, on a true construction of her claim, the Claimant does not challenge those paygrades, but the failure to pay her at the relevant pay grade for the social secretary job she was appointed to in 2014. Lord Sumption stated that there is a need to identify the juridical nature of the act. The relevant act in this instance is the private act of (alleging) breaching the terms of a contract agreed between the High Commissioner and the Claimant in 2014."

The legal framework

17. Section 1 **SIA 1978** provides a general immunity in the following terms:

> "(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions 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."

18. Section 4(1) **SIA 1978** creates an exception to this general rule in relation to employment contracts. It provides:

> "(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."

19. However, section 4 goes on to provide that this exception does not apply in a number of circumstances, including, in section 4(2)(a), where "at the time when the proceedings are brought the individual is a national of the State concerned". This is the provision that was the subject of a declaration of incompatibility in **Lorenzo 2**, as I explained at paragraph 4 above.

20. Giving the leading speech with which the other Justices of the Supreme Court agreed, Lord Sumption JSC explained the principle of state immunity at paragraph 17 of **Benkharbouche v Embassy of the Republic of Sudan** [2017] UKSC 62, [2019] AC 777 ("**Benkharbouche**") as follows:

> "State immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction. Unlike diplomatic immunity, which the modern law treats as serving an essentially functional purpose, state immunity does not derive from the need to protect the integrity of a foreign state's governmental functions or the proper conduct of inter-state relations. It derives from the sovereign equality of states. Par in parem non habet imperium. In the modern law the immunity does not extend to acts of a private law character. In respect of these, the state is subject to the territorial jurisdiction of the forum in the same way as any non-state party."

21. Lord Sumption then cited a passage from paragraph 57 of the International Court of Justice's decision in **Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)** [2012] ICJ Rep 99, where the Court explained that the rule of state immunity "is one of the fundamental principles of the international legal order".

22. Section 16 **SIA 1978** was amended by the **State Immunity Act 1978 (Remedial) Order 2023**

as a result of the Supreme Court's decision in **Benkharbouche**. The Remedial Order added section 16(1)(aa) which provides as follows:

> "(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."

23. In this case, it is agreed that the claimant was employed under her contract as a member of a diplomatic mission. Ground 2 of the cross-appeal concerns section 16(1)(aa)(i) and whether the ET erred in concluding that Malaysia did not enter into Mrs Muda's contract of employment in the exercise of sovereign authority. Ground 3 concerns section 16(1)(aa)(ii) and whether the ET erred in concluding that Malaysia was not engaged in the conduct that Mrs Muda complains of in the exercise of sovereign authority.

24. **Benkharbouche** concerned claims for unfair dismissal, failure to pay the minimum wage and breach of the **Working Time Regulations 1998** made by domestic workers employed to work at, respectively, the Sudanese Embassy in London and the Libyan Embassy in London. The Supreme Court held that the unamended section 4(2)(b) and section 16(1) **SIA 1978** were incompatible with article 6 **ECHR** and article 47 **EU Charter**, as these provisions went further in denying potential claims than was required by the principles of customary international law in respect of state immunity. The Supreme Court concluded that the only international consensus about the scope of state immunity was that it was a restrictive doctrine, whereby immunity was limited to acts by a state in the exercise of sovereign authority, as opposed to acts of a private character. At the time, section 16(1) **SIA 1978** extended state immunity to the claims of any employee of a diplomatic mission, irrespective of whether this was in the exercise of sovereign authority. The Supreme Court held that this exclusion could not be justified by reference to any rule of customary international law.

25. From paragraph 53 onwards, Lord Sumption addressed the application of the state immunity rule to contracts of employment. In the present appeal, both parties agree that sections 16(1)(aa)(i)

and (ii) are to be construed in accordance with this analysis, given these provisions were added to the statute to reflect the scope of state immunity as identified by the Supreme Court in this case.

26. Lord Sumption noted that it was not always easy to determine which aspects of the facts giving rise to the claim are decisive of its correct categorisation (paragraph 53). He said that the "most satisfactory general statement" was that of Lord Wilberforce in **Playa Larga (Owners of Cargo lately taken on board) v I Congreso del Partido** [1983] 1 AC 244 at 267, who said:

> "The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

27. Lord Sumption said that in the great majority of cases, the categorisation will depend on "the nature of the relationship between the parties to which the contract gives rise"; and this will, in turn, depend on "the functions which the employee is employed to perform" (paragraph 54).

28. Lord Sumption explained that 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. He indicated that the functions of diplomatic agents were inherently governmental, so that every aspect of the employment of those in the first category is likely to be an exercise of sovereign authority (paragraph 55). He continued:

> "55. ...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 v Sutton* [1995] 1 NZLR 426 (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." (Emphasis added.)

29. Lord Sumption noted that this approach was supported by the caselaw of the European Court of Human Rights. He referred to a number of the cases concerning the administrative and technical

staff of diplomatic missions, indicating that the test applied by Strasbourg was:

> "56. ...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."

30. Lord Sumption went on to say that the character of the employment is not necessarily decisive and that state immunity could extend to a state's conduct towards its employees in certain circumstances:

> "58. ...The first is that a state's immunity under the restrictive doctrine may extend to some aspects of its treatment of its employees or potential employees which engage the state's sovereign interests, even if the contract of employment itself was not entered into in the exercise of sovereign authority. Examples include claims arising out of an employee's dismissal for reasons of state security. They may also include claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which in the nature of things impinge on the state's recruitment policy. These particular examples are all reflected in the United Nations Convention and were extensively discussed in the preparatory sessions of the International Law Commission. They are certainly not exhaustive. *In re Canada Labour Code* [1992] 2 SCR 50 concerned the employment of civilian tradesmen at a US military base in Canada. The Supreme Court of Canada held that, while a contract of employment for work not involving participation in the sovereign functions of the state was in principle a contract of a private law nature, particular aspects of the employment relationship might be immune as arising from inherently governmental considerations, for example the introduction of a no-strike clause deemed to be essential to the military efficiency of the base. In these cases, it can be difficult to distinguish between the purpose and the legal character of the relevant acts of the foreign state. But as La Forest J pointed out, at p 70, in this context the state's purpose in doing the act may be relevant, not in itself, but as an indication of the act's juridical character."

31. Lord Sumption addressed the significance of article 7 of the **Vienna Convention on Diplomatic Relations**, which provides that a sending state may "freely appoint" members of the staff of a diplomatic mission, as follows:

> "70. ... however, article 7 of the Vienna Convention has only a limited bearing on the application of state immunity to employment claims by embassy staff. I would accept that the right freely to appoint embassy staff means that a court of the forum state may not make an order which determines who is to be employed by the diplomatic mission of a foreign state. Therefore, it may not specifically enforce a contract of employment with a foreign embassy or make a reinstatement order in favour of an employee who has been dismissed. But a claim for damages for wrongful dismissal does not require the foreign state to employ anyone. It merely adjusts the financial consequences of dismissal. No right of the foreign state under the Vienna Convention is infringed by the assertion of jurisdiction in the forum state to carry out that adjustment. Therefore, no right under the Vienna Convention would be prejudiced by the refusal of the forum state to recognise the immunity of the foreign state as regards a claim for damages."

32. Lord Sumption went on to hold that the employment of the claimants were not exercises of sovereign authority, that there was nothing about their alleged treatment that engaged the sovereign

interests of their employers; and nor were they seeking reinstatement in a way that would restrict the right of their employers to decide who is to be employed in their diplomatic missions. Accordingly, as a matter of customary international law, their employers were not entitled to immunity in respect of their claims (paragraph 76).

33. In **Lorenzo 1**, the Court of Appeal upheld the ET's rejection of state immunity in relation to a claim for discrimination and race related harassment made by a former member of the administrative and technical staff of the Spanish Embassy in London. She had worked as the ambassador's social secretary, sometimes having sight of confidential documents; and subsequently as an administrative assistant, where she also had sight of confidential documents which she placed or listed in the diplomatic bag. The Court of Appeal agreed that the functions the claimant was employed to perform did not call for a personal involvement in the diplomatic or political operations of the mission (paragraph 28). Bean LJ (giving the leading judgment with which Baker LJ and Andrews LJ agreed) said he did not think that any of the acts complained of were sovereign acts "or analogous to any of Lord Sumption JSC's very specific exceptional cases" (paragraph 28; emphasis added). He observed that Lord Sumption's example of a claim for reinstatement constituting an exceptional case was "a powerful indicator that most claims for express or constructive unfair dismissal are not to be treated as exceptional". As regards the nature of the claimant's employment, Bean LJ endorsed the ET's conclusion "that her functions did not call for personal involvement in the diplomatic or political operations of the mission but were rather activities such as might be carried out by private persons" (paragraph 29).

34. Lord Sumption's approach in **Benkharbouche** was more recently endorsed by the Supreme Court in **Royal Embassy of Saudi Arabia (Cultural Bureau) v Costantine** [2025] UKSC 9, [2025] 1 WLR 1207 ("**Costantine**"). The leading judgment was given by Lord Lloyd-Jones JSC (with whom the other Justices of the Supreme Court agreed). The claimant had been a member of the administrative and technical staff at the Embassy of Saudi Arabia. She brought a claim for discrimination and harassment. The Supreme Court upheld the decision of the ET (Employment

Judge Brown in that case too) rejecting the claim for state immunity under section 16(1)(aa) **SIA 1978**, on the basis that the claimant's role supported the embassy's administrative, rather than its governmental functions. The claimant had been employed as a post room clerk in the Administrative Affairs Department and, for some of the time, as secretary to the Head of the Cultural Affairs Department, Dr Nassir, a diplomat. During her time in the latter post, the claimant undertook basic secretarial functions, including booking rooms, inviting people to meetings and arranging refreshments; she made appointments for Dr Nassir as instructed, but did not attend meetings with him (paragraph 8). Her email correspondence concerning students and universities involved making practical arrangements for Saudi citizens studying abroad and arrangements for study and payment to universities for students, including the children of government officials or members of the Royal family. Her role was a purely administrative one (paragraph 12).

35. After citing extensively from Lord Sumption's judgment in **Benkharbouche**, Lord Lloyd-Jones rejected an argument advanced by counsel for the Embassy that was based upon the judgment of Browne-Wilkinson J (as he then was) in **Sengupta v Republic of India** [1983] ICR 221 ("**Sengupta**"), where he had accepted that performance of the claimant's contract was part of the discharge by the foreign state of its sovereign functions in which the applicant "at however lowly a level" was necessarily engaged. Lord Lloyd-Jones said:

> "61. ...However, the decision in *Sengupta* was 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 Sumption JSC 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. He also agreed with the statement in what is now *Fox and Webb* p 202, fn 177, that the decision appeared to have had more regard to the purposes than the commercial nature of the clerical work involved."

36. Like Lord Sumption in **Benkharbouche**, Lord Lloyd-Jones referred with approval to the Strasbourg caselaw concerning the administrative and technical staff of diplomatic missions, saying:

> "62. ...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 caried on by private persons..."

37. In terms of the section 16(1)(aa)(i) basis of immunity, Lord Lloyd-Jones referred to the examples given by Lord Sumption of cypher clerks and certain confidential secretaries (paragraph 28

above), observing that the outcome would depend "on the proximity of each employee's role to the governmental functions of the mission" (paragraph 70).

38. As regards the second potential head of immunity (section 16(1)(aa)(ii)), Lord Lloyd-Jones summarised the examples given by Lord Sumption as "dismissals for reasons of state security or challenges to the state's recruitment policy". He said it seemed clear that claims for reinstatement would be defeated by the immunity "because it would be an intrusion into the internal affairs of the mission to require reinstatement" (paragraph 70).

39. Lord Lloyd-Jones was unable to detect any error in the EJ's application of the law to the facts as she found them and he considered that she was clearly entitled to come to the conclusion that she did. The EJ had kept in mind that "the proximity of the [claimant] to governmental functions was crucial" (paragraph 73). He also rejected an argument raised under the second potential head of immunity, emphasising that the claimant sought compensation and a declaration, not reinstatement, so that the State's "right to decide who is employed at the mission is not restricted in any way by the claim" (paragraph 76). He observed that if the appellant State were entitled to immunity in that case "there would be such an entitlement in every case of dismissal of a member of the administrative staff of a mission" (paragraph 76).

40. The Supreme Court's analysis in **Benkharbouche** was also recently applied by the Court of Appeal in **The Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali** [2025] EWCA Civ 1162 ("**Alhayali**"). The claimant was employed by the Royal Embassy of Saudi Arabi Cultural Bureau in London. Her work included processing reports from Saudi students studying in the UK and passing documents to her head of department for approval. The ET (Employment Judge Brown again) held that the Embassy did not have the benefit of state immunity in relation to the claimant's claims for discrimination and victimisation. The EAT allowed the Embassy's appeal, but the EJ's conclusion was restored by the Court of Appeal, who held that the ET had made no error of law.

41. Bean LJ (giving the leading judgment, with which the President of the Family Division and Coulson LJ agreed) concluded that the EJ's decision showed she was well aware that the "critical

question" was "whether the Claimant's functions were sufficiently close to the exercise of sovereign authority, as opposed to being merely ancillary and supportive" (paragraph 22; emphasis added). Bean LJ endorsed the EJ's rejection of the Embassy's submission that because the claimant's role assisted the respondent to carry out its governmental functions, her employment was an exercise of sovereign authority. Bean LJ disagreed with the EAT's approach which appeared to be that once it was shown that the department or section of the Embassy in which the claimant worked was exercising any of the functions listed in Article 3.1 of the **Vienna Convention**, this was sufficient to establish the defence of sovereign immunity (paragraph 23). Bean LJ characterised Lord Sumption's examples in paragraph 55 of **Benkharbouche** of employees in technical and administrative roles sufficiently close to the exercise of sovereign authority for their claims to attract immunity as "very limited" (paragraph 24).

42. Bean LJ also rejected the EAT's distinction between the claimant's participation in the public service of the Embassy and merely working in its private administration. He said:

> "25. ...This suggests that any outward-facing activity such as 'discussing art exhibits with visitors' is sufficiently close to the exercise of sovereign authority to attract immunity. That seems to me to cast the net of immunity very widely indeed, certainly in comparison with the very specific examples given by Lord Sumption."

43. Bean LJ went on to observe that the EAT's approach gave "no weight to the findings of fact made by EJ Brown that the claimant did not have a decision-making role and that her activities were relatively low-level" (paragraph 25).

The role of the EAT

44. The Court of Appeal in **Alhayali** also disagreed with the view taken by the EAT as to the role of the appeal tribunal in respect of an appeal from an ET's decision on a respondent's claim of state immunity. It was (of course) common ground that the ET's findings of primary fact could not be disturbed on appeal, absent a finding of perversity (paragraph 11). The EAT had suggested, however, that the ET's conclusion based on those findings of fact was "either legally right or legally wrong". Bean LJ preferred to characterise the first instance tribunal's decision as "an evaluative judgment by

the fact-finder" (paragraph 26). He emphasised that the EAT had no jurisdiction save where the appellant shows that the ET has made an error of law.

45. In this regard, Bean LJ expressed agreement with the observations of HHJ James Tayler in **Webster v USA** [2022] EAT 9, [2022] IRLR 836, where he said:

> "In **Benkharbouche** Lord Sumption distinguished between three types of employees in diplomatic missions; those who have inherently governmental functions at one end and those whose domestic duties are invariably private. In the middle there are technical and administrative roles that may, or may not, be sovereign or governmental. Determining which side of the line an employee in the middle category falls is inherently a matter of factual assessment that is for the employment tribunal."

46. Bean LJ rejected the proposition that sovereign immunity cases "have become a unique category of case where the party losing before the ET can appeal as of right on the grounds that the conclusion of the tribunal is always a question of law" (paragraph 27).

The grounds of appeal

47. The respondent's Ground 2 and Ground 3 were prepared after the EAT's decision in **Alhayali** and before the Court of Appeal gave judgment (paragraphs 44 – 46 above). Accordingly, the grounds were formulated as contentions that the EJ had been "wrong" to conclude that sovereign immunity did not apply. Mr Jackson accepted that I was bound by the Court of Appeal's decision in **Alhayali**, so that I must proceed on the basis it was incumbent on him to identify how the EJ had erred in law and it was insufficient for the respondent to simply say that it disagreed with the EJ's evaluative judgment. Perhaps surprisingly in these circumstances, no application was made by the respondent to amend either of these grounds of the cross-appeal and Mr Jackson's Skeleton Argument still put forward Ground 2 and Ground 3 on the basis that the EJ was "wrong" to have arrived at the conclusions she did. However, during the hearing, I asked Mr Jackson to identify as precisely as possible the errors of law which he said the EJ had made. I identify the matters he relied upon in the paragraphs that follow. Mr Jackson's oral submissions focused on Ground 3, rather than Ground 2. In the circumstances, I have also tried to identify and list as potential errors of law, the other points that were made in the original Ground 2 (insofar as it is possible to do so), as Mr Jackson did not

formally abandon these. Insofar as the claimant suggested that some of these contentions amounted to new sub-grounds that the respondent should not be permitted to pursue, I reject that proposition. They were re-formulations of contentions that were already aired in the grounds (as part of the contention that the EJ was "wrong" in her conclusion) and in each instance the claimant's counsel had had an adequate opportunity to consider and address the points.

48. Thus, the alleged errors of law in relation to Ground 2 (the claimant's employment was not an act of sovereign authority) that I will consider are as follows:

a. As the claimant was so personally involved in the functions of the Mission (including using her own name in formal diplomatic communications) she was performing tasks that were sufficiently close to the diplomatic and governmental functions of the Mission that the EJ was wrong to find that her employment was not an act of sovereign authority. (This was the only point developed orally by Mr Jackson in relation to Ground 2);

b. The EJ erroneously thought that because the claimant was not a diplomat conducting diplomatic business herself, she could not come within the scope of section 16(1)(aa)(i) **SIA 1978**;

c. The EJ erred in not regarding it as sufficient that some of the claimant's duties constituted personal involvement in the diplomatic operations of the Mission;

d. The EJ erred in focusing upon what the claimant did not do, rather than on the duties that she did undertake; and

e. The EJ erroneously thought that the claimant could not satisfy the section 16(1)(aa)(i) test as her role was comparable to a private person acting as a social secretary for a business person in a private company.

49. The alleged errors of law in relation to Ground 3 (the claimant's claim does not involve an act engaging sovereign authority) that I will consider are as follows:

a. The EJ misdirected herself in treating the fact that the claimant was bringing a

contractual claim as determinative of the application of section 16(1)(aa)(ii);

b. The EJ failed to take account of a relevant consideration, namely that part of the claimant's claim was a challenge to the job title she was allocated in the 2020 review;

c. The EJ failed to appreciate and/or give sufficient weight to the fact that the claimant's claim about her 2014 appointment constituted an interference with the respondent's unqualified right to determine who it appointed and promoted; and

d. The EJ failed to appreciate and/or give sufficient weigh to the fact that the claimant's claim was a challenge to the respondent's recruitment policy.

Analysis and conclusions

50. Between paragraphs 58 – 72 of her Reasons, the EJ set out the relevant statutory provisions and the relevant passages from **Benkharbouche**, which I have referred to above. The EJ's decision was prior to the Supreme Court's judgment in **Costantine** and prior to the Court of Appeal's judgment in **Alhayali**, but, as will be apparent from my earlier summary of the legal framework, those later decisions followed the guidance provided by Lord Sumption in **Benkharbouche**. Mr Jackson accepted that these passages in the EJ's Reasons contained a correct statement of the applicable principles.

Ground 2: the Claimant's employment was not an act of sovereign authority

51. It is clear that the EJ made careful findings of fact, none of which are challenged in this appeal. Her core reasoning appears at her paragraphs 94 – 109 (reproduced at paragraph 15 above). As she explained at paragraph 96, she found that the claimant's functions did not call for her personal involvement in the diplomatic or political operations of the mission. The claimant undertook administrative tasks, following instructions as to who to invite to the High Commissioner's functions (paragraph 97, ET's Reasons). Her duties were functional clerical tasks, supportive but collateral to the High Commissioner's functions (paragraph 98, ET's Reasons). The claimant acted as the "public

face of the mission" as a point of liaison only (paragraph 101, ET's Reasons). There was a distinction between the claimant's functions and those of the High Commissioner's PA (paragraph 102, ET's Reasons). Her communications with 10 Downing Street were purely collateral to the functions of the Mission (paragraph 105, ET's Reasons). So far as events at the Mission were concerned, the claimant made the practical arrangements and undertook the "hands-on" organisational tasks; she was the public face only in terms of greeting the guests to usher them in to the function (paragraphs 106 – 107, ET's Reasons); she did not see and was not involved with governmental-level communications and she was excluded from all governmental functions (paragraph 108, ET's Reasons).

52. Mr Jackson also accepted that the EJ applied the correct test to these factual findings, asking whether any of the claimant's functions were "sufficiently close" to any of the governmental functions of the High Commissioner or the Mission, so as to be the exercise of sovereign authority (paragraph 104).

53. Having made the above unassailable findings and having asked the correct question, I consider that the EJ was perfectly entitled to conclude, as she did at paragraph 109, that the claimant's duties "were far removed from the relevant governmental functions".

54. I turn to the specific points raised by the respondent.

55. Mr Jackson submitted that the claimant's use of her own name and her own contact details in her correspondence with 10 Downing Street, the Royal Household and other Missions fixed her personal involvement in the diplomatic activities of the Mission and the EJ's decision failed to reflect this. I do not accept this contention. The EJ was well aware that the claimant used her own name and supplied her own contact details when she communicated on behalf of the High Commissioner with 10 Downing Street, the Royal Household and other Missions, in responding to their invitations to official events and in sending out invitations to functions at the Mission. The EJ described this aspect of the claimant's role in detail at paragraphs 31 – 37 of her decision (paragraph 11 above), explaining that the claimant was doing what she had been instructed to do on these occasions, rather than acting from her own initiative. At paragraph 105 of her Reasons, the EJ concluded that these aspects of the

claimant's role were "purely collateral" to the functions of the Mission and that she acted as an "administrative conduit" (paragraph 15 above). The EJ also found (at her paragraph 106) that the claimant was the public face of events at the Mission, only insofar as she greeted guests for the purposes of ushering them in to the function.

56. These were permissible findings for the EJ to arrive at and, in turn, she was entitled to conclude that whilst her work was supportive of the High Commissioner and his duties, the claimant's functions were insufficiently close to any of the governmental functions of the Mission to constitute an exercise of sovereign authority. The caselaw I have referred to earlier makes it quite clear that the sheer fact the employee's work assists the Mission to undertake one or more of its functions listed in Article 3.1 of the **Vienna Convention** is insufficient in itself to show that the employment is an act of sovereign authority. Lord Lloyd-Jones rejected a wider approach in **Costantine** (paragraph 35 above), as did Bean LJ in **Alhayali** (paragraph 41 above). I note too that in the latter case, Bean LJ emphasised the "very limited" nature of Lord Sumption's examples of where employees in administrative and technical roles were sufficiently close to the exercise of sovereign authority for their claims to attract immunity (paragraph 41 above); and he rejected the EAT's distinction between public-facing duties and private administrative work (paragraph 42 above).

57. Despite his attempts to re-formulate this aspect of his argument during the hearing, Mr Jackson still struggled to identify this part of the appeal as anything more than a disagreement with the EJ's conclusion (paragraph 48 above).

58. It is quite apparent from the EJ's accurate self-directions as to the applicable legal principles, her detailed findings of fact and her careful reasoning, that she was not under the (erroneous) impression that because the claimant was not herself a diplomat conducting diplomatic business, she could not come within the scope of section 16(1)(aa)(i). There is no foundation for this contention.

59. Similarly, the EJ was well aware that it would suffice if some of the claimant's duties were sufficiently close to the governmental functions of the Mission; she did not require all of the claimant's duties to do so. Whilst this is in any event apparent from a consideration of her Reasons,

read as a whole, I also note that at her paragraph 70 she specifically referred to paragraphs 96 – 97 of Bourne J's judgment in the EAT in **Alhayali,** where he held that not all of an employee's tasks have to meet the section 16(1)(aa)(i) test; it was sufficient if some of them did so. Moreover, in this instance, the EJ said that she "did not find that any of the claimant's functions in this case" met the "sufficiently close" test (paragraph 104, ET's Reasons; emphasis added).

60. It is inaccurate to suggest that the EJ simply focused on what the claimant did not do. As her findings and reasoning show, she carefully examined both what the claimant did and what she did not do. In applying the relevant test, it was natural and appropriate for her to identify the limitations of the claimant's role.

61. In considering whether the claimant's duties were comparable to those that would be undertaken by private persons, the EJ applied the very approach that the Supreme Court had endorsed in both **Benkharbouche** and **Costantine** (paragraphs 29, 33 and 36 above).

62. Accordingly, I conclude that there was no error of law involved in the ET's conclusion that the claimant's employment was not an act of sovereign authority.

Ground 3: the claim did not involve an act engaging sovereign authority

63. Before turning to the specific contentions raised, I record the following. Mr Jackson accepted that when it came to the section 16(1)(aa)(ii) issue, the EJ correctly directed herself as to Lord Sumption's approach in **Benkharbouche** (at paragraphs 71 and 72 of her Reasons). He also accepted that in substantial part (and subject to the point I discuss at paragraph 69 below) the EJ correctly summarised the nature of the claimant's claim in paragraph 112 of her Reasons, when she said the claimant "contends that the High Commissioner made the decision to appoint her to the social secretary role in 2014 and orally promised her that she would be paid for performing that role. She says that she did perform that role but was not given the pay applicable" (paragraph 16 above). The EJ had earlier described the claim in more detail at paragraphs 45 – 52 of her Reasons (paragraph 12 above) and she had set out the context of the claim that the respondent relies upon at paragraphs 53 –

57 of her Reasons (paragraph 13 above).

64. Mr Jackson submitted that the EJ erred in law by identifying the claim as a contractual one and then treating this as determinative of the section 16(1)(aa)(ii) issue. In this regard, he emphasised the last sentence of her paragraph 112, where the EJ said: "I considered that a claim for pay agreed under a contract relates to an act of a commercial, or private, nature, and not a sovereign act".

65. However, this sentence needs to be read in the context of the EJ's findings and her reasoning as a whole, rather than looking at this sentence in isolation. It is quite clear that the EJ did not believe that a contractual claim was by its nature incapable of involving an act engaging sovereign authority. Such an approach would be inconsistent with her accurate self-directions as to the applicable legal principles and inconsistent with her careful findings of fact and her assessment of the nature of the claim. If she had thought the sheer fact that this claim was a contractual one was determinative of the issue, it is likely that her reasoning would have said that explicitly and have been much more compressed. Moreover, in her paragraph 113, the EJ indicated in terms that she agreed with the respondent that a claim which challenged the respondent's setting of its pay grades for all staff at its Missions, would be a claim involving an act of sovereign authority, for which the respondent would have state immunity. This shows that the EJ appreciated that it was necessary to focus on the subject-matter of the particular claim being brought, rather than simply upon the cause of action involved. This impression is reinforced by the contents of paragraph 114 where the EJ identified the "true construction of her claim" as a challenge to the failure to pay her at the relevant pay grade for the job she says she was appointed to in 2014, rather than a challenge to the paygrades set by the respondent.

66. It is clear to me that, read in context, the conclusion the EJ drew in the last sentence of her paragraph 112 was that this claim for pay that was said to have been agreed in 2014 but not paid to the claimant was a claim relating to an act of a commercial or private nature, not that every conceivable contractual claim that a Mission employee might bring necessarily would be.

67. Mr Jackson relied on the material that was summarised by the EJ at her paragraphs 53 – 57. This included her acceptance (at paragraph 56) that the Malaysian Government and Parliament set

the roles and pay for civil servants and Mission employees in line with their national priorities and that the High Commission was then informed of the structure, roles and pay grades to be used at the Mission (paragraph 13 above). However, the EJ was entitled to characterise this particular claim as one that did not involve a challenge to those roles or pay scales, but rather as to where the claimant had been placed on the pay scale (given the claimed 2014 agreement).

68. Mr Jackson also disputed the existence of the agreement that the claimant alleges was made in 2014 in relation to her role and her pay, contending that this would not have occurred because it did not accord with the pay scales of the time. However, that is a point that goes to the merits of the claim, rather than to the question of whether the claim involves an act engaging sovereign authority.

69. Mr Jackson submitted that the EJ had failed to take account of the fact that part of the claimant's claim was a challenge to the job title she was allocated in the 2020 review. I do not consider that there is merit in this point.

70. As the EJ noted at paragraphs 47 – 49 of her Reasons, the claimant attached her earlier grievance letter of 7 June 2021 to her claim form and in that letter, in addition to complaining about the breach of the 2014 agreement, she said that in the July 2020 salary scale review, her job title had been downgraded to the level of a Clerical Assistant (paragraph 12 above). Accordingly, the EJ was plainly aware of this aspect. However, for the purposes of applying the section 16(1)(aa)(ii) test, the EJ was right to focus on the nature of the claim being made and whether it involved an act engaging sovereign authority. As the EJ said (and the respondent does not dispute), this was a claim for unlawful deduction from wages. This is consistent with section 8 of her claim form, where she ticked the box to say she was claiming for arrears of pay and said she was "[d]oing a senior role but receiving junior pay". At section 9.2 of the form, she said she was seeking remuneration in arrears for the difference between the pay she had received since 2014 and the job she had been doing during that time. By contrast, the claimant was not bringing a claim in relation to her 2020 job title. Whilst her grievance letter (which, understandably, had a wider compass) expressed unhappiness about this job title, as articulated, that unhappiness stemmed from her belief that she had been promised more in

2014, rather than this being a separate challenge to the 2020 review. The EJ rightly recognised this in her analysis at paragraphs 111 – 114 of her Reasons.

71. Mr Jackson submitted that the claim involved an interference with the respondent's sovereign authority to appoint its staff, as the ET would hear evidence about the respondent's appointment processes and would make a determination as to whether the claimant was or was not appointed to the role of Social Secretary in 2014, as she alleged. He said that this would cut across the respondent's right to freely appoint its employees.

72. I do not accept that submission. As the EJ recorded at her paragraph 46, the claimant was not seeking an order that she be appointed to the Social Secretary's role (paragraph 12 above). Her case is that because she had been appointed to that role (back in 2014) she was entitled to be paid at a higher rate of pay than she had in fact received. In deciding the claim, the ET will need to make findings of fact about what the respondent *had done* in the past. By contrast, the claim does not involve the ET requiring the respondent to act in a particular way in the future in terms of the claimant's appointment; whatever did or did not happen in 2014 was decided by the respondent at the time. Accordingly, the claim does not involve any intrusion into the internal affairs of the Mission, comparable to an order for future reinstatement. The position can also be tested in this way: if the ET, after hearing the evidence, decided that the claimant was not appointed as Social Secretary in 2014, that would be the end of it; the ET's decision would not require the claimant to be appointed to this position, contrary to the course taken by the respondent at the time in 2014.

73. The situation is comparable to that identified by Lord Lloyd-Jones in **Costantine**; as the claimant's claim was for compensation for the way she had been treated in the past, the State's right to decide who it employs at the Mission was not restricted in any way by the claim (paragraph 39 above). As Lord Lloyd-Jones went on to observe, if the position were otherwise, then every case of dismissal of a member of the administrative staff of the Mission would be covered by state immunity. I also note the emphasis in **Lorenzo 1** on the "very specific exceptional cases" that Lord Sumption identified in respect of the principle that is now reflected in section 16(1)(a)(ii).

74. Equally, I do not consider that the EJ erred in not appreciating that the claimant's claim was a challenge to the respondent's recruitment policy, since it is not such a claim. Mrs Muda is not complaining that she was not promoted to the Social Secretary role when she deserved to be; her complaint is that after she was promoted to this role, she was not paid accordingly. Similarly, she is not complaining that the respondent's pay scales do not remunerate Social Secretaries adequately, she is seeking to be paid at the rate that is attached to that role.

75. Accordingly, I am satisfied that there was no error of law in the ET's conclusion that the claimant's claim did not involve an act engaging sovereign authority.

Conclusion and outcome

76. For the reasons set out at paragraphs 51 – 62 above, I conclude that the ET did not err in law in finding that the claimant's employment was not an act of sovereign authority within the meaning of section 16(1)(aa)(i) **SIA 1978**. For the reasons set out at paragraphs 63 – 75 above, I conclude that the ET did not err in law in finding that the claimant's claim did not involve an act engaging sovereign authority within the meaning of section 16(1)(a)(ii) **SIA 1978**.

77. Accordingly, I dismiss Ground 2 and Ground 3 of the cross-appeal.

78. The appeal will remain stayed for the reason I identified at paragraphs 5 - 7 above.

79. I will give the parties the opportunity to agree the terms of a draft order, including as to the pro bono costs order sought by the claimant, or to make concise written submissions on these matters in default of agreement being reached.