Neutral Citation Number: [2026] EAT 20

Case Nos: EA-2024-000300-JOJ
EA-2024-000302-JOJ
EA-2024-000303-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 January 2026

Before :

MR JUSTICE CAVANAGH

- -

Between :

THE GOVERNMENT OF THE STATE OF KUWAIT

Appellant

- and –

MR S MOHAMED

Respondent

- -
- -

Mohinderpal Sethi KC (instructed by **Weightmans LLP**) for the Appellant
John Platts-Mills (acting pro bono with **Advocate**) for the Respondent

Hearing date: 18 November 2025

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JUDGMENT

SUMMARY

Age Discrimination, Jurisdictional/Time Points, Victimisation

This appeal is concerned with state immunity and with the circumstances in which the EAT should follow the decision of previous EATs on the same point of law.

The Appellant employed the Respondent in its diplomatic mission in London. He claimed discrimination and harassment, contrary to the Equality Act 2010, and claimed that he had suffered personal injury, consisting of psychiatric injury, as a result. The Appellant claimed state immunity. At a Preliminary Hearing, the ET held that the Appellant employed the Respondent in the exercise of state authority, so that section 16(1) of the State Immunity Act 1978 (SIA) applied. This provides for state immunity in respect of claims relating to a person's contract of employment in such circumstances. Such immunity applies to statutory employment claims (s17(4A). However, section 5 of the SIA provides that there is no state immunity as respects proceedings in respect of death or personal injury caused by an act or omission in the United Kingdom. The ET held that section 5 applied, because the Respondent's employment claim was one for compensation for personal injury, and so that there was no state immunity.

The Appellant appealed on two grounds.

Ground 1 was that the ET should have found that the exception to state immunity for personal injury claims, in section 5 SIA, does not apply personal injury claims arising out of employment that are within the scope of section 16(1) of the SIA. There have been three previous decisions of the EAT, **Military Affairs Office of the Embassy of the State of Kuwait v Caramba-Coker** (Unreported, 10 April 2003) **Federal Republic of Nigeria v Ogbonna** [2012] ICR 32, and **Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali** [2023] EAT 149; [2024] IRLR 381, in which the EAT has held that section 5 applies to such cases, so that there was no state immunity. However, in **Alhayali** in the Court of Appeal, [2025] EWCA Civ 1162; [2025] IRLR 918, Bean LJ had said, obiter, that these decisions were wrong.

The EAT considered the law relating to the circumstances in which the EAT should follow previous EAT decisions on the same point of law. The EAT followed the guidance of Singh J in **British Gas Trading v Lock and another** [2016] ICR 502. The EAT held that the normal convention that the EAT should follow its own previous decisions applies to state immunity cases. The EAT also held that none of the exceptional cases in which the EAT was not required to follow its own previous decisions applied: the previous decisions were not per incuriam, they were not manifestly wrong, and there were no exceptional reasons why the EAT should not follow the previous decisions. The fact that a Court of Appeal judge had stated, obiter, that the decisions were wrongly decided did not, mean, automatically, that they were manifestly wrong.

Accordingly, Ground 1 was dismissed.

Ground 2 was that the ET had erred in law because it should have found that, even if the section 5 exception to state immunity applies to such employment-related personal injury claims, section 5 does not cover psychiatric injury and so does not apply to the Respondent's claims. The Appellant accepted that the EAT was bound to dismiss the appeal on this ground, in light of the ruling of the Court of Appeal on the same point in **Shehabi v Bahrain** [2024] EWCA Civ 1158; [2025] KB 490. This point has been subject to a further appeal to the Supreme Court, in which judgment is pending. Unless and until the ruling of the Court of Appeal in **Shehabi** is overturned by the Supreme Court, the ruling is binding on the EAT.

Accordingly, Ground 2 was also dismissed.

MR JUSTICE CAVANAGH:

Introduction

1. This appeal raises two important questions about the scope of state immunity under the State Immunity Act 1978 ("the SIA") in relation to claims brought by employees for personal injury arising from discrimination and harassment, contrary to the Equality Act 2010 ("the EA10").

2. The Respondent to this appeal, the Applicant below, was employed by the Appellant in its diplomatic mission in London. He was dismissed on 20 May 2020. The Respondent brought a claim against the Appellant under the EA10 for personal injury, namely depression, arising from discrimination and harassment relating to his dismissal and the events leading up to it. The Appellant claimed state immunity. At a Preliminary Hearing ("the PH"), the Employment Tribunal ("the ET") found that it had jurisdiction under section 5 of the SIA to consider the Respondent's claims for personal injury under the EA10. At a subsequent Liability Hearing, the ET found the claims to have been proved in part, and after a Remedies Hearing, the ET awarded the Respondent the sum of £332,590.76, by way of compensation.

3. The relevant provisions of the SIA are set out below. The key provisions are, on the one hand, sections 4 and 16(1)(aa) which, when read together, and in light of findings by the Employment Tribunal which are not challenged in this appeal, grant the Appellant immunity as respects proceedings relating to the contract of employment between the Appellant and the Respondent, and, on the other, section 5(a), which provides that States such as the Appellant are not immune as respects proceedings in respect of personal injury.

4. There are two grounds of appeal. These are:

(1) Ground 1: The Appellant submits that the ET erred in law because the ET should have found that the personal injury exception to state immunity contained in the SIA, section

5, has no application to personal injury claims arising out of the employment by a State of an employee in a diplomatic mission, where the exercise of sovereign authority is involved; and

(2) Ground 2: The Appellant submits that the ET erred in law because it should have found that, even if the section 5 exception to state immunity applies to such employment-related personal injury claims, section 5 does not cover psychiatric injury and so does not apply to the Respondent's claims.

5. The Appellant has been represented before me by Mr Mohinderpal Sethi KC, who appeared for the Appellant in the ET. The Respondent has been represented by Mr John Platts-Mills, who did not appear below. I am grateful to both counsel for their very helpful submissions, but I am particularly grateful to Mr Platts-Mills, who acted pro bono in making his conspicuously clear and impressive submissions on behalf of the Respondent.

6. The issues of law in each of these grounds have been the subject of previous consideration at the appellate level.

7. So far as Ground 1 is concerned, there have been a number of rulings of the Employment Appeal Tribunal ("the EAT") on the same point of law, most recently in **Federal Republic of Nigeria v Ogbonna** [2012] ICR 32 ("**Ogbonna**"), and **Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali** [2023] EAT 149; [2024] IRLR 381 ("**Alhayali**"). On each occasion, the EAT held that the effect of section 5 of the SIA is that states have no immunity in relation to claims for personal injury arising from discrimination and harassment relating to the employment of staff in a diplomatic mission, even where the exercise of sovereign authority is involved. However, within the last few months, in the judgment of the Court of Appeal in **Alhayali** [2025] EWCA Civ 1162; [2025] IRLR

918, Bean LJ has taken the contrary view, stating, obiter, that the previous EAT decisions were wrong and that state immunity applies to such cases.

8. In light of the conflict of authority on this issue, and in light of submissions by Mr Sethi KC that special considerations apply to state immunity cases, I will have to consider whether, in reaching a decision on Ground 1, I should follow the decisions of the previous EATs, in accordance with the normal convention (as described by Singh J in **British Gas Trading v Lock and another** [2016] ICR 502 ("**Lock**")) that, where a point of law arises that has already been decided, as part of its ratio decidendi, by an EAT or other court of co-ordinate jurisdiction, the EAT should follow the prior ruling. Mr Sethi KC submits that I should decline to do so in this case because the normal convention does not apply to state immunity cases, or, alternatively, because one of the exceptions to the normal convention applies. The potentially relevant exceptions are that the EAT is satisfied that the decisions of the previous EATs were per incuriam, or were manifestly wrong, or that there are exceptional circumstances why the EAT should not feel bound to follow the previous EAT decisions.

9. As for Ground 2, the question whether section 5 of the SIA applies to psychiatric injury was recently considered and decided by the Court of Appeal, in **Shehabi v Bahrain** [2024] EWCA Civ 1158; [2025] KB 490 ("**Shehabi"**). The Court of Appeal held that section 5 does apply to psychiatric injury. The Supreme Court gave permission for an appeal on this issue. The hearing of the appeal in **Shehabi** before the Supreme Court took place on 26 and 27 November 2025, and the judgment is pending. **Shehabi** was not an employment case.

10. The Appellant accepts that I am bound by the ruling of the Court of Appeal in **Shehabi** and so, if Count 2 arises, I must find in favour of the Respondent on this issue.

11. Several points are worth emphasising at the outset of this judgment.

12. First, though it was the Appellant which brought this appeal, and the Appellant has participated fully in it, this was expressly on the basis that the Appellant did so without prejudice to its contention that it enjoys state immunity in these proceedings. Mr Sethi KC made clear that the Appellant's participation was without prejudice to and was solely in support of the Appellant's contention that it is immune from the jurisdiction of the ET and the EAT in these proceedings.

13. Second, and regardless of the outcome of the appeal before me, it is clear, in my view, that the issue of law in Ground 1 requires consideration and determination at a higher appellate level. In **Ogbonna** and **Alhayali**, respectively, a different conclusion has been reached on this important point of law by two of the most eminent employment lawyers of recent times, namely Underhill P (as he then was) and Bean LJ. The difference of view between them cannot be resolved definitively at the EAT level. It cries out to be resolved by the Court of Appeal itself. Mr Sethi KC acknowledged this at the end of the hearing of this appeal, and made clear that, if his client is unsuccessful, it will seek permission to appeal to the Court of Appeal.

14. Third, and unsurprisingly, the concession on behalf of the Appellant that it must lose on Ground 2 at the EAT level is without prejudice to its contention that the Court of Appeal in **Shehabi** was wrong to have reached the conclusion that it reached on this issue. If, therefore, the Appellant is unsuccessful on Ground 1, so that Ground 2 becomes a live issue, this will be a further reasons why the Appellant will seek leave to appeal to the Court of Appeal, to keep Ground 2 alive until the Supreme Court hands down its decision on the "psychiatric injury" point in the appeal in **Shehabi**.

15. Fourth, it should be emphasised that there can be no basis for criticising the Employment Judge for her decision on Ground 1. Whatever my decision on this Ground may be, the Employment Judge was plainly right to find that she was bound by **Ogbonna**, and the cases that preceded it, to find that the Respondent's claims came within section 5 of the SIA, so that state immunity did not

apply. The PH Judgment was handed down some time before the Court of Appeal gave judgment in **Alhayali**.

16. I will begin by setting out the relevant provisions of the SIA, and by summarising the facts and the procedural history of this case, before going on to deal with the grounds of this appeal.

The relevant provisions of the SIA

17. Section 1 of the SIA provides as follows:

> "**1 General immunity from jurisdiction.**
>
> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

18. The burden of proving that the claim falls within one of the exceptions to the general immunity provided by section 1 lies on a claimant. This must be established on the balance of probabilities as a preliminary issue: **JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry** [1989] Ch 72, pages 193–194 (Kerr LJ) and 252 (Ralph Gibson LJ); **Shehabi**, paragraph 8.

The "employment" exception, and the "exceptions to the exception"

19. Section 4 sets out an exception to state immunity in proceedings relating to a contract of employment. It provides, in relevant part:

> **"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.

> (2) Subject to subsections (3) and (4) below [which have no application to the present case], this section does not apply if—
>
> (a) at the time when the proceedings are brought the individual is a national of the State concerned; or
>
> (b) the State concerned is a party to the European Convention on State Immunity and at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or
>
> (c) the parties to the contract have otherwise agreed in writing."

20. The exception to state immunity in Section 4 is subject to the following qualifications, or exceptions, which are set out in sections 16(1)(a) and (aa) of the SIA (headed "Restriction and extension of immunities and privileges"):

> "…. (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; …

21. Section 17(4A) of the SIA provides:

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

22. Sections 16(1)(a) and (aa) are sometimes referred to as constituting "exceptions to the exception".

23. Section 16(1)(a) and (aa) were substituted for an earlier version of section 16(1)(a) by art.5(2) of the State Immunity Act 1978 (Remedial) Order 2023 (SI 2023/112) ("the Remedial Order"). In **Royal Embassy of Saudi Arabia (Cultural Bureau) v Costantine** [2025] UKSC 9; [2025] ICR 768 ("**Costantine**"), at paragraph 65, the Supreme Court said that this amendment was made in order to bring the SIA into line with the decision of the Supreme Court in **Benkharbouche v Embassy of the Republic of Sudan** [2017] UKSC 62; [2019] AC 777 ("**Benkharbouche**"), which in turn reflects customary international law. In **Benkharbouche**, the Supreme Court had held that the doctrine of state immunity in international law applies only to sovereign acts (the exercise of sovereign authority), not to the private acts of the state concerned (see Supreme Court judgment, paragraph 37).

24. The structure of the "exceptions to the exception" in sections 16(1)(a) and 16(1)(aa) is explicable on the basis that if a person is employed as a diplomatic agent or a consular officer, their employment will inherently involve the exercise of sovereign authority by the state. If a person is employed as a member of a diplomatic mission other than as a diplomatic agent, or as a member of a consular post, other than as a consular officer, then state immunity will apply to claims relating to their contract of employment only if the State entered into the contract of employment in the exercise of sovereign authority, or if the State engaged in the conduct complained of in the exercise of sovereign authority. This is consistent with what was said by Lord Sumption JSC in **Benkharbouche**, at paragraphs 53-58 of the judgment of the Supreme Court.

25. The previous version of section 16(1)(a) provided that section 4 did not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the Diplomatic Privileges Act of 1964, but did not say that this applied only where the exercise of sovereign authority was involved. The scope of the current "exception to the exception" is, therefore, somewhat narrower than before the Remedial Order was made.

26. Paragraph 1 of the Remedial Order deals with commencement. It states, in relevant part:

> "1.—(1) This Order may be cited as the State Immunity Act 1978 (Remedial) Order 2023 and comes into force 21 days after the day on which this Order is made [the Remedial Order was made on 2 February 2023 and so it came into force on 23 February 2023.
>
> ….
>
> (3) This Order applies in relation to proceedings in respect of a cause of action that arose on or after 18 October 2017 (whether those proceedings were initiated before, on or after the day on which this Order is made)."

27. The effect of paragraph 1(3) of the Remedial Order is that the amendments to the SIA, including the amendments to section 16, apply to this case, as the cause of action arose in 2020. However, the judgment following the PH at which the state immunity issues were decided in these proceedings was handed down in January 2023, and so the Remedial Order had not yet been made. Accordingly, the EJ did not (and could not) assess whether the "exceptions to the exceptions" applied by reference to the amended sections 16(1)(a) and 16(1)(aa). However, she took account of the judgment in **Benkharbouche** and applied the same test as was later set out in the new version of section 16(1).

The "personal injury" exception

28. Section 5 of the SIA provides, in relevant part:

> **"5 Personal injuries and damage to property**.
>
> A State is not immune as respects proceedings in respect of—
>
> (a) death or personal injury; ….
>
> caused by an act or omission in the United Kingdom."

29. It will be seen that the relevant part of section 16 does not state that there is an "exception to the exception" for personal injury claims, even in cases where the employment of the individual concerned involves the exercise of sovereign authority. Sections 16(1)(a) and 16(1)(aa) only refer to section 4, not section 5.

The EA10

30. It is not in dispute that, leaving aside issues of state immunity, compensation for acts of discrimination, victimisation and harassment under the EA10 can include compensation for personal injury, including psychiatric injury: see EA10, sections 119(2)(a), 124(2)(b) and 124(6).

The facts and the procedural history of this case

31. The Respondent is a medical doctor. He is a British citizen. He was employed by the Appellant in London from 5 May 2009 until 20 May 2020. He worked at the Kuwaiti Health Office ("the KHO"), which is part of the Appellant's diplomatic mission. The KHO is an international health service which is provided by the Appellant to all Kuwaiti nationals in cases where the Kuwaiti health service cannot provide a specific treatment to a patient. If the Ministry of Health or the Emir of Kuwait gives approval, the patient can travel abroad for treatment. If the treatment is in the UK, it will be arranged and paid for by the KHO. During his time at the KHO, the Respondent worked, successively, as an in-house doctor, who was responsible for arranging for suitable treatment, and as a medical auditor, who was responsible for reviewing invoices that were presented by private UK hospitals for treatment of patients, so as to ensure that they were properly authorised and that the correct fees were charged.

32. By the time that the first national lockdown started, in March 2020, the Respondent was 75 years old, and was suffering from prostate cancer, along with diabetes and hypertension. He remained

at home, in order to shield himself, and wanted to work from there. He was told that he should return to work at the office. On 20 May 2020, the Respondent was sent a dismissal letter, which pointed out that he had reached the compulsory retirement age of 70 sometime previously.

33. By a claim form presented on 28 September 2020, the Respondent brought claims of direct age, sex and disability discrimination, associative disability discrimination, age and disability harassment, discrimination arising from disability contrary to section 15 of the EA10, indirect disability discrimination and harassment. The claims included a claim for personal injury damages, resulting from depression caused by his dismissal. He also claimed unlawful deductions from wages and a failure to pay holiday pay.

34. The PH took place at Central London ET (via CVP) on 13 January 2023, before Employment Judge Brown, sitting alone. The sole issue at the PH was whether the Respondent's claims were barred by state immunity. At that stage, the central issue was described as being whether the Respondent was carrying out functions that were sufficiently close to the governmental functions of the Appellant so that his employment was a sovereign act. It was not suggested that the Respondent was a diplomatic agent or consular officer, and so the key questions were whether the Appellant had entered into the contract of employment with the Respondent in the exercise of sovereign authority, or the Appellant had engaged in the conduct complained of in the exercise of sovereign authority.

35. In a written judgment, entered in the Register and sent to the parties on 24 January 2024, Employment Judge Brown held that, throughout the Respondent's employment, the Respondent's job functions were exercises of sovereign authority. EJ Brown rejected the Appellant's contention that the employment of the Respondent was an act of sovereign authority simply because he was employed by the State to work in the Appellant's diplomatic mission, which carried out government functions. However, EJ Brown found that the Respondent's functions, as a member of the Appellant's administrative staff, were sufficiently close to the governmental functions of the diplomatic mission

to attract state immunity. This meant that, in entering into the contract of employment with the Respondent, the Appellant had acted in the exercise of sovereign authority. Therefore, the exception to state immunity in section 4 of the SIA did not apply. EJ Brown rejected the Respondent's alternative argument that the instruction given to the Respondent to return to work in the office, which was at the heart of his claims, was itself the exercise of sovereign authority.

36. Accordingly, the EJ held, the Appellant had the benefit of state immunity in relation to claims related to the Respondent's contract of employment. As I have said, she came to this conclusion having applied the test laid down in **Benkharbouche**, rather than by applying the revised version of section 16(1) of the SIA, as the Remedial Order was not yet made when she gave judgment. However it is clear that she would have reached the same conclusion, namely that the "exceptions to the exception" in section 4 applied, even if she had applied the test under section 16(1)(aa).

37. It has not been suggested on behalf of the Respondent to this appeal that EJ Brown was wrong in her analysis of the section 4 issue, or that the test in section 16(1)(aa) is not satisfied in respect of the Respondent, so that, subject to the section 5 argument, the Appellant would have state immunity in relation to claims relating to the Respondent's employment.

38. So far as the meaning and effect of section 5 of the SIA was concerned, EJ Brown followed **Ogbonna**, and so held that section 5 meant that there was no state immunity in respect of the Respondent's claim for personal injury, consisting of depression arising from the statutory torts of discrimination and harassment contrary to the EA10, notwithstanding that the claim was in the employment context. She referred to arguments to contrary effect that had been made to her by Mr Sethi KC on behalf of the Appellant, but she concluded that she was bound by **Ogbonna** to find that the personal injury aspects of the claims could proceed. She therefore held that the claims for

personal injury arising from discrimination and harassment could continue, but that the Respondent's other employment claims were barred by state immunity.

39. From the text of the PH Judgment it does not appear that the Appellant contended at the PH that, even if the effect of section 5 is that personal injury claims in the employment field can proceed, this applies only to claims relating to physical injury, not psychiatric injury. This point was, however, taken at the Remedies Hearing.

40. At the end of the PH Judgment, EJ Brown gave directions for the Liability Hearing. This took place on 20-23 November 2023 before a different EJ, EJ Webster, and lay members. As the issue of state immunity had already been determined at the PH, the issue was not revisited at the Liability Hearing. The ET considered only the claims for personal injury arising from the allegations of discrimination and harassment that had been made by the Respondent. The ET's written judgment was entered in the register and sent to the parties on 24 November 2023. The ET upheld some of the Respondent's claims and rejected others. It is not necessary for present purposes to summarise the rulings in the Liability Hearing judgment, save to say that the ET partly upheld the Respondent's claims for direct and indirect discrimination on grounds of disability and age, and for harassment related to disability and age, and the ET upheld the Respondent's claim for discrimination arising out of disability.

41. At the Liability Hearing, the ET did not specifically address the question whether the discrimination and harassment about which the Respondent complained had caused him to suffer personal injury, specifically depression. The causation issue was not specifically addressed at the Liability Hearing but was dealt with at the Remedies hearing, which took place on 7-8 March 2024. The Remedies hearing took place before EJ Webster and one lay member (the other being unavailable). This hearing proceeded on the basis that the only remedy that the Respondent was seeking, or was entitled to, was compensation for psychiatric injury. The ET found that the

Respondent had suffered personal injury, in the form of psychiatric injury, as a result of the unlawful discrimination and harassment in relation to his employment.

42. The written judgment following the Remedies Hearing was entered in the register and sent to the parties on 2 April 2024. The ET awarded the Respondent a total sum of £332,590.76. This consisted of £42,000 for pain, suffering and loss of amenity, with interest at 8% of £12,768, and £169,033.95 for special damages (loss of salary until date of Remedies Judgment), plus interest at 8% of £25,694.18, and an award for future loss of £83,094.64.

43. At the Remedies Hearing, Mr Sethi KC invited the ET to note that the Appellant reserved its position as to any award made by the ET given the forthcoming Court of Appeal hearing in **Shehabi**, which was to consider whether section 5 of the SIA applied to psychiatric injury.

44. On 12 March 2024, the Appellant lodged an Appellant's Notice against the PH judgment and the Liability Judgment. On 8 April 2024, the Appellant lodged an Appellant's Notice against the Remedies Judgment. Each of the appeals relied upon the two grounds that are now relied upon by the Appellant.

45. So far as the PH appeal was concerned, the Appellant's Notice was 370 days out of time. The appeal against the Liability Judgment was 67 days out of time. The appeal against the Remedies Judgment was in time.

46. The Appellant applied for an extension of time for appealing against the PH and Liability Judgments. By order sealed on 31 January 2025, the Registrar refused an extension of time. The Appellant appealed against the refusal and, following an oral hearing on 10 September 2025, this appeal was allowed by John Bowers KC, sitting as a judge of the EAT. Mr Bowers KC said that "The doctrine of state immunity as interpreted in **Costantine** by the Supreme Court required the Registrar to permit extension of time in this case."

47. In the meantime, the appeal against the Remedies Judgment had been found to be arguable and was set down for a full hearing by HHJ Katherine Tucker, sitting as a judge of the EAT. The three appeals were consolidated, but the practical reality is that this is a single appeal against the decision that the relevant claims were not barred by state immunity. The key relevant ET ruling is the PH Judgment.

GROUND 1: WAS THE ET WRONG TO FIND THAT THE EXCEPTION TO STATE IMMUNITY IN SECTION 5 OF THE SIA APPLIES TO PERSONAL INJURY CLAIMS ARISING OUT OF THE EMPLOYMENT OF AN EMPLOYEE BY A STATE AT ITS DIPLOMATIC MISSION WHICH INVOLVED THE EXERCISE OF STATE AUTHORITY?

48. As I have said, this issue has been the subject of a number of prior decisions by the EAT, and, more recently, of obiter dicta of Bean LJ in **Alhayali**. I will first set out those decisions and obiter dicta. I will then summarise the submissions made by the parties, before setting out my conclusions on Ground 1.

The EAT decisions

49. There are three previous EAT judgments in which the EAT has considered whether the exception to state immunity in section 5 of the SIA applies to employment-related personal injury claims brought by persons employed at a diplomatic mission in circumstances that involved the exercise of state authority. In each case, the decision on this issue was part of the ratio decidendi of the case, and, in each case, the EAT held that the answer was that section 5 did apply in such circumstances, and so that the State could not rely upon state immunity. I will deal with the cases in chronological order, though the most important of the cases is **Ogbonna**.

Military Affairs Office of the Embassy of the State of Kuwait v Caramba-Coker (Keith J, sitting with lay members, unreported) 10 April 2003 ("Caramba-Coker")

50. Mr Caramba-Coker was employed in the Military Affairs Office of the State of Kuwait, which was part of the diplomatic mission, as a shipping clerk. He was summarily dismissed on 22 October 1999 and presented claims for wrongful dismissal and race discrimination. The ET found in his favour, and he was awarded £754.64 for wrongful dismissal and £4,000 for race discrimination. The Respondent in that case, the Appellant in this case, did not file a notice of appearance or take part in the ET proceedings. However, an appeal was filed on the ground that the ET had no jurisdiction to deal with Mr Caramba-Coker's complaints because the State had state immunity, under the SIA. At that time, the "exception to the exception" in section 16(a) applied to the employment of any member of a diplomatic mission, regardless of whether or not their employment had any connection to the exercise of state authority.

51. In **Caramba-Coker**, the ET had failed even to consider whether state immunity applied. The EAT said that this would ordinarily have resulted in a remission of the case to the ET to determine the question of state immunity. However, both parties invited the EAT to determine the question of state immunity itself (judgment, paragraph 13), and the EAT went on to consider the question.

52. The EAT allowed the State's appeal against the finding of wrongful dismissal and the consequent award of compensation, on the basis that this was a claim as respects proceedings relating to a contract of employment between the State and an individual for which there was state immunity, by operation of sections 4 and 16(1)(a) of the SIA (judgment, paragraph 25).

53. Mr Caramba-Coker's claim for race discrimination had been presented under section 54 of the Race Relations Act 1976 ("the RRA"), which had similar effect to section 120 of the EA10, in that it provided that a complaint of race discrimination in the employment field is to be presented to an ET. Compensation for personal injury could be claimed for acts of race discrimination under the RRA, just as it can be claimed for acts of discrimination, victimisation and harassment under the EA10.

54. Mr Caramba-Croker claimed that he had suffered physical injury as a result of the treatment that he suffered, consisting of blood pressure problems and a heart condition, and psychiatric injury, consisting of stress, which resulted in loss of sleep and loss of confidence. The EAT accordingly held that his claim was, at least in part, for personal injury, including psychiatric injury (judgment, paragraph 17).

55. In **Caramba-Coker**, the State submitted that section 5 of the SIA has no application, because it does not apply to causes of action in which personal injury is only an incidental consequence. Rather, section 5 only applies to a cause of action in which a personal injury is a direct consequence of the conduct complained of. The EAT rejected this argument, saying that "We see no warrant for putting that gloss on the plain language of section 5." (judgment, paragraph 18). It is clear that the EAT also considered that "personal injury", for the purposes of section 5, encompasses psychiatric injury (paragraph 17).

56. The EAT said that, as the ET had not addressed its mind to the question of state immunity, its conclusions and assessment of compensation had not differentiated between a claim for personal injury arising from race discrimination, which the EAT held would not be covered by state immunity, and a claim for injury to feelings arising from race discrimination, which the EAT held would be covered by state immunity. Accordingly, the EAT remitted the case to the same ET to determine how far Mr Caramba-Coker's claim for compensation for race discrimination amounted to "proceedings in respect of … personal injury" within the meaning of section 5 of the SIA.

57. In my judgment, the EAT's ruling in **Caramba-Coker** that the effect of section 5 of the SIA is that there is no state immunity for personal injury claims for the statutory tort of discrimination, even if they arise in the context of the claimant's employment at a diplomatic mission, was part of the ratio decidendi of the EAT's judgment (and this was the view expressed by Underhill P in

Ogbonna). This was the basis for the decision to remit the case to the ET for further findings as regards the extent to which the race discrimination that Mr Caramba-Coker had suffered had resulted in personal injury rather than in injury to feelings. It is clear, however, that Keith J did not have the benefit of the same amount of detailed argument on this issue as has been advanced before me, and the matter was addressed only briefly in the judgment.

Ogbonna

58. The Claimant, Ms Ogbonna, worked in the Nigerian High Commission. She took some time off to care for her daughter, who was ill. Shortly after her return to work, she was summarily dismissed. The reason given was a staff rationalisation, but Ms Ogbonna claimed "associative" disability discrimination on the basis that the real reason for her dismissal was that she had taken time off. She claimed that her treatment had caused harm to her physical health, as it had led to a recurrence of sciatica, and to her mental health, in that she had developed depression. The Respondent State claimed state immunity under the SIA. The issue of state immunity was dealt with by an ET at a pre-hearing review, and the ET found that the State did not enjoy state immunity because the claim constituted "proceedings…. in respect of personal injury" for the purposes of section 5, SIA. The State appealed against this ruling, and the appeal was heard by Underhill P, sitting alone. Once again, this was before the scope of the "exception to the exception" to state immunity in section 16 was narrowed by the Remedial Order, but nothing rests on this for present purposes.

59. In a reserved judgment, Underhill P held that section 5 did indeed apply, and so the appeal was dismissed.

60. As in **Caramba-Coker**, the main argument advanced on behalf of the State was that, since the claim for personal injury was ancillary to the disability discrimination claim, the exclusion from

immunity under section 5 did not apply. That being so, it was submitted that the effect of section 16(1)(a) of the SIA was that the State had immunity in relation to the claim.

61. Underhill P referred to the **Caramba-Coker** judgment and said the following, at paragraph 7 of his judgment:

> "7 It is perfectly clear from that reasoning taken as a whole that this tribunal in **Caramba-Coker** decided as a matter of ratio (a) that any claim for compensation for personal injury fell within the terms of section 5 notwithstanding that it was consequent on a discrimination claim, and (b) that in this context a claim of mental ill-health caused by the discrimination complained of constituted a claim for "personal injury". The decision would seem therefore on its face clearly to apply to the circumstances of the present case. The judge was right to hold that she was bound by it. I am of course not so bound, and Mr Pipi [counsel for the State] submitted that the section 5 point was only fairly briefly dealt with in Keith J's judgment and that it did not seem that it had been very fully argued. I accept that; but my starting point must nevertheless be, on ordinary principles, that I should not depart from **Caramba-Coker** unless I am satisfied that it was wrong."

62. Counsel for the State relied on five main submissions.

63. The first was that section 5 should be interpreted so as to be in harmony with, and achieve the purpose and rationale of, state immunity under international law. Underhill P said that this did not really assist because, on any view, the general immunity afforded to States by the SIA is made subject to the exceptions provided for in sections 4 and 5 (judgment, paragraph 9).

64. The second submission was that **Caramba-Coker** is not authority for any proposition of law, because the decision of the EAT was simply to remit the case to the ET. Underhill P rejected this argument: the remission took place because the EAT had found that section 5 applies to claims for personal injury, including claims for injury to mental health (paragraph 10).

65. The third submission was that the effect of sections 4 and 16 of the SIA is that a state enjoys absolute immunity in respect of "proceedings relating to a contract of employment", which includes

a claim of infringement of statutory rights. The State relied, in particular upon, section 4(6) of the SIA, which was in broadly similar terms to what is now section 17(4A), save that it did not specifically mention section 16. Underhill P said that he could not accept this submission. He said, at paragraph 12, that:

> "Sections 4 and 5 are separate and freestanding exceptions to the general rule of state immunity provided by section 1: that is so even though on the facts of a particular case, and specifically in a case of a claim for personal injury by an employee, both exceptions might be engaged. Section 16(1)(a) expressly qualifies that exception as regards section 4 but it has no impact on section 5."

66. The fourth argument on behalf of the State was that section 5 does not apply because Ms Ogbonna's claim for personal injury was "ancillary to" her claim for personal injury. Underhill P said that this was the same argument as had been advanced and rejected in **Caramba-Coker**, and so that he should reject it unless he was sure that the submission was right. Underhill P was not sure that the submission was right. He was not sure what "ancillary" means in this context. Underhill P said, at paragraph 13:

> ""Personal injury" is not the name of a discrete wrong or cause of action (indeed Mr Pipi himself made that point in a different context); rather, it is a description of one of the kinds of harm that may be done by a number of different kinds of unlawful act, such as negligence, breach of contract, breach of statutory duty or discrimination. (I note in passing that that is why the heading of section 11 of the Limitation Act 1980 – "Special time limit for actions in respect of personal injuries" - has to be spelt out in the text of the section as "any action for damages for . . . [various specified wrongs] . . . where the damages claimed . . . consist of or include damages in respect of personal injuries . . .".) I accept that in a discrimination claim personal injury is not a necessary - or even, it may be, a particularly typical - part of the claim: the most typical consequences of acts of unlawful discrimination are injury to feelings and/or pecuniary loss. But I do not see why, when personal injury occurs, it is to be regarded as "ancillary", rather than simply being the form, or one of the forms, which the loss caused by the discrimination has taken in that particular case."

67. The fifth argument advanced on behalf of the State was that, whatever its meaning might be in domestic law, the phrase "personal injury" in section 5 of the SIA should be interpreted as it would be understood in international law, and that as a matter of international law a claim for compensation for harm to a person's mental health would be regarded as a claim for personal injuries if, but only if, it was consequent on a physical injury in the sense of some damage to the body as opposed to the mind. This was, therefore, an argument to the effect that even if, contrary to the State's primary case, the "personal injury" exception in section 5 applied in general to claims arising out of the employment by a State of Embassy-based employees, it did not apply in Ms Ogbonna's case, because section 5 does not apply to claims where the personal injury was psychiatric, rather than physical. Underhill P rejected this submission also, having looked at the international materials. This is the point of law in Ground 2, which was considered and determined by the Court of Appeal in **Shehabi**, and which has been the subject of a further appeal to the Supreme Court. The parties are agreed that I am bound by the Court of Appeal's ruling in **Shehabi**, and so it is not necessary for me to set out Underhill's reasoning on this issue in **Ogbonna**. It is worth noting, however, that at paragraph 15 of his judgment, Underhill P said that he had no difficulty with the proposition that the SIA generally, and section 5, in particular, should be construed so far as possible to conform to any recognised international norm.

Alhayali in the EAT

68. Ms Alhayali was employed by the Respondent State between January 2013 and January 2018 in its Academic and Cultural Affairs department. She made claims against the State in the ET. These included claims for discrimination on the grounds of religion and belief, and disability, harassment related to sex and religion, and victimisation. The State's solicitors accepted that the ET had jurisdiction over these claims, and Ms Alhayali withdrew various other claims, including claims for

unfair dismissal and breach of contract. At a later date, the State applied for the forthcoming hearing of Ms Alhayali's claims to be vacated, stating that the State was now asserting state immunity.

69. The judge who dealt with the ET hearing in **Alhayali** was EJ Brown, the same judge who dealt with the PH in the present case. The first question for the ET in **Alhayali** was whether it was too late for the State to assert state immunity in respect of the discrimination, harassment, and victimisation claims. That is not an issue that arises in the present case. The ET found that, through its solicitor's actions, Saudi Arabia had waived its right to claim state immunity.

70. The ET also decided, however, that, in any event, the State was not entitled to state immunity. The ET held that Ms Alhayali's contract of employment did not involve the exercise of state authority, and so the "exceptions to the exception" in section 16 did not apply. The ET held, therefore, that the exception to state immunity for employment-related claims in section 4 applied (the section 16 issue). The ET further held that, even if Saudi Arabia had been entitled to claim state immunity in relation to employment claims in general, section 5 of the SIA meant that there was no state immunity in respect of Ms Alhayali's claims that discrimination, harassment and victimisation by the State in relation to her employment had caused her psychiatric injury, this being a claim for personal injury (the section 5 issue).

71. Saudi Arabia appealed to the EAT, and the appeal was heard by Bourne J, sitting alone. Bourne J gave a reserved judgment. The first issue for the EAT was whether it was now too late for the State to rely upon state immunity in relation to the claims that the State's solicitors had previously conceded could proceed. The EAT held that the ET had erred in law in this respect, because it had given no weight to the certificate or unsigned statement of a witness on behalf of the State to the effect that no authority had been given to the State's solicitors to waive immunity (judgment, paragraph 76). Bourne J said that he would hear further argument on whether the case would have to

be remitted to the ET for further evidence/argument on the question whether the State had waived state immunity. In the event, the decision was made to remit the issue as to whether Saudi Arabia had submitted to the jurisdiction to a freshly constituted ET for redetermination (see Court of Appeal judgment, para 9a).

72. The EAT went on to consider the section 16 and section 5 issues. The EAT found that, on the basis of the findings of fact made by the ET, and given the nature of Ms Alhayali's work, she had been employed under the contract as a member of a diplomatic mission (other than a diplomatic agent) and the State had entered into the contract in the exercise of sovereign authority. The EAT held that the ET had erred in law in finding otherwise. Accordingly, Bourne J held that section 4 of the SIA was excluded by section 16(1)(aa), and so the State was immune as respects proceedings relating to the contract of employment between the State and Ms Alhayali (judgment, paras 98-100).

73. Bourne J then went on to consider the section 5 issue. Ms Alhayali's case before the ET had been that, even if sovereign immunity would otherwise apply to the claim, it was disapplied by section 5, because her claim was a claim for personal injury and for this purpose a personal injury claim includes a claim for psychiatric injury. The EJ had accepted these submissions, considering herself bound by **Ogbonna** to do so. At the EAT, the State relied upon the same two grounds are as relied upon by the Appellant in the present appeal. First, the state submitted that, on a proper construction of sections 4 and 5, together with section 16, immunity applied to this claim in spite of its personal injury element, because it was a claim that was related to Ms Alhayali's contract of employment. It was argued by counsel for the State that Parliament cannot have intended section 5 to mean that a claimant in employment law proceedings such as a discrimination claim, who would normally be met with a defence of sovereign immunity, could sidestep immunity purely by pleading personal injury as a head of loss. Second, and in the alternative, it was argued that section 5 does not remove state immunity where the claim is for psychiatric injury, rather than physical injury (see paras 101 and 104-105).

74. Counsel for the State invited Bourne J to depart from **Ogbonna**, on the basis that it was wrongly decided because of a failure to take sufficient account of international law and/or because some relevant international law materials were not cited. As a result, it was argued, the EAT should depart from **Ogbonna** either because it was per incuriam, or it was manifestly wrong, or there were "other exceptional circumstances" (see **Lock**, dealt with below).

75. Bourne J rejected these submissions. He examined the international materials relied upon by the State and said that there was a lack of material to demonstrate a consensus in international law that the "territorial tort" exception to immunity should not apply an employment dispute involving a member of a diplomatic mission, where that dispute involved a personal injury claim. The State had submitted that the "personal injury" exception to state immunity had originally been intended to cover the negligent use of motor vehicles by state officials. See judgment, paragraphs 119-127.

76. Bourne J said that all the indications in the SIA itself are that Parliament did not intend to provide in section 16 that that the exception in section 5 should not apply to a personal injury claim by an embassy official. Bourne J said:

> "Section 16 makes an express carve-out from section 4 but makes no express carve-out from section 5 , although it could have done so. The armed forces exception was expressly provided for by section 16(2), but there is no such equivalent for a claim by an embassy employee."

77. Bourne J agreed with the construction of the relevant sections adopted by Underhill P in **Ogbonna**, and with **Caramba-Coker**. He said that the State did not come close to surmounting the **Lock** test (paragraph 129).

78. So far as the argument that section 5 does not apply to psychiatric injury was concerned, Bourne J again agreed with Underhill P in **Ogbonna** that section 5 does apply to psychiatric injury (paragraphs 130-139).

79. Bourne J granted permission to appeal on the waiver, section 16, and section 5 issues.

80. In my judgment, the finding of the EAT in **Alhayali** on the section 5 issue was part of the ratio decidendi in the case. Bourne J heard full argument and gave a reasoned decision on the issue. As he had found that Saudi Arabia enjoyed state immunity in relation to claims arising from the contract of employment, as a result of section 16(1)(aa), the question whether the State nonetheless enjoyed state immunity for personal injury claims in the employment context because of section 5 was a live issue. It is true that the EAT remitted the issue of whether Saudi Arabia had waived state immunity to a different ET, but in my view this does not mean that the ruling on section 5 was not part of the ratio. I should add that, even if I am wrong about this, the position will still be that there are two previous EAT rulings which have held that section 5 applies to personal injury claims arising out of employment.

Alhayali in the Court of Appeal

81. The appeal to the Court of Appeal in **Alhayali** was heard by the President of the Family Division (Sir Andrew Macfarlane), Bean and Coulson LJJ. The main judgment was given by Bean LJ.

82. The Court of Appeal allowed Ms Alhayali's appeal on the section 16 issue. Bean LJ said that he was entirely satisfied that EJ Brown had applied the correct test in accordance with the guidance given by Lord Sumption in **Benkharbouche**. She was entitled to find that there had been no exercise of sovereign authority in the employment of Ms Alhayali by the State, and so that the "exceptions to the exception" in section 16 did not apply. In contrast, the Court of Appeal held that Bourne J had

applied the wrong test (judgment, paragraph 23). Bean LJ held that the evaluative judgment reached by EJ Brown on the section 16 issue involved no error of law (paragraph 28). The other members of the Court of Appeal agreed with Bean LJ. Accordingly, the Court allowed the appeal and restored the decision of the ET that the State did not have state immunity by virtue of section 4 and section 16.

83. In light of the Court's finding on the section 4 issue, the claim for state immunity in relation to Ms Alhayali's claims for discrimination, harassment and victimisation failed, regardless of the answer to the question whether section 5 applied. Bean LJ said, at paragraph 29:

> "29. That makes it strictly unnecessary to deal with the other two issues, but I will nevertheless refer to them briefly, and express my view on the first of them [i.e. the section 5 issue]."

It follows that the views expressed by Bean LJ on the section 5 issue were obiter dicta.

84. As regards the section 5 issue, Bean LJ said:

> **"The s 5 issue: was this a personal injury claim to which state immunity does not apply?**
>
> 30. In **Federal Republic of Nigeria v Ogbonna** [2012] 1 WLR 139 , Ms Ogbonna, who was employed as a member of a diplomatic mission, brought a claim for associative disability discrimination in respect of her dismissal, which she said had occurred because she sought time off to look after her sick daughter. She claimed to have suffered both physical and mental injuries as a consequence. The employer claimed state immunity, arguing that s 16(1)(a) of the 1978 Act prevented her from relying on s 4 to bring an employment claim, and that she could not rely on s 5 , either (i) because s 16(1)(a) applied state immunity in respect of all employment claims by members of diplomatic missions regardless of s 5, or (ii) because s 5 applies only to a claim for damages for physical injury and not to harm to mental health unless it was consequent on a physical injury.
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> 31. In the ET, the employer's claim to state immunity was dismissed by EJ Walker. On appeal to the EAT, this decision was upheld by the President, Underhill J (as he then was). He held that ss 4 and 5 of the Act were separate and free-standing exceptions to the general rule of state immunity even where, on a claim for personal injury by an

> employee, both exceptions might be engaged. He also held that the phrase "personal injury" in s 5 bore its normal meaning in domestic law so as to cover cases of psychiatric as well as physical injury.
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> 32. The second of these two issues appears to have been the main focus of the submissions in **Ogbonna** . Underhill J's ruling to that effect has recently been shown to be correct by the decision of this court (Lady Carr CJ, Males and Warby LJJ) in **Shehabi v Kingdom of Bahrain** [2025] 2 WLR 467; [2024] EWCA Civ 115. The claimants alleged that employees of the defendant state while located abroad had caused spyware to be installed remotely on the claimant's computers located in the UK, which had caused the claimants psychiatric injury when they discovered that the defendant had been spying on them in that way. The court held that a standalone psychiatric injury was a personal injury within the meaning of s 5 of the 1978 Act. **Ogbonna** was cited and approved on this issue: see paragraphs [96]-[107] of the judgment of Males LJ. Ms Darwin accepted that Shehabi resolves this issue authoritatively at the level of this court.
>
> 33. However, **Shehabi** was not an employment case and tells us nothing about the interaction of ss 4 and 5. There is no authority at the level of this court deciding whether **Ogbonna** was correct on the first issue. Although it is not necessary to determine the point, I consider that on the first issue **Ogbonna** is wrong. It would be very peculiar if an employee of an embassy, perhaps a very senior diplomatic agent, could be precluded from bringing any employment claim by virtue of ss 4 and 16, including a claim for compensation for discrimination, with the exception that if the discrimination caused psychiatric injury that element of the claim could not be defeated by state immunity. That would drive a coach and horses through the careful scheme of exceptions created under ss 4 and 16.
>
> 34. The exception created by s 5 is in my view linked to the cause of action, not the nature of the damage. If a chandelier at an embassy in London drops from the ceiling and causes injury to the person standing beneath it, there is no obvious rationale for conferring immunity on the state occupying the premises, whether the injured person is a diplomatic agent, a member of the technical and administrative staff, a member of the domestic staff, or simply a visitor to the premises. That would apply whether the injury caused was physical, psychiatric or both. But a claim by an employee that her employer had discriminated against her and thereby caused her harm of various kinds including psychiatric injury falls squarely within the scheme of ss 4 and 16."

85. So far as the waiver issue was concerned, Bean LJ noted that it was now unnecessary to reach a decision, as a claim of state immunity would have failed in any event. However, he expressed concern that a claimant could be led on for years and could incur substantial costs in litigation, only to be told that solicitors who had apparently submitted to the jurisdiction on behalf of the respondent

State had no authority to do so (paragraph 46). This might require reconsideration of an earlier Court of Appeal decision, **Republic of Yemen v Aziz** [2005] ICR 1391.

86. Coulson LJ agreed that, for the reasons given by Bean LJ, Ms Alhayali's appeal should be allowed (paragraph 48). In my judgment, this is a reference to the reasons given by Bean LJ on the section 16 issue. Coulson LJ also expressed the view, in relation the waiver issue, that the decision in **Aziz** may need reconsideration. Coulson LJ did not expressly adopt the obiter dicta of Bean LJ in relation to the section 5 issue.

87. The President of the Family Division did not say anything specifically about the section 5 issue, though he said that he shared the concerns of his fellow judges about **Aziz**. He said, at paragraph 49 that "I am also in agreement with the judgment of Lord Justice Bean…." In my view, the word "also" signifies that, as with Coulson LJ, he agrees with the conclusion reached on the section 16 issue.

88. It follows that, in my view, the obiter dicta of Bean LJ in relation to the section 5 issue were not expressly adopted either by Coulson LJ or by the President of the Family Division This may not matter very much, however. The fact remains that, in a recent judgment, a member of the Court of Appeal, who is an eminent employment law specialist, has expressed the view, unequivocally, that the interpretation placed on section 5 in **Ogbonna** is wrong.

The parties' submissions

89. I now come to the parties' submissions.

The submissions on behalf of the Appellant

90. On behalf of the Appellant, Mr Sethi KC's primary submission was that I am not obliged to follow the rulings of the previous EATs that had considered the point of law in Ground 1, as the principles set out in **Lock** do not apply to this appeal, because this case is concerned with the principle of state immunity. This is a mandatory rule of customary international law which delineates the limits of the jurisdiction of State courts. It is a fundamental principle of the international legal order. It is for this reason that domestic courts, including ETs and the EAT, have a positive duty to inquire into and resolve state immunity issues. See **Costantine** at paragraphs 36-45, per Lord Lloyd-Jones JSC. It is also for this reason that the normal rules of procedure, such the rules relating to the admission of fresh evidence on appeal, do not apply in state immunity cases: **Egypt v Gamal-Eldin** [1996] ICR 13 (EAT), at paragraph 46.

91. Mr Sethi KC submitted that, in a similar fashion, the principles set out in **Lock** do not apply in relation to points of law concerning state immunity. I should not, therefore, feel constrained by **Ogbonna** and the other EAT judgments on the section 5 issue to decide it in a particular way. I must decide the issue for myself.

92. In the alternative, Mr Sethi KC submitted that, even if I consider that the principles in **Lock** apply to this appeal, I should decline to follow **Ogbonna** and the other EAT cases because either there is an exceptional reason to decline to follow those rulings, or because those rulings were reached *per incuriam*, or because the conclusions reached by Underhill P in **Ogbonna**, by Keith J in **Caramba-Coker,** by and Bourne J in **Alhayali**, were "manifestly wrong". These are the circumstances in which, in **Lock**, Singh J said that EATs should not feel obliged to follow previous rulings of another EAT on the same point of law.

93. Mr Sethi KC submitted that, if I am not obliged to follow **Ogbonna** and the other EAT cases, I should find that section 5 does not prevent state immunity from applying to employment claims by

those who are employed in diplomatic missions where state authority is involved, simply because their employment claims seek compensation for personal injury.

94. As for the "per incuriam" argument, Mr Sethi KC submitted that the arguments that he advanced before me had not been advanced, or had not been advanced in the same depth, in the previous EAT cases.

95. As for the "exceptional reason" argument, Mr Sethi KC said that the fact that the issue of law related to state immunity was an exceptional reason why the EAT should not consider itself bound by the decisions of earlier EATs. This was essentially the same argument as was advanced in support of the proposition that the principles set out in **Lock** do not apply at all to state immunity cases.

96. So far as the "manifestly wrong" argument is concerned, Mr Sethi KC submitted that the fundamental error in the previous EAT cases was that they looked at the issue as a matter of domestic statutory interpretation, when they should have focused on the international law context. If they had done so, the EATs would have concluded that section 5 does not apply to personal injury claims in the employment context. Adding a head of loss for personal injury to a pleaded ET claim did not transform inherently sovereign acts into private non-sovereign acts.

97. Mr Sethi KC submitted that there were several reasons why **Ogbonna** and the other EAT cases were, manifestly, wrongly decided. He made three main submissions.

98. First, Mr Sethi KC said that it is clear that the SIA was enacted to give effect to customary international law. That is why it was amended after the Supreme Court in **Benkharbourche** identified respects in which the previous version of the SIA differed from customary international law. Mr Sethi KC referred to **General Dynamics v Libya** [2021] UKSC 22; [2022] AC 318 ("**General Dynamics**"), at paragraph 39, in which Lord Lloyd-Jones JSC, with whom Lord Burrows JSC agreed, said that the meaning of each provision of the SIA is to be decided having regard to the

ordinary meaning of the provision, its purpose, and legal context, including considerations of international law and comity. A purposive construction of the SIA should facilitate, not obstruct, the restrictive doctrine of state immunity, and promote international comity (**General Dynamics**, at paragraph 133, per Lord Stephens JSC, with whom Lord Briggs JSC agreed). Mr Sethi KC said, therefore, that UK legislation should be interpreted in a manner consistent with the UK's international obligations, and against the background of generally recognised principles of public international law.

99. Mr Sethi KC submitted that it is clear as a matter of customary international law that state immunity applies in relation to claims by employees against a State arising out of contracts of employment in circumstances where the exercise of state authority is involved, and this is so even where employee has suffered personal injury as a result of the breach of his or her employment-related rights.

100. Mr Sethi KC submitted that guidance on the scope of state immunity in customary international law can be obtained from the provisions of the European Convention on State Immunity ("ECSI", also known as the Basle Convention), which the United Kingdom signed in 1972 and ratified in 1979, from the Explanatory Report to ECSI, and from a further international treaty, which the UK has signed but not ratified, the United Nations Convention on Jurisdictional Immunities of States and their Property (2004) ("UNCSI"). UNCSI is not yet in force because it has 24 parties and requires 30 parties to enter into force. Mr Sethi KC said that the higher appellate courts have made clear that ECSI has a particular significance for the interpretation of the SIA, because the SIA was intended to give broad effect to ECSI, even if the language of the SIA is not identical to the language of the equivalent Articles of ECSI, and so the SIA should be interpreted in conformity with ECSI unless it is clear that Parliament has chosen intentionally to depart from it. see e.g. **Shehabi** at paragraphs 62-63. Mr Sethi KC said that domestic courts should go further and make use of the Explanatory Report, as it was drafted by the committee of experts who drafted ECSI, and whilst not

purporting to provide an authoritative interpretation of the text, the Explanatory Report was intended to facilitate ECSI's implementation. Mr Sethi KC said that courts should also, when interpreting the SIA, refer to UNCSI because, in **Jones v Ministry of the Interior of the Kingdom of Saudi Arabia** [2007] 1 AC 270 at paragraph 26, Lord Bingham described UNCSI as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases", although Mr Sethi KC acknowledged that, while some parts of UNCSI have been treated as reflecting customary international law (see **Benkharbouche** at paragraphs 25-29), others have not (see, for example, **Benkharbouche** at 62-63 and 72).

101. Mr Sethi KC said that it was clear from ECSI, Articles 5, 11 and 32, and UNCSI, Art 11(1) that, in accordance with customary international law, state immunity should apply to all employment-related claims by employees who were employed by the foreign State to work in another State as diplomatic agent or consular officer, or 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) in circumstances in which the State entered into the contract in the exercise of sovereign authority, or the State engaged in the conduct complained of in the exercise of sovereign authority. Mr Sethi KC said that this was also borne out by the statement of Lord Sumption JSC in **Benkharbouche**, at paragraph 53**,** that:

> "As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune."

He submitted that the addition of a head of loss for personal injury to any pleaded ET claim cannot and does not, transform inherently sovereign acts into private, non-sovereign matters.

102. Mr Sethi KC submitted that there is nothing to suggest that, in enacting the SIA, and in making the Remedial Order, Parliament had intended to do anything other than to implement customary international law into domestic legislation. He acknowledged that the position had not been made as

clear as it might have been in sections 4, 5 and 16. It would have been better if the Remedial Order (or section 16 in its original form) had stated expressly that the exceptions set out in section 16(1)(a) and (following the Remedial Order) in section 16(1)(aa), applied not just to section 4 but also to section 5. Nevertheless, he submitted, there is no difficulty in interpreting the SIA in accordance with customary international law, either by reading section 5 so that it does not apply to employment claims that are covered by the exceptions in section 16(1)(a) or 16(1)(aa), or by reading into the exclusions in sections 16(1)(a) and (aa) a reference to section 5 as well as to section 4.

103. Mr Sethi KC said that this line of argument did not appear to have been advanced in **Ogbonna**.

104. Secondly, Mr Sethi submitted that the interpretation adopted by the EAT in the three EAT judgments, and applied by the ET in this case, would lead to an absurd consequence. This is that the ET would have jurisdiction in an employment dispute between a senior diplomatic agent, even an ambassador, and their sending State, even in respect of matters that would otherwise obviously be sovereign matters, simply because part of the agent's claim asserted a head of loss seeking damages for personal injury. In **Benkharbouche**, at paragraph 55, Lord Sumption JSC had said that the functions of diplomatic agents are "inherently governmental. They are exercises of sovereign authority." Mr Sethi KC said that Parliament cannot conceivably have intended to confer jurisdiction over exercises of sovereign authority in this manner.

105. Mr Sethi KC said that the purpose of section 4 is to make clear that state immunity does not attach to employment in the local labour market, that is, where the contract was made in the United Kingdom or the work fell to be performed there (**Benkharbouche**, at paragraph 64) – subject to exceptions concerned with the employee's connections by nationality or residence with the foreign State or the forum State, none of which are relevant to this appeal.

106. Mr Sethi KC submitted that section 17(4A) of the SIA makes clear that section 4 applies not just to contract claims, such as wrongful dismissal claims, but also to statutory claims, such as holiday pay claims, TUPE claims or redundancy claims, and discrimination and victimisation claims.

107. Third, Mr Sethi KC submitted that Bean LJ's views on this issue as expressed in his judgment in **Alhayali** are correct, and that I should follow them.

108. Mr Sethi pointed out that the EJ who decided the section 5 issue in the present case, EJ Brown, changed her mind in a subsequent case in light of Bean LJ's judgment in **Alhayali**.

109. The subsequent case is **Alaeddine and Rfaieh v The Government of the State of Kuwait and others** (2204383 and 2206357, decided on 29 October 2025). EJ Brown said the following, at paragraphs 102-104 of her judgment:

> "102. I agreed with the Respondents that the judgment of Bean LJ in the Court of Appeal in **Alhayali**, with whom the other judges agreed, has provided persuasive authority that, if an employment claim is subject to state immunity by virtue of ss4 and 16, the Claimant cannot rely on s5 as an alternative ground on which to exclude immunity on the basis that the claim includes damages for personal injury.
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> 103. The Court of Appeal heard full argument on the s5 personal injury exception. It carefully considered and clearly disagreed with, and disapproved of, the EAT's decision in **Nigeria v Ogbonna**.
>
> 104. I considered that I should follow the reasoning of the Court of Appeal in **Alhayali**. The Second Claimant's personal injury claim arises out of a cause of action which is barred by state immunity under ss4 and 16 SIA. It is not a freestanding personal injury claim. It would be contrary to the scheme of the SIA to resurrect the same cause of action because a different type of damage arises out of it."

110. Mr Sethi KC submitted that, if I agreed that the EAT decisions were manifestly wrong, I should decline to follow them and should allow the appeal on Ground 1.

The submissions on behalf of the Respondent

111. On behalf of the Respondent, Mr Platts-Mills submitted that this case is on all fours with **Ogbonna**, and so that I should find that section 5 SIA 1978 applies. He said that it cannot sensibly be said that the previous decisions of the EAT in **Ogbonna** and **Alhayali** are "manifestly wrong" and so, applying **Lock**, they should be followed in this case. Broadly the same arguments as have been advanced in this case were advanced in those cases. Mr Platts-Mills said that the approach to the interpretation of the SIA that was taken by Underhill LJ in **Ogbonna** was consistent with the guidance on the interpretation of the SIA that was subsequently given by Males LJ in **Shehabi** (see below).

112. Mr Platts-Mills said that section 5 of the SIA is expressed in plain and straightforward language: it makes clear that claims for personal injury are not covered by state immunity, and that it is not possible to interpret the SIA in any other way. It is clear that section 5 applies to acts in the exercise of sovereign authority. The words of section 16(1)(a) and (aa) are equally plain: they do not make "exceptions to the exception" in relation to section 5 personal injury claims. He said that the Appellant is inviting me to rewrite the statutory scheme, and that it would be wrong for me to do that. There is no basis for inferring that the intention of section 5 of the SIA was to provide that state immunity should not apply to road traffic accidents.

113. Moreover, as the wording of the relevant provisions is clear and unambiguous, and do not lead to absurdity, there is no scope for relying upon secondary materials, such as ECSI, the Explanatory Report to ECSI, and UNCSI. In **Shehabi**, Males LJ said that it is not the case that the purpose (or even a purpose) of the SIA was to implement ECSI into domestic law (see **Shehabi**, paragraphs 62-63).

114. In addition, Mr Platts-Mills said that section 16(1) of the SIA, which applies to section 4 but not to section 5, can be contrasted with section 16(2), which applies to the whole of Part 1 of the Act, and so applies both to section 4 and to section 5.

115. Mr Platts-Mills further submitted that the Appellant gains no support from **Benkharbouche**, because the issue of the scope of section 5 of the SIA did not arise for consideration in that case.

116. Mr Platts-Mills submitted that that I am not bound by the obiter dicta of Bean LJ in **Alhayali** and that, with respect, Bean LJ was wrong. In particular, he submitted, Bean LJ was wrong to say that section 5 is linked to the cause of action, not the type of damage. It is clear that section 5 applies to statutory torts as well as to common law torts.

117. Mr Platts-Mills said that no absurdity results from the interpretation of section 5 adopted in **Ogbonna**. A balance has to be struck between proceedings that attract state immunity and those that do not, and section 5 strikes that balance.

Discussion

118. In my judgment, there are three questions I must potentially consider.

119. The first is whether I am bound by the principle of *stare decisis* to follow the reasoning expressed on this issue in **Alhayali** by Bean LJ.

120. The second question is whether, if not, I should follow the normal convention, as identified in **Lock**, and should treat myself as bound to follow the decisions of the three earlier EAT rulings on this issue, or whether, as Mr Sethi KC submitted, I am not so bound because the approach as set out in **Lock** does not apply to state immunity cases, or because I need not follow the earlier EAT cases as their decisions were reached, per incuriam, were manifestly wrong, or there are other exceptional reasons why I need not follow them.

121. Third, if I am not bound either by the views of Bean LJ, or the rulings in the earlier EAT cases, then I will have to go on to decide for myself whether the exception to state immunity in section 5 of the SIA applies in these circumstances.

(1) Is the EAT bound by the doctrine of precedent to follow the obiter dicta of a judge of the Court of Appeal

122. It is a trite observation to say that the EAT is bound by rulings of the Court of Appeal on a point of law, if the ruling is part of the *ratio decidendi* of the Court of Appeal judgment (i.e., necessary for the decision in the case). However, as with the High Court, the EAT is not bound by obiter dicta of judges of the Court of Appeal (i.e. statements of legal principle which were not necessary for the decision in the case), though they will be accorded great respect, and may have persuasive force. The Appellant has not suggested otherwise.

123. There is no doubt that the observations of Bean LJ on the section 5 point in **Alhayali** were not part of the ratio decidendi of the case: they were obiter dicta. This was acknowledged by Bean LJ himself.

124. It follows that I am not bound by the principle of *stare decisis* (the doctrine of precedent) to follow the view expressed by Bean LJ about the meaning and effect of section 5 in claims arising out of the employment by a State of employees at a diplomatic mission, where their employment involves the exercise of sovereign authority by the State. However, the fact that a view has been firmly expressed on a point of law by a Court of Appeal judge in a recent judgment, which differs from rulings on the same point that have been made by the EAT, may have an impact on the question whether it is appropriate for me to follow the normal convention that the EAT will not depart from prior EAT rulings on the same point. It may mean that there are grounds for the conclusion that the rulings of the EAT were manifestly wrong, but it does not inevitably mean that this is so.

125. I should add that it follows, with respect, that I do not agree with EJ Brown's conclusion in the **Alaeddine and Rfaieh** case, that she should follow the obiter dicta of Bean LJ in **Alhayali**, in preference to the rulings of the EAT in **Ogbonna** and the other two cases. An ET is, of course, bound by the ruling of an EAT on a point of law, if the EAT's ruling is part of the *ratio decidendi*. Even if the ET has doubts about the EAT's ruling, in light of views subsequently expressed, obiter, by the Court of Appeal (or even the Supreme Court), it is not for the ET to depart from the binding ruling of the EAT. The appropriate course of action in such cases is to express doubts about the EAT's ruling, and to leave the issue to be addressed by the EAT or the Court of Appeal, if the losing party chooses to appeal. It is right, as EJ Brown said, that obiter dicta of the Court of Appeal have "persuasive authority". If the obiter dicta relate to a point of law for which there is no binding appellate authority, then an ET will, no doubt, normally follow the obiter dicta. But obiter dicta of a higher appellate court do not override a binding ruling of a lower appellate court. I should emphasise, however, that I am not dealing with an appeal in the **Alaeddine and Rfaieh** case.

(2) The approach of the EAT to prior decisions of the EAT on the same point of law

126. The leading authority on this issue is the judgment of Singh J in **Lock**. The case was concerned with the question whether regulation 16(1) of the Working Time Regulations 1998 required that calculation of holiday pay should include an element for commission. Following a reference to the Court of Justice of the European Union, the CJEU had held that Article 7 of the Working Time Directive (Directive 2003/88/EC), which regulation 16(1) (as amended) had been introduced to implement, required that holiday pay include an element for commission. The remaining question was whether it was possible to construe regulation 16 so as to conform with Article 7 of the Directive. In the case of **Bear Scotland Ltd v Fulton** [2015] ICR 221 ("**Bear Scotland**"), the EAT had held that it was possible to do this. Before Singh J, British Gas Trading submitted that Bear Scotland was distinguishable or, alternatively, was wrongly decided.

127. Singh J held that **Bear Scotland** was not distinguishable. He held that, whilst not binding on other EATs, the judgments of EATs were of persuasive authority and should normally be followed, unless certain exceptions applied. He held that none of those exceptions applied in relation to the **Bear Scotland** judgment, and so Singh J followed it.

128. Singh J provided the following guidance about the circumstances in which the EAT should follow the conclusions of a previous EAT which dealt with the same point of law:

> **"The relevance of previous decisions of this appeal tribunal**
>
> 72. **In Secretary of State for Trade and Industry v Cook** [1997] ICR 288 this appeal tribunal said, at p 292:
>
> "The appeal tribunal is not bound by its previous decisions, although they will only be departed from in exceptional circumstances, or where there are previous inconsistent decisions."
>
> 73. It seems to me that one logical extension of that last situation is where there are conflicting decisions, not of this appeal tribunal itself, but of this appeal tribunal and other courts or tribunals. This can readily be seen to be analogous to the situation where there are inconsistent decisions of this appeal tribunal itself, at least where there is said to be an inconsistent decision of a court of co-ordinate jurisdiction to this appeal tribunal. That seems to me to have been the position in **Timothy James Consulting Ltd v Wilton** [2015] ICR 764, which was a decision of mine: see paras 61–90, which concerned the issue of whether an award of compensation for injury to feelings in a discrimination case is liable to income tax. I held that it was not. I preferred the reasoning of this appeal tribunal in **Orthet Ltd v Vince-Cain** [2005] ICR 374 to that in the decision of the First-tier Tribunal (Tax Chamber) in **Moorthy v Revenue and Customs Comrs** [2014] UKFTT 834 (TC) . It was argued before me that the decision of this appeal tribunal in **Orthet** was wrong and should not be followed because it was inconsistent with an earlier decision of the High Court in **Horner v Hasted** [1995] STC 766, which had not been cited in **Orthet**. I note in passing that, since the hearing in the present appeal took place before me, the decision of the First-tier Tribunal in **Moorthy** has been upheld by the Upper Tribunal (Tax and Chancery Chamber) [2016] UKUT 13 (TCC) , which came to the conclusion that **Horner v Hasted** should be preferred to the decisions of this appeal tribunal in **Orthet** and **Timothy James**, which should not be followed. Be that as it may, that does not affect the underlying principles which are material for present purposes.

> 74. Further guidance is to be found in **Inland Revenue Comrs v Ainsworth** (unreported) 4 February 2004, a decision of Burton J (President), sitting with lay members. At para 9 of the judgment Burton J observed that counsel for the revenue did not put forward any case that the earlier decision in **Kigass Aero Components Ltd v Brown** [2002] ICR 697 was either "manifestly wrong" or per incuriam. Rather counsel simply (i) invited this appeal tribunal to reconsider the same scenario and come to a different conclusion; and (ii) submitted that he had different arguments, not apparently run in **Kigass**, which might persuade this tribunal where different or similar arguments failed to persuade a differently constituted tribunal two years earlier. As Burton J made clear at paras 15–16 of the judgment, the appeal tribunal was not prepared to accede to that invitation. Rather he said, at para 16:
>
> "It appears to us quite plain that it would be quite inappropriate for there to be … further consideration by an Employment Appeal Tribunal of this case at this level. Even if we might be persuaded that there are arguments, and we plainly are persuaded, on both sides, this would be a re-argument, contrary to our practice, of a persuasive recent decision of the Employment Appeal Tribunal, and possibly of three such recent decisions. If **Kigass** is to be changed, it must, in our judgment, be done by the Court of Appeal …"
>
> 75. In the light of the authorities to which I have referred it may be helpful if I summarise the applicable principles when this appeal tribunal is invited to depart from an earlier decision of its own. Although this appeal tribunal is not bound by its own previous decisions, they are of persuasive authority. It will accord them respect and will generally follow them. The established exceptions to this are as follows:
>
> (1) where the earlier decision was per incuriam, in other words where a relevant legislative provision or binding decision of the courts was not considered;
>
> (2) where there are two or more inconsistent decisions of this appeal tribunal;
>
> (3) where there are inconsistent decisions of this appeal tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;
>
> (4) where the earlier decision is manifestly wrong;
>
> (5) where there are other exceptional circumstances."

129. Pausing there, there are no inconsistent decisions of the EAT or a court of co-ordinate jurisdiction on the section 5 point, and so the questions to be considered are whether the earlier

decisions were per incuriam; whether they are manifestly wrong; or whether there are other exceptional circumstances.

130. Singh J then went on to consider the meaning of "manifestly wrong" and "exceptional circumstances":

> 77. I would not wish to add any further gloss to the concept of "manifestly wrong": it means a decision which can be seen to be obviously wrong ("manifest"). If the error in the decision is manifest it should not be necessary for there to be extensive or complicated argument about the point.
>
> 78. As for the concept of "exceptional circumstances" it is inherently one that is flexible and dependent on the circumstances. It is deliberately not defined by reference to an exhaustive list or in some other way because one cannot predict what circumstances will arise in the future and which may justify departure from an earlier decision. In this way courts and tribunals retain the flexibility required to do justice in the case before them. On the other hand it is also important to recall that certainty in the law is also a fundamental value: indeed it lies at the root of the concept of legal certainty which is well established in EU law and on which reliance has been placed by Mr Cavanagh in the course of his submissions albeit in a different context."

131. Singh J then proceeded to apply those principles to the issue in **Lock**:

> "81. A number of cases were cited to me in which this appeal tribunal has departed from an earlier decision of its own, in order to persuade me to take a similar approach in the present context. Particular emphasis was placed by Mr Cavanagh on the decision in **Ministry of Defence v Hunt** [1996] ICR 554 (Maurice Kay J, sitting with lay members). In that case this appeal tribunal departed from its earlier decision in **Ministry of Defence v Bristow** [1996] ICR 544 (Tucker J, sitting with lay members). At pp 566–567, Maurice Kay J said:
>
> "Although we are not bound by previous decisions of this appeal tribunal, we would not depart from one except after the most careful consideration. With due respect to the constitution of this tribunal in **Bristow**, we are satisfied that we have received far fuller submissions on this matter than our colleagues did in that case. We do not share the equanimity of the Ministry of Defence to which we have just referred. In our judgment, its approach to the issue is potentially productive of injustice."

82. Pausing there, Mr Cavanagh submits that, in the present case too, the reasoning of Langstaff J in **Bear Scotland** is "potentially productive of injustice". However, it seems to me that, when Maurice Kay J used that phrase in **Hunt**, he was not intending to lay down some general principle: he was simply observing that that was the assessment of this appeal tribunal in the circumstances of that case and that was a factor to be taken into account in deciding whether there existed the exceptional circumstances which justify a departure from an earlier decision.

83. Furthermore, it does not seem to me that Mr Cavanagh can realistically submit that this is a case in which I have received "far fuller submissions" than Langstaff J did in **Bear Scotland**. On my reading of that judgment and the summary of the arguments made by the parties, there was very full argument about the very issue which I have to decide in this appeal: namely whether the domestic legislation can be interpreted in a way which conforms to EU law. Mr Cavanagh emphasised before me that the focus of counsel's submissions in **Bear Scotland** was on a different point: namely whether the interpretative obligation in section 3 of the Human Rights Act 1998 is stronger than the obligation in EU law. However, in my judgment, it is clear that very similar arguments were also made in **Bear Scotland** as have been made before me as to the question of substance: namely whether it is possible to give a conforming interpretation to the domestic legislation. I do not accept Mr Cavanagh's submission that I have received far fuller submissions on this substantive issue than Langstaff J did.

84. It is also telling in my view that there was another aspect to this appeal tribunal's reasoning in **Hunt**, to which I now return. Following the passage quoted earlier, Maurice Kay J said, at p 567:

"We are also mindful of the fact that in **Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2)** (Case C-271/91) [1993] ICR 893 , 932, para 26, the European Court of Justice specifically stated of compensation for a discriminatory dismissal: 'it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full accordance with applicable national rules.' It seems to us that if the law were as submitted on behalf of the Ministry of Defence on this issue it would fall short of providing 'full' compensation. Accordingly, in our judgment the percentage should be applied after and not before the subtraction of the mitigation earnings."

85. In other words what was clearly an important part of this appeal tribunal's reasoning in **Ministry of Defence v Hunt** was the consideration that the decision in **Bristow** would lead to a result which was inconsistent with a requirement of EU law. That was another reason why there were the "exceptional circumstances" which warranted a departure from a previous decision of this appeal tribunal.

86. A similar concern, to avoid a result that would be contrary to the United Kingdom's obligations in EU law, lay behind the decision of

> this appeal tribunal in **Secretary of State for Trade and Industry v Cook** [1997] ICR 288 itself. In that case this appeal tribunal took the view that, if it were to follow its earlier decision in **Photostatic Copiers (Southern) Ltd v Okuda** [1995] IRLR 11 , there would be a breach of EU law: see the judgment of Morison J at pp 294 and 295–296."

(3) Does the approach in Lock apply to state immunity cases? Alternatively, are there exceptional circumstances why I should not follow the previous EAT ruling on the section 5 issue?

132. Mr Sethi KC's primary argument was that the principle set out in **Lock** simply does not apply to state immunity cases. In the alternative, he submitted that the fact that the point of law in question concerns state immunity gives rise to an exceptional circumstance which means that the EAT need not follow previous decisions on same point. These amount to the same thing. In my judgment, for what it is worth, the real issue is whether the "exceptional circumstances" proviso applies. This proviso to the **Lock** principle means that it is sufficiently flexible to allow of exceptions in special circumstances, without the need to find that the **Lock** principle does not apply at all.

133. The real issue, therefore, is whether the fact that the point of law relates to state immunity is an "exceptional circumstance". In my judgment, it is not.

134. It is true that the normal procedural rules that apply to litigation do not apply to proceedings in which a State has claimed state immunity. This is the effect of section 1(2) of the SIA. In **Costantine**, at paragraph 47, Lord Lloyd-Jones JSC, giving the judgment of the Court, said:

> "There is, however, in section 1(2) a clear direction to all courts and tribunals that effect should be given to immunity and this must be capable of overriding procedural rules."

135. This is why, as the Supreme Court made clear in **Costantine**, a court or tribunal (including an appellate court or tribunal) has an affirmative duty to enquire into whether state immunity applies, even if the point is not taken by the State concerned, and even if the State does not appear in the proceedings. It is also why time limits do not apply to States who belatedly raise the issue of state

immunity with the same rigour as they apply in other circumstances. Indeed, it was for that reason that John Bowers KC allowed the Appellants to proceed with their appeals against the PH Judgment and the Liability Judgment in this case, even though the appeals were filed out of time. Similarly, in **United Arab Emirates v Abdelghafar** [1995] ICR 65, the EAT allowed a State to raise the issue of state immunity by way of appeal, even though the appeal was lodged out of time. Again, as Mr Sethi KC pointed out, the usual procedural rules about admitting fresh evidence on appeal do not apply if a State raises the issue of state immunity only at the appellate stage (as in **Egypt v Gamal-Eldin**). (This does not mean, however, that a court or tribunal is obliged to grant indulgence for every conceivable procedural failing by a State if the failing concerns a state immunity issue: see **Costantine**, paragraph 49).

136. There are also statements in the authorities which emphasise the importance of ensuring that state immunity is respected, because otherwise there will be a breach of international law. So, for example, in **Costantine** at paragraphs 37-38, Lord Lloyd-Jones JSC said;

> 37. In **Benkharbouche** [2017] ICR 1327 Lord Sumption JSC, with whose judgment the other members of the Supreme Court agreed, held (at para 17) that:
>
> "State immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction … It derives from the sovereign equality of states. Par in parem non habet imperium."
>
> In J**ones v Ministry of the Interior of the Kingdom of Saudi Arabia** [2007] 1 AC 270 Lord Bingham of Cornhill observed (at para 24): "Where state immunity is applicable, the national court has no jurisdiction to exercise."
>
> 38. These statements demonstrate the importance of compliance by domestic courts with international law rules on state immunity. If a court exercises jurisdiction over a foreign state which is entitled to state immunity, there is a breach of international law. To require a foreign state entitled to immunity to appear before a court and to enquire into its conduct of sovereign affairs would be a violation of the foreign state's sovereignty."

137. In **Abdelghafar**, Mummery J said:

> "The overriding duty of the court, of its own motion, is to satisfy itself that effect has been given to the immunity conferred by the State Immunity Act 1978. That duty binds all tribunals and courts, not just the court or tribunal which heard the original proceedings. If the tribunal in the original proceedings has not given effect to the immunity conferred by the Act, then it must be the duty of the appeal tribunal to give effect to it by correcting the error."

138. Notwithstanding the approach to procedure in state immunity cases, and notwithstanding these statements of general principle, I do not think that it follows that the EAT is obliged, in state immunity cases, to depart from the normal approach to following other rulings of the EAT, as laid down in **Lock,** or to regard the very fact that a point of law is concerned with state immunity as being an "exceptional circumstance". There are several interlocking reasons why I have come to this conclusion.

139. First, there is a difference between procedural rules for litigation, on the one hand, and the **Lock** principle, on the other. The circumstances in which a court or tribunal should follow the ruling on the same point of law if it has already been determined by a court or tribunal of co-ordinate jurisdiction is not a rule of procedure. It is a principle which governs the substantive outcome of the case. It is, in effect, a principle of law. The **Lock** principle is, moreover, an aspect of, or at least an adjunct to, the principle of *stare decisis*. In argument, Mr Sethi KC accepted (correctly in my view) that the different approach that is taken to state immunity cases does not mean that the principle of *stare decisis* does not apply to such cases. He accepted, therefore, that I am bound to follow the Court of Appeal ruling in **Shehabi** which requires me to dismiss his appeal on Ground 2, notwithstanding that it is his submission that Shehabi was wrongly decided by the Court of Appeal and has the effect of depriving States of state immunity in certain circumstances (personal injury claims where the only injury is psychiatric) in which, he says, customary international law grants immunity. If the doctrine

of precedent applies in state immunity cases, even if the lower court believes that the ruling of the higher appellate court was wrong, then I do not see why the same does not apply to the **Lock** principle.

140. Second, the general statements in **Costantine** and **Abdelghafar**, set out above, were in the context of appeals that were concerned with whether procedural rules applied to state immunity cases. Neither the Supreme Court in **Costantine**, nor the EAT in **Abdelghafar**, was considering whether a different approach should be taken to the substantive issues in the case, if the case was concerned with state immunity.

141. Third, the essential question with which this EAT is faced is one of statutory interpretation. Though the context is state immunity, the issue before the EAT is the meaning and effect of the relevant provisions of the SIA, and the scope of the exceptions to state immunity that are provided for in the Act. I am engaged in an exercise involving the interpretation and application of the SIA, not the interpretation and application of customary international law. In my judgment, it is not open to me to abandon the normal principles of statutory interpretation, where the SIA is concerned, and simply to decide for myself what customary international law requires by way of state immunity and then to make my ruling in relation to state immunity by reference to customary international law, rather than the SIA. Customary international law may inform or influence the proper interpretation of the SIA, but, in the final analysis, this ground of appeal must be decided by reference to the provisions of the SIA.

142. This was made clear in **Shehabi**. At paragraphs 18-25 of the judgment, Males LJ, with whom Lady Carr of Walton-on-the-Hill CJ and Warby LJ agreed, gave clear guidance about the approach to interpretation of the SIA. He said:

> "18. We are concerned with the scope of section 5 of the State Immunity Act 1978 . The circumstances in which the common law, following the development of international law, moved from a near

absolute principle of state immunity to a restrictive theory, distinguishing between "acta jure imperii" and "acta jure gestionis", are well known. The story is traced by the Supreme Court in **Argentum Exploration Ltd v The Silver** [2025] AC 555 at paras 17–22 . This was the background to the 1978 Act .

19. However, the Act did not attempt simply to enact the restrictive theory of state immunity as it had so far developed, but provided what the Supreme Court in **Argentum** at para 25 described as "a new statutory scheme providing detailed and comprehensive rules governing both adjudicative and enforcement jurisdiction in cases involving foreign and Commonwealth states". Its long title is:

"An Act to make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes."

20. That statutory scheme must be interpreted in accordance with the usual principles of statutory interpretation. These have been authoritatively explained in the judgment of Lord Hodge DPSC in **R (O) v Secretary of State for the Home Department** [2023] AC 255 :

"28. Having regard to the way in which both parties presented their cases, it is opportune to say something about the process of statutory interpretation.

"29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': **Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG** [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (**R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd** [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in **Spath Holme**, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'

"30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: **Bennion, Bailey and Norbury on Statutory Interpretation** , 8th ed (2020), section 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

"31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in **Spath Holme**, p 396 , in an important passage stated: 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House … Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning'."

21. I would add that section 5 of the 1978 Act is expressed in plain and straightforward language. That language is the primary source by which its meaning must be ascertained.

22. Further, as explained by the Supreme Court in **General Dynamics United Kingdom Ltd v State of Libya** [2022] AC 318, at para 59, the 1978 Act must be understood in the context of the twin (and equally important) principles of international law on which the law of state immunity is based, summarised in these terms by the **International Court of Justice in Jurisdictional Immunities of the State (Germany v Italy)** [2012] ICJ Rep 99:

"57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."

23. Beyond this, however, it would be regrettable if the true meaning of section 5 could only be understood by reference to the substantial volume of external material, extending over more than 2,600 pages, cited in the course of this appeal. Indeed, it is notable that in Al-Adsani v Government of Kuwait (No 2) (1996) 107 ILR 536, 549 Ward LJ said of section 5 of the 1978 Act that " the Act is as plain as plain can be", an observation endorsed by Lord Bingham of Cornhill and Lord Hoffmann in Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2007] 1 AC 270 at paras 13 and 38 .

24. Finally as to the general approach to the interpretation of section 5, section 1 is sometimes described as containing the general rule, to which the provisions of sections 2 to 11 are exceptions. But that does not mean that they should be interpreted restrictively, in the way that (for example) a contractual exceptions clause would be interpreted. As Lord Sumption JSC explained in **Benkharbouche v Embassy of the Republic of Sudan** [2019] AC 777 :

"39. I do not regard these considerations as decisive of the present issue. No one doubts that as a matter of domestic law, Part I of the State Immunity Act is a complete code. If the case does not fall within one of the exceptions to section 1, the state is immune. But the present question is whether the immunity thus conferred is wider than customary international law requires, and that raises different considerations. In the first place, it is necessary to read the grant of the immunity in article 5 of the United Nations Convention together with the exceptions which follow, as an organic whole. The exceptions are so fundamental in their character, so consistent in their objective and so broad in their effect as to amount in reality to a qualification of the principle of immunity itself rather than a mere collection of special exceptions …"

25. It appears that Lord Sumption JSC was speaking mainly about the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 ("the UN Convention"), but this court made clear in **London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The Prestige)** [2022] 1 WLR 3434 that the same approach applies to interpretation of the 1978 Act :

> "38. … we were not attracted by Mr Young's argument that a restrictive interpretation should be put on the scope of the definition within subsection (3)(c) because the structure of the Act was one which provided immunity in section 1 and section 3(1)(a) was an exception, thereby giving rise to a strict interpretation of the exceptions if it was to be removed. We do not accept that the structure of the Act provides any basis for such a restrictive approach to construction of the exception sections, for the reasons articulated by Lord Sumption JSC in **Benkharbouche** at para 39."

143. In my judgment, two propositions of particular importance for present purposes can be derived from this passage:

(1) The statutory scheme in the SIA must be interpreted in accordance with the usual principles of statutory interpretation; and

(2) The function of the court or tribunal that is interpreting and applying the SIA is to seek the meaning of the words which Parliament used.

144. In light of the guidance in **Shehabi**, in my judgment, it is clear that, when interpreting sections 4, 5 and 16 of the SIA, the EAT is engaged in statutory interpretation and I do not see any reason why there are exceptional circumstances which mean that the **Lock** principle should not apply to this exercise of statutory interpretation as it does to any other.

145. Accordingly, in my judgment, the **Lock** principle applies and the "exceptional circumstances" exception does not apply. I should, therefore, follow the rulings of the previous EATs on the interpretation of the SIA unless one of the other exceptions referred to by Singh J in **Lock** applies. There are no inconsistent decisions of previous EATs and so the remaining exceptions are that the previous EAT judgments were per incuriam, or that they were manifestly wrong.

(4) Per incuriam

146. As Singh J said, a judgment is per incuriam where a relevant legislative provision or binding decision of the courts was not considered. In my judgment, that does not apply to any of the three prior EAT judgments. Mr Sethi KC submitted that the argument which he advanced to the effect that the SIA must be interpreted in accordance with customary international law was not one that was advanced or considered in the previous cases. I do not accept that submission. This argument was front-and-centre in **Ogbonna**. It was the first of the five submissions made on behalf of the State in **Ogbonna**. The international materials were considered by Bourne J in **Alhayali**. There was no statutory provision, or relevant authority, that was missed in any of the three EAT judgments.

147. A related point is whether there are "exceptional circumstances" for departing from the previous EAT judgments because I have received "far fuller submissions" on the point of law than the previous EATs. This is the reason why Maurice Kay J considered it appropriate to depart from the ruling of a previous EAT in **Ministry of Defence v Bristow.** However, I do not consider that I have heard "far fuller submissions" on the argument based on the customary international law point than in the earlier EATs (or, at least, in **Ogbonna** and **Alhayali**, as it appears that the state immunity point was not argued in the same depth in **Caramaba-Coker).** Moreover, I think that the EAT should be cautious about drawing the conclusion that it should not follow the decision of a previous EAT or EATs because it has heard "far fuller submissions", unless the position is very clear. In many cases, it will not be possible to investigate or to find out exactly what submissions were or were not made to an earlier EAT, which may have given judgment some years previously. I should add that, with respect, I am not sure that Bean LJ is right that the focus of the submissions in **Ogbonna** was upon the question whether section 5 applies to psychiatric injury. Most of the discussion in the judgment in **Ogbonna** deals with the other question as to whether section 5 applies to statutory employment claims giving rise to personal injury, and most of the points raised in argument that were mentioned in the judgment appear to deal with that point.

(5) "Manifestly wrong"

148. This is the final exception to the principle that the EAT should follow previous decisions of one or more EATs. It is a high hurdle. Singh J said that "manifestly wrong" means "obviously wrong". It is not good enough, in my view, that there are good arguments that the previous EAT decisions may be wrong, unless they are clearly and plainly wrong. The whole point of this principle is that the EAT should not generally revisit a point of law that has already been decided at the EAT level. The exceptions are narrow. As Singh J said in **Lock**, if there has to be extensive or complicated argument about the point, that is a clear sign that the previous ruling was not manifestly wrong.

149. In order to determine whether the previous EAT rulings are manifestly wrong, it is necessary for me to evaluate the strengths of the various arguments, either way. However, this is not so that I can reach a concluded view on the point of law; rather, it is so that I can decide whether the previous EAT decisions are obviously wrong. Of course, if I were to reach that conclusion, it would follow not only that I would not consider myself bound to follow the previous EAT rulings, but also that the only possible outcome would be for me to depart from those earlier rulings and so to allow the Appellant's appeal on ground 1.

150. In my judgment, though there are strong arguments either way, the decisions of the EAT in **Caramba-Coker**, **Ogbonna** and **Alhayali** are not manifestly wrong, despite the fact that Bean LJ subsequently took the opposite view. The fact that obiter dicta from a Court of Appeal judge makes clear that the judge firmly disagrees with rulings of the EAT does not, automatically, mean that the EAT rulings are manifestly wrong.

151. As I have said, there are strong arguments in favour of the conclusion that the SIA should be read to mean that the "exceptions to the exception" in section 16(1) of SIA apply to statutory employment law claims, even if those claims seek compensation for personal injury.

152. In broad summary, these are:

(1) As Bean J pointed out, sections 4 and 16 of the SIA created a careful scheme of exceptions to state immunity. The "exceptions to the exception" in section 16 apply to proceedings relating to a contract of employment between the State and an individual. It is clear that this is not limited to proceedings for breach of contract, because section 17(4A) states that references to proceedings relating to a contract of employment include references to proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee. Prior to the Remedial Order, the same language appeared in section 4(6) of the SIA, which was repealed by the Remedial Order, albeit that it referred only to section 4, not section 16. The purpose behind the replacement of section 4(6) by section 17(4A) must, in my judgment, have been so as to make absolutely clear that the "exceptions to the exceptions" in section 16 apply to employment-related claims in respect of statutory rights, just as they do for employment-related contract claims. The key point is that, as the "exceptions to the exceptions" in section 16(1) are expressly stated to apply to statutory employment law claims, and so mean that state immunity applies to such claims, it would be surprising if the effect of section 5 to the SIA is that there is no state immunity for statutory employment law claims if and in so far as the damage suffered takes the form of personal injury;

(2) Again, it appears, at first sight, surprising, that some forms of loss arising from a breach of statutory employment rights under the EA10 should attract state immunity, whilst other forms of loss will not;

(3) Still further, it is not easy to see why a claim for financial loss and for injury to feelings for discrimination, harassment or victimisation should attract state immunity, but, if the injury to feelings tips over into, or results in, psychiatric harm, it will not;

(4) It is not apparent that the distinction is derived from customary international law. In **Benkharbouche**, at paragraph 10, Lord Sumption JSC, giving the judgment of the Court, said that:

> "In **Alcom Ltd v Republic of Colombia** [1984] AC 580 , 597-598, Lord Diplock, with whom the rest of the Appellate Committee agreed, observed that given the background against which it was enacted, the provisions of the Act:
>
> "fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations…."

(5) Also in **Benkharbouche**, at paragraph 53, as I have already said, Lord Sumption said:

> "As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune."

This appears to support the contention that there is a blanket rule that state immunity attaches to any employment claim which arises out of the inherently sovereign or governmental act of the foreign State;

(6) It would make sense and be logical for the dividing line to be drawn between "traditional" personal injury claims, where the personal injury is the cause of action, which do not attract state immunity, on the one hand, and employment claims, of any type, which do not, even if the type of damage suffered is personal injury, on the other. If a chandelier falls on a visitor, or there is a road traffic accident, then state immunity should be inapplicable, because the wrong has no real connection with the exercise of state authority. On the other hand, if an employment claim is brought by a person whose contract of employment was entered into in the exercise of state authority, or the claim is about

something done to them in the exercise of state authority, then it makes good sense that state immunity should apply;

(7) At least arguably, it would be possible to read sections 4, 5 and 16(1) in this way. Whilst it would be very difficult to read section 16(1) as if it referred to section 5 as well as section 4, as it simply does not do so, it would potentially be possible to read section 5 in a way that does not apply to statutory employment claims, even if the loss suffered was personal injury; and

(8) The interpretation of the SIA as applied by the EAT rulings would have striking and wide-ranging consequences. It would mean that even an ambassador could pursue a claim against his or her country for discrimination, victimisation, or harassment whilst serving in the Embassy in the UK, if the allegation is that the discrimination, victimisation or harassment resulted in personal injury including (as it not uncommon) psychiatric injury.

153. Strong though these arguments are, in my view there are also strong arguments in favour of the conclusions that were reached by the EATs on this issue. These include:

(1) As the Court of Appeal made clear in **Shehabi**, the provisions of the SIA must be interpreted in accordance with the normal principles of statutory interpretation. In **Shehabi**, Males LJ said, at paragraph 21, that Section 5 of the SIA is expressed in plain and straightforward language. This had been said on a number of previous occasions, including by Ward LJ in **Al-Adsani v Government of Kuwait (No 2)** (1996) 107 ILR 536, CA at 549, an observation, as Males LJ said, which was endorsed by Lord Bingham of Cornhill and Lord Hoffmann in **Jones v Ministry of the Interior of the Kingdom of Saudi Arabia** [2006] UKHL 26; [2007] 1 AC 270 at paras 13 and 38. **In Al-Masarir v Kingdom of Saudi Arabia** [2022] EWHC 2199 (QB); [2023] Q.B. 475, again in the context of a non-employment case, Julian Knowles J said, at paragraph 60,

> "60 Section 5 is not a complicated provision. On its face, it is concerned with all acts and omissions in the UK, of whatever type (i. E., both those done jure imperii and those done jure gestionis) causing death, etc"
>
> Then, at paragraph 66, having cited some earlier authorities, Julian Knowles J said:
>
> "66. All of this supports the construction of "act or omission" in section 5 as meaning "all acts or omissions", without any restriction as to the nature of the act being read into it."

(2) That statutory language is the primary source by which its meaning must be ascertained The court or tribunal must, therefore, start with the plain words of the statute. Section 5 states, in plain terms, that state immunity does not attach to "personal injury". It does not say that state immunity does not attach to "personal injury claims" and so there is no basis in the statutory language for concluding that section 5 applies only to "traditional" personal injury claims. On the face of it, it applies to any claim where the wrong complained of has resulted in personal injury;

(3) On a literal reading of section 5 and of sections 4/16(1), there is an apparent overlap. Breaches of statutory employment rights which have resulted in personal injury arguably come within the statutory language of section 5 and of section 16(1), when read with section 17(4A). But a specific claim cannot, at one and the same time, give rise to state immunity and not give rise to state immunity. So there must be some way of reconciling the two sets of provisions. Consistent with the statutory language, the clearest and most straightforward way of doing so is to give section 5 its literal meaning, so that it applies to any proceedings in respect of personal injury, and to recognise that section 16(1) does not provide "exceptions to the exception" for proceedings in respect of personal injury. after all, section 16(1) refers to section 4 but it does not refer to section 5;

(4) Accordingly, the clear steer provided by the statutory language is that state immunity does not attach to any proceedings in relation to personal injury, regardless of the nature of the cause of action. Put another way, it is strongly arguable that the statutory provisions are

clear and unambiguous and support the conclusions reached in **Ogbonna** and the other EAT cases;

(5) It is significant that, if the contrary view was correct, Parliament could have made the position clear when the SIA was first enacted, by stating that the exception in section 16(1) applies to "sections 4 and 5 above", not "section 4 above". Parliament did not do so. More significantly still, Parliament took the opportunity to amend section 16(1) in 2023 by means of the Remedial Order, but Parliament did not make this change. By then, the judgments in **Caramba-Coker** and **Ogbonna** had been handed down (the EAT judgment in **Alhayali** was not handed down until nearly a year later). Parliament and the Government must have been aware, therefore, as things stood, the SIA had been interpreted by the EAT to mean that section 16(1) did not grant state immunity for statutory employment claims for personal injury, and no steps were taken to amend the legislation in this regard;

(6) Section 16(1) of the SIA can be contrasted with section 16(2). Section 16(2) of the SIA, which takes anything done by or in relation to visiting armed forces out of the scope of the SIA, applies both to section and to section 5. Section 16(2) provides that:

> "(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952."

The relevant Part of the SIA, Part 1, includes both sections 4 and 5, and so this applies both to claims relating to a contract of employment and to personal injury claims. This suggests that, where Parliament intended that a part of section 16 should apply to section 5 as well as to section 4, this was made clear by the statutory language;

(7) It is not safe to assume that customary international law requires that state immunity attaches to all employment law claims where sovereign authority is engaged, even where the damage that results takes the form of personal injury. It is clear that, on the one hand,

customary international law generally grants state immunity to acts of sovereign authority, but, it is also clear, on the other hand, that customary international law carves out an exception for proceedings involving personal injury. The reality, at least arguably, is that that the same grey area between employment claims and personal injury claims exists in customary international law as appears in the SIA itself. It follows that no clear guidance can be derived from customary international law to resolve this issue as a matter of domestic statutory construction;

(8) In particular, none of the materials referred to by Mr Sethi KC, Articles 5, 11 and 32 of ECSI, its Explanatory Report, and Article 11(1) of UNCSI provides a clear answer to this issue, let alone provide support for the Appellant's interpretation. So, for example, Article 11 of ECSI states:

> "A contracting state cannot claim immunity from the jurisdiction of a court of another contracting state in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the state of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

(9) In any event, in **Benkharbouche**, at paragraph 9, Lord Sumption JSC said of ECSI that it did not seek to codify the law of state immunity or to apply the restrictive doctrine generally and he observed that it had attracted limited support. At paragraph 62 of Shehabi, Males LJ said:

> "…it is too simple, and therefore inaccurate, to say that the purpose (or even a purpose) of the 1978 Act was to implement the ECSI as a matter of domestic law. The true position is that the Act gave broad effect to the ECSI, but departed from it in a number of respects."

(10) The Explanatory Report to ECSI is, in my judgment, of limited status, and, as Mr Sethi KC acknowledged, UK courts have recognised that not all of UNCSI (which is not

in force) reflects customary international law. One looks in vain for a clear answer to the problem raised by Ground 1 in any of the international material;

(11) The passage from the judgment in **Shehabi**, set out above, emphasises the limit to the assistance that external aids to construction can provide, if the meaning conveyed by the words of a statute are clear. In **Al Masirir**, at paragraph 59, Julian Knowles J referred to:

> "… the well-understood rule that international law obligations, while relevant in resolving any ambiguity in the meaning of statutory language, are not capable of overriding the terms of a statute which lack such ambiguity**: Lesa v Attorney-General of New Zealand** [1983] 2 AC 20, 33. This was the approach of **Lord Porter in Theophile v Solicitor-General** [1950] AC 186 (cited in relation to the SIA 1978 in **Al-Adsani (No 2)** 107 ILR 536, 548) …"

(12) Again, the judgment of the Supreme Court in **Benkharbouche** does not provide clear support for the view taken by Bean LJ. The issue with which this appeal is concerned did not arise in **Benkharbouche**;

(13) The extract from **Shehabi**, set out above, makes clear that the Court of Appeal has previously taken the view that the structure of the SIA does not require a restrictive approach to the exception sections in Part 1 of the Act. As that extract records, in **Benkharbouche**, Lord Sumption JSC said that the exceptions to state immunity in the SIA are so fundamental in their character, so consistent in their objective and so broad in their effect as to amount to a qualification of the principle of immunity itself, rather than a mere collection of special exceptions;

(14) As regards state immunity, the line between proceedings in respect of personal injury, for which there is no immunity, and employment-type claims, for which there is immunity if sovereign authority is involved, has to be drawn somewhere. Arguably, the line drawn in **Ogbonna** and in the other cases is in as good a place as any. The rights of States to state immunity must be balanced against the rights of persons to litigate their claims under Article 6 of the European Convention on Human Rights;

(15) There is nothing in the SIA to justify a distinction between "traditional" torts, on the one hand, and claims where the personal injury element is "ancillary" or an "incidental consequence" on the other. The point made is that it is not possible to draw a coherent distinction in this manner;

(16) Nor it is appropriate to draw a distinction, for these purposes, between a cause of action for personal injury, on the one hand, and a claim of some other sort in which the damage suffered takes the form of personal injury, on the other. Indeed, in section 5 itself, the focus is on the type of loss suffered, whether death or personal injury. It may well be that it is because death and personal injury are such serious consequences that they have been singled out for exclusion from state immunity. If so, then it is not absurd that state immunity does not apply to employment-related personal injury claims even if they are brought by an ambassador or other senior diplomat. In **Al Masarir**, Julian Knowles J held that section 5 applies even if the acts complained of are sovereign acts (see judgment, paragraph 71);

154. Taking all of these considerations into account, I am unable to say that the rulings in **Caramba-Coker**, **Ogbonna** and **Alhayali** in the EAT were manifestly wrong. The very fact that there are so many detailed and complex points that can be made one way or another indicates that the view reached by the earlier EATs was not manifestly wrong.

(6) Conclusion on Ground 1

155. As I have already made clear, the key issue for me on Ground 1 is whether the rulings of the three previous EATs are manifestly wrong. I have decided that they are not, and so that I should follow them, and so that I should dismiss the Appellant's appeal on Ground 1. As I have said, this ground gives rise to an important point of law that will need to be determined by the Court of Appeal. It is not necessary, therefore, for me to express my own view on this issue. I have carefully

considered whether I should do so. On the one hand, it is a matter for the Court of Appeal and not for me, and I feel a great degree of circumspection about expressing my own opinion on an issue which has divided two titans of employment law, in Underhill P and Bean LJ (not to mention two other judges who are also very eminent specialist employment lawyers, in Keith J and Bourne J). On the other hand, in deference to the full argument that I have received on this issue, I have decided that I should come off the fence. For what it is worth, my opinion is that Bean LJ's view is correct. Though, as I have said, there are strong arguments either way, ultimately it seems to me that the express statement in section 17(4A) that employment claims that are covered by the "exceptions to the exception" include statutory employment claims means that Parliament must have intended that all statutory employment claims involving the exercise of state authority attract state immunity, even if the breach has resulted in personal injury. As Bean LJ put it, employment claims, even if the compensation sought is for personal injury, fall squarely within the scheme of sections 4 and 16. Moreover, this seems to me to be likely to be consistent with customary international law, which is what the SIA was enacted to implement. The point is by no means straightforward, however. Indeed, I regard the arguments as being very finely balanced.

156. This means that I am in the somewhat uncomfortable position of having to reject the Appellant's argument on Ground 1, even though I agree with it. However, I am satisfied that this is the right thing to do, because there is a real benefit in the EAT adhering to the principles that are laid down in the **Lock** case about following decisions of previous EATs on the same point of law. This is important for consistency and for legal certainty.

GROUND 2: DOES "PERSONAL INJURY" IN SECTION 5 OF THE SIA APPLY TO PSYCHIATRIC INJURY AS IT DOES TO PHYSICAL INJURY?

157. As I have said, the parties are agreed that this question must be answered in the affirmative, in light of the ruling of the Court of Appeal in **Shehabi** on the same issue. The Supreme Court has

given leave to appeal on this point and has heard argument but has not yet handed down its judgment. Unless and until the Supreme Court overrules the decision of the Court of Appeal in **Shehabi**, I am bound by it.

CONCLUSION

158. In relation to Ground 1, for the reasons given in this judgment, I consider that I must follow the rulings in three previous EAT judgments on the same point of law. Accordingly, the Appellant's appeal on Ground 1 is dismissed.

159. As for Ground 2, it is common ground that I am bound to dismiss the Appellant's appeal on this ground because I am bound by the ruling of the Court of Appeal in Shehabi on the same point of law.

160. I mentioned in the introductory section to this judgment that, at the end of oral argument, Mr Sethi KC, counsel for the Appellant, indicated that if I decided this appeal against the Appellant, his client would seek permission to appeal on both grounds.

161. I hope that it is helpful if I indicate that, if the Appellant maintains that position, and makes a formal application for permission to appeal, then, subject of course to any submissions to the contrary that Mr Platts-Mills might make on behalf of the Respondent, I would be inclined to grant permission to appeal. So far as Ground 1 is concerned, as I have explained, Bean LJ has recently expressed the view, obiter, in **Alhayali**, that the EAT judgments which I feel obliged to follow were wrongly decided on this point. As I have said, this is an issue that cries out for determination by the Court of Appeal. As for Ground 2, it seems to me at present that it is plain that leave to appeal should be granted, so as to keep the issue alive until it is finally determined by the Supreme Court. But, I repeat, I will consider any submissions to the contrary that Mr Platts-Mills might make.