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## Employment rights of foreign embassy staff

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**Employment analysis: How do the EU and UK's approaches to employment rights of embassy staff differ? Nicholas Lakeland, partner at Silverman Sherliker, considers the common issues in this area of law and comments on two recent decisions that recognise EU Charter rights as having horizontal effect.**

### Original news

*Reyes and another v Al-Malik and another (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2015] EWCA Civ 32, [2015] All ER (D) 56 (Feb)

The claimant domestic workers issued proceedings in the employment tribunal against the defendant Saudi diplomatic agent and his wife. The Employment Appeal Tribunal (EAT) upheld the defendants' claim to diplomatic immunity, but held that service had been validly effected. The Court of Appeal, Civil Division, in dismissing the claimants' appeal and the defendants' cross-appeal, held that, on the proper construction of art 31(1)(c) of the Vienna Convention on Diplomatic Relations 1961, the EAT had been right to uphold the defendants' claim to diplomatic immunity. Further, service at the defendants' private residence by post had constituted good service.

*Benkharbouche and another v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2015] EWCA Civ 33, [2015] All ER (D) 51 (Feb)

The appeals concerned whether a member of the service staff of a foreign diplomatic mission to the UK could bring proceedings in the UK against the employer state to assert employment rights or whether such a claim was barred by state immunity. In particular, whether provisions of the State Immunity Act 1978 (SIA 1978) were compatible with art 6 of the European Convention on Human Rights (ECHR) and art 47 of the Charter of Fundamental Rights of the European Union (the EU Charter). The Court of Appeal, Civil Division, held, among other things, that, on the application to the claimants' claims:

- o SIA 1978, s 16(1)(a) infringed ECHR, art 6
- o SIA 1978, s 4(2)(b) infringed ECHR, arts 6 and 14, and
- o SIA 1978, ss 4(2)(b) and 16(1)(a), in their application to those parts of the claims which fell within the scope of EU law, infringed art 47 of the EU Charter

### What is the significance of this decision?

The appeals raised the question, as set out in para [2] of the judgment, whether a member of the service staff of a diplomatic mission to the UK may bring proceedings in this jurisdiction against the employer state to assert employment rights or whether such a claim is bared by state immunity.

The significance is that SIA 1978, s 16(1) was held to incompatible with ECHR, art 6 as an infringement of the same. Also SIA 1978, s 4(2)(b) was found to be infringing ECHR, art 6 as well as art 14. Both also infringe art 47 of the EU Charter which was held as having horizontal direct effect.

### **What were the key issues raised in the case?**

The key issue was whether ECHR, art 6 applies to claims of employment where the employees were neither nationals of the host state or habitually resident in that state.

### **How did the court approach the interaction between state immunity and employment rights?**

The denial of access to the court to enforce employment rights on grounds related to their national origin breached the right to a fair trial under ECHR, art 6. The court analysed in great depth previous case law both in the UK as well as in the European Court of Justice (ECJ) and indeed cited examples of decisions and laws in a whole host of other jurisdictions. Given the relatively few court cases ever brought by embassy staff the court had to draw from a multitude of jurisdictions. The analysis set out in the judgment is particularly complex and requires careful reading of it is to be properly understood.

### **How was ECHR, art 6 applied in this case?**

ECHR, art 6 was applied because the claimants argued that the EU Charter had direct effect in national law and that SIA 1978 had to be disapplied to the extent that, in respect of rights within the material scope of the EU law, it had breached art 47 of the EU Charter, the effect of which was coterminous with ECHR, art 6.

### **What is the significance of the analysis of the court in respect of the relevant EU law?**

The significance of the analysis is the recognition of the divergent approaches of the UK courts and the ECJ to this very narrow area of law. But ultimately, by recognising art 47 of the EU Charter, the court recognised the primacy of EU law in these cases.

### **How might this case affect future disputes?**

It affects future cases because the rights in the EU Charter are recognised as having horizontal direct effect and under the European Communities Act 1972, s 2(1), SIA 1978, ss 4(2)(b) and 16(1)(a) are disapplied and those parts of the claimants' claims which fall within the scope can therefore proceed. This in turn allows staff employed by foreign embassies greater protections when dismissed from their employment. However, embassy staff are limited in number and therefore it is unlikely we will see many more cases being brought because of this decision.

*Interviewed by Diana Bentley.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*