Neutral Citation Number: [2024] EAT 92

Case No: EA-2023-000115-NU

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 June 2024

**Before** :

**THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT**

**Between :**

**THE BRITISH COUNCIL**

**Appellant**

**- and -**

**MRS ANA-MARIA BELDICA**

**Respondent**

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**Mr Zac Sammour** (instructed by Lews Silkin LLP) for the **Appellant**
**Mr Edward Kemp** and **Ms Anna Dannreuther** (instructed by Advocate) for the **Respondent**

Hearing date: Wednesday 8th May 2024

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# JUDGMENT

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.**
**The date and time for hand-down is deemed to be 10:30 on 17 June 2024**

## SUMMARY

*Jurisdictional points - territorial reach of employment protections under the Employment Rights Act 1996 and the Equality Act 2010*

The claimant was employed by the respondent in the United Arab Emirates as a local employee. When seeking to pursue employment claims against the respondent in the UAE, the claimant had been unable to do so, and she had lodged claims before the Employment Tribunal ("ET") in Great Britain. In holding that the territorial pull of the claimant's place of work in the UAE had been severed, the ET proceeded on the assumption that, in any proceedings in the UAE, the respondent would have successfully relied on a plea of immunity, in breach of customary international law. In relying on such a plea of immunity in the UAE, the ET further considered that the respondent would have been acting as a diplomatic agent such as to extend the territorial reach of the **European Convention of Human Rights** and, therefore, the **Human Rights Act 1998**. In those circumstances, the ET concluded that it was bound to construe the relevant statutes in such a way as to respect the claimant's right to court under article 6 **ECHR** and, therefore, to find that it had jurisdiction to hear her claims. The respondent appealed.

*Held:* allowing the appeal

As a matter of fact, there had been no act or omission on the part of the respondent such as to amount to an act of a diplomatic agent (the ET's decision was based on an exercise of counterfactual reasoning), but, even if the respondent had entered a plea of immunity/declined to waive immunity in any UAE proceedings brought by the claimant, that would still not give rise to a relevant act of authority or control so as to establish an extra-territorial jurisdiction under the **ECHR**; as such the ET's decision could not stand.

In the alternative, the ET's decision assumed that the acceptance of a plea of (diplomatic or state) immunity would be in breach of international law, but there had been no relevant assessment (whether by the UAE courts or by the ET itself) as to whether the claimant's employment might amount to an exercise of sovereign authority, and thus no basis for the assumption underpinning the ET's reasoning. More generally, the relevant case-law did not support the ET's suggestion that

domestic and customary international law anticipates ("*in spirit if not in letter*") that a plea of immunity must not result in a lack of recourse for the employee in the employer's home state; as had been held in **Bryant v Foreign and Commonwealth Office [2003] UKEAT** 174/02; **Hottak v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 CA; **Hamam v British Embassy** [2020] IRLR 570 EAT; and **Rajabov v Foreign and Commonwealth Office** [2022] EAT 112, such an outcome did not intrinsically establish the "*something more*" required in **Lawson v Serco** [2006] UKHL3; [2006] ICR 250.

**The Honourable Mrs Justice Eady DBE, President:**

## Introduction

1. The issue raised by this appeal is whether a plea of diplomatic or state immunity in legal proceedings in the United Arab Emirates ("UAE") might give rise to circumstances that, through reliance on the **European Convention of Human Rights** ("ECHR") and the **Human Rights Act 1998** ("HRA"), establish the jurisdiction of the Employment Tribunal ("ET") to determine claims based on British employment law protections, notwithstanding the UAE-based nature of the employment in question.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the respondent's appeal from a decision of the London Central ET (Employment Judge Klimov, sitting alone on 7-8 December 2022, with a further day in chambers), sent to the parties on 9 January 2023, by which it was ruled that the ET had jurisdiction to consider the claimant's claims arising out of her employment with the respondent in the UAE.

## The factual background

3. The claimant is a Romanian national who has lived and worked exclusively in Dubai since 2012. Between 20 March 2016 and 31 December 2020, she was employed by the respondent as its Human Resources ("HR") Business Partner for the Middle East and North Africa ("MENA") region. The respondent is the British Council, a non-departmental public body formally accountable to Parliament and overseen and closely controlled by the United Kingdom Foreign and Commonwealth and Development Office ("FCDO"). In the UAE, the respondent is considered to be "*an integral part of the British Embassy, operating as its cultural and educational department and as Diplomatic mission*" (ET, paragraph 66).

4. Throughout her employment, the claimant was paid in the currency of the UAE, into a UAE bank account, subject to UAE tax requirements; her employment benefits and rights were calculated by reference to UAE law, which was the governing law for her contract; the focus of her work was on the MENA region and she had no material involvement in the respondent's operations in the UK. As the ET found, the claimant:

> "176. … was not just … "truly expatriate" but a local employee through and through."

5. The claimant's employment was terminated on 31 December 2020. When she raised complaints

with the respondent regarding her dismissal, she was advised that her employment was governed by UAE labour law; specifically, on 13 February 2021, the respondent's Country Director advised the claimant:

> "… We have sought legal advice and as you [are] aware, your employment is governed by the UAE Federal Law No.8 of 1980 as amended …" (see the citation at ET, paragraph 30)

6. The claimant was, however, unable to present a complaint in the UAE labour court as her contract had not been registered with the Ministry of Human Resources and Emiratisation ("MoHRE"), which meant she did not have a labour card number (required to register a complaint via the MoHRE portal). On asking the respondent for a copy of her labour card, she was told that, as the respondent fell under the UAE Ministry of Foreign Affairs ("MoFA"), and not the MoHRE, labour cards were not issued. The claimant therefore emailed the MoFA, seeking help to be able to file a legal complaint against the respondent and the British Embassy.

7. In the meantime, on 6 May 2021, following an early conciliation period between 2 March and 7 April 2021, the claimant presented an ET1 in this jurisdiction (at that stage, against the respondent, the FCDO, and the British Embassy), claiming unfair dismissal, pregnancy or maternity discrimination, and redundancy pay. The claim form was accepted by the ET.

8. On 13 June 2021, the claimant wrote to the MoHRE asking for an acceptance letter to take her claim to the labour court in Dubai, explaining that she was unable to present a complaint online because she did not have a labour card. The MoHRE responded the same day, stating that they were not able to help because their service was limited to employment relationship in private sector and advising the claimant to contact "*the concerned authority where [her] employment [was] registered*."

9. On 2 July 2021, the respondent presented an ET3 denying the claims and contesting the ET's jurisdiction to consider the claimant's claims.

10. On 22 December 2021, the MoFA responded to the claimant's email, telling her that she needed to submit a complaint to the FCDO.

**The ET's decision and reasoning**

11. The claimant had withdrawn her claims against the FCDO and the British Embassy before the hearing in December 2022. At that hearing, as a preliminary issue, the ET addressed the question whether it

had jurisdiction to determine the claimant's claims, arising out of her employment in the UAE, under the **Employment Rights Act 1996** ("ERA") and the **Equality Act 2010** ("EqA"). It was common ground that the test would be the same for the purposes of both statutes, requiring the ET to determine, as a question of fact, whether the circumstances of the claimant's employment by the respondent were such that, notwithstanding the territorial pull of her place of work, that relationship had a closer connection with Great Britain than with the UAE (**Lawson v Serco** [2006] UKHL3; [2006] ICR 250).

12. Rejecting the claimant's submissions on the closeness of her connection with the respondent's operations in the UK, the ET concluded:

> "183. … even if one were to disregard the terms of the Claimant's employment contract completely, the reality of the situation remains that the Claimant was a truly expatriate employee with insignificant connection to Great Britain and British employment law."

Given that finding, the ET proceeded on the basis that the claimant would have to establish "*especially strong*" factors connecting her with Great Britain and British employment law in order for the territorial pull of her place of work to be overcome and its jurisdiction to be established.

13. The ET first considered whether the claimant had been barred from pursuing a claim against the respondent under UAE labour law: it was the claimant's case that she had been prevented from presenting her claim in the UAE because her employment with the respondent had not been registered with any competent ministry in Dubai. The ET rejected that argument, noting that in **Case no. 39**, on 23 March 2021, the Court of Cassation in Dubai had held that the fact that an employment contract was not registered with the MoHRE did not serve as an absolute bar to an employee's ability to submit an employment claim in the labour court in Dubai. The ET thus found that, in fact, the claimant would have been able to present her claim to the labour court, notwithstanding that her employment was not registered with the MoHRE.

14. Although the claimant had not actually presented a claim in the UAE, the ET then proceeded to consider what would have happened had she done so. In carrying out this counterfactual exercise, the ET had regard to two decisions of the UAE Court of Cassation, one involving the respondent (in 2014), the second the US Consulate General (in 2018); in both cases, pleas of diplomatic immunity had been accepted by the Court. In the light of those decisions, the ET concluded:

> "73…. on the balance of probabilities, I find that if, and despite administrative difficulties the Claimant had with submitting her claim to a local court, the Claimant had been able to file a claim against the Respondent in a labour court or a civil court

> in the UAE, the Respondent would have entered a plea of immunity and the UAE court would have declined jurisdiction to consider the Claimant's claim."

15. The ET considered that conclusion was further supported by the following matters:

> "74. … The letter dated 3 November 2020 … signed by the British Embassy in Dubai states that "*the British Council in the United Arab Emirates is an integral part of the British Embassy, operating as its cultural and education department and as Diplomatic Mission, we do not require a Trade Licence*".
> 75.I accept the Claimant's evidence at paragraph 7 of her witness statement that she participated in senior management meetings where the topic of the Respondent's legal status was discussed with the senior management stating that it was better for the Respondent to operate under the Embassy "umbrella" to protect itself from being sued in the UAE labour courts.
> 76. In April 2021, the Claimant requested the British Embassy in Dubai to issue a non-objection certificate to enable her to file a claim in the UAE Labour Court. The Embassy's solicitors responded stating that it was their understanding that she could pursue a claim without a certificate, however, they did not confirm that the Respondent would waive the immunity."

16. At paragraph 79 of its decision, the ET reiterated its conclusion:

> "… I find that the Respondent's plea of diplomatic immunity would have been successful."

Holding that the claimant had thus been:

> "80. … effectively prevented by the Respondent from making an employment claim under the UAE Labour Law against the Respondent in the UAE."

17. Returning to the question of territorial pull, the ET referred to the case of **Duncombe and ors v Secretary of State for Children, Schools and Families (No. 2)** [2011] UKSC 26, [2011] 4 All ER 1020, and the potential relevance of an employee's ability to obtain redress in a court or tribunal in the country where they had been employed. Accepting that the reach of British legislation could not be determined by the extent of an employee's knowledge of their ability to pursue a claim in local courts, the ET nevertheless considered that a legitimate expectation of an ability to do so would be a relevant factor. That, the ET found, was a feature in the claimant's case, both by reason of the fact that her contract stated it was governed by UAE law and by the further reassurance she had been given to that effect by the respondent's Country Director in February 2021. In those circumstances, and having vowed (in its equality policy) to strive to meet the obligations set out by UAE laws, in letter and spirit, the ET found that by:

> "196. … then removing itself from the reach of UAE law under the generously extended "umbrella" of diplomatic immunity, the Respondent has effectively done (or will have done) what Sir Robert Phillimore in ***The Charkieh*** said was against the recognised principles of international law…"

In **The Charkieh** (1873) LR4 A&E 59, it was held that immunity could not be claimed in respect of

a collision caused by a ship owned by the state but being used for trading purposes; the use of state property for such purposes was considered to amount to an implicit waiver of any immunity attaching to the state:

> "no principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorise a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character. …" see **The Charkieh** pp 99-100

18. In the claimant's case, the ET concluded that what it found to be the respondent's immunity from being sued in the UAE:

> "200. … effectively destroys the connection to that system of law, no matter how strong it otherwise would have been. …"

19. The ET acknowledged, however, that a quartet of authorities (**Bryant v Foreign and Commonwealth Office [2003] UKEAT** 174/02; **Hottak v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 CA; **Hamam v British Embassy** [2020] IRLR 570 EAT; **Rajabov v Foreign and Commonwealth Office** [2022] EAT 112) made clear that severance of the territorial pull of the place of work arising from a plea of immunity would not, of itself, create sufficient connection to British law to mean that an ET would have jurisdiction to determine a claimant's claims; there needed to be "*something more*" (*per* Lord Hoffman **Lawson v Serco**, approving the decision in **Bryant**). While accepting it was bound by these authorities, the ET nevertheless opined that what had been understood as a requirement for "*something more*" might have arisen from a misreading of Lord Hoffman's endorsement of **Bryant**.

20. Turning to the question whether "*something more*" had been established in this case, the ET considered the potential relevance of the **HRA**, and the Supreme Court's decision in **Benkharbouche v Embassy of the Republic of Sudan** [2017] UKSC 62, [2019] AC 777. In so doing, the ET rejected the claimant's submission that **Benkharbouche**, and the **Remedial Orders** to which it gave rise, showed that Parliament intended that overseas employees of British companies should have access to the ET in the event that they are unable to sue in their place of work because of a plea of state or diplomatic immunity. The ET went on to find, however, that the following principles might be derived from Lord Sumption's analysis in **Benkharbouche** (I summarise): (1) the right to court provided by article 6 **ECHR** may be triggered by a plea of immunity, albeit article 6 cannot create a substantive right where one does not exist because, for

example, the law providing that right does not apply by reason of its territorial scope; (2) immunity does not extinguish underlying obligations and liabilities, rights and remedies, but simply bars courts of a particular state from adjudicating on them, leaving them intact to be determined elsewhere; (3) customary international law only recognises "*restrictive immunity doctrine*" and a wider application of the doctrine would be inconsistent with recognised principles of international law and incompatible with article 6 **ECHR**; (4) state/diplomatic immunity international rules should not result in an employee finding themselves in a "*jurisdictional no man's land*" (see ET, paragraphs 211-216).

21. Addressing then the question of the territorial scope of the **HRA** and **ECHR**, the ET drew support from the judgment of Langstaff J in **Smania v Standard Chartered Bank** [2015] ICR 436 EAT for the proposition that the **ECHR** might apply outside the territory of the contracting states by way of the activity of diplomatic or consular agents. Referring to the description of the respondent as "*an integral part of the British Embassy ...*" (ET, paragraph 253), the ET was satisfied that the respondent's activities in the UAE were conducted as a diplomatic agent of the UK government; had that not been so, the UAE Court of Cassation would not have recognised the respondent's immunity. Moreover, the ET concluded that:

> "255. …, the very act of claiming immunity from being sued in the UAE court (as I have found on balance the Respondent would have done if the Claimant managed to lodge her claim) is an activity of a diplomatic or consular agent."

22. Further finding that, in carrying out its activities in the UAE, the respondent was acting as a public body, the ET considered that:

> "251. … by claiming diplomatic immunity against a claim brought by the Claimant, the Respondent would clearly be acting in public capacity as an emanation of the UK state. Therefore, as far as that action is concerned (i.e., the plea of immunity), it would fall within the scope of the HRA, if it were found on the facts the HRA applied extraterritorially."

23. In reaching the conclusion that the "*acts of diplomatic and consular agents*" gateway applied in these circumstances (and having referred to the judgment of Lord Hope in **Smith and ors v Ministry of Defence** [2013] UKSC 41, [2014] AC 52 SC), the ET explained its reasoning as follows:

> "258. … The threshold of "exceptional circumstances" must not be set especially high before they can justify the finding of the state exercising jurisdiction over the individual. The relevant question is whether the state is in a position to guarantee to the individual the Convention rights which it is said to have been breached (Article 6 in the present case).
> 259. It was clearly within the gift of the Respondent to allow the Claimant to pursue her claim in the UAE courts by waiving immunity, or, as in ***Bryant***, giving her assurances that immunity would not be sought. By doing the opposite (as I found the

> Respondent would have done), the Respondent as a diplomatic agent exercised the UK state jurisdiction over the Claimant, thus bringing her within jurisdiction of the UK for the purposes of Article 1."

24. In these circumstances, the ET concluded that the claimant's article 6 right to court was engaged and that - the respondent being a public body for these purposes - the **HRA** applied for the purpose of interpreting the **ERA**. On that basis, in considering whether it had jurisdiction to consider the claimant's claims, the ET held that it was required not to act in a way that was incompatible with her rights under the **ECHR**, but must, so far as it was possible to do so, read and give effect to the **ERA** in a way that was compatible with the claimant's right to a fair trial pursuant to article 6 **ECHR**. The ET summarised its reasoning as follows:

> "265. Considering my findings and conclusions that (by way of a summary):
> (i) The "territorial pull" factor has been effectively severed by the Claimant's being prevented from suing the Respondent in the UAE due to the Respondent's diplomatic immunity, thus making the outcome of the test of the relative connection between the UAE system of law and British employment law neutral.
> (ii)The Claimant had legitimate expectations created by the Respondent that she would be able to enforce her employment rights against the Respondent in the UAE courts.
> (iii) In the circumstances of the case the Respondent's claim of immunity is contrary to the restrictive immunity doctrine recognised by customary international law and the principles recognised by the UK domestic law.
> (iv)The Respondent's claim of immunity potentially infringes the Claimant's Article 6 and common law right to court. The right is not absolute, but its restriction can only be justified if it is a proportionate means of achieving a legitimate aim.
> (v) The Respondent's claim of immunity potentially breaches section 6(1) of the HRA.
> (vi) Immunity does not extinguish liability.
> (vii) Customary international law and the UK domestic law in spirit if not in letter anticipate that immunity in the forum state must not result in the situation that an employee cannot pursue his/her employer in the employer's state court.
> (viii) The Respondent's actions brought the Claimant within the UK's jurisdiction for the purposes of Article 1 ECHR.
> (ix) Articles [sic] 3 and 6(1) of the HRA are engaged and bind this Tribunal.
> I have little difficulty in coming to the overall conclusion that the Claimant's case does fall within the legislative grasp."

25. Returning to the quartet of cases previously referenced - **Bryant**, **Hottak**, **Hamam** and **Rajabov** - the ET distinguished those cases on two bases: (1) it considered that the "*issues of the claimants' Convention rights and the applicability of the HRA were not considered*" in **Bryant**, **Hamam** and **Rajabov**, and only considered "*in passing*" in **Hottak**; (2) all four cases concerned claims against central government, whereas the claimant's claim was against the British Council, and she had a greater expectation of her rights being enforced in the UAE as a result (ET, paragraphs 274-275).

26. More generally, the ET was satisfied that:

> "271. … it could not have been Parliament's intention that a British employer organised and operating in accordance with the laws of this land can escape judicial scrutiny of its actions vis-à-vis its employees hired in foreign lands in the "legal lacuna" created by diplomatic immunity on the one hand and the "territorial pull" of the employees' place of work on the other."

**The legal framework**

27. Before turning to the parties' submissions on the appeal, it is helpful to first consider the legal framework that informed the ET's reasoning. Adopting the same approach as the ET, I have considered the claimant's case through the prism of the **ERA**, although it is not suggested there is any material difference for the purposes of the claimant's claims under the **EqA**.

28. By section 94 **ERA** an employee has the right not to be unfairly dismissed. For these purposes, "*employee*" is defined by section 230(1) **ERA** as:

> "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

29. Although neither the protection under section 94 nor the definition of "*employee*" are stated to be subject to any geographic limitation, the case-law makes clear that, in order to give effect to the intention of Parliament, there must be such a limitation: it would be inconceivable that Parliament would have intended to confer rights upon employees working in foreign countries with no connection to Great Britain. Thus, in **Lawson v Serco** [2006] UKHL3, [2006] ICR 250, Lord Hoffmann considered it:

> "37. … would be very unlikely that someone working abroad would be within the scope of s 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was 'rooted and forged' in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary."

30. In **Bryant v Foreign and Commonwealth Office** [2003] UKEAT 174/02, Mrs Bryant, who had been employed in Italy by the Foreign and Commonwealth Office, sought to pursue a claim for unfair dismissal in Great Britain. The question raised by the appeal was whether the territorial reach of the ET extended to British nationals employed abroad by the British government, in respect of whom any claim in a court or tribunal in the jurisdiction in which they were employed would be met by a plea of diplomatic or

state immunity (**Bryant**, paragraphs 20 and 26). The EAT answered that question in the negative, holding:

> "27. The is no basis upon which we can construe the statutes … in order to add … that category of people, on to the existing legislation. Plainly it has been done in relation to mariners and offshore workers; whether it needs to be done … in the case … where immunity would have been claimed, … is a matter of jurisprudential or political argument. …"

31. The EAT in **Bryant** also went on to consider the position under the **HRA**:

> "27. … Assuming we exercise powers by reference to the Human Rights Act, even then there must be a section which we must then be persuaded to construe as purposively as possible in order to comply with human rights, we cannot just re-write the law or add a new provision.
> 28. It is apparent to us that we would first of all have to define carefully the new category, … and then add a new section to the Act, or at the very least, a new subsection to the Act, in order to bring, within the ambit of what we are otherwise satisfied is an intra-territorial piece of legislation, protection for certain people who work full-time out of the United Kingdom in the position such as Mrs Bryant. This Tribunal cannot possibly so rewrite the legislation; it would be a matter for Parliament, as we see it, if for anyone. Consequently, even as reformulated, the argument by Mrs Bryant cannot succeed as the differently constituted argument failed before the Employment Tribunal."

32. The decision of the EAT in **Bryant** was approved by Lord Hoffmann in **Lawson** (see paragraph 39). It is right to observe (as the ET did in the present case; ET, paragraph 116) that Lord Hoffmann was there addressing the example of "*an expatriate employee of a British employer who is operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country*" (**Lawson**, paragraph 39), but I consider it unlikely that the approval given to that decision simply overlooked the question the EAT considered it was addressing in **Bryant**, expressly identified as relating to the position of those working abroad who might be met with a plea of immunity if they sought to pursue claims in the country in which they worked.

33. Certainly, in **Hottak v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 CA, Sir Colin Rimer (with whom the other two members of the court agreed) understood Lord Hoffmann's approval of **Bryant** to extend to the EAT's conclusion that, even if considered under the **HRA**, it was not possible to find that the territorial reach of domestic employment protections must be extended to those employed by the UK government abroad notwithstanding that any claim they might bring in the jurisdiction in which they were employed would be met by a plea of diplomatic or state immunity. In **Hottak**, reliance was expressly placed on the fact that, unlike most employees, staff of the UK government would not be able to vindicate their rights in a foreign court as any claim would automatically fail by reason

of the UK's plea of immunity, but the Court of Appeal rejected the submission that this made such cases "*sufficiently exceptional*" to come within the reach of British employment law (see, in particular, **Hottak**, paragraphs 38-45 and 55-56).

34. A similar conclusion was subsequently reached in **Hamam v British Embassy in Cairo and anor** [2020] IRLR 570 EAT, in which it was held:

> "47. The fact that state immunity may prevent a Claimant from suing his or her employer in his or her own country is a relevant factor, but it is certainly not determinative. …"

And, to like effect, in **Rajabov v Foreign and Commonwealth Office** [2022] EAT 112, where it was observed:

> "7. That the respondent will or may have diplomatic or state immunity in the courts of the country with which it argued that a claimant's employment had the closest connection, and therefore that the claimant will not have any recourse in respect of the termination of their employment if the tribunal declines territorial jurisdiction, is not a matter of overriding significance which trumps other factors tending against jurisdiction. It is not a factor which intrinsically discloses a close connection with Great Britain. …"

35. In **Duncombe and ors v Secretary of State for Children, Schools and Families (No. 2)** [2011] UKSC 26, [2011] 4 All ER 1020, the territorial reach of the ET's unfair dismissal jurisdiction was again considered in the context of expatriate employees working or based abroad. In giving the judgment of the Court, Lady Hale observed:

> "8. It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britian and with British employment law than with any other system of law. …"

(For completeness, although not a point in dispute in this case, the comparison that the ET is thus required to undertake relates to the relative strength of connection with British employment law than with the law of the forum jurisdiction; the relative merits of any competing systems of law have no part in that inquiry; **Dhunna v CreditSights Ltd** [2015] EWCA 1238, [2015] ICR 105, paragraphs 40-41).

In going on to hold that teachers employed by the Secretary of State to work in European Schools outside Great Britain were to be treated as an exceptional case, falling within the ET's jurisdiction, the Supreme Court in **Duncombe** emphasised that they were employed under contracts governed by English law and worked in international enclaves, which distinguished the teachers:

> "17. … from the 'directly employed labour' of which Mrs Bryant was an example. There, the closer analogy was with a British, or indeed any other company, operating a business in a foreign country and employing local people to work there. These people are employed under local labour laws and pay local taxes. They do not expect to enjoy the same protection as an employee working in Great Britain, although they do expect to enjoy the same protection as an employee working in the country where they work. They do, in fact, have somewhere else to go. (It would indeed be contrary to the comity of nations for us to assume that out protection is better than any others.). …"

Of course, as was clear from the EAT's judgment in **Bryant**, if - as she argued - any claim she brought in Italy would be met by a plea of immunity, Mrs Bryant would not in fact have "*somewhere else to go*". Again, although addressing the broader question of the ET's territorial reach in respect of employees of the British state who were employed abroad, I would not infer that the Supreme Court had overlooked the EAT's finding that the fact that Mrs Bryant might be left without a potential forum for her complaints did not mean that employees in her position must be treated as an exceptional case for these purposes.

36. In the present case, the ET took the view that, in the claimant's circumstances, the respondent's claim of immunity would be contrary to the restrictive immunity doctrine and, as a result, would potentially infringe her article 6 **ECHR** right to court. The restrictive immunity doctrine relates to the customary international rule of state immunity, whereby, as Lord Sumption explained in **Benkarbouche v Embassy of the Republic of Sudan** [2017] UKSC 62, [2019] AC 777, that immunity is recognised:

> "8. … only in respect of acts done by a state in the exercise of sovereign authority (*jure imperii*), as opposed to acts of a private law nature (*jure gestionis*). …"

Further explaining the context of the restrictive immunity doctrine, Lord Sumption observed that:

> "17. State immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction. Unlike diplomatic immunity, which the modern law treats as serving an essentially functional purpose, state immunity does not derive from the need to protect the integrity of a foreign state's governmental functions or the proper conduct of inter-state relations. It derives from the sovereign equality of states. Par in parem non habet imperium. In the modern law the immunity does not extend to acts of a private law character. In respect of these, the state is subject to the territorial jurisdiction of the forum in the same way as any non-state party. …"

Applying that doctrine in the employment context, Lord Sumption provided the following guidance:

> "53. 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. It is not always easy to determine which aspects of the facts giving rise to the claim are decisive of its correct categorisation, and the courts have understandably avoided over-precise prescription. The most satisfactory general statement is that of Lord Wilberforce in *The I Congreso* [**Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)** [1983] 1

AC 244]) at p 267:

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

54. In the great majority of cases arising from contract, including employment cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. This will in turn depend on the functions which the employee is employed to perform.

55. The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, ie the head of mission and the diplomatic staff; (ii) administrative and technical staff; and (iii) staff in the domestic service of the mission. Diplomatic agents participate in the functions of a diplomatic mission defined in article 3, principally representing the sending state, protecting the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state. These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority. The role of technical and administrative staff is by comparison essentially ancillary and supportive. It may well be that the employment of some of them might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission. Cypher clerks might arguably be an example. ... However, I find it difficult to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act *jure gestionis*. The employment of such staff is not inherently governmental. It is an act of a private law character such as anyone with the necessary resources might do."

37. State immunity means that a state may not be impleaded in a domestic court against its will, although it is open to the state to waive the immunity and to voluntarily submit to the forum court's jurisdiction. Where, however, there is no waiver, the rule of state immunity requires that the claim must be dismissed, without determination of the merits; the forum court's jurisdiction is limited to examining the basis on which immunity is asserted and determining whether it applies. Where state immunity applies, the forum court's refusal to determine a claim does not amount to a denial of access to a court because it has no access to give (**Benkharbouche**, paragraphs 18-19). A plea of immunity does not, however, render the proceedings before the forum court a nullity; the immunity is procedural and, if found not to arise, the claim will simply continue (per Lord Sumption **Al-Malki v Reyes** [2017] UKSC 61, [2019] AC 735, paragraph 49).

38. Although the ET's references to the restrictive immunity doctrine might suggest that it considered

that it was state immunity that was in play in this case, its decision seems to indicate that it in fact reached its conclusion on the basis that the respondent would have asserted diplomatic immunity, which, if it applied, would similarly have had the effect of depriving the UAE court of jurisdiction. While the effect of diplomatic immunity will thus be the same, it is an immunity with a different basis to state immunity, serving an essentially functional purpose derived from the need to protect the integrity of a foreign state's governmental functions and the proper conduct of inter-state relations (**Benkharbouche**, paragraph 17, *supra*). Moreover, the scope of diplomatic immunity is subject to the **Vienna Convention on Diplomatic Relations** ("VCDR"), which:

> "6. … provides a complete framework for the establishment, maintenance and termination of diplomatic relations. It not only codifies pre-existing principles of customary international law relating to diplomatic immunity, but resolves points on which differences among states had previously meant that there was no sufficient consensus to found any rule of customary international law." *per* Lord Sumption in **Al-Malki**.

39. In many respects, for practical purposes, the scope of state immunity and diplomatic immunity will be the same, but the immunities are not co-extensive and the differences between them reflect the different purposes to which they relate; as Lord Sumption explained in **Al-Malki**:

> "17. Articles 31 to 40 of the Convention [the VCDR] represent an elaborate scheme which must be examined as a whole. Fundamental to its operation is the distinction, which runs through the whole instrument, between those immunities which are limited to acts performed in the course of a protected person's functions as a member or employee of the mission, and those which are not. The distinction is fundamental because what an agent of a diplomatic mission does in the course of his official functions is done on behalf of the sending state. It is an act of the sending state, even though it may give rise to personal liability on the part of the individual agent. In such a case, the individual agent is entitled to both diplomatic and state immunity, and the two concepts are practically indistinguishable: see *Jones v Ministry of Interior for the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270, at paras 10 (Lord Bingham), 66-78 (Lord Hoffmann). By comparison, the acts which an agent of a diplomatic mission does in a personal or non-official capacity are not acts of the state which employs him. They are acts in respect of which any immunity conferred on him can be justified only on the practical ground that his exposure to civil or criminal proceedings in the receiving state, irrespective of the justice of the underlying allegation, is liable to impede the functions of the mission to which he is attached. The degree of impediment may vary from state to state and from case to case. …"

While acknowledging that state and diplomatic immunity have a number of points in common (not least in that they are both immunities of the state, which can only be waived by the state), Lord Sumption further observed:

> "28. … the analogy should not be pressed too far. In some significant respects, the immunities of diplomatic agents are wider than those of the state. This is because their purpose is to remove from the jurisdiction of the receiving state persons who are within its territory and under its physical power. Human agents have a corporeal vulnerability not shared by the incorporeal state which sent them. Section 16 of the State Immunity Act 1978, which defines the ambit of state immunity in the United Kingdom, and article 3 of the UN Convention on the Jurisdictional Immunities of States, both provide that the rules relating to state immunity are not to affect diplomatic immunity. These provisions are necessary because, as Professor Denza points out in *Diplomatic Law*, 4th ed (2016), 1.
>
> > "As international rules on state immunity have developed on more restrictive lines, there has always been a saving for the rules of diplomatic and consular law and an increasing understanding that although these sets of rules overlap they serve different purposes and cannot in any sense be unified."
>
> …
> 30. The difficulty about the appellant's proposed analogy between state and diplomatic immunity is that the immunity of a diplomat in post, unlike that of a state, unquestionably extends to some transactions which are outside his official functions, and therefore almost inevitably of a private law character. …."

40. In finding that the respondent's plea of immunity would be relevant to the question of territorial reach in this case, the ET reasoned that this was because the plea would amount to an activity of a diplomatic or consular agent, such as to mean that it would fall within the scope of the **ECHR** and, therefore, the **HRA** (the **HRA** applying extraterritorially to the extent necessary to correspond with the case law of the European Court of Human Rights on the reach of rights under the **ECHR**; see *per* Lord Brown at paragraph 149 **R (Al-Skeini) v Secretary of State for Defence** [2008] 1 AC 153 HL). The diplomatic or consular agent "*gateway*" is properly to be understood as an exception to the principle that the territorial scope of article 1 **ECHR** is determinative of the scope of the contracting parties' positive obligations and, as such, of the scope and reach of the entire system of human rights protection under the **ECHR** (**Bankovic v Belgium** (2001) 11 BHRC 435 at paragraph 65). By article 1 **ECHR**, it is provided that:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

41. The principles applicable to the question of jurisdiction under article 1 **ECHR** were set out by the Grand Chamber in **Al-Skeini v UK** (2011) 53 EHRR 589 ECtHR, (relevantly) as follows:

> "1. A State's jurisdictional competence under Article 1 is primarily territorial ... Jurisdiction is presumed to be exercised normally throughout the State's territory ... Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases ….
> 2. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether

> exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.
> (ib) State agent authority and control
> 3. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory ...
> 4. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others ….
> …
> 135. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. ... The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.
> 136. It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" …."

42. Considering these principles in **Smith and ors v Ministry of Defence** [2013] UKSC 41, [2014] AC 52, Lord Hope made the following observations:

> "46. … The whole structure of the judgment [in **Al-Skeini**] is designed to identify general principles with reference to which the national courts may exercise their own judgment as to whether or not, in a case whose facts are not identical to those which have already been held by Strasbourg to justify such a finding, the state was exercising jurisdiction within the meaning of article 1 extra-territorially. While the first sentence of para 137 does not add a further example of the application of the principle to those already listed in paras 134-136, it does indicate the extent to which the principle relating to state agent authority and control is to be regarded as one of general application. The words "whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction," can be taken to be a summary of the exceptional circumstances in which, under this category, the state can be held to be exercising its jurisdiction extra-territorially. … [T]he word "exceptional" does not set an especially high threshold for circumstances to cross before they can justify such a finding. It is there simply to make it clear that, for this purpose, the normal presumption that applies throughout the state's territory does not apply. …
> …
> 49. … The concept of dividing and tailoring goes hand in hand with the principle that extra-territorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. The court need not now concern itself with the question whether the state is in a position to guarantee Convention rights to that individual other than those it is said to have breached …"

43. In applying the principles identified in **Al-Skeini**, and reviewing the case-law cited by the Grand

Chamber in that case, in **R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs** [2013] EWCA Civ 581, [2013] 3 All ER 757, Lord Dyson MR observed that:

> "44. What emerges from the other decisions concerning the activities of diplomatic and consular agents is that these activities *may* so affect an individual as to bring the individual within the jurisdiction for the purpose of article 1. A motif that runs through the cases is that it is a condition of the engagement of article 1 that the acts or omissions of which complaint is made come within the scope of an exercise of control and authority by the state in question. That is the governing principle in relation to diplomatic and consular activities. The jurisprudence provides only limited assistance on the question of how this principle should be applied on the facts of a particular case. It is important to note the cautious way in which the principle has been expressed. …"

44. In **Sandiford**, it was argued that by providing consular assistance and support to a UK national in Indonesia, who had been tried, convicted and sentenced to death in that jurisdiction, sufficient had been done to amount to an exercise of authority and control by the consular agents concerned. The Court of Appeal disagreed:

> "47. … The mere provision of assistance by consular officials is not enough to engage the article 1 jurisdiction. Whether the involvement amounts to the exercise of control and authority sufficient to engage the jurisdiction is a question of fact and degree. But in circumstances where the individual is completely under the control of and detained by the foreign state, it is difficult to see how the necessary degree of authority and control can be exercised by diplomatic and consular agents who do no more than provide the kind of assistance that was provided to the appellant in the present case. The point was put well by Gloster J at para 40 of her judgment in these terms:
>
> > "In my judgment it is manifestly clear on the facts of this case, that, at all relevant times, from the moment she was arrested, throughout the time she was in custody, throughout the trial process, and after her conviction when held in prison, the claimant was and remains under the authority and control of the Indonesian state and relevant criminal authorities. The mere fact that the consular officials provided her with advice and support, and that the FCO engaged in diplomatic representations, cannot be regarded as any kind of exertion of authority or control by agents of the United Kingdom so as to engage its responsibilities under the Convention.""

45. Moreover, in dismissing an appeal against the Court of Appeal's judgment, the Supreme Court in **Sandiford** ([2014] UKSC 44, [2014] 1WLR 2697) was clear that a decision by the UK government *not* to exercise powers to arrange for Mrs Sandiford's legal representation would not fall within the diplomatic or consular agent exception:

> "30. … [It is] Mrs Sandiford's case that a mere unexercised consular power suffices for the purposes establishing jurisdiction under article 1. But, read literally, that would appear to imply that any omission to exercise any power which could be exercised by diplomatic or consular means would bring the circumstances within the jurisdiction under article 1. On that basis, jurisdiction under article 1 would depend not on activities undertaken or duties performed, but simply on powers possessed.

> That would be contrary to the later statements of principle in *Bankovic* and *Al-Skeini*. …
> …
> 32. Looking at the matter more broadly, the position is that Mrs Sandiford has been apprehended, convicted and tried for drug smuggling in Indonesia. If one asks, by reference to any common-sense formulation, under whose authority or control she is, the answer is: that of the Indonesian authorities. It is they who ought to be ensuring her fair trial. If they were party to the Convention, it would be their duty to do so, and to provide appropriate legal assistance in a case of impecuniosity, under article 6. Since *Al-Skeini*, it is possible in certain respects to divide and tailor the Convention rights relevant to the situation of a particular individual: see para 137 in that case. But to divide and tailor the rights under article 6, so as to isolate the duty to fund from the remaining package of rights involved in fair trial, and to treat it as applying to the United Kingdom and as putting Mrs Sandiford to that extent under the authority or control of the United Kingdom, is in our opinion impossible in circumstances where the United Kingdom has deliberately not assumed or performed any role in relation to funding."

46. In the present case, having found that the **ECHR** (and the **HRA**) could extend to the claimant's putative employment claims in the UAE, the ET was satisfied that a plea of immunity on the part of the respondent would (potentially) amount to a breach of the claimant's article 6 **ECHR** right to court.

47. By article 6 **ECHR**, it is provided:

> "Right to a fair trial 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

As Lord Sumption observed in **Benkharbouche**:

> "14. … article 6 implicitly confers a right of access to a court to determine a dispute and not just a right to have it tried fairly …
> [A]lthough there is no express qualification to a litigant's rights under article 6 (except in relation to the public character of the hearing), the right to a court is not absolute under the Convention any more than it is at common law. It is an aspect of the rule of law, which may justify restrictions if they pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right…"

In **Benkharbouche**, to the extent that the relevant domestic provisions in issue in that case extended immunity beyond that allowed by customary international law, it was held to be an unjustified limitation to the rights afforded by article 6 **ECHR**. Where, however, a restriction on the right of access to a court reflects the rules of immunity recognised in international law, that cannot in principle be regarded as disproportionate to the legitimate aim of complying with a state's international law obligations; see **Benkharbouche**, paragraph 20, and **Basfar v Wong** [2022] UKSC 20, [2023] AC 33 *per* Lord Briggs and Lord Leggatt at paragraph 23(iii).

48. Returning to the ET's reasoning in the present case, given what it found to be the territorial reach of

the **ECHR**, it equally considered the provisions of the **HRA** to apply, such that, pursuant to section 6(1):

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

There is no dispute that the respondent would constitute a public authority for these purposes. What is in issue, however, is the ET's finding that, in the circumstances of this case, a claim of immunity on the part of the respondent would be contrary to the restrictive immunity doctrine recognised by customary international law and, therefore, would amount to an unjustified interference with the claimant's **ECHR** article 6 right to court.

49. Moreover, having found that the **HRA** would have application in these circumstances, the ET further had regard to section 3(1), which provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

**The grounds of appeal and submissions in support**

50. By ground 1, the respondent contends the ET erred in finding that the acts of diplomatic and consular agents gateway applied so as to mean the **ECHR** and **HRA** were engaged in respect of the claimant's attempts to bring proceedings in the UAE: (1) because the jurisdiction of the **ECHR** and **HRA** could only be extended where such agents have actually acted, a counterfactual finding as to what they would have done (which is all the ET found) is not sufficient (see **Al-Skeini**, and the authorities cited by the Grand Chamber in that case), and the existence of an unexercised power is not enough (**Sandiford** SC); (2) the gateway requires authority or control sufficient to guarantee to the claimant the rights under the **ECHR** she says have been breached (**Sandiford** CA; **Smith**): it is not enough that a state may be able to interfere with those rights, it must be in a position to guarantee them (**Sandiford** CA); (3) the claiming of immunity cannot be sufficient when its adjudication will be dependent on the decision of the foreign court: as a litigant in a court in the UAE, the respondent would be in an equivalent position to the claimant, able to defend itself on the basis of UAE law as determined and applied by the UAE court, but with no power or authority to secure the claimant a fair trial.

51. Ground 2 is put in the alternative, the respondent submitting that, in any event, the ET erred in finding that article 6 **ECHR** was potentially breached on the basis that the respondent's plea of diplomatic immunity would have been contrary to international law: (1) the ET's conclusion depended upon an

impermissible analysis of the quality of protection afforded to the claimant under UAE law, essentially finding that UAE courts breach international law in their handling of claims of diplomatic immunity (**Dhunna**); (2) to the extent the ET's reasoning was founded upon the restrictive doctrine of *state* immunity: (i) it failed to undertake the analysis required to reach such a finding: as a matter of customary international law, where an employment claim arises out of an inherently sovereign or governmental act of a foreign state, that foreign state is immune, but whether an employment relationship is of such character is a matter of fact and degree and requires a close analysis of the nature of the employment relationship (**Benkharbouche**, paragraphs 53-54 and 56-59), and no such analysis was attempted by the ET, and (ii) this was inapt, as the ET had made no finding that the respondent would have relied on *state* immunity, its reasoning was founded upon a potential claim of *diplomatic* immunity, the scope of which is governed by the **VCDR**, and the ET had failed to engage with the **VCDR**, in particular article 31(c), which provides an exception to immunity in the case of commercial or professional acts by a diplomatic agent outside of their official functions.

52. In submissions, the respondent next turned to ground 5, by which it contends the ET erred in concluding that customary international law and domestic law (at least in spirit) anticipate that immunity cannot result in an employee being unable to pursue her claim in the employer's home jurisdiction: (1) the "*spirit*" of the law (international or domestic) cannot provide a basis for the ET's reasoning: the law either requires an outcome or it does not; (2) diplomatic/state immunities impose a procedural limit on the power of a state to adjudicate disputes but have nothing to say about whether a person/entity subject to immunity should be capable of being sued in their home country, which will be a matter for the domestic law of that home state: the immunities leave intact the claimant's legal rights, and any relevant defences, in the courts/tribunals of the state which pleads immunity (**Benkharbouche**, paragraph 18) and what those rights/defences might be will depend upon the domestic law of that state - the law of state/diplomatic immunity does not create a right to sue in the courts/tribunals of the immune state where none exists as a matter of domestic law.

53. Lastly, by grounds 3 and 4, the respondent says the decision reveals errors in the application of the relevant authorities on the impact of immunity for the territorial jurisdiction of the ET. In holding that the effects of the plea of immunity severed the territorial pull of the claimant's employment in the UAE, the ET elevated the effects or legal classification of the plea to "*something more*", contrary to the approach adopted

in **Bryant**, **Hottak**, **Hamam**, and **Rajabov**. In its reasoning, the ET effectively treated those authorities as though decided *per incuriam* the **HRA** and **ECHR**, and thus not binding; the respondent submits, however, that was wrong: (1) because the **HRA** and **ECHR** make no difference to the analysis (see above), and (2) because the EAT in **Bryant** had considered the **HRA** and **ECHR**, and **ECHR** rights were relied upon in **Hottak** as a basis for establishing the territorial jurisdiction of the ET. Moreover, the respondent contends that the ET's attempt to distinguish those authorities on the basis that they all concerned central government departments whose employees would expect to be unable to sue in the states in which they worked could not save the decision: (1) if the claimants in **Bryant**, **Hottak**, **Hamam** and **Rajabov** expected to be unable to sue in the state in which they were employed, that would tend to emphasise the *absence* of connection with that state, which might be a factor pulling in favour of the jurisdiction of the ET; and (2) in the claimant's case, the ET found she expected to be able to sue in the UAE because of what she was told when recruited (pointing to her connection being closer to the UAE than Great Britain), but, if this was because of what the respondent had led her to believe, that was a point the claimant could have made in the UAE courts, alleging waiver of immunity - it did not establish the extra-territorial scope of British employment protections.

**The claimant's case**

54. The claimant objects that ground 1 mischaracterises the ET's reasoning: (1) the act of claiming immunity was not merely hypothetical as the ET found as a fact: (i) the respondent did not confirm it would waive immunity (ET, paragraph 76), (ii) the plea of immunity would have been successful (ET, paragraph 79), and (iii) the claimant was effectively prevented by the respondent from making an employment claim against it in the UAE (ET, paragraph 80); (2) the ET had not simply held that the fact the respondent would have claimed immunity was sufficient to bring the claimant within its jurisdiction for article 6 purposes but had found article 1 **ECHR** applied extra-territorially because the respondent acted as a diplomatic or consular agent: (i) generally, when undertaking its activities in the UAE (ET, paragraph 253), (ii) specifically, in not waiving immunity or providing assurances immunity would not be sought (ET, paragraph 259), and claiming immunity in the UAE Court (ET, paragraph 255) - by those acts, the respondent, as a diplomatic agent, exercised UK state jurisdiction over the claimant, bringing her within the jurisdiction of the UK for article 1 purposes (ET, paragraph 259); (3) article 6 was engaged by the subject matter of the claim,

that is, as a case involving state/diplomatic immunity and lack of access to a court.

55. Further, it is the claimant's case that the ET applied the correct test for extra-territorial jurisdiction: (1) it directed itself to the "*authority and control*" required for the diplomatic and consular agents gateway, and referred to the relevant case law; (2) while the authorities often refer to extra-territorial jurisdiction in relation to **the ECHR** applying only exceptionally (**Al-Skeini**, paragraph 131), as the ET correctly observed (ET, paragraph 258) the word "*exceptional*" does not set an especially high threshold but simply makes clear that, for this purpose, the normal presumption does not apply (**Smith**, paragraph 46); (3) **Sandiford** was distinguishable as it did not involve an act or omission in the exercise of authority or control but merely a decision not to take any step to exercise authority or control.

56. As for ground 2, the claimant again contends this mischaracterises the ET's reasons: (1) the ET was not opining on which system of employment law was superior, but found the respondent's claim of immunity was contrary to the restrictive immunity doctrine and, as such, could not be a justified interference of the claimant's article 6 right of access to a tribunal (**Benkharbouche** paragraphs 51–52); (2) in any event, it was open to the ET to conclude that the law of state immunity as it applied in the UAE was contrary to the rules of customary international law (and to apply British law in this regard; **FS Cairo (Nile Plaza) LLC v Lady Brownlie** [2022] AC 995); (3) when read fairly and as a whole (**DPP Law Ltd v Greenberg** [2021] IRLR 1016 CA), the ET plainly found the claimant's employment contract and employment relationship to be an act *jure gestionis*, to which the restrictive immunity doctrine applies (as demonstrated by the ET's comparison of the instant circumstances to those of **The Charkieh**; ET, paragraph 196); (4) as for the alternate way of seeing the plea of immunity: (i) state and diplomatic immunity are practically indistinguishable given that the acts concerned are acts of the sending state (**Al-Malki** *per* Lord Sumption at paragraph 17; **Basfar v Wong** [2023] AC 33 *per* Lord Briggs and Lord Leggatt at paragraph 33), (ii) in substance, the respondent's plea was of state immunity and the doctrine of restrictive immunity was thus relevant, (iii) in any event, the wider personal protections of diplomatic immunity under article 31 **VCDR** would not apply to the respondent, which is not a human agent (**Reyes** paragraph 28; **Basfar** paragraph 33).

57. Adopting the respondent's approach and next turning to ground 5, the claimant submits that there was no misdirection on the part of the ET: having directed itself to **Benkharbouche**, and Lord Sumption's citation at paragraph 65 from the explanatory report submitted to the Committee of Ministers of the Council

of Europe, the ET was entitled to deduce: (i) that customary international law appears to take the view that, if prevented from suing their employer in the forum state, the employee can always bring proceedings against the state employer in that state employer's home jurisdiction (ET, paragraph 265 (vii)), and (ii) that "*state/diplomatic immunity international rules should no (sic) result in an employee finding themselves in the "jurisdictional no men's land*." (ET, paragraph 216). In any event, the ET's conclusion on this narrow point would not vitiate its overall conclusions.

58. As for grounds 3 and 4, it is the claimant's case that there was no material misdirection: (1) the ET carefully considered the relevant authorities and distinguished them; (2) the strength of connection to the competing systems of law is a question of weight and it was open to the ET, exercising its evaluative judgment, to hold that the claimant's connection to UAE law was severed by the respondent's immunity; (3) that evaluative judgment should only be disturbed if the EAT is satisfied that the judgment is wrong (**Jeffery v British Council** [2019] ICR 929 per Longmore LJ at paragraph 136 and Peter Jackson LJ at paragraph 140); (4) as for the authorities in issue, (i) in **Bryant**, the Foreign Office had agreed to waive immunity, (ii) the ET was entitled, on a contextual reading of **Lawson**, to conclude that Lord Hoffmann was not addressing the issue of diplomatic immunity as a factor in the decision on the territorial application of the **ERA**, but was drawing a distinction between a case where a claimant had recourse to local systems of law (such as **Bryant**) and a case where the claimant was effectively established in an extra-territorial British enclave abroad; (iii) the ET had been entitled to distinguish **Bryant**, **Hottak**, **Hamam** and **Rajabov** on the basis that issues of the claimants' **ECHR** rights and the applicability of the **HRA** were not considered, and (iv) in **Hottak** the issue was not that the claimants were prevented from bringing claims in their local courts, and immunity was considered only in passing, and **Rajabov** simply states that it is open to the ET, on the facts of a particular case, to consider immunity is not a significant factor; (5) in any event, the ET accepted the principle from **Hottak** that "*a plea of immunity is not a factor which without more*" can extend the territorial reach of the **ERA**, finding the "*something more*" in this case arose from: (i) the fact that the respondent's claim of immunity potentially infringed the claimant's article 6 rights, and section 6(1) of the **HRA**, (ii) the fact that the claimant had been engaged in a private capacity as a local employee on terms governed by UAE law, and the respondent, through its equality policy, had vowed to "*strive to meet both the obligations [the local laws] set out and the spirit of them*", (iii) in contrast to the cases of **Bryant**, **Rajabov**, **Hottak**, and **Hamam**, the

respondent was not the UK government, but was a non-departmental public body which was "*committed to complying with the law in all the countries…where it works*" and which "*may sue and be sued in all courts and in all manner of actions and suits*" (ET, paragraph 276), and (iv) the claimant had a strong legitimate expectation that she would be able to enforce her employment rights in the UAE courts (ET, paragraph 276).

**Analysis and conclusions**

59. A difficulty that underlies the ET's decision in this case arises from the fact that it is founded upon an exercise of hypothetical reasoning. Although Mr Kemp and Ms Dannreuther say this is a mischaracterisation of the ET's decision - and point to its findings that the respondent had not confirmed it would waive immunity, and that a plea of immunity would have been successful - the fact is that the claimant never did submit a claim in the UAE, and the respondent never did assert immunity (whether state or diplomatic). Indeed, on the ET's findings, the reason why the claimant had been unable to commence her claim in the UAE was because she had been unable to navigate the procedural requirements for doing so, even though the difficulties she faced should not have been fatal (ET, paragraph 13). I do not say that the ET could not engage in such a counterfactual exercise (I note, for example, that Mrs Bryant's case was similarly determined on the basis of assumed facts as to the plea of immunity; see **Bryant**, paragraph 10), but it is an approach that gives rise to particular difficulties for the ET's reasoning in this case.

60. The first difficulty is identified by ground 1 of the appeal. As the ET recognised, given that the claimant was based and worked in a country that is not a signatory to the **ECHR**, the starting point must be that the **ECHR** would have no application: the scope and reach of the protections afforded by the **ECHR** being defined by the territorial scope of article 1 (see the judgment of the Grand Chamber in **Al-Skeini**, paragraph 131). To fall within the exception allowed in respect of the acts of diplomatic and consular agents, those agents must have exerted authority and control over others (**Al-Skeini**, paragraph 134); it is through the exertion of that authority and control, through its diplomatic and consular agents, that a signatory state is to be fixed with the (extra-territorial) obligation to secure to the individual complainant the relevant rights and freedoms under the **ECHR** (**Al-Skeini**, paragraph 137). It therefore matters not that the state would be unable to guarantee *all* rights under the **ECHR**, provided that the acts or omissions of which complaint is made - the matters which are said give rise to the denial of the relevant right or freedom - fall

within the scope of the state's exercise of authority and control (see **Sandiford** in the Court of Appeal, paragraph 44, and in the Supreme Court, paragraph 32).

61. In the present case, the claimant could not point to any relevant act or omission on the part of the respondent in her case. The fact that the respondent had entered a plea of diplomatic immunity in relation to a claim brought by a former employee in the UAE in 2014 could not amount to an activity in relation to the claimant. Equally, the respondent's general approach - characterising itself as operating under the umbrella of the British Embassy - could not be described as an exertion of authority or control over any right to court the claimant might have in the UAE. Addressing this case on a counterfactual basis thus gave rise to a basic conceptual difficulty for the ET's approach.

62. In any event, even assuming that this should not be fatal, I consider the ET's reasoning to be flawed. On the assumption that the claimant had submitted a claim in the labour court in the UAE, and that this had been met by a plea of diplomatic or state immunity by the respondent, this still would not amount to a relevant exertion of authority or control so as to establish jurisdiction under article 1 **ECHR**. In such circumstances, the respondent's plea would amount to an assertion that the circumstances were such that the UAE court could have no jurisdiction to determine the claim against it. That plea would, however, not render the proceedings a nullity; rather, it would then be for the UAE court to examine the basis on which immunity was asserted and to determine whether it applied. The assertion of immunity would be a plea by one party to the litigation; it could not amount to the exertion of authority or control by the UK state over the UAE court's ability to determine that question any more than a plea of immunity by a foreign state in proceedings in this country could be said to usurp the authority of a court or tribunal in this jurisdiction to decide whether or not such immunity exists.

63. It is, however, right to acknowledge that it would have been within the power of the UK state, acting through the respondent, to waive immunity and to thus voluntarily submit itself to the jurisdiction of the UAE court. That would not be to remove the rule of state or diplomatic immunity: in either case, it is an inherent feature of the rule that it is always within the power of the state to voluntarily submit to the jurisdiction of the forum court. Assuming, therefore, that the respondent had determined not to waive immunity in the claimant's case, can it then be said that this would give rise to an omission in the exercise of authority or control such as to engage the jurisdiction of the **ECHR** under article 1? The claimant contends

that the answer to this question must be yes; in this regard, it is submitted that the decision not to waive immunity can be distinguished from the circumstances of **Sandiford**, as that case involved no omission in the exercise of authority or control but merely a decision not to take any step to exercise authority or control. I am, however, unable to understand the distinction being made. Were the respondent to determine not to waive immunity in proceedings brought by the claimant in the UAE, it would be omitting to exercise a power in the same way that the UK government had omitted to exercise the power available to it to fund Mrs Sandiford's legal representation. The proceedings brought by the claimant - and the fairness of any trial within those proceedings - would still be subject to the authority and control of the UAE court: on one possible scenario, that might be limited to the determination of the question of immunity; on another (whether because immunity had been waived, or because it had been found not to exist), that might extend to the full determination of all the claimant's claims. In either case, however, the fact that the respondent possessed the power to waive immunity would, in my judgement, be insufficient to establish an extra-territorial jurisdiction under the **ECHR**.

64. I therefore uphold this appeal on ground 1. As is common ground before me, that inevitably means that the ET's decision must be set aside and, as such, it is unnecessary for me to consider the other bases of challenge. As the remaining grounds have been fully argued before me, however, I have, in any event, also gone on to consider the alternative questions thus raised.

65. The second ground of appeal attacks the ET's apparent finding (whether the ET reached a definitive conclusion on this point is not entirely clear, albeit this would seem to be a necessary step in its reasoning) that the respondent's plea of immunity in proceedings brought by the claimant in the UAE would have been contrary to customary international law and, as such, to have amounted to a breach of article 6 **ECHR**. A preliminary question arises in this regard, as to whether the ET approached this as a case involving a plea of diplomatic immunity (as is stated in its conclusions at paragraphs 79, 196, 251, and 265(i)) or of state immunity (as its reasoning in respect of the restrictive doctrine might suggest). For the claimant it is said that any lack of precision in the ET's reasoning reflects the way the case was argued, with neither side suggesting that the particular type of immunity that would have been pleaded would be material to the questions to be determined. I am not sure that the distinction can be so readily set aside - the two immunities serve different purposes, have developed in different ways, and are subject to different regimes in the

determination of their scope (see **Benkharbouche**, paragraph 17; **Al-Malki** paragraphs 17, and 28-30) - but, for the reasons I explain below, I ultimately agree that this is not a point that is determinative on this appeal.

66. On the assumption that the ET had in mind that the respondent would have entered a plea of *state* immunity (and, of course, the hypothetical nature of this exercise again reflects the counterfactual nature of the ET's decision), its reasoning appears to presuppose that this would have been contrary to the restrictive doctrine laid down by customary international law. Although there is no clear finding to this effect, I understand this to be the implication of the ET's reference to **The Charkieh** (ET, paragraph 196), where the distinction was drawn between the acts of a sovereign acting in a sovereign capacity (for which immunity could be claimed) and when acting as a private trader (for which immunity should not be recognised). That, of course, reflects the distinction drawn by the restrictive doctrine of state immunity, between "*the exercise of sovereign authority (jure imperii), as opposed to acts of a private law nature (jure gestionis)*" (**Benkharbouche**, paragraph 8). The difficulty is, however, that there has never been any assessment as to whether the claimant's employment claims might have arisen out of any inherently sovereign or governmental act, or whether her employment was properly to be characterised as an act of private law, falling outside the sovereign or governmental functions of the UK state (**Benkharbouche**, paragraphs 53-55)

67. Applying the guidance provided in **Benkharbouche**, although the claimant was not employed as a diplomatic agent, her employment would have fallen within the second category identified, as a member of the administrative and technical staff, which, although essentially ancillary and supportive, might amount to an exercise of sovereign authority if sufficiently close to the governmental functions of the mission (**Benkharbouhe**, paragraph 55). That, however, would be a question to be determined upon an assessment of the functions which the claimant had been employed to perform. As the claimant had not submitted a claim in the UAE courts, that was not an assessment that was ever undertaken in that jurisdiction. And, although the ET was plainly influenced by the UAE courts' acceptance of the respondent's plea of immunity in an earlier case in 2014 (albeit that seems to have been a plea of diplomatic immunity in any event), that would say nothing about whether a plea of state immunity in respect of the claimant's employment would have properly fallen within the restrictive doctrine recognised by customary international law. Moreover, as the ET itself carried out no assessment of the claimant's employment claims in this regard, I cannot see that it could reach any conclusion as to whether or not a plea of state immunity would fall within, or be contrary

to, the restrictive doctrine. As such, it was simply not open to the ET to assume that a plea of immunity on the part of the respondent would be contrary to customary international law; still less could it assume that a court within the UAE would adjudicate on such a plea in a way that would fall outside the restrictive doctrine (not least as that would seem to import an evaluative judgement as to the relative merits of the systems of law within the UAE and the UK, which would not have been open to the ET; *per* **Dhunna**).

68. As for the possible alternative basis for the ET's decision, the position is essentially the same if it is assumed that the counterfactual was premised upon a plea of *diplomatic* immunity. In that case, the potential applicability of the plea would be subject to the regime laid down by the **VCDR**. As the claimant observes, that would require consideration of whether the claims made related to the acts of human agents within the **VCDR** and, if so, as to whether the exception to immunity allowed by article 31(c) applied. Again, as no such plea was ever made by the respondent to any claim brought by the claimant, this was not a question that had been adjudicated upon within the UAE. Equally, however, the ET itself carried out no assessment of the potential application of the **VCDR** so as to be able to reach any conclusion as to whether a plea of diplomatic immunity would have been open to the respondent in this case.

69. For the reasons provided, therefore, I would also allow this appeal on ground 2. Whether the decision is seen as founded upon a plea of state *or* diplomatic immunity, it presupposes a breach of customary international law and/or of the **VCDR** absent the required factual assessment and, as such, there is no proper foundation for the assumption that underpins the ET's reasoning.

70. As for the points raised by grounds 3, 4 and 5, it seems to me that these can be taken shortly, and together. The ET's suggestion (recorded at paragraph 265(vi) of its decision) that - "*in spirit if not in letter*" - domestic and customary international law anticipates that immunity in the forum state must not result in an employee being unable to pursue their employer in the employer's state court, is certainly not supported by domestic case-law. Indeed, the EAT in **Bryant** - expressly with the **HRA** in mind - clearly envisaged that would inevitably be the outcome if Mrs Bryant was correct in her understanding that any employment claim she brought in Italy would be forestalled by a plea of immunity. That was also an outcome acknowledged by the Court of Appeal in **Hottak** and by different compositions of the EAT in **Hamam** and **Rajabov**. The point made in **Bryant** - that addressing any lacuna in protection in such circumstances must be a matter for Parliament - has effectively informed the relevant domestic case-law on this question. Certainly, the

appellate courts have been unwilling to assume any Parliamentary intention (whether in spirit or letter) that the absence of recourse that might result from a plea of immunity should intrinsically be taken to be the "*something more*" envisaged in **Lawson**. As for international law, while I note the reference by Lord Sumption, at paragraph 65 **Benkharbouche**, to the explanatory report submitted to the Committee of Ministers of the Council of Europe, whereby state immunity was justified on the basis that "*the links between the employee and the employing State (in whose courts the employee may always bring proceedings), are generally closer than those between the employee and the State of the forum*", I cannot see that this provides a basis by which a principle of customary international law should be taken to create a right to sue in the employer's home state where no such right exists under domestic law.

71. More generally, and returning to the domestic case-law by which I am bound, I am unable to see that there is any proper distinction to be drawn between the present case and the circumstances being considered in **Bryant**, **Hottak**, **Hamam** and **Rajabov**. To the extent that the claimant had any greater expectation that she would be able to pursue her claims in the UAE, that can only serve to emphasise the strength of the connection between her employment and that jurisdiction. As the ET found, the claimant was properly to be regarded as a local employee in the UAE, and any possible questions of immunity would have needed to be determined, in accordance with the relevant principles of international law, in that jurisdiction. In such circumstances, even assuming that a plea of diplomatic or state immunity had been upheld, I am unable to see that would provide a proper basis for establishing the extra-territorial reach of British employment protections under the **ERA** or **EqA**. For all the reasons provided, I therefore allow the respondent's appeal.