EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
1. Mr B Animashaun	**v**	**1. Nigeria High Commission**
2. Mrs G Antonza		**2. The Federal Republic of Nigeria**

Heard at: Central London Employment Tribunal (By CVP remote videolink)

On: 14 June 2021

Before: Employment Judge Brown

Appearances

For the Claimant:	**Mr D Stephenson, Counsel**
For the First Respondent:	**Mr E Pipi, Counsel**
For the Second Respondent:	**Did not attend and was not represented**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Nigeria High Commission does not have a separate legal personality to the Federal Republic of Nigeria. The claims were therefore brought against the Federal Republic of Nigeria, which was the Claimants' employer and is the correct Respondent to both claims.

2. The Nigeria High Commission is removed as a Respondent to the claims.

3. Throughout the Claimants' employment, the Claimants' job functions were not exercises of Sovereign Authority, but were ancillary and supportive technical and administrative functions.

4. The Claimants' dismissals were not exercises of sovereign authority.

3. The Federal Republic of Nigeria therefore does not have the benefit of state immunity in relation to the Claimants' European law claims.

4. The Claimants' domestic law claims are dismissed on withdrawal by the Claimants.

REASONS

1. This Open Preliminary Hearing was listed to determine all issues relating to state immunity in this case.

2. By a claim form presented on 30 April 2019, the First Claimant, Mr Animashaun, brought complaints of unfair dismissal; wrongful dismissal; direct age discrimination; indirect age discrimination; whistleblowing (detriments on the grounds that he made protected disclosures); victimisation; failure to pay accrued but untaken holiday pay on the termination of his employment; and breach of contract/unlawful deductions from wages in relation to his entitlement to a payment on the termination of his employment against the Respondent Embassy, his former employer.

3. The First Claimant's claim was served on the Nigerian Ministry of Foreign Affairs by the FCO Diplomatic Channel on 14 October 2019.

4. The Second Claimant also presented a claim against the Respondent Embassy on 30 April 2019. She brought complaints of unfair dismissal; wrongful dismissal; direct age discrimination; indirect age discrimination; direct disability discrimination; discrimination arising from disability; indirect disability discrimination; failure to make a payment in lieu of accrued but untaken holiday on the termination of the Claimant's employment; and breach of contract/unlawful deductions from wages in relation to the Claimant's entitlement to a payment on the termination of her employment.

5. The Second Claimant's claim was also served on the Nigerian Ministry of Foreign Affairs by the FCO Diplomatic Channel on 14 October 2019.

Procedural History

6. I had conducted a TPHC in these cases on 13 November 2020.

7. At the time of the TPHC on 13 November 2020, the Respondent Embassy had not presented an ET3 Response in either claim, but had indicated that it relied on state immunity to defend the claims.

8. The Respondent Embassy did not attend the 13 November 2020 TPHC.

9. At that TPHC, I gave directions, which applied to both parties, for preparation for an Open Preliminary Hearing on 15 April 2021. The directions included requiring the Respondent to set out the arguments it relied on in asserting state immunity only and directions for exchange of documents and witness statements on the issue of state immunity.

10. I said that it was important that the Respondent Embassy indicated the basis for its assertion of state immunity, so that the Tribunal could fairly determine the issue and, if it was appropriate, give effect to state immunity. I said, "If the Respondent

participates in these proceedings only for the purposes of asserting state immunity, it will not be considered to have submitted to the jurisdiction."

11. The Respondent Embassy did set out its position regarding state immunity by way of a position statement dated 26 November 2020.

12. The Respondent Embassy's position was that, as a diplomatic mission, it could not be made a party to legal proceedings. The Respondent Embassy contended that the correct Respondent was the Federal Republic of Nigeria ("the State") and that the issue of state immunity did not arise unless the State was made a party to the legal proceedings. It did not exchange documents and witness statements for the OPH on 15 April 2021.

13. At the Open Preliminary Hearing on 15 April 2021, I decided to join the Federal Republic of Nigeria as Second Respondent to the claim.

14. I gave further directions for establishing the issues regarding state immunity and for the parties to exchange documents and witness statements in relation to those issues, so that the cases would be ready for hearing on the preliminary issue of state immunity at today's hearing, 14 June 2021.

Second Respondent's Application to Postpone this Hearing

15. Just before this OPH, by letter sent on 13 June 2021, the Second Respondent applied for a postponement of this hearing listed for 14 June 2021, and to vary my directions given on 15 April 2021. It said that the Second Respondent had not been served properly under *ss 12(1) & (2) SIA 1978* and that directions should be postponed until the provisions of *ss 12(1) & (2) SIA* were complied with.

16. The Second Respondent said that service had been effected on 14 October 2019 on the Federal Republic of Nigeria as a non-party. It said that service of an ET claim on a non-party outside the jurisdiction of the ET would require prior permission of the President of the ET under *r 87 ET Rules of Procedure 2013,* but such permission had not been obtained. It said that, therefore, there had been no valid service of the ET claim at any time.

17. I dismissed the application for a postponement.

18. It was not in dispute that the claims had been served on the Nigerian Ministry of Foreign Affairs by the FCO Diplomatic Channel on 14 October 2019, in accordance with the mandatory provisions of *s12(1) SIA* "(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through [the Foreign, Commonwealth and Development Office] to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry." The State was therefore served with the proceedings at the outset.

19. I noted that Lord Sumption had stated in *R(Bancoult) v Foreign Secretary (No. 3)* [2018] 1 WLR 973 at [68]: "A diplomatic mission is not a separate legal entity. Its archives and documents belong to the sending state."

20. By *s14(1) SIA*, references to a state in that Act "include references to (a) the sovereign or other head of that State in his public capacity; (b) the government of

that state; and (c) any department of that government, but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued."

21. Insofar as the High Commission had been named as Respondent at the date of service, the High Commission was, in fact, part of the sending state. It had no separate legal personality from the sending State. Service on the High Commission, in accordance with *s12 SIA 1978,* was therefore service on the State in accordance with the mandatory provisions of *s12.*

22. I noted that the named respondent in *Benkharbouche* in the EAT was "Embassy Of The Republic Of Sudan". The EAT did not suggest that service of the proceedings of that title were defective.

23. Even if service of an ET claim on a party outside the jurisdiction of the ET would normally require prior permission of the President of the ET under *rule 87 ET Rules of Procedure 2013*, *s12 SIA 1978* sets out the applicable procedure for service in claims against a foreign state, or organs of a foreign state. The normal rules for service under the *ET Rules of Procedure 2013*, including *r87 ET Rules 2013*, do not apply to claims served on a foreign State.

24. The Respondents had been properly served. There had been very substantial delays, even in determining the preliminary issue, and there was no good reason to yet further delay the proceedings.

Procedure at this Hearing

25. At the outset of the hearing, Mr E Pipi, Counsel for the First Respondent Embassy, told the Tribunal that he had originally been instructed for both Respondents. However, given that the Second Respondent had applied to postpone the hearing, he was unsure whether he was still instructed by the Second Respondent. I gave him time to take instructions. Having done so, he told me that he did not have instructions from the Second Respondent regarding this OPH, but that he was still instructed by the First Respondent Embassy and that he would assist the Tribunal, as Counsel, more generally.

26. Before the Second Respondent had applied for postponement of this hearing, the parties had agreed the Issues for determination at this hearing. They were:

"Diplomatic Immunity

1. Is a claim brought against the First Respondent in fact brought against the Head of the Mission, or is it to be treated as such?

2. If so, does the First Respondent enjoy diplomatic immunity?

3. In the alternative, does the First Respondent have immunity from proceedings under Article 22(2) of the Vienna Convention on Diplomatic Relations or under customary international law **[1]** on the basis that claiming against, or suing, the First Respondent has the effect of impairing its dignity?

State Immunity

4. Was the employment of the Claimants an exercise of sovereign authority? **[2]**

5. If not, can the Second Respondent nevertheless enjoy immunity from these proceedings if its treatment and/or dismissal of the Claimants:

a) engaged a sovereign interest, or

b) was an exercise of sovereign authority?

6. If so, did the Second Respondent's treatment and/or dismissal of the Claimants in fact engage a sovereign interest and/or was it an exercise of sovereign authority?

Footnotes

[1] The Claimants note that the First Respondent has not identified any principle of customary international law or provided any authority in support of its position.

[2] The parties agree that none of the exceptions in section 4(2) of the State Immunity Act 1978 apply."

27. Both the Respondents had therefore conceded that they were not relying on any of the provisions of *s4(2) SIA 1978* in their assertion of state immunity.

28. Despite the Second Respondent's later application for a postponement, I was satisfied that it was fair to conduct the hearing on the basis of that List of Issues. It had been agreed when all parties were participating in the proceedings for the purposes of determining the issue of state immunity. It had been agreed on the instruction of all the parties.

29. Both Claimants had presented witness statements. I heard evidence from them. Mr Pipi cross examined the Claimants on behalf of the First Respondent.

30. Rose Yakowa-Okoh, Head of Chancery at the Nigerian High Commission, made a statement for this OPH. She did not attend to give evidence. I read her witness statement.

31. There was a bundle of documents, page numbers in these reasons refer to that Bundle.

32. Mr Stephenson, acting for the Claimants, and Mr Pipi, acting for the First Respondent, both made written and oral submissions.

33. The hearing was conducted by CVP videolink. There were some connection issues during the hearing but these were resolved. All the participants heard what the Tribunal heard. Members of the public were entitled to attend.

Relevant Law

State Immunity

34. Foreign states enjoy a general immunity from the jurisdiction of the courts in the UK, pursuant to the *State Immunity Act 1978*. By *SIA 1978 s 1(1):* 'A state is

immune from the jurisdiction of the courts of the UK, except as provided in the following provisions of this Part of this Act'.

State Immunity: Contracts of Employment

35. However, state immunity does not apply in the case of proceedings relating to a contract of employment between the state and an individual where the contract was made in the UK or the work is to be wholly or partly performed there, *s 4(1) SIA*. On the other hand, *s4(1) SIA* itself does not apply if: (a) at the time when the proceedings are brought the individual is a national of the state concerned; or (b) at the time when the contract was made the individual was neither a national of the UK nor habitually resident there; or (c) the parties to the contract have otherwise agreed in writing, s 4(2) SIA.

36. *S 4(1) SIA* also does not apply to proceedings concerning the employment of the members of a mission within the meaning of the *Vienna Convention on Diplomatic Relations* or the members of a consular post within the meaning of the *Vienna Convention on Consular Relations ("VCDR")*, *s 16(1)(a) SIA*.

37. *Art 1 VCDR* defines: (1) The "members of the mission" as including "members of the staff of the mission": art 1(b); (2) The "members of the staff of the mission" as including "members … of the administrative and technical staff … of the mission": art 1(c); and (3) "The "members of the administrative and technical staff of the mission" are the members of the staff of the mission employed in the administrative and technical service of the mission": art 1(f).

38. Thus, where the provisions of *s 4(2)* or *s 16(1)(a)* apply, state immunity can operate to prevent employees from bringing claims relating to their contract of employment.

39. However, *Art 6.1 European Convention on Human Rights ("ECHR")* provides: "In the determination of his civil rights and obligations…., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

40. *Art 47 Charter of Fundamental Rights of the EU* provides: "47 Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article."

41. In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah*, [2018] IRLR 123, [2017] ICR 1327, the Supreme Court decided that the doctrine of state immunity in international law applied only sovereign acts, not private acts, of the foreign state concerned. "The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority" [37].

42. Whether there has been such an act will depend on the nature of the relationship between the parties, and this in turn will depend on the functions that the employee was employed to perform [54].

43. At [55] Lord Sumption distinguished between the three categories of embassy staff as follows:

    (1) "The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, ie the head of mission and the diplomatic staff; (ii) administrative and technical staff; and (iii) staff in the domestic service of the mission. Diplomatic agents participate in the functions of a diplomatic mission defined in article 3, principally representing the sending state, protecting the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state. These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority. The role of technical and administrative staff is by comparison essentially ancillary and supportive. It may well be that the employment of some of them might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission. Cypher clerks might arguably be an example. Certain confidential secretarial staff might be another: see Governor of Pitcairn and Associated Islands v Sutton (1994) 104 ILR 508 (New Zealand Court of Appeal). However, I find it difficult to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act jure gestionis. The employment of such staff is not inherently governmental. It is an act of a private law character such as anyone with the necessary resources might do."

44. The SC in *Benkharbouche* decided that, with regard to purely domestic staff employed in a diplomatic mission, their employment is not an inherently governmental act, but is an act of a private law character, and there is no basis in customary international law for the application of state immunity in an employment context to such acts. The wider immunity conferred in such employment cases by *ss 4(2)(b)* and *16(1)(a) State Immunity Act 1978* was therefore inconsistent with *art 6 European Convention on Human Rights*, and *art 47 Charter of Fundamental Rights of the EU*.

45. Following *Benkharbouche*, Tribunals do have jurisdiction to hear complaints brought by domestic staff against foreign states based on EU law, if the employment relationship is of a purely private law character. Tribunals also have jurisdiction to hear complaints brought by administrative staff, if the employment relationship was of a purely private law character. Art 47 of the Charter provides for the right to an effective remedy and a fair trial. The Supreme Court decided that the Charter therefore provided the power to disapply the provisions of the SIA 1978 entirely to ensure that the Claimants were able to pursue an effective remedy for the alleged contravention of their EU law rights.

46. Under the *State Immunity Act 1978*, Tribunals still do not have jurisdiction to hear complaints based on national law only. While a Declaration of Incompatibility was made in *Benkharbouche*, domestic law claims remain barred by the *SIA 1978* because the Supreme Court decided that neither *s 4(2)(b)* nor *s 16(1)(a) SIA* could be read down, pursuant to the *HRA 1998 s 3(1),* in such a way as to make them compatible with the Convention rights.

Nature of State Immunity – Older Authorities

47. In *Benkharbouche*, Lord Sumption, giving the judgment of the Court, addressed the issue of whether "state immunity is absolute unless the case is brought within an internationally recognised exception to it." [37]. Lord Sumption said that that proposition was not correct, because "The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority." [37]. He said that, in the absence of a special rule applicable to Embassy employees, that was also the default position in respect of Embassy employees.

48. At [70] *Benkharbouche*, Lord Sumption rejected the contention that states are immune from claims in relation to the dismissal of Embassy staff, who are in a special category. Lord Sumption noted that, by Art 7 VCDR a sending state may "freely appoint" members of the staff of a diplomatic mission. He said that there was an argument that a freedom to appoint must imply a freedom to dismiss.

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

50. In *Sengupta v Republic of India* [1983] ICR 22, the Employment Appeal Tribunal had said:

    "……..when one looks to see what is involved in the performance of the applicant's contract, it is clear that the performance of the contract is part of the discharge by the foreign state of its sovereign functions in which the applicant himself, at however lowly a level, is under the terms of his contract of employment necessarily engaged. One of the classic forms of sovereign acts by a foreign state is the representation of that state in a receiving state … A contract to work at a diplomatic mission in the work of that mission is a contract to participate in the public acts of the foreign sovereign. The dismissal of the applicant was an act done in pursuance of that public function, ie the running of the mission. As a consequence, the fairness of any dismissal from such employment is very likely to involve an investigation by the industrial tribunal into the internal management of the diplomatic representation in the United Kingdom of the Republic of India, an investigation wholly inconsistent with the dignity of the foreign state and an interference with its sovereign functions.". (emphasis supplied).

51. Sengupta concerned the common law position on state immunity because the SIA did not apply on the facts of that particular case: the relevant contract of employment giving rise to the claim for unfair dismissal was entered into before the SIA came into effect.

52. Lord Sumption considered *Sengupta* at [73] *Benkharbouche.* He confirmed that "*Sengupta v Republic of India* [1983] ICR was a decision of the Employment Appeal Tribunal under the common law in force before the passing of the State Immunity Act 1978." As Lord Sumption said, the employee in Sengupta was at "'the lowest clerical level'. He was essentially responsible for collating press cuttings."

53. Lord Sumption said, of Sengupta and other cases with similar ratio decidendi, "These decisions amount to saying that the employment of embassy staff is inherently governmental notwithstanding the non-governmental character of the particular employee's functions or of the relevant acts of the employer. Sengupta was decided at an early stage of the development of the law in this area and, in my opinion, the test applied by the Employment Appeal Tribunal was far too wide." [73].

54. He went on to say, "I doubt whether an English court applying customary international law could properly have categorised the facts of these cases as involving exercises of sovereign authority. … What is, however, clear beyond argument is that there is no international consensus on this point sufficient to found a rule of customary international law corresponding to s 16(1)(a) of the State Immunity Act 1978." He said, at [75], that no principle of international law deprived the employment tribunal of jurisdiction in the cases of the embassy domestic workers in *Benkharbouche.*

55. In addressing the issue of the nature of state immunity, Lord Sumption noted that law of state immunity had developed differently to the law of diplomatic immunity, which was based mainly on an international consensus established by writers and governmental practice over many centuries, [40].

Sovereign Acts in Private Law Employment

56. At [57] - [58] *Benkharbouche*, Lord Sumption cautioned against the suggestion that, because the employment of an employee is of a private law character, state immunity does not attach to any act of the state in relation to that employment. He gave examples of where state immunity could attach to particular acts of a state in relation to an employee.

57. He said,

"[57] I would, however, wish to guard against the suggestion that the character of the employment is always and necessarily decisive. Two points should be made…

[58] The first is that a state's immunity under the restrictive doctrine may extend to some aspects of its treatment of its employees or potential employees which engage the state's sovereign interests, even if the contract of employment itself was not entered into in the exercise of sovereign authority. Examples include claims arising out of an employee's dismissal for reasons of state security. They may also include claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which in the nature of things impinge on the state's recruitment policy. These particular examples are all reflected in the United Nations Convention and were extensively discussed in the preparatory sessions of the Inter-national Law

Commission. They are certainly not exhaustive. *United States v Public Service Alliance of Canada, Re Canada Labour Code* [1993] 2 LRC 78, [1992] 2 SCR 50 concerned the employment of civilian tradesmen at a US military base in Canada. The Supreme Court of Canada held that while a contract of employment for work not involving participation in the sovereign functions of the state was in principle a contract of a private law nature, particular aspects of the employment relationship might be immune as arising from inherently governmental considerations, for example the introduction of a no-strike clause deemed to be essential to the military efficiency of the base. In these cases, it can be difficult to distinguish between the purpose and the legal character of the relevant acts of the foreign state. But as La Forest J pointed out ([1993] 2 LRC 78 at 89, [1992] 2 SCR 50 at 70), in this context the state's purpose in doing the act may be relevant, not in itself, but as an indication of the act's juridical character."

Relevance of Diplomatic Immunity

58. The Vienna Convention forms part of the law of the UK and is contained in *Sch 1 Diplomatic Privileges Act 1964*. The nature of the immunity granted to diplomatic agents from the civil jurisdiction of the courts is set out in Art 31(1) of the Convention, which provides that a diplomatic agent shall enjoy immunity from the civil and administrative jurisdiction of the receiving state, with 3 very limited exceptions.

59. The law of diplomatic immunity has developed over centuries. The Respondent referred to the following sources:

60. According to *Gentili , De Legationibus Libri Tres*, first published in 1585, *Professor Alberico Gentili* an "embassy" or a "mission" is not a building or the staff in it, but a "right" or a "public function".

61. In *Le Droit des Gens [The Law of Nations*], first published in 1758, Vattel described embassy in similar terms as Gentilli and also in terms of a right to mutual diplomatic intercourse between nations performed by ambassadors. In Book 4 chap.5 [sections 55-57] he said:

'OF THE RIGHT OF EMBASSY, OR THE RIGHT OF SENDING AND RECEIVING PUBLIC MINISTERS

It is necessary that nations be enabled to treat and communicate together.

It is necessary that nations should treat and hold intercourse together, in order to promote their interests, - to avoid injuring each other, - and adjust and terminate their disputes……., see page 13.

They do this by the agency of public ministers.

But nations or sovereign states do not treat together immediately: and their rulers or sovereigns cannot well come to a personal conference in order to treat of their affairs…….The only expedient, therefore, which remains for nations and sovereigns, is to communicate and treat each other by the agency of procurators or mandatories, -- of delegates charged with their commands, and vested with their powers, -- that is to say, public ministers……..; see pp.13 – 13[a].

The right of embassy, like all other rights of sovereign, originally resides in the nation as its principal and primitive subject. During an interregnum, the exercise of that right reverts to the nation, or devolves on those whom the laws have invested with the regency of state……"; p.14

62. Describing ambassadors as 'legates' or public ministers Vattel said:

'…..people were scarcely acquainted with more than one order of public ministers, in Latin termed legati, which appellation has been rendered by that of "ambassadors"….; p.16

Every minister, in some measure, represents his master…..; p.16

According to the generally established custom, the ambassador is a public minister, representing the person and dignity of a sovereign……"; p.17.

63. Vattel described ambassadors as being on a 'mission' or 'embassy', ie, the public function they are charged to perform:

"……At present there are ambassadors ordinary and extraordinary; but this is no more than an accidental distinction, merely relative to the subject of their mission…."; p.18

'……Embassies, then, being of such great importance in the universal society of nations, and so necessary to their common well-being, the person of ministers charged with those embassies are to be held sacred and inviolable among all nations…."; p.19"

64. In *Omerri v Uganda High Commission* [1973] 8 ITR 14 NIRC the NIRC, Sir John Donaldson presiding, dismissed an appeal against an industrial tribunal's decision that it had no jurisdiction to hear a complaint of unfair dismissal brought against the Unganda High Commission because the High Commissioner of the Republic of Uganda enjoyed diplomatic immunity. The NIRC stated that the basis of diplomatic immunity is that of international law. It said that diplomatic immunity was a procedural bar against claims. It also said that it was not necessary for the Uganda High Commission to claim diplomatic immunity, which was based on international law.

65. *Omerri v Uganda High Commission* [1973] 8 ITR 14, predated the SIA 1978. In *Richards v High Commissioner for Zambia* UK/EAT/619/96 per HHJ Clark (at a Preliminary Hearing) considered *Omerri*. In *Richards* HHJ Peter Clark said, "Prior to the passing of the State Immunity Act 1978 employees of foreign and commonwealth missions fell outside the scope of employment legislation and were unable to claim unfair dismissal protection. See *Omerri v Uganda High Commission* [1972] 8 ITR 14. Section 4 of the 1978 Act softened the absolute bar on proceedings. It withdrew the immunity in respect of proceedings between parties to a contract of employment relating to any statutory rights arising out of the contract, subject to certain exceptions."

66. By *s2(7) SIA 1978 Exceptions from Immunity,* "The head of a State's diplomatic mission in the United Kingdon, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on

behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

Status of Security Guards

67. Denza on Diplomatic Law, 4th Edition notes that, p140 "The Uk Government has said that the employees of private military and security companies may – if performing security functions of a diplomatic mission – properly be notified to the receiving State as members of its administrative and technical staff.", Response of the Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee Report on Human Rights, Session 2008-9, Cm 7723, 2009 BYIL 835-6.

68. Satow's Diplomatic Practice 7th edition refers to the same UK Government statement to the committee, at p231.

Findings of Facts

(a) Mr Animashaun

69. Mr Animashaun had two periods of employment working in the UK. Between May 2002 and September 2006, he was employed as a Special Assistant to Dr Kolade, the then High Commissioner to the UK as a Special Assistant. Mr Animashaun was employed and paid directly by the High Commissioner and was classed as being part of the High Commissioner's diplomatic household for immigration purposes, pp95-96.

70. Mr Animashaun the applied for a vacancy, was employed, by the High Commission as a Commissionaire from 1 October 2006 to 21 December 2018. The role of a Commissionaire is essentially that of a security guard and involves providing security at both the High Commissioner's residence and the Commission's premises.

71. During his shifts at the High Commissioner's residence, Mr Animashaun worked in an office located in a separate building at the back of the house, monitoring the CCTV. If he saw anything unusual, which was extremely rare, he or another Commissionaire would patrol around the perimeter of the residence.

72. At the beginning of a shift, Mr Animashaun and his colleagues would be told the names of any visitors expected to attend the house that day. They were not told the purpose of their visit, or given any other information about them. When the doorbell rang, the Claimant would ask the visitor to confirm their name and, if they were expected, he would buzz them into the house. If they were not expected, he would inform the Head of Domestic Staff, who would ask one of the High Commissioner's family members. His role was strictly limited to buzzing guests into the house, which he did from the security office. He did not greet the guests or perform any other security checks. He rarely, if ever, had any contact with the High Commissioner or his family.

73. As such, he was not privy to any Government-related matters and did not have access to any confidential information.

74. His role at the Commission buildings also involved monitoring the CCTV and patrolling the premises to investigate anything unusual on the footage.

75. Mr Animashaun would be assigned to a particular entrance, and his duties varied depending on which entrance it was. For example, if the Claimant was posted at the staff entrance, his role involved checking the ID badges of all employees before letting them into the building. If an employee had forgotten their badge, the Claimant had a list of employees and their extensions, from which to cross-check identity.

76. Most members of the public attended the Commission by appointment. They usually had to check in at the reception of the relevant department, who confirmed their appointment. The Claimant was then responsible for checking their bags and putting them through a scanner. Occasionally, the Claimant would provide further assistance by directing or escorting them to where they needed to go for their appointment. In order to do this, he would ask to see their appointment letter, so that he knew where to direct them. He told the Tribunal that he did not attend any meetings or have any access to confidential information relating to Government-related matters.

77. In addition to providing security, Mr Animashaun told the Tribunal that he was responsible for preparing the rota and allocating shifts to the other Commissionaires. He was also responsible for answering the out of hours telephone service during my night shifts. He would speak to members of the public and explain that they would need to call back during opening hours. Occasionally, he would tell these people which department they needed to ask for. For example, if someone called because they wanted to arrange to pick up their passport, he would tell them to call the immigration department during opening hours. He did not provide these people with any telephone numbers or answer any other queries.

78. He did not have access to any systems or confidential information in order to deal with these calls.

79. While there were some keys available to the security guards, these were to the public areas and rooms. Mr Animashaun did not have access to keys to any diplomatic areas (for example, areas where the diplomatic bags were kept, or where passports were kept) .

80. On 27 June 2012 Mr Animashaun was granted settled status with indefinite leave to remain in the UK. He subsequently became a naturalised British Citizen on 7 August 2013, p93.

81. Mr Animashaun's initial letter of appointment offered him "appointment in the High Commission", p97. The letter of appointment said that he would be "bound by the provisions of the Conditions of Service of the Nigeria High Commission".

82. The Nigeria High Commission Conditions of Service for Local Staff provide, in their Preamble, "Locally recruited staff referred to as employees are recruited to provide various services for the Mission", p135.

83. These High Commission Conditions of Service provide that the "Nigeria High Commission means the High Commission of Nigeria in London representing the Government of the Federal Republic of Nigeria", p161.

84. His payslips were issued by the Nigeria High Commission, pp101 -103.

85. Mr Animashaun's 22 November 2018 letter, giving notice of dismissal, said, ".. the High Commission in its efforts to restructure .. has decided to terminate your employment … If you are interested in continuing to serve the Mission beyond 21 December 2018 you may wish to apply for a contract appointment.." p105.

86. Mr Animashaun told me that, despite being employed by the Commission, he always understood that the Commission was ultimately part of the Government of the Federal Republic of Nigeria ("the State").

87. I accepted Mr Animashaun's evidence about his job role and functions. It was not undermined in cross examination. The documents to which he referred me supported what he said, where relevant.

(b) Ms Antonza

88. By letter of 23 June 1989 on Nigeria High Commission writing paper, Ms Antonza was offered "appointment in the High Commission as a Copy Typist II", p113. The letter attached "our Conditions of Service".

89. Ms Antonza told me, and I accepted, that she started work for the Commission on 3 July 1989 and was classed by the Commission as being a member of its "locally recruited staff", because she was already living in the UK when she was recruited, rather than being recruited over from Nigeria. Additionally, my role was to be permanently based in the UK.

90. Ms Antonza had a very long career at the Commission spanning over 29 years, from 3 July 1989 until 21 December 2018, when she was dismissed.

91. Ms Antonza also told me that, throughout her employment at the Commission, she was granted a visa which allowed her to live and work in the UK pp107-108. She understood that this specific type of visa was only given to employees of the Commission who were not performing any kind of diplomatic function: those who performed diplomatic functions had red-coloured Nigerian passports which exempted them from immigration control, whereas all other employees had standard, green-coloured Nigerian passports, with their visas stamped inside.

92. On 7 February 2002, Ms Antonza became a naturalised British citizen p110 and she has had dual Nigerian and British nationalities ever since, p111-112.

93. Ms Antonza drew my attention to the Definitions section of the Nigeria High Commission Conditions of Service for Local Staff, para 16.11, which defines "Member of Local Staff" as "employees of the High Commission locally recruited by the Mission as distinct from Home-Based Officers normally posted from Nigeria" p161, and "employee" as "Nigerian and non-Nigerian who is in the service of the Mission as a local staff and who has acceded to the Conditions of Service". P161.

94. The same definitions section also defines the Nigeria High Commission as "the High Commission of Nigeria in London, representing the Government of the Federal Republic of Nigeria", p162

95. Ms Antonza told me that, despite being employed directly by the Commission, she always understood that the Commission and the government of the Federal Republic of Nigeria ("the State") were effectively one and the same. This is

because the State ultimately controlled the Commission and that the State implemented policies and directives, which the Commission had to enforce. For example, the State implemented a retirement policy requiring all staff (both in Nigeria and abroad) to retire at the age of 60 or after 35 years of service, whichever came first. She said that the Commission implemented this policy by incorporating it into the terms of service for locally recruited staff, p144.

96. Ms Antonza said that, as far as she was aware, the State also funded the Commission. During her time in the Accounts Department, one of her colleagues was responsible for processing the payroll and told Ms Antonza that the State transferred funds to the Commission on a quarterly basis, from which the Commission paid its employees directly.

97. Ms Antonza told me that administrative or domestic service staff were categorised into groups called “cadres” based on the type of job they had, pp138-141. Ms Antonza was in the secretarial cadre, and there were grades within that cadre too. Ms Antonza said, however, that an employee’s grade generally reflected their length of service and had no bearing on their level of responsibility or pay. She said that, as such, employees of a very low grade generally had the same duties and responsibilities as employees of a very high grade, providing they were in the same cadre. Ms Antonza was not challenged on her evidence regarding these grades and I accepted her evidence.

98. During her employment at the Commission, Ms Antonza’s grade increased from “Copy Typist II” to “Principal Personal Secretary I”.

99. Ms Antonza told the Tribunal that diplomatic staff were very careful to keep all government-related matters strictly confidential, including from other employees. Any diplomatic function was performed personally by the diplomatic staff and Ms Antonza was not allowed to assist with this work. All meetings of a sensitive nature were held privately behind closed doors and all confidential documents were typed up personally by the diplomatic staff.

100. Ms Antonza started her role as a typist on 3 July 1989, at the grade “Copy Typist II”. For the first three months, she worked in the Deputy High Commissioner’s office. She was only allowed to perform unskilled tasks such as making cups of tea and fetching food. Ms Antonza became frustrated with this role, as she had professional secretarial qualifications raised this as an issue with the secretary and personal assistant after a few months.

101. Ms Antonza was then transferred to the Accounts Department.

102. Ms Antonza told me that her CV, which she prepared and submitted to the Commission in November 2018 as part of a re-engagement process pp130-131, overstated her duties and responsibilities. She said that, for example, she stated in my CV that whilst working for the Deputy High Commissioner, she was responsible for typing correspondence relating to staff matters, planning the Deputy High Commissioner’s itinerary and organising functions and events. However, she told me that these duties were actually performed by the Deputy High Commissioner’s secretary and personal assistant. She said that when she compiled her CV she had wanted to paint myself in the best light possible in order to maximise her chances of being re-engaged.

103. Ms Antonza said that it was not true, as the commission alleged, that she received and processed top level government correspondence between the Nigerian government, the Commission and other government agencies, whilst working for the Deputy High Commissioner, p62. She said that the diplomatic staff kept any correspondence of this nature strictly confidential and administrative employees (including the secretary and personal assistant to the Deputy High Commissioner) were not privy to this information.

104. I accepted the Claimant's evidence that her CV was inaccurate and that she worked in a very junior, domestic staff – type role, when working for the High Commissioner.

105. Between 1989 and 2009 Ms Antonza worked as an administrative assistant in the Accounts Department. The Commission had a public counter where members of the public would go to submit their visa and passport applications. She worked at this counter and was responsible for taking payment for these applications.

106. Ms Antonza was not responsible for reviewing, processing or approving visa or passport applications; this was done by the visa officer. At the end of each day, she would add the receipts together and give it to an accounts officer to cross-check. The accounts officer would then give it to a diplomat, who would check the receipts again and take the postal orders to the bank personally.

107. Whilst working in the Accounts Department, Ms Antonza's grade increased from "Copy Typist II" to "Principal Personal Secretary I". This did not result in any changes to her duties or responsibilities.

108. Between 2009 and 2015 Ms Antonza worked in the Industry, Trade and Investment Department at the grade "Principal Personal Secretary I", p120. She initially worked under the Head of Department. The Head of Department's role involved putting UK companies in touch with Nigerian ministries or parastatals (entities owned by the government) in order to discuss potential trade and investment deals. The Head of Department would hold an initial meeting with a company representative and then introduce them to the relevant ministry in Nigeria via an introductory letter. Ms Antonza would sometimes arrange and diarize these meetings for the Haed of Department. Ms Antonza would greet the relevant visior on arrival but did not attend the meetings.

109. The Head of Department would draft letters of introduction to different ministries and parastatals in Nigeria and Ms Antonza would type them up. The letters would say something along the lines of "I met with this person/company, who is interested in doing business with you. Please could you assist them". Ms Antonza told me that there was no confidential information about potential trade or investment deals in these letters.

110. Beyond the introductory letter, Ms Antonza told me that the Head of Department prepared and sent all correspondence personally. Ms Antonza therefore had no knowledge of any potential or actual business ventures, proposals, negotiations or meetings between these companies and the Nigerian government.

111. Ms Antonza explained in evidence that, when she stated in her CV that she "coded" all documents relating to ministries and parastatals in Nigeria, p131, she

was referring to the code or reference number for the relevant Ministry. She would attach the correct reference number for the relevant Ministry to any letter of introduction.

112. Ms Antonza said that, as far as she was aware, the Commission did not "code" any of its sensitive political documents in the sense that the documents were translated into code.

113. I accepted her evidence on this. It was consistent with the description of her other tasks.

114. Ms Antonza's duties also included submitting the Head of Department's expenses to the Accounts Department on their behalf and chasing up payment, buying their lunch, laying the food out and clearing up afterwards, and buying food for them to take home for dinner. Ms Antonza would also run personal errands for the Head of Department, buying gifts of clothing and shoes for his wife.

115. In 2014 Ms Antonza had a another kidney transplant. She was transferred to the Immigration Department from September 2015, p122, where she continued to work at the grade "Principal Personal Secretary I" until her dismissal in December 2018, pp128-129.

116. Her role there involved working as a call centre agent. She answered telephone and email enquiries from members of the public in relation to their passport, visa and emergency travel document applications.

117. Occasionally, people would call in respect of welfare issues or applications for police clearance certificates. Ms Antonza could not deal with these enquiries personally and would give the the phone number of the relevant department.

118. I accepted Ms Antonza's evidence regarding her job roles and the true nature of her responsibilities. I found that she had overstated her responsibilities on her CV, which was significantly misleading.

The Claimants' Dismissal

119. On 19 November 2018, staff at the High Commission were told that there had been a directive from Abuja to reduce staff numbers at the High Commission. On 22 November 2018 both permanent and contract employees were issued with letters of disengagement, p165.

120. Ms Antonza agreed in evidence that the High Commissioner told a staff meeting of 19 November 2018 that a directive to dismiss local staff had come from Aduja and that she understood that that meant that the Nigerian government had made a decision to dismiss all local staff. She agreed that she understood that everyone was then dismissed.

121. Rose Yakowa-Okoh, Head of Chancery at the Nigerian High Commission, made a statement for this OPH. She did not attend to give evidence. In her witness statement, she said that the decision to terminate all local staff at missions around the world was made by the Federal republic of Nigeria "based on its employment/recruitment policy in discharge of its constitutional duties". She said that the government had policies regarding the number of local staff employed by

each mission. In 2018, the government had directed the government to dismiss all local staff and re-employ up to the maximum number approved by the mission.

122. Mr Rose Yakowa-Okah also said that the Federal Government has a legal obligation to distribute the national wealth for the common good of its citizens. She said, "If a section of the workforce is using up a disproportionate amount of its budget… it has to make adjustments to its employment policy to discharge its constitutional duties. That was exactly what it did by instructing missions to dismiss all local staff and recruit up to the approved numbers."

Discussion and Decision

Diplomatic Immunity

1. Is a claim brought against the First Respondent in fact brought against the Head of the Mission, or is it to be treated as such?

2. If so, does the First Respondent enjoy diplomatic immunity?

123. Mr Pipi, for the Embassy Respondent, contended that the 'legate' [the ambassador or his diplomatic team] is on a diplomatic mission or embassy to the UK to perform a public function which the 'legate' is sent here to perform. According to Professor Alberico Gentili and Vattel, an "embassy" or a "mission" is not a building or the staff in it, but a "right" or a "public function". The right or public function is, on the other hand, personified by the ambassador who leads the 'mission'. Mr Pipi argues that, therefore, if the diplomatic mission or the embassy [which is not a legal entity but merely a 'right' or 'public function'] is sued, it is the ambassador [who is a legal entity and personifies the 'right' or 'function'] that is sued.

124. I considered that Mr Pipi was eliding the separate concepts of the "embassy" and the person who carries out the embassy.

125. I did not agree that the extracts from *Gentili* or *Vattel* were authority for Mr Pipi's proposition that a claim against a mission must be considered to be a claim against the head of Mission.. They state that an "embassy" or a "mission" is not a building or the staff in it, but a "right" or a "public function", which resides with the sending state. The extracts also explain the basis for according diplomatic immunity to the persons of diplomats, as legates of the sending state, charged with those embassies. Diplomats "represent" the state and their "person" is inviolable. Vattel says that "the ambassador is a public minister, representing the person and dignity of a sovereign……"; p.17 and that "the person of ministers charged with those embassies are to be held sacred and inviolable among all nations…."; p.19"

126. The mission or embassy is therefore not a separate legal entity to the sending state, but a right of the sending state. As Lord Sumption also stated in *R(Bancoult) v Foreign Secretary (No. 3)* [2018] 1 WLR 973 at [68], "A diplomatic mission is not a separate legal entity. Its archives and documents belong to the sending state."

127. On the other hand, an individual diplomat, while carrying out the embassy and representing the state, is a person, to whom diplomatic immunity attaches due to the nature of their role as legate.

128. I considered that the High Commission was not a separate legal entity to the sending state, but that the High Commissioner was indeed a separate legal person. I considered that there are no legal grounds for eliding these 2 separate legal personalities in the way suggested.

129. This is consistent with the drafting of the *SIA 1978* – by *s2(7) SIA 1978 Exceptions from Immunity,* "The head of a State's diplomatic mission in the United Kingdon, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

130. *S2(7) SIA 1978* therefore envisages that the head of a mission can act on behalf of the state, but does not embody the state.

131. Furthermore, by *s14(1) SIA*, references to a state in that Act "include references to (a) the sovereign or other head of that State in his public capacity; (b) the government of that state; and (c) any department of that government, but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued."

132. *S14 SIA* recognizes that the state and all its organs are separate legal personalities from legal personalities which are capable of being sued in their own right and are distinct from those organs.

133. If a High Commissioner was automatically considered to be the correct Respondent to a claim against the High Commission, that would potentially expose them to personal liability, contrary to the universal protections which are given to diplomats (diplomatic immunity can be lost in certain circumstances). It would be contrary to the very principles of international law on which the Respondents rely.

134. In any event, the Claimants letters of appointment both stated that they were employed in the "High Commission". They were also bound by the provisions of the Conditions of Service of the Nigeria High Commission..

135. The Nigeria High Commission Conditions of Service for Local Staff provide, in their Preamble, "Locally recruited staff referred to as employees are recruited to provide various services for the Mission", p135.

136. These High Commission Conditions of Service provide that the "Nigeria High Commission means the High Commission of Nigeria in London representing the Government of the Federal Republic of Nigeria", p161.

137. By contrast, the Claimants' terms of employment did not say that they were employed by the High Commissioner. Mr Animashaun had been directly employed

by the High Commissioner previously, but that employment had ended and Mr Animashaun was later directly employed by the Embassy.

138. The Claimants bring claims against their employer, and have named the High Commission as employer. They rely on the High Commission Conditions of Service in bringing their claims, for example paragraph 11 and 12 Mr Animashaun's grounds of complaint. These conditions of employment provide that the High Commission represents the Federal Republic of Nigeria. Contractually, therefore, their employment was with the Federal Republic of Nigeria.

139. The Federal Republic of Nigeria was the Claimants' employer and is the correct Respondent to their claims. There is no basis for substituting the High Commissioner as Respondent.

140. The Nigerian High Commission is removed as a Respondent to the claims.

141. The question as to whether the First Respondent has immunity from proceedings under Article 22(2) of the Vienna Convention on Diplomatic Relations does not therefore arise.

State Immunity

4. Was the employment of the Claimants an exercise of sovereign authority?

142. On the facts, Mr Animashaun was employed as a security guard throughout his employment by the Federal Republic of Nigeria. This involved checking and admitting visitors to the High Commission and the High Commissioners' residence, monitoring CCTV cameras, patrolling the building, answering routine telephone enquiries and devising rotas. Mr Animashaun's role did not involve any access to confidential governmental information, or systems, nor access to any diplomatic areas holding the diplomatic bag or passports.

143. Mr Animashaun's duties were low-level and routine security functions, almost identical to security functions carried out in non-government buildings. They did not involve access to any confidential information or systems. They were entirely ancillary and supportive. They did not involve any governmental functions, nor were they close to these, as described in *Benkharbouche,* at [55].

144. I noted that Denza on Diplomatic Law, 4th Edition states at, p140 "The Uk Government has said that the employees of private military and security companies may – if performing security functions of a diplomatic mission – properly be notified to the receiving State as members of its administrative and technical staff.", Response of the Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee Report on Human Rights, Session 2008-9, Cm 7723, 2009 BYIL 835-6.

145. This confirmed that security guards are administrative and technical staff, rather than diplomatic agents.

146. Following *Benkharbouche,* therefore, Mr Animashaun's employment was not an inherently governmental act, but was an act of a private law character, and there is no basis in customary international law for the application of state immunity to his employment.

147. Likewise, I found that all Ms Antonza's duties were truly ancillary and supportive as described by Lord Sumption in *Benkharbouche,* at [55].

148. She initially worked as a very junior "personal assistant" for the High Commissioner, making cups of tea and fetching food.

149. Between 1989 and 2009 Ms Antonza worked as an administrative assistant in the Accounts Department taking payment for visa and passport applications. Ms Antonza was not responsible for reviewing, processing or approving visa or passport application. Her role was that of a cashier.

150. Between 2009 and 2015 Ms Antonza worked in the Industry, Trade and Investment Department at the grade "Principal Personal Secretary I". She arranged and diarized meetings for the Head of Department. She also greeted the relevant visitor, on arrival, but did not attend the meetings.

151. Ms Antonza would type up simple letters of introduction drafted by the Head of Department. The letters would say something like "I met with this person/company, who is interested in doing business with you. Please could you assist them". There was no confidential information about potential trade or investment deals in these letters.

152. Ms Antonza's duties also included submitting the Head of Department's expenses to the Accounts Department and chasing up payment, buying lunch and clearing up afterwards. Ms Antonza would run personal errands for the Head of Department, buying food for dinner and gifts of clothing and shoes for his wife.

153. Ms Antonza worked in the Immigration Department from September 2015, p122, as a call centre agent. She answered telephone and email enquiries from members of the public in relation to their passport, visa and emergency travel document applications. Occasionally, people would call in respect of welfare issues or applications for police clearance certificates. Ms Antonza could not deal with these enquiries personally and would give the the phone number of the relevant department.

154. All of these tasks were routine, very low level, administrative functions. None involved access to any confidential government information. None were in the nature of governmental functions.

155. Again, following *Benkharbouche*, her employment was not an inherently governmental act, but was an act of a private law character, and there is no basis in customary international law for the application of state immunity to her employment.

5. If not, can the Second Respondent nevertheless enjoy immunity from these proceedings if its treatment and/or dismissal of the Claimants:

a) engaged a sovereign interest, or
b) was an exercise of sovereign authority?

6. If so, did the Second Respondent's treatment and/or dismissal of the Claimants in fact engage a sovereign interest and/or was it an exercise of sovereign authority?

156. Mr Pipi contended that the Nigerian government has a duty to use public finances and use national budget in way which is consistent with its governmental aims. On the facts, he said that the directive to dismiss all the local staff at the High Commission came from the Nigerian Government. Mr Pipi said that the Government was entitled to make a decision to dismiss employees to protect public finances.

157. Mr Pipi contended that the decision to dismiss all local staff could only be an *acta imperii*. It was an exercise of the constitutional duty of the Federal Republic of Nigeria. He said that it would sit uncomfortably with the Vienna Convention and the European Conventions to interfere with the way a State decides to handle its finances or run its Missions.

158. Mr Pipi said that questioning the classification and notification of staff working at the mission was considered to be intrusive. He referred to a practice which had developed whereby receiving states do not do this, *Denza* p.15. Mr Pipi said that this was in line with *Sengupta.*

159. I acknowledged that, while *Benkharbouche* indicated that the employment of administrative and technical staff, whose functions were truly ancillary and supportive, is an act of a private law nature, state immunity could still attach to certain acts of a state in relation to that employment - paras [57] & [58] *Benkharbouche*.

160. Lord Sumption gave examples of acts of sovereign authority in private law employment, such as claims arising out of an employee's dismissal for reasons of state security. Claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which impinge on the state's recruitment policy, can also attract state immunity. He also gave an example of the introduction of a no strike policy at a military base.

161. While Mr Pipi and Ms Yakowa-Okoh contended that the dismissals in this case were an application of the state's recruitment/employment policy, in reality what they were describing was a decision to save money by making redundancies from embassy staff. Embassy employees were dismissed and then re-employed up to a certain number. Ms Yakowa-Okoh said, "If a section of the workforce is using up a disproportionate amount of its budget… it has to make adjustments to its employment policy to discharge its constitutional duties. That was exactly what it did by instructing missions to dismiss all local staff and recruit up to the approved numbers."

162. I did not agree with Mr Pipi's characterisation of the Respondent's actions as "classification and notification of staff working at a mission". I agreed that the classification of staff in an embassy might be a governmental act. However, on the

Respondent's case, it made a decision to reduce embassy staff numbers in order to save some costs. It did not make a decision regarding how to categorise groups of staff at this mission, for example as diplomatic staff, rather than technical staff.

163. It was difficult to see how a reduction in staff numbers constituted a recruitment policy for civil servants, as a governmental function, rather than a narrow decision to dismiss on the grounds of exigencies.

164. I considered that a recruitment "policy" for civil servants was more likely to be directed towards ensuring a particular composition of the civil service, for the purposes of carrying out its governmental functions in the relevant state. Such a policy might encompass matters such as the structure of the civil service, the nature and level of roles in it, the level of qualification and experience required for these, any exclusions from eligibility, the levels of security clearance applicable to various roles and limits on the length of service permitted. A recruitment policy was also likely to apply more broadly than in the single instance of the decision to dismiss made in this case.

165. The decision in this case therefore did not appear to pursuant to a broader recruitment policy. I considered that the fact that more than one embassy employee was dismissed at a time did not make the relevant decision into a "recruitment policy" of government.

166. It was not obviously an act which attracted state immunity in the way a recruitment to the military or diplomatic corps might.

167. I rejected the Embassy Respondent's broader submission, based on *Sengupta*, that examination by the Tribunal of the dismissal of a group of embassy staff, to save money, involves an interference with the state's sovereign functions.

168. The employer was the Federal Government of Nigeria. That being so, the actions taken in relation to the Claimants were necessarily decisions and actions of the state. In *Benkharbouche*, in the Supreme Court, the Respondents were also the relevant states. The dismissals in *Benkharbouche* were not considered to be acts of sovereign authority. Clearly, individual decisions to dismiss embassy employees taken by states do not necessarily arise out of a "recruitment policy".

169. At [70] *Benkharbouche*, Lord Sumption rejected the contention that states are generally immune from claims in relation to the dismissal of Embassy staff. Lord Sumption noted that, by Art 7 VCDR a sending state may "freely appoint" members of the staff of a diplomatic mission. He said that there was an argument that a freedom to appoint must imply a freedom to dismiss.

170. Lord Sumption specifically said, however, that, ".. a claim for damages for wrongful dismissal does not require the foreign state to employ anyone. It merely adjusts the financial consequences of dismissal. No right of the foreign state under the Vienna Convention is infringed by the assertion of jurisdiction in the forum state to carry out that adjustment. Therefore, no right under the Vienna Convention would be prejudiced by the refusal of the forum state to recognise the immunity of the foreign state as regards a claim for damages."

171. Lord Sumption also disapproved *Sengupta v Republic of India* [1983] ICR 22, where the Employment Appeal Tribunal had held that "A contract to work at a

diplomatic mission in the work of that mission is a contract to participate in the public acts of the foreign sovereign. The dismissal of the applicant was an act done in pursuance of that public function, ie the running of the mission. As a consequence, the fairness of any dismissal from such employment is very likely to involve an investigation by the industrial tribunal into the internal management of the diplomatic representation in the United Kingdom of the Republic of India, an investigation wholly inconsistent with the dignity of the foreign state and an interference with its sovereign functions."; see p.156

172. At [73] *Benkharbouche* Lord Sumption said, of Sengupta, "These decisions amount to saying that the employment of embassy staff is inherently governmental notwithstanding the non-governmental character of the particular employee's functions or of the relevant acts of the employer. Sengupta was decided at an early stage of the development of the law in this area and, in my opinion, the test applied by the Employment Appeal Tribunal was far too wide." [73]. He also said, , "I doubt whether an English court applying customary international law could properly have categorised the facts of these cases as involving exercises of sovereign authority. …".

173. On the facts the Embassy Respondent's witness has put forward, the decision to reduce staff numbers was a narrow decision to dismiss based on exigencies. In my view, that did not involve implementing a civil service recruitment policy and was not a sovereign act.

174. Accordingly, neither the Claimants' employments, nor their dismissals, were acts of sovereign authority.

175. As a result, both Claimants can rely on Art 47 of the EU Charter to disapply the provisions of the SIA 1978 and pursue an effective remedy for the alleged contravention of their EU law rights.

Withdrawal of UK Claims

176. I indicated that I would not list the EU claims and stay the UK claims as the claims were based on the same facts and needed to be determined together. The Claimants withdrew their domestic law claims so that their EU law claims could proceed to hearing.

Dated: 24 June 2021

Employment Judge Brown

JUDGMENT SENT TO THE PARTIES ON

24/06/2021...

FOR THE TRIBUNAL OFFICE