EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs ANA-MARIA BELDICA	**v**	**THE BRITISH COUNCIL**

Heard at: London Central ET (by video)

On: 7-8 December 2022, and in Chambers on 9 December 2022

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: Ms A. Dannreuther, counsel

For Respondent: Mr Z. Sammour, counsel

Reserved Judgment

The Tribunal has territorial jurisdiction to consider the Claimant's claims.

Reasons

Background and issues

1. This was an open preliminary hearing ordered by Employment Judge Lewis on 23 September 2021 in a claim by Ms Ana-Maria Beldica ("The Claimant") brought originally against three respondents, namely The British Council ("The Respondent"), The Foreign, Commonwealth and Development Office ("The 2nd Respondent"), and The British Embassy in the United Arab Emirates ("The 3rd Respondent").

2. The hearing was to consider the following issues:

    a. Whether the employment tribunal has territorial jurisdiction to hear all or any of the claims made against the Respondents.

    b. Whether it is possible to decide as a preliminary issue if the claims against the 2nd and/or 3rd Respondent should be struck out on grounds that they were not the Claimant's employer and took no other actions for which they could be held liable.

    c. If the judge considers that it is possible to decide this as a preliminary issue, whether the claims should therefore be struck out as having no reasonable prospect of success or alternatively a deposit ordered on the basis that they have little reasonable prospect of success.

3. Before the hearing the Claimant had withdrawn her complaints against the 2nd Respondent and the 3rd Respondent. On 14 July 2022, these were dismissed upon withdrawal. Accordingly, the second issue fell away.

4. With respect to the third issue, the Respondent still maintained the strike out/deposit order application. However, since the application would only be of relevance if it were determined that the Tribunal did have territorial jurisdiction to consider the Claimant's claims, at the start of the hearing I agreed with the parties that the application would only be considered (time permitting) if the first issue had been determined in the Claimant's favour at the hearing.

5. There was also a pending Claimant's application to amend her claim, which was resisted by the Respondent. The application to amend would fall to be decided before considering the Respondent's strike out/deposit order application.

6. At the end of the hearing, I decided to reserve my judgment on the first issue. Accordingly, the application to amend and strike out/despot order applications will need to be considered at a separate hearing to be listed by the Tribunal.

7. Ms Dannreuther appeared for the Claimant pro bono and Mr Sammour for the Respondent. I am grateful to both Counsel for their helpful submissions and other assistance to the Tribunal.

8. There were three witnesses: the Claimant, and Ms A Waweru (Regional HR Operations Manager for Middle East and North Africa) and Mr J Etten (former HR Director Global Network) for the Respondent. All witnesses gave sworn evidence and were cross-examined. The claimant gave her evidence from Dubai. On the eve of the hearing, the Tribunal received confirmation from the FCDO that in this specific case there were no objections to oral evidence being taken from witnesses located in Dubai, the UAE.

9. I was referred to various documents in two bundles of documents of 553 and 196 pages, respectively, which the parties introduced in evidence. These included a statement (with attachments) submitted on behalf of the Claimant

by Mr Abdulla Hassan Ahmed Bamadhaf of Bamadhaf Associates, a local lawyer in Dubai, and a statement (with attachments) submitted on behalf of the Respondent by Ms Rebecca Ford, of Clyde & Co LLP, an English solicitor based in Dubai.

10. I was referred to various authorities in the joint bundle of authorities prepared by the parties. The full list of authorities provided by the parties is in the annex to this judgment.

11. Both Counsel prepared written opening submissions. Ms Dannreuther presented written closing submissions (which included one additional document, which I accepted in evidence), which she supplemented by oral submissions. Mr Sammour gave his closing submissions orally.

12. At the end of the closing submissions, on the second day of the hearing, I raised with Counsel the issue of the possible application of the Human Rights Act 1998 ("**HRA**") and the European Convention on Human Rights ("**ECHR**") on the issues in the case and requested them to provide written submissions. The submissions were provided the following morning together with additional authorities, for which I am grateful.

13. I considered the parties' submissions on the third day (in Chambers). Unfortunately, I was not able to complete my deliberations on that date, largely due to the extent of the Claimant's submission on the HRA/ECHR issue. Due to other work commitments, I was unable to return to this matter until some days later.

Findings of Fact

14. I confine my findings of fact to the matters which I consider relevant for the disposal of the territorial jurisdiction issue.

15. The Claimant was employed by the Respondent between 20 March 2016 and 31 December 2020 as an HR Business Partner for the Middle East and North Africa ("**MENA**") region. She was responsible for providing HR support to the Respondent's operations in Jordan, Lebanon, the Occupied Palestinian Territories, Syria, Yemen and Iraq ("**the LEVANT Cluster**").

16. The Claimant is a Romanian national. She moved to Dubai, the UAE with her previous employer in 2012, and has ever since lived and worked exclusively in Dubai. Her immediate family is in Dubai. Her four children were born in the UAE. She is settled in the UAE.

17. The Claimant was recruited by the Respondent in Dubai. She was interviewed for the role by the Respondent's local employees. The decision to recruit the Claimant was made by the Respondent's management staff in Dubai.

18. Her contract of employment contained the following key terms (***my emphasis***):

1. On behalf of the British Council UAE, I have pleasure in offering you a local indefinite contract with effect from 20 March 2016, as HR Business Partner - MENA, based in Dubai.

2. Your appointment is based on the terms set out in this letter and on the British Council's Terms and Conditions of Service (TACOS). In case of inconsistency between those conditions and this contract letter, the contract letter shall take precedence.

5. You will be paid at the rate of AED 19,183.50/- per month which is on the British Council Grade E salary scale. You will additionally be entitled to a housing allowance of AED 8,687.00/- per month. In total you will be entitled to a salary of AED 27,870.50/- paid to you monthly in arrears.

14. Your contract is governed by the law of UAE in force at any given time. ***This means therefore that if UAE law entitles you to any benefits which are not otherwise provided by this letter, the Council will grant you such benefits in accordance with the law. It also means that the law of UAE prevails in any case where it conflicts with the terms of this letter and/ or the Council's Terms and Conditions of Service***.

19. The TACOS terms were specific for the MENA region on the matters such as pay, working hours, overtime, travel, annual leave, public holidays, medical, maternity and other types of leave. TACOS referred to the Respondent's global policies on Equal Opportunities, IT, Code of Conduct, Confidentiality, etc. as applicable to the Claimant's employment. TACOS stated:

Labour law
Should any of the above provisions be contrary to the terms of any statute or law from time to time in force in any country, then the provision(s) will have no force or effect for as long as they provision remains contrary to the statute and/or law. It will not however invalidate the remainder of the contract which remains valid in all respects.

20. At all material times the Claimant reported to mangers based in Dubai. Her salary was paid in the local currency into her local bank account. She was treated as a local employee for the purposes of taxation and social benefits. She was not invited to join and was not a member of the Respondent's pension scheme. She was not provided with any other benefits that the Respondent offers its UK employees.

21. During the entire period of her employment with the Respondent the Claimant never worked in or travelled on business to the UK.

22. The focus of her role was to provide HR support to the Respondent's managers in the LEVANT Cluster and deal with day-to-day HR issues (pay, promotion, terms and conditions of employment, benefits, etc) in her cluster. She had six employees reporting to her. All were based in the LEVANT Cluster's countries.

23. In performing her job functions, she had to liaise with the Respondent's HR staff based in the UK and other global support centres staff (tax, benefits, etc). Her liaisons with such staff were largely to take instructions and learning and other input for the purposes of rolling out the Respondent's global projects

and programmes in the MENA region. She did not provide HR services to the Respondent's operations in the UK. She did not support the Respondent's HR managers based in the UK. She did not have any UK employees reporting to her.

24. In or around March 2019, Ms Kate Harris ("**KH**") became the Claimant's direct line manager. KH was initially based in the UK, but within 3 months of becoming the Claimant's manager she relocated to Dubai to assume the role of MENA Regional HR Director. KH's direct line manager was based in the UK.

25. In mid-July 2019, KH put the Claimant on a performance improvement plan. The focus of the plan was on the Claimant's provision of HR services in her cluster. There were no improvement targets/actions related to the UK or the Respondent's global operations.

26. In November 2019, the Claimant went off sick with anxiety and depression. She was on sick leave until August 2020.

27. On 8 August 2020, the Claimant started maternity leave, which was due to last until 14 November 2020. The Claimant's maternity leave and maternity pay were provided in accordance with the UAE law.

28. On 24 September 2020, KH informed the Claimant that her role was being supressed and she could apply for a role in the new structure. Several consultation meetings were held in November 2020, which resulted in the confirmation that the Claimant's role was to be eliminated. The Claimant was unsuccessful in securing an alternative role. She was notified that her employment would be terminated on 31 December 2020.

29. The Claimant's employment was terminated on 31 December 2020. On termination she was paid an "Amount of Gratuity" (a severance payment stipulated in the Claimant's contract of employment) into her UAE bank account.

30. The Claimant subsequently made several complaints regarding her dismissal, including in various emails she sent to the Respondent's management in Dubai and the UK. On 13 February 2021 Ms Aida Salamanca, the Respondent's Country Director, wrote to the Claimant to respond to her complaints. Ms Salamanca's letter stated: "*We have sought legal advice and as you aware, your employment is governed by the UAE Federal Law No.8 of 1980 as amended (the Labour Law)*".

31. After her dismissal the Claimant tried to present a complaint in the Labour Court in the UAE but was un able to do so because her contract of employment had not been registered with the Ministry of Human Resources and Emiratisation ("**the MoHRE")** (previously called Ministry of Labour) and she did not have a Labour Card number, which was necessary to register a

complaint via the MoHRE portal (a mandatory field in the on-line application form).

32. On 15 February 2021, the Claimant wrote to the UK Foreign and Commonwealth and Development Office ("**the FCDO**") stating that she had been advised by the UAE Ministry of Foreign Affairs ("**the MoFA**") that the FCDO needed to provide the MoFA with "*an approval*" for the Claimant's case to be accepted by the UAE Courts.

33. On 2 March 2021, the Claimant sought to register her complaint via the Police in Dubai and was referred by the Police to the Ministry of Labour.

34. On 14 March 2021, Lynda Conchie, Deputy Regional Head of HR – MENA, at the British Embassy in the UAE, responded to the Claimant's 15 February email stating that the matter was being dealt with in the UAE and someone would be in touch soon. The Claimant chased for a response on 25 March and 8 April 2021.

35. In April 2021, the Claimant requested the British Embassy to issue a non-objection certificate to enable her to file a claim in the UAE Labour Court.

36. On 20 April 2021, solicitors for the British Embassy wrote to the Claimant stating that their client's understanding was that the Claimant was free to pursue legal action without a non-objection certificate.

37. On 23 April 2023, the Claimant wrote to Ms Nikita Arora, the Respondent's HR Manager, asking her to urgently send to the Claimant a copy of her Labour Card.

38. On 24 April 2023, Ms Arora responded saying: "*Labour cards are issued only for organisations under Ministry of Labour. Since we fall under MoFA, we do not have labour cards.*"

39. On 29 April 2021, the Claimant wrote to the MoFA explaining that the MoHRE had confirmed that her case was outside their jurisdiction and seeking help to be able to file a formal legal complaint against the Respondent and the British Embassy.

40. On 6 May 2021, following an early conciliation period between 2 March and 7 April 2021, the Claimant presented ET1 claiming unfair dismissal, pregnancy or maternity discrimination and redundancy pay. The claim form was accepted by the Tribunal.

41. 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 not able to present a complaint online because she did not have a labour card. The MoHRE responded on 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*."

42. On 2 July 2021, the Respondent presented an ET3 denying the claims and contesting the Tribunal's territorial jurisdiction to consider the Claimant's claims.

43. On 22 December 2021, the MoFA responded to the Claimant's email of 29 April 2021, telling the Claimant that she needed to submit a complaint to the FCDO.

UAE Labour Law

44. I did not hear expert evidence on UAE labour law and procedure. However, based on the statements of Mr Bamadhaf and Ms Ford and materials appended to their statements, on the balance of probabilities, I make the following findings of fact.

45. Article 7 of the UAE Federal Law No. 8 of 1980 (as amended) ("**The Labour Law**") states: (***my emphasis***)

> ***Without prejudice to the provisions concerning collective labor disputes prescribed in this Law, if the employer or the worker, or any of their respective beneficiaries, dispute over any right accruing to any of them under the provisions of this Law, they shall submit an application to that effect to the competent Labor Department which shall summon both of the disputing parties and take whatever actions it deems necessary to settle the dispute amicably between them. In the absence of an amicable settlement, the said department shall, within (30) days from the date of submission of the application, refer the dispute to the appropriate court****. The referral shall be accompanied by a memorandum summarizing the dispute, the arguments of both parties and the observations of the department.*
>
> *The competent court shall, within three days of receiving the application, set hearing to consider the action and serve a notice on the disputing parties. The judicial body may request the appearance of a representative of the Labor Department to clarify the contents of the memorandum.*
>
> *In all cases, actions for claiming any right accruing under the provisions of this Law shall not be heard after the elapse of two years from the date of entitlement to such right.* ***The action shall not be heard either unless the procedures prescribed in this Article are observed*****.**

46. Under Article 1 of the Labour Law "Labor Department" is defined as "*the offices subordinate to the* ***Ministry [of Labor]*** *and competent for labor affairs in the Emirates of the State".*

47. Article 14 (1) of the Labour Law provides that "*[n]o foreigner may be recruited for work or employment anywhere in the State without the approval of the Labor Department of the recruitment or employment application*". The employer must be registered with MoHRE.

48. Article 15 of the Labour Law states that in the event a recruitment application is approved, the employer must, *inter alia*, conclude the labour contract "*according to the provisions [in the Labour Law] and the procedures and rules prescribed by [MoHRE]"*.

49. Article 36 of the Labour Law states:

> *In compliance with the provisions of Article 2 hereof, a labor contract shall be in writing and consist of three copies, one of which shall be attested by the Ministry. One copy shall be kept by the employer, the second shall be given to the worker and the third shall be deposited with the Ministry or the Labor department. If no written contract exists or is attested, the worker may prove all the conditions of the contract by all means of proof*.

50. Article 2 requires contract be both in Arabic and in a language understandable to the worker.

51. The Labour Law allows either party to terminate a labour contract concluded for an indefinite period of time, provided the provisions of the Labour Law concerning notice and acceptable reasons are complied with. The Labour Department may direct the employer to return the worker to his work if the termination is found to be in violation of the law. If the employer fails to do so, the court may order additional compensation to be paid to the employee.

52. The Court of Cassation in Dubai, the highest court in the Emirate of Dubai, held in case No 39 on 23 March 2021 that a failure of the employer to register the claim with the MoHRE is not a bar to an employee bringing a claim for entitlements under the Labour Law. The court said that the Labour Law only required that the Claimant submitted a complaint to the competent labour department, and if the competent labour department fails to submit the request to the competent court or claims that it does not have jurisdiction over the complaint, "*… the employer or employee shall not be blamed if he files his case directly to the court*." The court also held that it is sufficient simply for the employee or his representative to go to the labour department in order to submit the complaint, and the electronic form of submission of a complaint via the MoHRE portal was not mandatory. A similar conclusion was reached by the Dubai Court of Cassation in an earlier decision (case No. 165 of 2017).

53. The competent court under Article 7 of the Labour Law is generally understood to be the labour court in the relevant Emirate. If an employment claim is submitted to the civil court, it is likely to be rejected either at the submission stage or at the point of judgment as being submitted to the wrong court.

Respondent's Legal Status

54. The Respondent is a registered charity in England and Wales (Charity No. 209131) and in Scotland. Its legal form is a body incorporated under Royal Charter. It was established in 1934. It has operations both overseas and within the UK.

55. The Respondent is classified by the Office of National Statistics as a public non-financial corporation and as an executive non-departmental public body. On its website the Respondent describes itself as "*a non-departmental public body spending taxpayers' money*" and as being "*formally accountable to parliament*".

56. The Respondent's Bye-Laws state that its objects are:

> *[….] to advance, for the public benefit, any purpose which is exclusively charitable and which shall:*
> *(a) promote cultural relationships and the understanding of different cultures between people and peoples of the United Kingdom and other countries;*
> *(b) promote a wider knowledge of the United Kingdom;*
> *(c) develop a wider knowledge of the English language;*
> *(d) encourage cultural, scientific, technological and other educational cooperation between the United Kingdom and other countries; or*
> *(e) otherwise promote the advancement of education*.

57. All the powers of the Respondent are vested in the Board, consisting of Trustees, who must be members of the Respondent.

58. The appointment of the Chair and the Deputy Chair of the Board require approval by the Secretary of State for Foreign and Commonwealth Affairs.

59. Under Article 14 of the Respondent's Bye-Laws

> "[t]*he Board may appoint a Chief Executive and such other employees of the British Council on such terms as it thinks fit, provided only that the appointment of the Chief Executive shall be previously approved by the Secretary of State for Foreign and Commonwealth Affairs and that he or she shall hold office for such period as the said Secretary of State shall approve*".

60. The Respondent's Bye-Laws provide that it

> "*may sue and be sued in all courts and in all manner of actions and suits and generally shall have power to do all matters and things incidental or appertaining to a Body Corporate*".

61. The FCDO is the Respondent's sponsor department, from which it receives grant-in-aid to enable the Respondent to run its operations. The Secretary of State for Foreign and Commonwealth Affairs is accountable to Parliament for the activities and performance of the Respondent, including in relation to approval of the grant-in-aid amount to be paid to the Respondent and the securing of Parliamentary approval for the grant.

62. The Respondent's close relationship with the FCDO is regulated by the Management Statement and associated Financial Memorandum drawn up by the FCDO in consultation with the Respondent in July 2013. Under the Memorandum the FCDO has a significant level of oversight and control over activities of the Respondent.

63. The Memorandum states that

> *[w]ithin the arrangements approved by the Secretary of State and HM Treasury, [the Respondent] shall have responsibility for the recruitment, retention and motivation of its staff.*", and that it must ensure, *inter alia*, that "*[i]ts rules for the recruitment and management of staff create an inclusive culture in which diversity is fully valued; where appointment and advancement is based on merit; and where there is no unjustified discrimination on grounds of gender, marital status, sexual orientation, race, colour, ethnic or national origin, religion, disability, community background or age;"*.

64. The Respondent's Code of Conduct states:

> "***Respecting the law***
> *We are committed to complying with the law in all the countries and territories where we work. This is a fundamental principle and we must follow it in all our dealings and behaviours. In addition, all our activities must comply with the UK's charity law and be for the public benefit*".

Can the Respondent be sued in the UAE?

65. The following findings of fact are made on the balance of probabilities, largely based on the statements of Mr Bamadhaf and Ms Ford and the materials appended to their statements and other documents in the joint bundle.

66. In the UAE the Respondent is closely aligned with the British Embassy. The British Embassy represents the Respondent as being "*an integral part of the British Embassy, operating as its cultural and education department and as Diplomatic Mission*" (letter of 30 November 2020, page 193 of the bundle). The UAE Country Director of the Respondent is also the Cultural Affairs Attaché at the British Embassy. The UAE authorities consider the Respondent to be an arm of the UK government.

67. The Respondent is not registered with the MoHRE. Since it is not registered with the MoHRE, the Respondent could not register the Claimant's labour contract with the MoHRE, as required by the Labour Law. However, the Court of Cassation decision referred to in paragraph 52 above, shows that the failure to have the employment contract registered with the MoHRE does not serve as the absolute bar on the employee's ability to submit an employment claim in the labour court in Dubai.

68. In 2014 a former employee of the Respondent submitted an employment claim against the Respondent for salary payments, notice pay, compensation for involuntary dismissal, severance pay and a travel ticket. The claim was submitted in Abu Dhabi. The Respondent entered a plea of diplomatic immunity, stating that it "*was part of the British diplomatic mission and thus enjoys judicial immunity under Article 31/1 of the Vienna treaty on diplomatic relations*". In support of this contention, the Respondent submitted a

translated certificate from the British Embassy which was endorsed by the UAE Ministry of Foreign Affairs, indicating that the British Cultural Council is an inseparable part of the British Embassy. At the first instance, the court ruled that it did not have jurisdiction to hear the claim.

69. The Claimant appealed on various grounds, including that the parties had agreed that the employment contract would be subject to the UAE laws and that his work did not involve any sovereign or diplomatic activities.

70. The Abu Dhabi Court of Cassation rejected the appeal, holding:

> *The argument in its entirety and in all of its details is not sound, given that Article 31/1 of the 1961 Vienna treaty on diplomatic relations - to which the United Arab Emirates became a signatory on 24 February 1977 - specifies that a diplomatic envoy is to enjoy judicial immunity from the criminal justice system of the country in which he is accredited, and also its civil and administrative judiciary systems*.

71. The Court went on to hold (***emphasis added***)

> *Any disputes hence brought up regarding transactions and contracts concluded by diplomatic employees, or concluded by diplomatic missions, or any civil responsibilities that arise from them, are not subject to the regional judicial authority of the hosting country. This is the case as long as it does not fall within the range of exceptions mentioned above, and as long as the accrediting country has not forfeited this judicial immunity in an explicit fashion, as per the requirements of Article 32 of the aforementioned Vienna treaty. The meaning of the aforementioned text is that this treaty has outlined in its own Article 31 a general principle, which is that the diplomatic envoy is exempted from being subject to the regional judicial jurisdiction of the country in which they are accredited, regardless of whether criminal, civil, administrative, or any other type of judiciary. It has specified three exceptions to this principle, as mentioned above. It thus follows that the criterion for establishing regional jurisdiction for hearing cases such as those that have been presented is for the subject of dispute to be covered by one of the exceptions specified in Article 31/1 A/B/C of the Vienna treaty,* ***or for the accrediting government to have explicitly forfeited the judicial immunity in accordance with Article 32 of this agreement****. The contested verdict has adhered to this view, and judged that the embassy,* ***which is the contestation appeal defendant (in the form of the British Cultural Council), is not subject to the regional judicial authority of the United Arab Emirates***

72. In another employment claim, this time against the US Consulate General (Case No 40 of 2018), the Dubai Court of Cassation reached the same conclusion. The Court rejected the employee's appeal and affirmed the lower court's decision that the Dubai courts lacked jurisdiction to consider the claim by reason of diplomatic immunity enjoyed by the US Consulate General. The Court referred to Article 43 of the 1963 Vienna Treaty on Consular Relations and the UAE Federal Law number 4 on Diplomatic and Consular Privileges and Immunities issued of 21 December 1971, holding that the contested employment contract fell within the diplomatic immunity provisions of the law, because the law states that: "*consular members, employees, and staff are not subject to the jurisdiction of the judicial or administrative authorities of the country to which they are dispatched, as pertains to the activities they engage*

in to perform their consular business", and the exceptions provided in the law did not apply in this case.

73. Therefore, 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.

74. I find that because the Respondent in 2014 successfully resisted a similar employment claim in Abu Dhabi claiming diplomatic immunity. The letter dated 3 November 2020 (page 193 of the bundle) 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.

77. Ms Ford in her written statement refers to another labour claim against the Respondent in the Emirate of Sharjah. However, she does not say whether the Respondent resisted the claim by pleading diplomatic immunity. Mr Sammour said in his closing submission that on his instructions the case was settled. I cannot accept that as evidence, but, in any event, this does not show that the Respondent did not resist the claim by a plea of diplomatic immunity.

78. Although Ms Waweru said in her evidence that she was aware of the Respondent being sued in Dubai by its former employees, she did not provide any details of such claims, and in particular whether these were met by a plea of immunity.

79. Considering the decisions by the Abu Dhabi and Dubai Courts of Cassation in the cases quoted above, I find that the Respondent's plea of diplomatic immunity would have been successful.

80. I, therefore, find that the Claimant was effectively prevented by the Respondent from making an employment claim under the UAE Labour Law against the Respondent in the UAE.

The Law

Territorial Jurisdiction

81. In *Simpson v Intralinks* [2012] ICR 1343 at [8], Langstaff J (President of the EAT, as he then was) referred to an article by Louise Merrett in the Industrial Law Journal 2010 (pages 355 et seq.) explaining that the word "jurisdiction" can be used in three different contexts (***my emphasis***):

> "*First, in all cases where there is a foreign element, the question arises as to whether the English court or tribunal has jurisdiction to hear the case at all or whether it should be heard in a foreign court … this is an issue of private international law and will be referred to as international jurisdiction. If the Defendant is domiciled in a Member State of the European Union, the question of international jurisdiction must be determined by applying the rules of the Brussels I Regulation … Secondly, in domestic cases or in foreign case where England has international jurisdiction, there may be an issue as to which domestic court or tribunal should hear the case: for example, should the case be heard in the High Court or County Court, or in some countries by a court in a particular district? This issue will be referred to as domestic jurisdiction. In employment cases, this issue is of particular significance. That is because of the role of Employment Tribunals in enforcing employment rights. Broadly speaking, 'normal' Common Law claims, for example in tort arising from injuries sustained at work, or in contract, are brought in the Common Law courts … whereas statutory employment rights must be enforced through the Employment Tribunals …* ***Thirdly, even if the court or tribunal has jurisdiction to hear the claim in both the senses described above, and English law applies, in the case of statutory employment rights the Claimant must show that he falls within the scope of the relevant legislation … most statutory rights have either express or implied territorial limits which must be satisfied … this last issue … will be referred to as territorial scope*** ."

82. It was common ground that the issue of the territorial jurisdiction I needed to determine was in that third meaning, namely the territorial reach of the Employment Rights Act 1996 ("**ERA**") and Part 5 of the Equality Act 2019 ("**EqA**").

83. It was also accepted by the parties (and I agree) that on the relevant authorities there was no difference in the test the Tribunal must apply in determining the territorial reach of the ERA and the EqA. In other words, if it is found that the Claimant's claims under the ERA fall within the territorial reach of the ERA, the same conclusion must follow with respect to her EqA claim and vice versa[1].

84. The explanatory note 15 to the EqA states: "*As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the Employment Rights Act 1996, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain*". See also, *Bates van*

[1] For the sake of brevity, I shall refer in this judgment to the ERA only.

Winkelhof v Clyde and Co LLP and anor 2013 ICR 883, CA, and *R (on the application of Hottak and anor) v Secretary of State for Foreign and Commonwealth Affairs and anor* 2016 ICR 975, CA.

85. Equally, there should be no difference in the territorial reach test with respect to various rights in the ERA (in this case s.94(1) and s.135 ERA) – see *Lawson v Serco Ltd* 2006 ICR 250, HL at [14], *Bleuse v MBT Transport Ltd and anor* 2008 ICR 488, EAT and *British Council v Jeffery and another case* 2019 ICR 929, CA).

86. The current version of the ERA does contain any provisions dealing with the territorial reach of the Act. In *Lawson v Serco* [2006] UKHL 3, [2006] ICR 250, at [7] - [9] Lord Hoffman recounted the history of the legislation concluding that by repealing section 196 of the Act (which stated that the Act did not apply "*to any employment where under his contract of employment the employee ordinarily works outside Great Britain*")

"*Parliament was content to accept the application of established principles of construction to the substantive rights conferred by the Act, whatever the consequences might be*".

87. At [6] Lord Hoffman explained the relevant rules of construction citing Lord Wilberforce in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152, where he said that it

"requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?"

88. While it is a well-established principle that Parliament is supreme and can legislate on any issue, including extraterritorially, as Sir Ivor Jennings famously wrote in 1959 "*the British Parliament could legally ban smoking on the streets of Paris…*", as Lord Hoffman said in ***Lawson*** at [6]:

"*The general principle of construction is, of course, that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world. Some international crimes, like torture, are an exception. But usually such an exorbitant exercise of legislative power would be both ineffectual and contrary to the comity of nations.*"

89. In the same judgment at [1] he said that

"*It is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain*",

and went on to formulate the relevant question as:

"*Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair? The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have jurisdiction to decide upon the unfairness of the dismissal if (but only if) section 94(1) is the appropriate choice of law.*"

90. While stating at [9] that he did not think

"*that any inferences can be drawn from the repeal of section 196 except that Parliament was dissatisfied with the way in which the express provisions were working and preferred to leave the matter to implication. Whether this would result in a widening or narrowing of the scope of the various provisions to which section 196 had applied is a question upon which, in my opinion, the decision to repeal it throws no light"*,

at [11] Lord Hoffman said:

"*The repeal of section 196 means that the courts are no longer rigidly confined to this single litmus test.* ***Nevertheless, the importance which parliament attached to the place of work is a relevant historical fact which retains persuasive force***" (***my emphasis***).

91. Lord Hoffman then went on to formulate the relevant principles, emphasising that these were principles and not rules. At [23] he said (***my emphasis***):

"*In my opinion the question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements.* ***This is a question of the construction of section 94(1) and I believe that it is a mistake to try to formulate an ancillary rule of territorial scope, in the sense of a verbal formula such as section 196 used to provide, which must then itself be interpreted and applied.*** *That is in my respectful opinion what went wrong in the Serco case. Although, as I shall explain, I think that there is much sound sense in the perception that section 94(1) was intended to apply to employment in Great Britain, the judgment gives the impression that it has inserted the words "employed in Great Britain" into section 94(1). The difference between Lord Phillips of Worth Matravers MR and the majority of the court in Crofts v Veta Ltd was about how these words should be construed. But such a question ought not to arise, because the only question is the construction of section 94(1).* ***Of course this question should be decided according to established principles of construction, giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme. But this involves the application of principles, not the invention of supplementary rules.***"

92. He went on at [24] to say:

"*On the other hand, the fact that we are dealing in principles and not rules does not mean that the decision as to whether section 94(1) applies (and therefore, whether the Employment Tribunal has jurisdiction) is an exercise of discretion. The section either applies to the employment relationship in question or it does not and, as I shall explain later, I think that is a question of law, although involving judgment in the application of the law to the facts.*"

93. At [34] Lord Hoffman said:

"*…. In my opinion therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. …*".

94. In *Ravat v Halliburton Manufacturing and Services Ltd* 2012 ICR 389, SC, Lord Hope said at [29]:

"*But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they were not both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree.*"

95. In *British Council v Jeffery and another case* 2019 ICR 929, CA, the Court of Appeal considered how the above dicta by Lord Hope in ***Ravat*** could be reconciled with what Lord Hoffman said in ***Lawson*** at [34]. While the Court did not come to the same view on this question, all judges agreed that there must be evaluation of whether a particular employment has the sufficient connection with Great Britain and British Employment Law[2] before the question of the territorial reach of the Act can be answered. As Underhill LJ put it at [41]

> "*In the typical case, however, the answer to the former question* [whether s.94 ERA applies] *will depend entirely on the answer to the latter* [whether the sufficient connection requirement is satisfied]*, with the result that in practice the dispositive issue is one of fact*….".

96. In ***Lawson*** at [36] Lord Hoffman while accepting that

> "*[t]he circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation*" said that "*there are some who do*", and (***my emphasis***):
>
> "***I hesitate to describe such cases as coming within an exception or exceptions to the general rule because that suggests a definition more precise than can be imposed upon the many possible combinations of factors, some of which may be unforeseen****. Mr Crow submitted that in principle the test was whether, despite the workplace being abroad, there are other relevant factors so powerful that the employment relationship has a closer connection with Great Britain than with the foreign country where the employee works.* ***This may well be a correct description of the cases in which section 94(1) can exceptionally apply to an employee who works outside Great Britain, but like many accurate statements, it is framed in terms too general to be of practical help.*** *I would also not wish to burden tribunals with inquiry into the systems of labour law of other countries.* ***In my view one should go further and try, without drafting a definition, to identify the characteristics which such exceptional cases will ordinarily have.***"

97. Lord Hoffman then went on to offer examples of such exceptional cases, first stating that (***my emphasis***):

> "*….it would be very unlikely that someone working abroad would be within the scope of section 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***."

98. The examples he gave where *"[s]omething more can be provided*" were an employee posted abroad by a British employer (at [38]) and "*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*" (at [39]). However, at [40] he emphasised that these were just two examples that he could think of and there might be others.

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[2] Underhill LJ said in the footnotes to his Judgment: *The authorities fairly consistently refer to factors connecting the employment "with Great Britain and British employment law"; but these two elements largely overlap, and I will sometimes for brevity refer simply to the former."*

99. Subsequent case law evolved in a way that the territorial reach question was looked at by considering the strength of connection of a particular employment to Great Britain and British employment law, and the two examples given by Lord Hoffman were treated as relevant factors in that assessment and not as fixed categories of exceptions (see *Duncombe v Secretary of State for Children, Schools and Families* (No.2) 2011 ICR 1312, SC, and *Ravat v Halliburton Manufacturing and Services Ltd* 2012 ICR 389, SC).

100. In other words, it is necessary for the employee to show that despite working outside Great Britain, particular features of his or her employment relationship with the employer created that connection, which was sufficiently strong to overcome what Underhill LJ described in ***Jeffery*** at [2(4)] as "*the territorial pull*".

101. Underhill LJ described that approach in ***Jeffery*** as "*the sufficient connection question*", that essentially determines the question of territorial reach of the ERA (see paragraph 95 above).

102. In ***Duncombe*** Lady Hale stated at [8] (***my emphasis***):

> "*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 Britain and with British employment law than with any other system of law. There is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle***."

103. In ***Jeffery*** at [2(5) and (6)] Underhill LJ, summarising the relevant legal principles, said:

> *"(5)….In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.*
>
> *(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work…..*".

104. It appears that the evolution of case law created the situation where the question of statutory construction (i.e., whether the ERA applies to a particular case) essentially became the question of whether an employee, who does not normally work in Great Britain, can discharge the burden of showing that his or her employment relationship with the employer had sufficiently strong connection to Great Britain and British employment law.

105. Whilst that appears to be somewhat at odds with the relevant principle of statutory construction formulated by Lord Hoffman in ***Lawson*** (see paragraphs 87 and 91 above), nevertheless all these subsequent cases are binding authorities on this Tribunal.

106. While in ***Duncombe*** Lady Hale said at [8] that

> *"the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law"*,

In ***Jeffery***, Underhill LJ appears to be treating these two terms as referring to the same (see paragraph 95 above).

107. Therefore, it appears that if an employee can establish factors showing that his or her employment had "*much stronger*" connection with British employment law than with "*any other system of law*", that should be sufficient for the question of the territorial reach of the ERA, even if the employee's employment had no such much stronger connection to Great Britain as a country. Of course, often it will be the territorial connection that creates that "pull factor", but not necessarily. See, for example, ***Jeffery***.

108. That, of course, is not to say that the Tribunal must involve in comparing the competing jurisdictions and decide which would be more favourable to the employee (see *Creditsights Ltd v Dhunna* 2015 ICR 105, CA at [40] and *Foreign and Commonwealth Office v Bamieh* [2020] ICR 465 at [82-85]). The fact that the local law might not offer the same level or the same type of protection as available under British employment law is irrelevant. As Gross LJ said in ***Bamieh*** at [42] "*The issue was the strength of the connection, rather than the strength of the protection*".

109. All the cases cited by the parties to me are fact specific, and although are of assistance in terms of directing the Tribunal to the correct approach in considering "*the sufficient connection question*" and giving a "menu" of relevant factors, cannot substitute or override the key principle established in ***Lawson***, namely that the question the Tribunal must decide is one of construction of the statute, "*giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme*" (see paragraph 91 above).

110. I shall now consider certain specific factors discussed in the authorities, which I find are relevant for the present purposes.

Governing Law

111. The governing law of the contract is a relevant factor in the analysis (see ***Duncombe*** at [16]), although this creates some tension with the wording of s.204 ERA, as acknowledged by the Court of Appeal is ***Jeffery***.

112. In ***Duncombe*** at [16] Lady Hale said the governing law was relevant because it creates "***the expectation of each party as to the protection which the employees would enjoy***". At [17] she also emphasised that people employed locally by a British employer in a foreign country "*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" (***my emphasis***).

State/Diplomatic Immunity

113. In *Hamam v British Embassy in Cairo and anor* 2020 IRLR 570, EAT, the EAT held [at 47] that "*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*". The EAT referred to the earlier decisions in *Bryant v Foreign and Commonwealth Office* EAT 174/02 and (ii) *Hottak v Secretary of State for Foreign and Commonwealth Affairs* [2016] ICR 975, where the argument that s 94(1) ERA must be extended because the claimants could not sue the British government in local courts was not accepted. Lord Hoffman in ***Lawson*** said he had no doubts that **Bryant** was correctly decided.

114. However, it is worth noting that in ***Bryant*** the EAT had to deal with the argument that the ERA must be extended for specific category of employees "*who are English nationals who were employed abroad in a diplomatic mission by their government, and who are unable to sue that government in the local Courts by virtue of the existence of diplomatic immunity*" (at [11]).

115. While rejecting that argument on the basis that it was "*a matter for Parliament*" and that the "*Tribunal cannot possibly rewrite the legislation*" (at [28]), the EAT went on to observe at [29]:

> "*However, Mrs Bryant is not left without remedy. Quite apart from the question as to whether she could now pursue a claim for unfair dismissal in the Italian Courts, and could have done that at least since October 2001, when she was given the assurance by the Government that they would waive state immunity, she has a claim, on her case, for breach of contract, to which we now turn.*"

116. In ***Hottak*** Sir Colin Rimer, giving the only Judgment, with which Richards LJ and Arden LJ agreed, accepted (at [55]) the argument by the respondent's Counsel in that case that the point that any claim by local employees against the UK Government in a local court would be likely to be met with a plea of state immunity "*is not a factor which, without more, can bring their employment contracts within the exceptional type of case to which section 94(1) of the 1996 Act, or Part 5 of the 2010 Act, can be assumed to be intended to apply*", because the same consideration would also have applied in ***Bryant***, which Lord Hoffman said in ***Lawson*** was correctly decided.

117. However, when stating that he had no doubt that ***Bryant*** was correctly decided Lord Hoffman was dealing (at [39] with his second 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*". It is in that context Lord Hoffman draws the distinction between a local employee engaged by the British Government to work in the British Embassy abroad, and an employee working on "*an extra-territorial British enclave in a foreign country*".

118. I do not read this passage as Lord Hoffman addressing the issue of state/diplomatic immunity as a factor in the decision on territorial application of the ERA. The full passage reads (***my emphasis***)

> "*I have no doubt that Bryant v Foreign and Commonwealth Office [2003] UKEAT 174, in which it was held that section 94(1) did not apply to a British national locally engaged to work in the British Embassy in Rome, was rightly decided.* ***But on Ascension there was no local community. In practice, as opposed to constitutional theory, the base was a British outpost in the South Atlantic. Although there was a local system of law, the connection between the employment relationship and the United Kingdom were overwhelmingly stronger.***"

119. Finally, in the recent case of *Rajabov v Foreign and Commonwealth Office 2022* EAT 112, the EAT found (at [9]) that there "*no basis upon which the EAT can interfere with [the Tribunal's] treatment of [the diplomatic immunity] factor"*, which the employment tribunal considered "*not very significant*" (at [16] of the ET judgment, Case No: 2200743/2019).

120. The EAT (at [8]) referred to the above quoted passage from the judgment in ***Hamam*** (see paragraph 113 above) and noting that in ***Bryant*** and ***Hottak*** the Claimants' argument that the territorial jurisdiction should be extended because state immunity would prevent them from suing their British employer in local courts did not succeed.

121. It appears that the Court of Appeal in ***Hottak***, and the EAT in ***Hamam*** and ***Rajabov*** placed some weight on the Lord Hoffman's endorsement of the EAT's decision in ***Bryant***, where, as I noted above, he probably was not dealing with the question of state/diplomatic immunity as the relevant factor.

122. Furthermore, it appears the passage in ***Bryant*** at [29] that Mrs Bryant was not left without a remedy because she was assured by the British government that they would waive state immunity, was somehow left out, and it was tacitly assumed that whether immunity was or likely to be waived or claimed was not a relevant factor.

123. In my view, this ought to be a highly relevant factor, however, I am bound by these authorities and accept that it is not determinative (see ***Hamam***) and "without more" (see ***Hottak***) is not sufficient to extend the territorial reach of the ERA.

Benkharbouche and The State Immunity Act (1978) (Remedial) Order 2022

124. In the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, the Supreme Court affirmed the Court of Appeal decision that the immunity conferred on the respondent-embassies by virtue of the provisions of the UK State Immunity Act 1978 in respect of two members of non-diplomatic staff was contrary to their right to a fair trial under Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights.

125. Whilst this case considered a different issue, I find that the following dicta by Lord Sumption JSC are of relevance for the present purposes (***my emphasis***)[3]. I explain why in the Conclusions section of my judgment.

"*14. Article 6 of the Human Rights Convention provides that "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."* ***Two points are well-established, and uncontroversial in this appeal. The first is that 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: Golder v United Kingdom (1975) 1 EHRR 524. The "right to a court" corresponds to a right which the common law has recognised for more than two centuries. As early as the 1760s, Blackstone wrote in his Commentaries, 4th ed (1876), 111:***

"A … right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein."

The second uncontroversial point is that although 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: Ashingdane v United Kingdom (1985) 7 EHRR 528 , para 57****.*

15. ***One of the perennial problems posed by the right to a court is that article 6 is concerned with the judicial processes of Convention states, and not with the content of their substantive law.*** *When the Duke of Westminster complained in James v United Kingdom (1986) 8 EHRR 123 that the Leasehold Reform Act 1967 allowed qualifying leaseholders to enfranchise their properties without providing any grounds on which the freeholder could object, he was met with the answer (para 81) that article 6 "does not in itself guarantee any particular content for (civil) rights and obligations in the substantive law of the Contracting States."* ***In Fayed v United Kingdom (1994) 18 EHRR 393 , the Court explained (para 65) that it was not at liberty to "create through the interpretation of article 6(1) a substantive civil right which has no legal basis in the state concerned", but that it would be inconsistent with the rule of law if the state were to "confer immunities from civil liability on large groups or categories of persons." These statements have been repeated in much of the subsequent case law of the Strasbourg Court. It is not always easy to distinguish between cases in which the petitioner's problem arose from some difficulty in accessing the adjudicative jurisdiction of the court, and cases where it arose from the rules of law which fell to be applied when he got there. The jurisprudence of the Strasbourg court establishes that, as a general rule, the question whether such cases amount to the creation of "immunities" engaging article 6 depends on whether the rule which prevents the litigant from succeeding is procedural or substantive****: see, among other cases, Fayed v United Kingdom , at para 67; Al-Adsani v United Kingdom (2002) 34 EHRR 11 , para 47; Fogarty v United Kingdom (2001) 34 EHRR 12 , para 25; Roche v United Kingdom (2005) 42 EHRR 30 , paras 118-119; Markovic v Italy (2006) 44 EHRR 52 , para 94.*

16. ***The dichotomy between procedural and substantive rules is not always as straightforward as it sounds, partly because the categories are not wholly distinct and partly because they do not exhaust the field****. There may be rules of law, such as limitation, which are procedural in the sense that they bar the remedy, not the right, but which operate as a defence. There may be rules of law which require proceedings to be dismissed without consideration of the merits.* ***These may be substantive rules, such as the foreign act of state doctrine, or procedural rules such as state immunity. There may be rules, whether substantive or procedural, which limit the territorial or subject-matter jurisdiction of the domestic courts, and which they have no discretion to transgress.*** *Or the claimant's right*

[3] I include lengthy extracts from the Judgment to give the relevant background to help the reader understand the basis for my conclusions on the relevance of the Benkharbouche judgment for the purposes of this case.

may be circumscribed by a substantive defence, such as privilege in the law of defamation. Or he may simply have no legal right to assert under the domestic law, for example because the law is that no relevant duty is owed by a particular class of defendants although it would be by defendants generally. But these are not refinements with which the Strasbourg court has traditionally been concerned. ***What the Strasbourg court means by a procedural rule is a rule which, whether technically procedural or substantive in character, has the effect of barring a claim for reasons which do not go to its legal merits; that is to say, rules which do not define the existence or extent of any legal obligation***."

126. Lord Sumption then went on to analyse the European Court of Human Rights ("**ECtHR**") jurisprudence on the issue of state immunity, stating at [18] that its character is procedural, meaning that

> "*it requires the court to dismiss the claim without determining its merits.* ***But it leaves intact the Claimant's legal rights and any relevant defences, which remain available, for example, to be adjudicated upon in the courts of the state itself***". (***my emphasis***)

127. At [19] he quoted Lord Miller in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, at p 1588 (***my emphasis***):

> "***Article 6 requires contracting states to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting states have the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting states adjudicative powers which they do not possess****. State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself."*

128. At [22] Lord Sumption then turned to the ECtHR Grand Chamber decision in *Al-Adsani v United Kingdom* (2001) 34 EHRR 11, in which the Strasbourg Court rejected the submission of the British government (para 44) that Article 6 could not extend to matters which under international law lay outside the jurisdiction of the state.

129. He then considered the ECtHR case law involving employment disputes between a state and non-diplomatic staff at one of its embassies (at [24] – [28]), which restated the principle that where state immunity restricts the exercise of the right of access to a court, the court must ascertain whether the circumstances of the case justified such restriction. The approach was summarised by the ECtHR in *Sabeh El Leil v France* (2011) 54 EHRR 14 as follows:

> "*51. Therefore, in cases where the application of the rule of state immunity from jurisdiction restricts the exercise of the right of access to a court, the Court must ascertain whether the circumstances of the case justified such restriction.*
> *52. The Court further reiterates that such limitation must pursue a legitimate aim and that state immunity was developed in international law out of the principle par in parem non habet imperium , by virtue of which one state could not be subject to the jurisdiction of another. It has taken the view that the grant of immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty*."

130. Having considered whether the application of state immunity to a contract for the employment of non-diplomatic staff of a foreign diplomatic mission can be found as a rule of customary international law, and having decided that there was no such rule of international law, Lord Sumption then concluded at [37] that "*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*", which he called "*restrictive immunity doctrine*" (see *ibid* at [52]).

131. Analysing the development of the state immunity doctrine in domestic law at [43] Lord Sumption referred to the case *The Charkieh* (1873) LR 4 A & E 59 in which the question whether corresponding immunity applied to a sovereign's non-sovereign acts was first considered. Quoting from the judgment of Sir Robert Phillimore at pp99-100:

> "*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 . . .*"

132. Turning to analysing the application of the restrictive immunity doctrine to contracts of employment, Lord Sumption said at [54] – [59] (***my emphasis***)

> 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. Certain confidential secretarial staff might be another: see Governor of Pitcairn 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.*
>
> *[…]*

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, albeit briefly since neither is critical to this appeal.

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. [....]

*59**. The second point to be made is that the territorial connections between the claimant on the one hand and the foreign or forum state on the other can never be entirely irrelevant, even though they have no bearing on the classic distinction between acts done jure imperii and jure gestionis . This is because the core principle of international law is that sovereignty is territorial and state immunity is an exception to that principle.** As the International Court of Justice observed in Jurisdictional Immunities of the State, at para 57, the principle of state immunity*

> *"has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."*

***The whole subject of the territorial connections of a non-state contracting party with the foreign or the forum state raises questions of exceptional sensitivity in the context of employment disputes. There is a substantial body of international opinion to the effect that the immunity should extend to a state's contracts with its own nationals irrespective of their status or functions even if the work falls to be performed in the forum state; <u>and correspondingly that it should not extend to staff recruited from the local labour force in whose protection the forum state has a governmental interest of its own</u>.** Both propositions received substantial support in the preparatory sessions leading to the United Nations Convention and were reflected in the final text of article 11. Both receive a measure of recognition in the Vienna Convention on Diplomatic Relations which carefully distinguishes between the measure of immunity accorded to the staff of a diplomatic mission according to whether they are nationals of the foreign state or nationals or permanent residents of the forum state: see articles, 33.2, 37, 38, 39.4 and 44. **In a practical sense, it might be thought reasonable that a contract between a state and one of its own nationals should have to be litigated in the courts of that state under its laws, but unreasonable that the same should apply to locally recruited staff. There is, however, only limited international consensus on where the boundaries lie between the respective territorial responsibilities of the foreign and the forum state, and on how far the territorial principle can displace the rule which confers immunity on acts jure imperii but not on acts jure gestionis** . I shall expand on this point below, in the context of section 4 of the State Immunity Act, which is largely based on the territorial principle*.

133. At [64] Lord Sumption explained that:

"*….Section 4(2)(a) extends the immunity to claims against the employing state by its own nationals. As I have said, this may have a sound basis in customary international law, but does not arise here. Section 4(2)(b) extends it to claims brought by nationals or habitual residents of third countries. Both subsections apply irrespective of the sovereign character of the relevant act of the foreign state*".

observing at [65] (***my emphasis***):

> "…..*Contractual submission apart, the availability of state immunity in answer to employment claims is made to depend entirely on the location of the work and the respective territorial connections between the employee on the one hand and the foreign state or the forum state on the other.* ***The explanatory report submitted to the Committee of Ministers of the Council of Europe justified this on the ground 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***."
>
> and concluding at [67] that "*section 4(2)(b) of the State Immunity Act 1978 is not justified by any binding principle of international law*".

134. Moving to section 16(1)(a), which extends state immunity to the claims of any employee of a diplomatic mission, irrespective of the sovereign character of the employment or the acts of the state complained of, Lord Sumption also concluded that it cannot be justified by reference to any general principle of immunity based on the restrictive doctrine and there was no special rule of an absolute immunity applicable to all embassy staff, which did not exist in customary international law.

135. Hence, the Supreme Court decided that both sections 4(2)(b) and 16(1) were incompatible with Article 6 of the Convention and Article 47 of the EU Charter, and that the employer states were not entitled to immunity in respect of the Claimants' claims.

136. Following that decision, on 7 September 2022, the Government laid the draft State Immunity Act 1978 (Remedial) Order 2022, designed to remedy an incompatibility in the State Immunity Act 1978 identified by the Supreme Court.

137. When a draft Remedial Order is laid by the Government, the Standing Orders of the Joint Committee on Human Rights (**JCHR**) require the JCHR to report to each House our recommendation as to whether the draft Remedial Order should be approved.

138. The JCHR's report published on 22 November 2022 contains the following, in my view, relevant statement:

> *21. The operation of the rules of state immunity can interfere with the right to access court, protected under Article 6 ECHR. However, Article 6 ECHR does not have the effect of invalidating all state immunity as "[A]rticle 6 cannot confer on a Court jurisdiction which it does not have, and a State cannot be said to deny access to its courts if it has no access to give"[18], for example due to the operation of a mandatory rule of customary international law, such as state immunity. Therefore, whilst the caselaw of the European Court of Human Rights has consistently held that Article 6 will be engaged in cases involving state immunity, state immunity is a justifiable interference with Article 6 to the extent that it is derived from a fundamental principle of international law[19]. Article 6 will, however, be violated in cases where a claim to state immunity is not founded in international law. It is therefore crucial to establish*

[18] Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2007] 1 AC 270 at paragraph 14

[19] Benkharbouche and Janah at paragraph 20.

exactly what is required by international law in order to ascertain whether any interference with Article 6 is justified.

139. In ***Hamam***, the Claimant referred the EAT to paragraphs [18], [34], [65] and [73] of the ***Benkharbouche*** judgment in support of her submission that she should be allowed to sue the respondent in the UK because she could not sue them in Egypt. Lavender J said that none of those passages were of any relevance because the issue in ***Benkharbouche*** was very different to the issues in the case in front of him.

The Human Rights Act 1998

140. The Human Rights Act 1998 ("**HRA**") incorporates the European Convention of Human Rights ("**ECHR**") into the UK domestic law.

141. Section 2(1) of the Act states:

> ***"2.— Interpretation of Convention rights****.*
> *(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—*
> *(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*
> *(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*
> *(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
> *(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen*."

142. Section 3 of the Act states:

> ***"3.— Interpretation of legislation****.*
> *(1) 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.*
> *(2) This section—*
> *(a) applies to primary legislation and subordinate legislation whenever enacted;*
> *(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*
> *(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility*."

143. Section 6 of the Act states:

> *"**6.— Acts of public authorities.***
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
> *(2) Subsection (1) does not apply to an act if—*
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
(3) In this section "public authority" includes—
(a) a court or tribunal, and
(b) any person certain of whose functions are functions of a public nature,
but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
[…]"

144. The definition of "public authority" in the HRA was considered in a number of cases, including by the Court of Appeal in *Poplar Housing and Regeneration Community Association Ltd v. Donoghue*, [2001] EWCA (Civ) 595, [2002] Q.B, and by the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 and in *YL v. Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95.

145. While there is little difficulty in identifying "pure" public authorities, such as central government departments, local authorities, the police, the courts, the armed forces, etc., the position is more complicated when it comes to the so-called "hybrid" bodies, i.e., essentially private organisations that perform functions of public nature (s. 6(3)(b) HRA).

146. In ***YL***, the House was split 3:2 on the application of the definition to the facts of that case. The majority held that a privately owned care home, operating on a for-profit basis and acting pursuant to a contract with a local authority, could not be deemed to be a "hybrid" public authority under section 6(3)(b) of the HRA. However, their Lordships were in agreement that there was no universal test to determine whether a particular body falls within s.6(3)(b) and the question must be approached considering a range of factors, citing with approval those stated by Lord Nicholls in ***Aston Cantlow***, where he said at [11] and [12] (***my emphasis***)

"*11. Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b).* ***Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary****.*

12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. ***Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service***."

147. Article 1 of the ECHR states:

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

148. Article 6(1) of the ECHR states:

> "***Article 6***
>
> *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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*."

149. The question of the territorial reach of the HRA was extensively discussed by the House of Lords in *R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26, [2008] 1 AC 153*. The Claimants in that case were relatives of six deceased Iraqi civilians who had been killed by or in the course of action taken by British soldiers in the period following the completion of major combat operations in Iraq and prior to the assumption of authority by the Iraqi Interim Government. They sought judicial review of the Secretary of States failure to conduct independent inquiries into or to accept liability for the deaths and the torture. Both the Divisional Court and the Court of Appeal decided that the HRA and the ECHR did not apply to the cases of the first five claimants but did apply in the case of the sixth claimant. The claimants appealed and the Secretary of State cross-appealed.

150. The House of Lords held (with Lord Bingham dissenting) that although in general the ECHR did not apply outside the territory of the contracting states, it was not objectionable in principle for legislation to apply to British subjects outside the territory of the United Kingdom where it did not offend against the sovereignty of other states (at [54] and [88]). The wording of section 6(1) was general, containing no geographical limitation, and applied only to United Kingdom public authorities (at [45], [53], [88] and [97]).

151. The House of Lords also held (at [56] - [59], [138] –[142]) that since the central purpose of the 1998 Act was to provide a remedial structure in domestic law for the rights guaranteed by the Convention, it would not be offensive to the sovereignty of another state to make those remedies available on its territory for acts of such authorities.

152. The House of Lords also stated (at [68] – [81], [90], [105]-[106]) that domestic courts must interpret Article 1 of the Convention no wider than how it is interpreted by the ECtHR, in particular by the established case law of its Grand Chamber. As Lord Brown put it at [106] "*no less, but certainly no more*".

153. Pertinently for the present purposes, the House of Lords held (at [108]) that in exceptional circumstances acts of the contracting states performed outside their territory could constitute an exercise of their jurisdiction within the meaning of Article 1 of the Convention, including Article 2, were to be read as applying wherever the United Kingdom had jurisdiction in terms of Article 1 ECHR, and, accordingly, Section 6 was to be interpreted as applying to a public authority acting not only in the United Kingdom but also within its Article 1 jurisdiction outside its territory.

154. Reviewing the Strasbourg Court case law Lord Brown at [109] set central propositions with respect to the scope of Article 1 of the Convention arising from the decision by the Grand Chamber in the case of *Bankovic v Belgium* (2001) 11 BHRC, including (***my emphasis***):

> […]
>
> *(4) The circumstances in which the court has exceptionally recognised the extraterritorial exercise of jurisdiction by a state include (ii) At para 73:*
>
> > *"**cases involving the activities of its diplomatic or consular agents abroad** and on board craft and vessels registered in, or flying the flag of, that state [where] **customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction**"*.

155. At [122] Lord Brown referred to the cases involving the activities of embassies and consulates, which he said were subdivided into two sub-categories, those concerning nationals of the respondent state and those concerning foreign nationals. With respect to the latter cases, he gave examples of *MW v Denmark* (1992) 73 DR 193 and *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643, however, decided that for the purposes of the appeal in front of the House it was unnecessary to consider the facts of those cases, as these were not helpful to the appellants.

156. At [142] referring to the House of Lords judgment in ***Lawson***, Lord Brown said:

> "*In that case section 94(1)'s "legislative grasp" was held to extend to an employee summarily dismissed from his employment at an MoD military establishment in Germany. Why then should the Human Rights Act's legislative grasp not extend to encompass a human rights complaint arising out of such employment abroad and, indeed, such other few categories of claimants as the Strasbourg jurisprudence suggests to be within the UK's article 1 jurisdiction?*"

157. At [146, 147] he disagreed with Lord Bingham's statement at [15(2)] that section 3 HRA was not intended to be used in construing the Act itself. Referring to the judgment by Diplock LJ in *Salomon v Customs and Excise Comrs* [1967] 2 QB at [116], [143] where he held that there was "*a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations"* ("the **Salomon**

Presumption"), Lord Brown then referred to Article 13 of the ECHR[4], which imposes upon the UK an international law obligation to afford "*everyone whose rights and freedoms as set forth in [the] Convention are violated . . . an effective remedy before a national authority.*"

158. He distinguished the cases of *Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153 and *McCann v United Kingdom* (1995) 21 EHRR 97, advanced by the Secretary of State as the proposition that the Salomon Presumption does not assist the claimants because the UK undertook no international obligation to incorporate the Convention into domestic law, on the basis that in those cases Article 13 had not been breached by virtue of the claimants in those cases were not being prevented from their claims to be considered on their merits. In contrast, in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, the Strasbourg Court held (at [138]) that Article 13 was violated because:

> "*the threshold at which [the domestic courts] could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued . . .*"

concluding that in the present appeal, Article 13 would have been found to have been violated with respect to the sixth claimant if it were to be held that HRA did not apply, that is because "*his complaints could not then be considered on their merits under domestic law*".

159. The Claimants took their case to the ECtHR contending that their relatives were within the jurisdiction of the United Kingdom under Article 1 of the Convention at the moment of death and that, except in relation to the sixth applicant, the United Kingdom had not complied with its investigative duty under Article 2.

160. While the ECtHR's judgment (*Al-Skeini v UK* [GC] App. No. 55721/07) deals with the application of Article 2 of the Convention by reason of a jurisdictional link being established between the deceased and the UK for the purposes of Article 1 by virtue of the UK, through its soldiers engaged in security operations in Iraq, exercising authority and control over those killed individuals, the Court confirmed at [134] that:

> "*…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 (see Banković and Others, cited above, § 73; see also X. v. Germany, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158; X. v. the United Kingdom, no. 7547/76, Commission decision of 15 December 1977, DR 12, p. 73; and M. v. Denmark, no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193*)"

[4] Right to an effective remedy: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

161. In a powerful concurring opinion Judge Bonello advocated a "functional jurisdiction" test instead of "extraterritorial jurisdiction", which he said (at [4]) "*has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies*."

162. He described the proposed functional test at [8] –[13] as follows:

> "*9. The founding members of the Convention, and each subsequent Contracting Party, strove to achieve one aim, at once infinitesimal and infinite: the supremacy of the rule of human rights law. In Article 1 they undertook to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. This was, and remains, the cornerstone of the Convention. That was, and remains, the agenda heralded in its Preamble: "the universal and effective recognition and observance" of fundamental human rights. "Universal" hardly suggests an observance parcelled off by territory on the checkerboard of geography.*
>
> *10. States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. These constitute the basic minimum functions assumed by every State by virtue of its having contracted into the Convention.*
>
> *11. A "functional" test would see a State effectively exercising jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control.*
>
> *12. Jurisdiction means no less and no more than "authority over" and "control of". In relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial: it ought to be functional – in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.*
>
> *13. The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfil them (or not to fulfil them)*."

163. The Supreme Court had a further opportunity to consider the vexed question of the territorial reach of the HRA in the case *Smith v Ministry of Defence* [2014] AC 52 SC. This case came to the Supreme Court after the ECtHR judgment in ***Al-Skeini***. It arose from the death and serious injuries of British Army servicemen in Iraq.

164. This first issue for the Supreme Court was whether soldiers in the British Army are within the jurisdiction of the United Kingdom when serving both on and off base in Iraq for the purposes of article 1 of the ECHR. Lord Hope

gave the leading judgment on this issue, with which all other Law Lords agreed.

165. Considering the ECtHR Grand Chamber judgment in ***Al-Skeini***, Lord Hope found three key elements in that judgment concerning the extra-territorial application of the Convention. At [46] he said (***my emphasis***):

> "*46. The first is to be found in its formulation of the general principle of jurisdiction with respect to state agent authority and control.* ***The whole structure of the judgment 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.*** *As I said in para 30, above,* ***the 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***."

166. At [49] Lord Hope said (***my emphasis***):

> "*49. The Grand Chamber has now taken matters a step further. 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****: see Jamaa v Italy 55 EHRR 627*".

167. In <u>*R (B) v Secretary of State for Foreign and Commonwealth Affairs*</u> [2005] QB 643, mentioned by Lord Brown in ***Al-Skeini*** as an example of the cases involving activities of embassies and consulates concerning foreign nationals and thus potentially attracting extra-territorial application of the HRA and the ECHR (see paragraph 155 above), the Court of Appeal had to consider the question of whether and in what circumstances the HRA required British diplomatic or consular officials to afford what has been described as "diplomatic asylum" to fugitives whose fundamental human rights are under threat. The case involved two Afghan immigrants, who arrived in Australia and were detained in the Australian government detention centre. They escaped from the centre and entered the British Consulate in Melbourne, requesting asylum, refugee and humanitarian protection the UK Government.

168. After initial conversations with the applicants and their lawyers, the Vice-Consul told the applicants that he would have to seek guidance from his superiors as to the appropriate course of action, but that while they were in the Consulate they would be kept safe. After consultations with the Foreign and Commonwealth Office in London, the Deputy High Commissioner was informed from London that there were no grounds to consider an asylum request other than in the country of first asylum. He then telephoned the

Australian authorities indicating that he wished to return the applicants to their care. He then told the applicants that there was no possibility of the applicants being permitted to remain in the Consulate or that the United Kingdom would intervene in any way in the consideration of their case by the Australian authorities. He stated that unless they left voluntarily, he would need to find some other way to return them to the Australian authorities. The applicants left and were detained by the Australian authorities.

169. The applicants later brought a claim that the Secretary of State and his Consular officials were in breach of the Convention and the Human Rights Act in refusing to permit the applicants to remain in the Consulate, because returning them to the Australian authorities and therefore back to the detention centre had put them under real threat of being subjected to inhuman and degrading treatment of sufficient severity to infringe Article 3 of the Convention, and at risk of indefinite and arbitrary detention which would amount to a breach of their rights under Article 5 of the Convention.

170. The Court of Appeal identified the three issues in needed to answer:

> *(i) "Could the actions of the United Kingdom diplomatic and consular officials in Melbourne fall 'within the jurisdiction' of the United Kingdom within the meaning of that phrase in Article 1 of the Convention?*
> *(ii) Could the Human Rights Act apply to the actions of the United Kingdom diplomatic and consular officials in Melbourne?*
> (iii) *Did the actions of the United Kingdom diplomatic and consular officials in Melbourne infringe a) the Convention and b) the Human Rights Act?*"

171. Having conducted a substantial review of the Strasbourg Court case law on the territorial reach of the Convention, the Court held at [78], [79] (***my emphasis***)

> " *78. The Strasbourg Court, when considering whether a Convention right has been infringed, will consider whether the events in issue have fallen within the jurisdiction of the Contracting State, within the meaning of Article 1. It is not realistic to divorce the right from the circumstances in which the right is enjoyed.* ***It seems to us that we are under a duty, if possible, to interpret the Human Rights Act in a way that is compatible with the Convention rights, as those rights have been identified by the Strasbourg Court. This duty precludes the application of any presumption that the Human Rights Act applies within the territorial jurisdiction of the United Kingdom, rather than the somewhat wider jurisdiction of the United Kingdom that the Strasbourg Court has held to govern the duties of the United Kingdom under the Convention****.*
>
> *79.* ***For these reasons we have reached the conclusion that the Human Rights Act requires public authorities of the United Kingdom to secure those Convention rights defined in Section 1 within the jurisdiction of the United Kingdom as that jurisdiction has been identified by the Strasbourg Court. It follows that the Human Rights Act was capable of applying to the actions of the diplomatic and consular officials in Melbourne****. It remains to consider whether those actions infringed the Convention and the Act*."

Submissions and Conclusions

Territorial pull – significant connection question

172. The Claimant's case as to why the Tribunal should find that the ERA applies to her is essentially twofold. The principal argument is that, in the circumstances where:

(i) she is effectively barred from pursuing a claim against the Respondent in the UAE,
(ii) her former employer is UK-based and a quasi-governmental entity, and
(iii) the Claimant has a sufficiently strong connection with the UK,

it must have been within Parliament's intention that she should be protected by UK employment legislation.

173. Further, the Claimant submits that in any event she had a stronger connection to Great Britain and British employment law that to the UAE system of law. In her original opening submissions, Ms Dannreuther listed 16 factors which she claimed showed the strong connection to Great Britain and British employment law. Many of those (such as the fact that the Claimant applied for the job through the UK ".org" website and is a European citizen, employed at a time when the UK was an EU member state) rather expose the weakness of the Claimant's case on the significant connection question.

174. In her supplemental written and oral closing submissions, Ms Dannreuther argued that the Claimant was "*a lynchpin between the UK and Regional MENA HR*" and effectively a representative of the Respondent in the UAE.

175. Mr Sammour for the Respondent identified 11 factors, which he argued show that the Claimant had much stronger connection to the UAE than to Great Britain and British employment law. These are:

(i) She lives in Dubai and is settled there with her family.
(ii) She was recruited in the UAE and interviewed for the job there by local staff.
(iii) Her contract is subject to UAE laws. It is a local contract, not an international contract, and the Claimant as an experienced HR person would have understood that.
(iv) She was paid in local currency to her UAE bank account,
(v) She was subject to local tax treatment.
(vi) She was not entitled the Respondent's UK benefits, such as pension. Instead, she was given local "terminal gratuity", which was paid to her local bank account on termination.
(vii) Her sick pay and maternity benefits were provided in accordance with UAE and not UK law.
(viii) Her line manager was based in Dubai, and the fact that for the first three months her new line manager was based in the UK while transitioning to the UAE only proves the point that the

Claimant's employment concerned local MENA operations, not the Respondent's UK operations. In any event, at all material times for the purposes of the claim the Claimant's line manager was based in Dubai. All claimant's direct reports were based in the region. No UK staff was reporting into the Claimant.

(ix) The focus of her work was the MENA region. That was where her internal clients were based. The lion share of her work was providing HR support to local managers and employees. Her performance improvement plan identified areas of improvement, all of which were related to local operations with no reference to global projects. The Claimant accepted in cross-examination that her key stakeholders were local directors and the extent of her engagement with the UK-based HR colleagues and other support functions was to take instructions and learnings to roll out the Respondent's global policies and programmes in her region.

(x) The decision to terminate her employment was made in Dubai by her line manager based in Dubai.

(xi) All alleged acts of discrimination took place in Dubai.

176. I do not accept Ms Dannreuther's submissions that the Claimant was a "lynchpin" between the UK and HR MENA or that she was a representative of the Respondent's UK operations in Middle East. I accept (both as established facts and as relevant factors) all 11 factors identified by Mr Sammour as unequivocally showing that the Claimant was not just a "truly expatriate" but a local employee through and through.

177. The fact that her direct line manager reported to someone in the UK is a simple matter of a vertical management structure of the Respondent. The higher up an employee in an international organisation is the greater the chance that they will be reporting to someone at the headquarters. This, however, does not create the strong connection the Claimant must establish, since at all material times she reported to Dubai based managers.

178. I do not accept that the Claimant was "the link" between the HR team in the UK and the local teams in the region, nor that for that local team she was the representative of UK headquarters. The fact that she needed to roll out the global policies in her region in a manner consistent with the directions given by the head office in the UK does not make her a representative of the Respondent's UK operations, or, at any rate, no more of a representative than any other employee of the Respondent world-wide who is equally required to follow global operational and other policies when performing their local duties.

179. I also do not accept that the Claimant was closely involved in global projects. Her evidence on this matter was patchy and unsatisfactory. I prefer the oral evidence of Mr Etten, who could not recall the Claimant ever leading any such global projects and said that it would be unusual for a local HR manager to lead the Respondent's global HR projects. In any event, even if the Claimant were involved in the marketing function restructuring project (the only example she gave) to a greater degree than merely rolling it out in her

region, considering all other factors, that involvement would be wholly insufficient to overcome the territorial pull of her place of work.

180. On the facts, as far as her day-to-day work was concerned, I find the Claimant's connection to Britain was by far more tenuous, as compared to connections to Britain the respective employees in the cases cited by the parties had.

181. For the sake of completeness, I say that I would have come to the same conclusion even if I had disregarded the governing law of the Claimant's employment contract as one of the relevant factors.

182. Finally, I find that the dicta of Lord Leggatt in *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209, at [70] (referred to by Ms Dannreuther in her opening submissions) is of no assistance to the Claimant. The Claimant must first come within the scope of the ERA before the purposive approach to statutory interpretation can be adopted.

183. In any event, 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.

No redress in local courts

184. The matter, however, does not end there. The Claimant's principal case is that her inability to sue the Respondent in the UAE, and considering the nature of the Respondent as the UK based quasi-government organisation, creates the necessary connection to Great Britain and British employment law, because, Ms Dannreuther argues, in such circumstances it would have been Parliament's intention that the ERA must apply.

185. On the balance of probabilities, I found that indeed the Claimant would not have been able to bring a claim against the Respondent in the UAE even if she had managed to overcome the initial procedural difficulties, because the Respondent would have met any such claim with a successful plea of immunity (see paragraphs 65-80 above). I, therefore, shall proceed to analyse the position on that factual basis.

186. Ms Dannreuther in her submissions placed strong emphasis on the fact that unlike the claimants in ***Duncombe*** the Claimant did not have "somewhere to go" referring to a passage in the Lady Hale's judgment in that case (see paragraph 112 above).

187. She also argued that ***Rajabov*** was distinguishable on the facts on the basis that Mr Rajabov as a former employee of the British Embassy in Tajikistan "*at least knew, or could/should have known, that his employer was a diplomatic body, with all the diplomatic/immunity protections that entails*". Whereas the Respondent was holding itself out as "*operationally independent*

from the UK Government" and as a private charity. She further argued that the Respondent held out the Claimant's employment contract, by what was included in its terms, as legally enforceable in the UAE, when in fact it was not, and therefore "*reliance on the terms of the contract to prove that the Claimant had a stronger employment connection with the UAE rather than the UK cannot stand*".

188. Ms Dannreuther also submitted, in the alternative, that ***Rajabov*** was wrongly decide. This, of course, is not a matter I can rule on.

189. Mr Sammour argued that the Claimant's inability to pursue her claim in the UAE cannot be the basis on which to extend the territorial jurisdiction of the Tribunal. This would be contrary of the binding authorities (***Bryant, Hottak Hamam*** and ***Rajabov***). He argues that inability to obtain redress is just one factor but by itself it is not sufficient to displace the territorial pull.

190. He further argued that the fact that the Claimant tried to sue the Respondent in Dubai is a further factor demonstrating the close connection to the UAE and the laws of the UAE.

191. Finally, he pointed out that the Claimant's argument that she did not know that she could not sue the Respondent in the UAE was (a) contrary to her evidence in chief (paragraph 7 of her witness statement states that she was aware that the Respondent wanted "*to operate under the Embassy "umbrella" as this way the British Council would be protected since no labour court case can be initiated by any of the employees*"), and (b) in any event irrelevant because the employee's knowledge of his/her ability to pursue a claim in local courts cannot be the basis to establish connection with Great Britain and British employment law.

192. Dealing with the knowledge issue first, I do agree with Mr Sammour's submission that the territorial reach of the ERA cannot be determined by the extent of a putative employee's knowledge as to his or her ability to pursue a claim in local courts. Such approach to interpreting Parliament's intention would be plainly wrong.

193. However, I do find that legitimate expectations by an employee that they would be able to enforce the rights conferred by the local employment contract and local employment law in the competent local courts is a relevant factor when it comes to consider the sufficiently strong connection question.

194. As Lady Hale said in ***Duncombe*** at [16] the governing law of the contract creates "*the expectation of each party as to the protection which the employees would enjoy*" and at [17] that those employed locally by a British employer in a foreign country "*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*".

195. I accept the Claimant's evidence that she knew that the Respondent wanted to avoid being sued in local courts by operating under the British Embassy's "umbrella". However, she would have acquired that knowledge only after joining the Respondent. She would not have known that when the contract was presented to her stating that her employment rights will be governed by UAE law and that UAE law will prevail in the event of conflict. That statement would have given her the legitimate expectation that her employment rights would be enforceable against the Respondent in accordance with UAE law in the UAE courts. That expectation was later reinforced by Ms Salamanca's representation (see paragraph 30 above)

196. By inviting the Claimant to join the Respondent as a local employee on the terms governed by UAE law and vowing to "*strive to meet both the obligations [the local laws] set out and the spirit of them*"[5] when that was for its benefit, and 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 (see paragraph 131 above).

197. Furthermore, Lady Hale stated in ***Duncombe*** at [8] "*The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law."*

198. Both parties accept, this requires the Tribunal to compare the connection to British employment law with a competing connection to the relevant foreign system of law. That exercise must not involve the Tribunal comparing the competing systems of law, but just the connection of the employment in question to those systems.

199. System of law must be understood as not merely substantive laws of the land, but also relevant procedures or processes for interpreting and enforcing the law. Having a strong connection to a system of law makes little sense if a person cannot realise their rights and remedies that the legal system in question gives them, because the bodies that are meant to enable such realisation are powerless against the counterparty against which the person seeks to enforce their rights.

200. I find that the Respondent's immunity from being sued in the UAE effectively destroys the connection to that system of law, no matter how strong it otherwise would have been. I cannot see how it can be said that the Claimant employment with the Respondent is connected to the UAE system of law, when that system does not recognise her employment contract with the Respondent for lack of registration with the MoHRE and does not accept that she can enforce her contractual or statutory employment rights against the Respondent in the UAE courts by reason of the Respondent's diplomatic immunity.

[5] Page 5 of the Respondent's Equality Policy

201. Therefore, in my judgment, whatever the "territorial pull" the Claimant's place of work had created, it was severed by the Respondent's action (or to be more precise - would be action) of claiming immunity from being sued in the UAE courts.

202. This, however, does not automatically create the sufficient connection to British employment law. The authorities suggest that something more is needed. While I find that the requirement of "something more" might have arisen from misreading Lord Hoffman's endorsement of ***Bryant*** and omitting from consideration paragraph 29 of the ***Bryant*** judgment (see paragraphs 113-123 above), I am bound by ***Hamam*** and ***Hottak*** and shall proceed on that basis.

203. With respect to ***Rajabov***, I do not read the EAT judgment as creating any rule beyond saying that it was open for the employment tribunal on the facts of that particular case to find that the diplomatic immunity factor was not very significant.

204. Before deciding whether in the present case "something more" can be found, I shall first deal with the relevance of ***Benkharbouche*** and the HRA.

Benkharbouche

205. While the argument was not fully developed by Ms Dannreuther at the hearing, in her supplemental written submissions she makes the point that ***Benkharbouche*** and the JCHR's report "*indicate Parliament's intention to exclude employment contracts from the protection of diplomatic or sovereign immunity where it is just for the UK to hear the claim, as it is here*".

206. Although somewhat cryptic I understood it to mean that in laying down the Remedial Order in response to ***Benkharbouche*** Parliament indicated its intention that employment contracts concluded by the state or an emanation of the state acting jure gestionis cannot escape employment tribunals jurisdiction through a plea of diplomatic or sovereign immunity.

207. In turn, this means that for the present purposes (i.e. determining Parliament's intention as to the territorial scope of the ERA) this must be taken as indicating Parliament's intention that when a claim is brought by an employee against a British-based employer in a British employment tribunal or court by reason of that employee not being able to sue the British employer in a foreign court due to immunity the foreign state recognises with respect of that British employer, British employment tribunals must have jurisdiction to consider such claims, which necessary means extending the territorial reach of the ERA.

208. There is some superficial attractiveness in this argument. Indeed, if Parliament's intention is that foreign states and diplomates cannot escape

examination in British courts and tribunals of their conduct in employment relationship with non-diplomatic staff in this country, why should the British state and diplomates be able to avoid such an examination by a successful plea of immunity in the foreign courts, and in the British courts and tribunals - by the limited territorial jurisdiction of the relevant British statutes? As Ms Dannreuther put it by reference to what Lady Hale said in Duncombe at [16], the Claimant must have "somewhere to go".

209. This, however, in my view, conflates two issues: the question of the application of the state and diplomatic immunity doctrine, which, as acknowledged in ***Benkharbouche,*** significantly varies from state to state (see at [46] – [52] and [72]), which is a procedural rule, and the question of the territorial application of a substantive rule contained in the state's legislation.

210. Just because a foreign state might on particular facts recognise state/diplomatic immunity where on the same facts British law would not recognise immunity, this cannot automatically trigger an extension to the territorial scope of the UK legislation.

211. Having said that, I find that the analysis in ***Benkharbouche*** is relevant in so far as it confirms that "right to court" under Article 6 of the ECHR and in common law is triggered by a claim of state immunity. The right, however, is not absolute. "*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"* (at [14])*.*

212. However, Article 6 itself cannot create a substantive right where one does not exist, for example, because the law containing such right does not apply to the claimant, including by reason of its territorial scope. I shall return to that when dealing with the issue of whether the Human Rights Act applies and if so, the effect of it.

213. The analysis in ***Benkharbouche*** also shows that immunity does not extinguish underlying obligations and liabilities, rights and remedies, but simply bars courts of a particular state from adjudicating on those, however, leaving them intact to be determined elsewhere (see at [16], [18] and [65]). The same point was made earlier in *Al-Malki v Reyes* [2017] ICR 1417 SC where Lord Sumption (with whom on this issue the other justices agreed) at [40] held that: "*Diplomatic immunity, like state immunity, is an immunity from jurisdiction and not from liability*."

214. The question then arises if a claim of immunity does not extinguish liability and therefore the corresponding remedy, how could the remedy-holder obtain satisfaction against the liability-holder, who is shielded by immunity in the foreign forum?

215. ***Benkharbouche*** also establishes that customary international law only recognises "*restrictive immunity doctrine"* (see paragraph 130) and that "*There is a substantial body of international opinion to the effect that the immunity ….. should not extend to staff recruited from the local labour force in*

whose protection the forum state has a governmental interest of its own." (see paragraph 132), and a wider application of the doctrine is inconsistent with the recognised principles of international law and incompatible with Article 6 ECHR.

216. Finally, Lord Lord Sumption's observation at [65] (see paragraph 133 above) suggests that the availability of state immunity in the forum state is justified because the employee may always bring proceedings in the employing state. In other words, customary international law appears to view the matter in a way that if an employee is prevented from suing their state employer in the forum state (i.e. in the country where the employee works for the foreign state employer) by reason of state immunity, they can "*always bring proceedings*" against the state employer in that state employer's home courts. That is to say that state/diplomatic immunity international rules should no result in an employee finding themselves in the "jurisdictional no men's land".

The Human Rights Act

217. Ms Dannreuther provided extensive submissions on the application of the HRA and the ECHR, in my view, casting her "net" far wider than is necessary for the present purposes.

218. She submits that the Claimant's Article 6 rights have been infringed by the denial of access to a court in Dubai. The Tribunal is obliged both to act compatibly with the ECHR rights and to read and give effect to legislation in a way which is compatible with Convention rights, and therefore, were the Tribunal to decline to exercise jurisdiction over her case, that would be in breach of her Article 6 right to effective access to a court.

219. Ms Dannreuther suggests: "*A principal question in this matter is whether [the Claimant] had/has Convention rights either (i) in relation to the inability to file a claim/obtain legal redress in the UAE/Dubai courts or (ii) before the Tribunal in the UK (i.e. in so far as a denial to hear her claim here would leave her without a remedy)*".

220. Concerning sub-question (i), whatever the position might be, it is not for this Tribunal to determine whether by denying the Claimant access to the UAE courts, the Respondent violated her Convention rights (if engaged). That question lies outside the jurisdiction of employment tribunals.

221. With respect to (ii), it is established law (see paragraphs 125 and 138 above) that Article 6 by itself cannot be a "gateway" to attract Convention rights or confer jurisdiction on the Tribunal, where it otherwise does not have it. In other words, in this case the Tribunal can only have jurisdiction to consider the Claimant's claims if it decides that the Claimant has the right not to be unfairly dismissed under the ERA (and the right not to be discriminated against under the EqA) despite working for the Respondent outside Great Britain. It will be an error of law to approach this matter by first founding the

Tribunal's jurisdiction by reason that denying it, in the circumstances where the Claimant is prevented from suing the Respondent in the UAE, would put the Tribunal in breach of section 6(1) of the HRA, and from there find that Article 6 is engaged, and therefore to enable the Claimant to realise her Article 6 right she should be allowed to have her claim considered by the Tribunal, which necessarily requires the Tribunal to find that the ERA applies to the Claimant.

222. It is, of course, accepted that in hearing the Claimant's case on the territorial jurisdiction issue as a preliminary issue, the Tribunal is required to act in a way which is compatible with her Convention rights, including her Article 6 rights, but that is a different matter to founding the Tribunal's jurisdiction to hear the Claimant's substantive claims, where otherwise the Tribunal lacks such jurisdiction.

223. Therefore, the starting point is to establish whether the ECHR applies in the circumstances of the case. Considering that the matters complained of took place in the UAE, which is not a Convention state, the only way that Convention rights could be engaged if on the facts of the case the Convention applies extraterritorially.

224. Ms Dannreuther, largely relying on the House of Lords decision in **Al-Skeini**, argues that Convention rights are engaged because although the acts took place outside the UK, these were "*within the jurisdiction of the UK for the purposes of Article 1 ECHR*". She says the same reasoning must apply to Article 6. I accept that if it is found that when the acts complained of occurred the Claimant was "within the jurisdiction of the UK" for the purposes of Article 1, her Article 6 rights will be engaged.

225. Ms Dannreuther suggests several "gateways" that establish the extraterritorial application of the Convention. First, she argues by reference to the ECtHR decision in *Markovic and Ors v Italy* [GC] (App. No.1398/03), 14 December 2006 that there is "*there is an undeniable "jurisdictional link" for the purposes of the Convention, to the extent that the rights secured under Article 6(1) are at stake"*. With respect, I find this argument misconceived. I have already dealt with this matter at paragraphs 221 and 222 above). The Grand Chamber judgment clearly recognises that difference, when it says at [53] and [54] (***my emphasis***):

> "*53. …**Everything depends on the rights which may be claimed under the law of the State concerned. If the domestic law recognises a right to bring an action** and if the right claimed is one which prima facie possesses the characteristics required by Article 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level.*
>
> *54. **Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings**, it cannot under any circumstances affect the jurisdiction ratione loci and ratione personae of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6*."

226. Her next "gateway" is an "act of diplomatic or consular agents". I shall return to this later in my judgment, because I think on the facts it is the only available "gateway" for the Claimant to establish that she comes with the jurisdiction of the UK for the purposes of Article 1, and consequently her Article 6 rights are engaged.

227. Next, Ms Dannreuther relies on the *Bosphorous* presumption, submitting: "*[a]s the United Kingdom, in transferring its powers to the British Council (i.e. that of educational opportunities and cultural promotion), did not allow for the Claimant's rights to effective access to a Tribunal, it is submitted that jurisdiction is established under this heading in the alternative*". She referred the Tribunal to three cases *Gasparini v Italy and Belgium* (2009) [Second Section] (App. No 10750/03), *Rambus Inc v Germany* [Fifth Section] (App. No. 40382/04), and *Klausecker v Germany* [Fifth Section] (App. No. 415/07), none of which, on my reading, have any relevance. The first case was a complaint against the alleged incompatibility of the NATO Appeal Board procedure with Article 6, the other two cases are complaints involving the European Patent Office internal appeal process.

228. In none of those cases was the territorial reach of the Convention rights an issue. In fact, in ***Gasparini***, the Court confirmed the threshold requirement limiting the applicability of Convention rights to persons within the jurisdiction of one of the Contracting States, which generally requires the person to be physically present on the territory of the Contracting State (see, for example, *Galic v Netherlands* App.No. 22617/07, 9 June 2009, [46]).

229. The so-called *Bosphorus* presumption refers to a doctrine in the ECtHR case law starting with the judgment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* no. 45036/98. In that judgment the ECtHR stated that member states of an international organisation (for example the EU) are still liable under the ECHR for "*all acts and omissions of its organs regardless of whether the act or omission in question was a consequence […] of the necessity to comply with international legal obligations*" (at [153]). ***Gasparini*** appears to extend the application of the doctrine to international organisations which include member states that are not Contracting States (NATO and the USA and Canada), but it still holds true to the principle that for the Convention rights to be engaged the person must be within the jurisdiction of one of the Contracting States.

230. In any event, I do not see on what basis it is suggested that the *Bosphorus* doctrine applies to the Respondent. The Respondent is not an international or a supranational organisation, to which the UK transferred its sovereign power in order to pursue cooperation in certain fields of activity, in the sense envisaged in those ECtHR judgments. In short, I find that the argument wholly misconceived and unhelpful.

231. I equally find nothing of assistance in Ms Dannreuther's next submission on "*the 'personal model' of jurisdiction under Al-Skeini*", to the extent it goes beyond the activities of diplomatic and consulate agents "gateway" (albeit I

accept that the "personal model" concept encompasses the diplomatic and consulate agents "gateway"). The Claimant was clearly not in "physical custody" (*Hassan v UK* [GC] App. No. 29750/09, 16 September 2014) of the Respondent, or passing through the Respondent-manned military checkpoints (*Jaloud v Netherlands* [GC] App No. 47708/08, 20 November 2014) when the acts complained of took place. Her position is manifestly different to the British Army personnel serving in Iraq (as in *Smith v Ministry of Defence* [2013] UKSC 41).

232. I reject Ms Dannreuther's submission that "*as the British Council had authority over the Claimant, and control over the arrangement whereby she can sue/not sue her employer in Dubai/UAE, and the British Council is an emanation of the UK state, jurisdiction can be established under this model*".

233. Although this submission seems to echo the functional test proposed by Judge Bonello in his concurring opinion (see paragraph 161 above), it is not for this Tribunal to expand the concept of authority or control over an individual by the state beyond the recognised principle of territoriality and limited exceptions of extraterritorial application established in the ECtHR case law.

234. Ms Dannreuther's submission that the *"[e]ven if the Tribunal were to find that the Claimant was not within the UK's jurisdiction under the ECHR, it is bound by the President of the Employment Appeal Tribunal's holdings in Millicom Services UK Ltd & Ors v Michael Clifford [2022] EAT 74 at [84] that common law principles "bring back into play the Article 6 ECHR right to a fair trial*", seems to be based on a completely wrong reading of ***Millicom***.

235. The EAT in ***Millicom*** clearly stated at [46] and [83] that the duty under s.6 HRA was not engaged when the protection is sought in respect to individuals outside the territory of the ECHR. The "bring back into play the Article 6" argument was only relevant to the issue of the exercise of the tribunal's discretion under Rule 50 of the Employment Tribunals Rules of Procedure 2013, but cannot by itself confer jurisdiction on the Tribunal where it otherwise does not have it (see paragraphs 221, 222 above). There was no issue of the tribunal not having jurisdiction to consider the claimant's claim in ***Millicom***.

236. I am equally unpersuaded by Ms Dannreuther's submission that the Respondent can "self-impose" extraterritoriality of the HRA "*by holding [itself] out as being bound by the [HRA] and upholding human rights*", nor do I read the Respondent's Equality Policy as saying that. I do not find anything in *R (Begum) v Secretary of State for Home Department* [2021] UKSC 7 at [20] and [21] that supports that submission.

237. Before returning to the act of diplomatic or consular agents "gateway", I shall deal with the Respondent's submissions on the application of the HRA.

238. Mr Sammour submissions were more concise and grounded on two main propositions. First, none of the four authorities (***Bryant, Hottak, Hamam, Rajabov***) dealing the relevance of the state immunity factor considered that

the HRA or the ECHR had any bearing on the issue of territorial jurisdiction, and in ***Bryant*** at [27] it was expressly rejected for the purposes of interpreting the ERA as to create a special category of people to whom the statue should be extended by reason of them not being able to sue their employer in a foreign court.

239. Secondly, the supposition in ***Bryant*** that a claim brought by an employee working and living abroad might be within the scope of the ECHR, and thus engage the interpretive duties under s.3 of the HRA is incorrect. That is because the ECHR territorial nature limits its application to the territory of the Contracting States. In support of that submission, Mr Sammour relies on the dicta by Underhill LJ in ***Jeffery*** at [119], where rejecting the argument that s.48(1A) of the ERA 1996 conferred a wider territorial jurisdiction on the Tribunal than did other provisions of the ERA 1996 because whistleblowing claims engaged Article 10 ECHR, Underhill EJ said:

> "*I have hardly less hesitation in rejecting Mr Kemp's fallback submission. In the case of protected rights arising out of an employment relationship with a foreign element it seems to me that the dispositive question must be whether the relationship is within the jurisdiction of the state in question, rather than depending on the chance of where a particular act is done or whether the worker happens to be within its territory at any particular moment. I would be inclined to accept, though the point was not fully explored before us, that the question of whether that is so in any given case cannot depend wholly on the choice of that state: that is, there may be cases where for the purposes of the Convention a state is to be treated as having jurisdiction over an employment relationship even though it does not itself seek to exercise such a jurisdiction. But in the generality of cases I see no reason why the jurisdictional parameters recognised by a particular state should not be respected for the purposes of the Convention. Certainly in the present case I can see no reason why the Convention should be understood as requiring the UK to exercise a more extensive jurisdiction than is established by reference to the Lawson/Ravat principles summarised at para 2 above. Indeed I can see very good reason why it should not. Convention rights may be engaged in a variety of different ways in the context of the rights afforded by the 1996 and 2010 Acts. Quite apart from article 10, articles 8, 9, 11 and 14 are not infrequently invoked. It would lead to extraordinary incoherence and confusion if the jurisdictional rules differed as between causes of action that do or do not engage a Convention right*."

240. Further, Mr Sammour relies on the EAT judgment in *Smania v Standard Chartered Bank* [2015] ICR 436 where at [37] Langstaff J rejecting the argument that the ECHR applied to employment in a foreign, non-EU state (in that case, Singapore) said:

> *"…The ECHR applies outside the territory of contracting states only in the context of specific state actions such as invasion or occupation…the Charter [of Fundamental Freedoms of the European Union] does not extend the scope of Convention rights, and therefore reliance on the Charter cannot confer jurisdiction where none would otherwise exist under domestic law…The ECHR does not apply to Singapore. It is not engaged in the present case. I accept Mr Williams' arguments*."

241. Mr Sammour argues, the same analysis must be applied in the present case. The ECHR does not apply in the UAE and therefore the Claimant does not have Convention rights to be engaged. Article 6 by itself cannot confer

jurisdiction on a court, which it does not have (see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at [14]).

242. Therefore, Mr Sammour, concludes the HRA and the ECHR make no difference because by not being able to establish sufficient connection with Great Britain and British employment law so as to displace the territorial pull of the UAE as her place of work, the Claimant falls outside the scope of the ERA, and although the Tribunal is bound by the HRA, it cannot interpret the ERA 1996 purposively to give effect to any ECHR "rights" of the Claimant because (i) she does not have any in respect of the subject matter of this claim and (ii) a purposive interpretation is not available in any event.

243. With respect, Mr Sammour submissions overlook the important matter of the possibility of extra-territorial application of the HRA and the ECHR.

244. Further, the fact that in the four cases dealing with the issues of the relevance of state immunity on the territorial reach of the ERA the issue of the applicability of the HRA and the ECHR was not expressly dealt with is not sufficient to conclude that the HRA and the ECHR are of no relevance and have no bearing on the analysis. I note that in three of those cases the claimants appeared in person and quite possibly were not aware of the ECHR and the HRA and the possibility of their extraterritorial application. Indeed, in this case, it appears that neither party had given any consideration to this issue until it was raised by the Tribunal.

245. Also, I find that the dicta by Underhill LJ in ***Jeffery*** on which Mr Sammour relies expressly acknowledges the possibility of the ECHR application extraterritorially (***my emphasis***)

> *"In the case of protected rights arising out of an employment relationship with a foreign element it seems to me that* ***the dispositive question must be whether the relationship is within the jurisdiction of the state in question****, rather than depending on the chance of where a particular act is done or whether the worker happens to be within its territory at any particular moment.* ***I would be inclined to accept****, though the point was not fully explored before us,* ***that the question of whether that is so in any given case cannot depend wholly on the choice of that state: that is, there may be cases where for the purposes of the Convention a state is to be treated as having jurisdiction over an employment relationship even though it does not itself seek to exercise such a jurisdiction***."

246. In ***Smania*** Langstaff J specifically acknowledged the possibility of the ECHR applying extraterritorially, including by way of "activity of diplomatic or consular agents" exception by referring to ***Bankovic***, ***Al-Skeini*** and ***Smith***. It appears that "invasion" and "occupation" were cited by the respondent's counsel as examples only. Considering that the respondent in that case was a bank and not a diplomatic mission, the diplomatic or consular agent exception was clearly not relevant. Hence, I do not see how ***Smania*** could assist the Respondent on the facts.

247. I shall now turn to deal with the question of whether for the purposes of her claim the Claimant was "within the jurisdiction of the UK" under Article 1 and therefore had her Convention rights are engaged.

Is the Respondent a public authority

248. First, I need to consider whether the Respondent is a public authority within the meaning of section 6(3)(b) of the HRA. Applying the multifunctional test (see paragraph 146) to my findings of fact at paragraphs 54- 65 I find that the Respondent falls within the definition of "public authority" under the HRA.

249. Although it is registered as a charity, it is classified by the Office of National Statistics as a public non-financial corporation and as an executive non-departmental public body. On its website the Respondent describes itself as "*a non-departmental public body spending taxpayers' money" and as being "formally accountable to parliament*". The Respondent's Code of Conduct states that "*all [its] activities must … be for the public benefit*".

250. Its objects of promoting and representing the UK language and culture abroad are clearly of a public nature, it is publicly funded, it is closely aligned to the FCDO. The British Embassy in Dubai represents the Respondent as "*an integral part of the British Embassy, operating as its cultural and education department and as Diplomatic Mission*". Further, the Abu Dhabi Court of Cassation recognition of diplomatic immunity with respect to the Respondent (see paragraph 68) serves to show that the Respondent in carrying out its activities in the UAE was acting as a public body.

251. Finally, even it can be argued (and it wasn't by the Respondent) that as far as the Claimant's employment by the Respondent was concerned the Respondent was exercising non-public functions and was acting purely as a private employer – a charity, nevertheless, by claiming diplomatic immunity against a claim 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 that on the facts the HRA applied extraterritorially.

Acts of diplomatic or consular agents?

252. As I stated earlier, the only possible extraterritorial "gateway" to engage the Convention that I can see on the facts is if it can be established that the Respondent's actions fall within the exception of "cases involving the activities of its diplomatic or consular agents" (see paragraph 154 above).

253. I find that it is one of such cases. Firstly, the British Embassy statement that the Respondent is "*an integral part of the British Embassy, operating as its cultural and education department and as Diplomatic Mission*" by itself is sufficient to show that all Respondent's activities in the UAE were conducted as a diplomatic agent of the UK Government.

254. The Abu Dhabi Court of Cassation would not have otherwise recognised the Respondent's immunity under Article 31/1 of the Vienna treaty on diplomatic relations.

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

256. Although the relevant ECtHR case law, most notably *WM v Denmark* (14 October 1992), and the CoA judgment in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643 are cases when the appellants were physically present on the premises of the respective Embassy and the Consulate, I do not read them as establishing that the physical presence on the foreign state's premises was the necessary element to establish that the appellants were "within the jurisdiction" of the Convention State.

257. It is not the physical presence of the applicants on the diplomatic premises but the actions of the diplomatic staff (in those cases surrendering the applicants to local authorities) that brought the appellants within the jurisdiction of the Contracting state. I see no principal reason why an action of a diplomatic agent in claiming immunity against a person trying to sue the agent should be treated any differently to the agent's action of surrendering the person to the police authorities.

258. I draw further support for this conclusion from Lord Hope's judgment in ***Smith*** (see paragraphs 165 and 166 above). 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.

260. It follows, that I find that Article 6 right is engaged. This also leads to the conclusion that the HRA applies for the purposes of interpreting ERA.

261. This conclusion is further supported by the analysis by Lord Brown in ***Al-Skeini*** that Article 3 of the HRA can be used in construing the HRA itself. By analogy, Article 6 would be violated with respect to the Claimant if it were to be found that HRA did not apply, that is because "*[her] complaints could not then be considered on their merits under domestic law*" (see paragraphs 156 - 158 above).

262. Finally, the Court of Appeal in ***R (B) v Secretary of State for Foreign and Commonwealth Affairs*** said that the duty to interpret the Human Rights Act in a way that is compatible with the Convention "*precludes the application of any presumption that the Human Rights Act applies within the territorial jurisdiction of the United Kingdom, rather than the somewhat wider jurisdiction of the United Kingdom that the Strasbourg Court has held to govern the duties of the United Kingdom under the Convention*" (see paragraph 171 above).

263. Accordingly, it considering the issue of whether the Tribunal has territorial jurisdiction to consider the Claimant's claims I must not act in a way which is incompatible with the Claimant's Convention rights and, so far as possible to do so, read and give effect to the ERA in a way which is compatible with the Claimant's Convention rights, notably the right to a fair trial under Article 6 of the ECHR.

Overall conclusion

264. I remind myself that my task is to construe s. 94(1) to decide whether on the facts of this case the Claimant falls within "*the legislative grasp, or intendment, of the statute*", recognising the principles of construction as explained by Lord Hoffman in ***Lawson***.

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 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.

266. Considering my finding that the UAE courts would have declined to assume jurisdiction over the Claimant's claim against the Respondent, extending the application of the ERA to the Claimant's claims will not offend the comity of nations.

267. I cannot see how it would have been in Parliament's intention to allow the Respondent, essentially a private organisation, but through its close association with the executive branch of the UK state enjoying certain privileges (such as immunity from legal claims in foreign states), to effectively put itself beyond the reach of law. That can't be right.

268. The rule of law and the separation of powers with a system of checks and balances are fundamental principles underpinning the UK constitutional order and are essential elements of a functioning democracy.

269. If the Respondent's actions vis-à-vis its local employees in foreign countries are not susceptible to scrutiny by independent judicial authorities in those countries, it ought to have been within Parliament's intention, attributing to Parliament a rational scheme, that such actions ought to be judged against the laws of this country.

270. In my view, Parliament, as the legislative branch of the State and the ultimate guardian of the UK constitution, would not have accepted or acquiesced to the situation whereby the executive branch of the UK state could "provide diplomatic cover" to an independent (albeit closely associated) organisation with respect to that organisation's actions affecting rights of a person, which rights the UK recognises as fundamental human rights, without there being an effective check to ensure that the rule of law principle is not being compromised.

271. Put it simply, in my judgment, 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.

272. That is even more so, considering the essential function of the Respondent as an organisation, that is of a cultural ambassador of the UK in hundreds of foreign lands where it operates. It represents and promotes the UK values and democratic principles abroad.

273. Furthermore, the Respondent as a public authority is bound by the HRA, and it is unlawful for the Respondent to act in a way which is incompatible with the Convention rights. Therefore, it ought to have been within Parliament's intention that people claiming their Convention rights against the Respondent would have an effective way of enforcing their right. In the Claimant's case it means extending British employment law, so that the Tribunal's statutory jurisdiction is engaged.

274. As I explained above (see paragraphs 114 - 123 and 203) it appears that more weight was being placed on Lord Hoffman's endorsement of ***Bryant*** as a proposition that an employee being barred from bringing a claim in a foreign court is not a determinative factor and "*without more*" is insufficient "*to bring their employment contracts within the exceptional type of case*", than on my reading of ***Bryant*** and ***Lawson*** is justified. However, if "something more" is required, I find that the Claimant's case is distinguishable.

275. In ***Bryant*** the claimant was given assurances that she could pursue her claim for unfair dismissal in Italy. In ***Hamam***, ***Hottak*** and ***Rajabov*** the issues of the claimants' Convention rights and the applicability of the HRA were not considered. Further, in ***Hottak*** the issue was not about the claimants' being prevented from bringing claims in the Afghan courts, and the issue of immunity was considered only in passing. ***Rajabov*** simply states that it was open to the employment tribunal on the facts of that case to consider immunity as not very significant, but otherwise it does not make any new law binding on this Tribunal.

276. In all four cases the respondent was the UK government. The Respondent describes itself as a non-departmental public body. Its Bye-Laws state that it "*may sue and be sued in all courts and in all manner of actions and suits*". Its Code of Conduct states that it is "*committed to complying with the law in all the countries and territories where [it] work[s]*". This, in my view, created a greater legitimate expectation for the Claimant that she would be able to enforce her employment rights against the Respondent in the UAE, than in the cases involving Embassy staff.

277. Therefore, I find that it was within Parliament's intention that the ERA and the EqA should apply on the specific facts of this case. It follows, that the Tribunal has jurisdiction to consider the Claimant's complaints in the claim.

Case Management Orders (Rule 29 of the Employment Tribunals Rules of Procedure)

278. The Claimant's complaints shall now proceed to be determined on their merits. There shall be a further open preliminary hearing to determine the Claimant's application to amend the claim and the Respondent's application to strike out/deposit order (if still pursued), and to give further case

management directions. Time estimate – 1 day. If the parties consider that more or less time will be required, they must tell the Tribunal as soon as possible. They must give their time estimate and reasons.

279. Within 21 days of the date of this judgment:

(i) the parties must write to the Tribunal with their dates to avoid starting from March 2023.

(ii) The Respondent must confirm whether in light of the Claimant's application to amend and this judgment it still pursues the strike out/deposit order application.

(iii) The Respondent must send to the Claimant and the Tribunal its representations on the Claimant's application to amend.

Employment Judge Klimov

7 January 2023

Sent to the parties on:

09/01/2023

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

Annex – List of Authorities

Joint Bundle of Authorities:

1. *Wilson v Maynard Shipbuilding Consultants AB* [1978] ICR 376
2. *Governor of Pitcairn v Sutton* [1994] 1 NZLR 426 (CA)
3. *Jackson v Ghost Ltd* [2003] IRLR 824
4. *Bryant v Foreign and Commonwealth Office* [2003] All ER (D) 104
5. *Lawson v Serco Ltd* [2006] ICR 250
6. *Duncombe v Secretary of State for Children, Schools and Families (No 2 [2011] ICR 1312*
7. *Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389
8. *Bates van Winkelhof v Clyde & Co llp* [2013] ICR 883
9. *Lodge v Dignity & Choice in Dying & anor* [2015] IRLR 184
10. *Dhunna v CreditSights Ltd* [2015] ICR 105
11. *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] ICR 975
12. *Jeffery v British Council* [2019] ICR 929
13. *Benkharbouche v Embassy of the Republic of Sudan* (SC(E)) [2019] AC 777
14. *Commonwealth Office v Bamieh* [2020] ICR 465
15. *Hamam v British Embassy in Cairo & Foreign and Commonwealth Office* [2020] IRLR 570
16. *Uber BV v Aslam* [2021] 4 All ER 209
17. *Rajabov v Foreign and Commonwealth Office* [2022] EAT 112
18. The State Immunity Act 1978 (Remedial) Order 2022 (draft)
19. Joint Committee on Human Rights, *Draft State Immunity Act 1978 (Remedial) Order 2022* (Second Report) (2022, HC 895, HL Paper 103)

Additional authorities submitted by Claimant:

1. *R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26, [2008] 1 AC 153*
2. *Markovic and Ors v Italy [GC] (App. No. 1398/03), 14 December 2006*
3. *X v Germany – Commission decision of 25 September 1965*
4. *X v UK, Commission Decision of 15 December 1977*
5. *Rambus Inc v Germany [Fifth Section] (App. No. 40382/04)*
6. *Klausecker v Germany [Fifth Section] (App. No. 415/07)*
7. *Al-Skeini v UK [GC] App. No. 55721/07*
8. *Millicom Services UK Ltd & Ors v Michael Clifford [2022] EAT 74*
9. *Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557*
10. *MN and others v Belgium*
11. *British Council Equality Policy*
12. *R (Begum) v Secretary of State for Home Department [2021] UKSC 7*

Additional Authorities submitted by Respondent:

1. *Smania v Standard Chartered Bank [2015] ICR 436*