



18 October 2017

PRESS SUMMARY

Reyes (Appellant/Cross-Respondent) v Al-Malki and another (Respondents/Cross-Appellants) [2017] UKSC 61

On appeal from: [2015] EWCA Civ 32

JUSTICES: Lord Neuberger, Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption

BACKGROUND TO THE APPEAL

Between January and March 2011 the respondents, Mr and Mrs Al-Malki, employed Ms Reyes as a domestic servant at their London residence. Mr Al-Malki was a member of the diplomatic staff of the Saudi Arabian embassy in London. In June 2011, Ms Reyes began proceedings in the Employment Tribunal. She alleges that Mr and Mrs Al-Malki mistreated her in the course of her employment and that she is a victim of trafficking. Those allegations are yet to be determined at trial.

The Court of Appeal held that the Employment Tribunal lacked jurisdiction because Mr Al-Malki was entitled to diplomatic immunity under article 31 of the Vienna Convention on Diplomatic Relations 1961 (“the Convention”), which is incorporated into the law of the United Kingdom by section 2(1) of the Diplomatic Privileges Act 1964. Under article 37(1) of the Convention, Mrs Al-Malki therefore benefited from immunity as his family member. Mr and Mrs Al-Malki then left the United Kingdom when Mr Al-Malki’s posting came to an end.

Ms Reyes appealed to the Supreme Court, contending that the Employment Tribunal has jurisdiction to hear her claims under the exception, contained in article 31(1)(c) of the Convention, to the general rule of diplomatic immunity. Mr and Mrs Al-Malki cross-appealed, contending that they were never validly served with the claim form. Two parties intervened: the Secretary of State for Foreign and Commonwealth Affairs and Kalayaan, a charity which supports migrant domestic workers including victims of trafficking.

JUDGMENT

The Supreme Court unanimously allows the appeal and dismisses the cross-appeal. Lord Sumption gives the lead judgment, with which Lord Neuberger agrees. Lord Wilson gives a separate judgment in which he concurs with that of Lord Sumption, save in respect of one point. Lady Hale and Lord Clarke agree with the judgment of Lord Wilson.

REASONS FOR THE JUDGMENT

Diplomatic immunity is not an immunity from liability. It is immunity from the jurisdiction of the courts of the state which hosts the diplomat (the “receiving state”) [7-9].

The claim form was served validly, without violating the protections conferred on diplomats and their residences respectively by articles 29 and 30 of the Convention: the service of a claim form by post does not involve any trespass against the diplomat’s person or residence; it merely conveys information [13-16].

The Convention draws a fundamental distinction between the acts of a diplomat which are performed in the exercise of an “official function” and those which are not. The former are immune because they

are committed on behalf of a state. The immunity of the latter is justified on the pragmatic basis that it facilitates diplomatic relations. Article 31(1) confers diplomatic immunity on both types of acts, subject to specified exceptions. Once a diplomat's posting has come to an end, his or her immunity after leaving the receiving state is ordinarily limited to a "residual immunity" under article 39(2). That residual immunity applies only to acts performed the exercise of "official functions" [17-18]. Acts performed in the exercise of a diplomat's official functions are limited to acts which are part of the diplomatic functions of the diplomatic mission, performed on behalf of the state which that diplomat represents [20].

Mr and Mrs Al-Malki left the United Kingdom at the end of Mr Al-Malki's posting, so the only potentially relevant immunity is the "residual immunity" in respect of official acts. The employment of Ms Reyes to carry out domestic tasks in the residence of Mr and Mrs Al-Malki was not an act in the exercise of the diplomatic functions of the mission. Nor was it done on behalf of Saudi Arabia, even though it assisted Mr Al-Malki in the performance of his official functions. It was not there the exercise of an official function. Consequently, neither Mr Al-Malki nor Mrs Al-Malki may rely on that residual immunity [48].

The appeal is therefore allowed. Unless within 21 days the parties in writing justify an alternative, the case will be remitted to the Employment Tribunal to be determined at trial [54-55].

Lord Sumption, with whom Lord Neuberger agrees, expresses the view (obiter) that Mr Al-Malki would have been entitled to immunity under article 31(1) if he had still been in post. Ms Reyes sought to rely on an exception to article 31(1), set out in article 31(1)(c). That exception applies in civil claims "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Lord Sumption would have concluded that the acts alleged do not constitute the "exercise" of a "professional or commercial activity" [51]. Lord Sumption reasons that: (i) the wording of the exception envisages a diplomat who also conducts a business, practises a profession, or similar [21(1)-(3)]; (ii) the drafting history of the Convention confirms that this was the drafters' intention [21(4), 34-38]; (iii) the reasoning in case law from the United States supports that interpretation [22-25]; (iv) the reasons for the exception are obvious: nothing in the concept of diplomatic immunity requires it to protect a diplomat's private business activities, in competition with others, from business-related claims [21(5)]; (v) a wide interpretation of the exception risks exposing diplomats to liability in respect of everyday transactions, undermining the carefully-constructed scheme of immunities under the Convention [21(6)]; (vi) nothing in the Convention nor in wider international law justifies interpretation of the Convention with reference to the International Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo, 2000) ("the Palermo Protocol") and nothing in the Palermo Protocol would require a different interpretation of article 31(1)(c) [41-47].

Lord Wilson, with whom Lady Hale and Lord Clarke agree, welcomes the lack of any binding decision as to whether Mr Al-Malki would have been immune, had he remained in his post. In his view the answer is not obvious [57]. This is because: (i) the exploitation of migrant domestic workers by diplomats is a significant problem [59]; (ii) there is a global determination to combat human trafficking [60]; (iii) the employment of trafficked persons may form part of the wider commercial activity of "trafficking" [61-62]; (iv) the absence of state immunity in similar cases is difficult to reconcile with recognition of diplomatic immunity in this case [63]-[64]; (v) it is not clear how recognition of Mr Al-Malki's immunity would further the stated purpose of the Convention [66]. Lord Wilson disagrees with Lord Sumption's opinion that it was inappropriate to construe article 31(1)(c) in the light of the more recent international condemnation of human trafficking [67]. He invites the International Law Commission to consider amendment of the Convention [68].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>