United Kingdom, Benkharbouche v Sudan and Janah v Libya Court of Appeal, 5 February 2015

Deciding bodies and decisions

United Kingdom, England and Wales Court of Appeal, [2015] EWCA Civ 33, A2/2013/3062, *Benkharbouche & Anor v. Embassy of Sudan (Rev 1)*, Appellate, 5 February 2015

Area of law

Non discrimination in the field of employment

Subject matter

Racial discrimination - Immunities and Privileges of Diplomatic Missions - jurisdiction over employment disputes between service staff of a diplomatic mission and the foreign state - Compatibility of the State Immunity Act 1978 with Article 6, ECHR and Article 47, Charter

Summary Facts Of The Case

Ms. Benkharbouche and Ms Janah are Moroccan nationals who were employed as members of the domestic staff of, respectively, the Sudanese and the Libyan Embassy of London.

After being dismissed, they brought proceedings before the competent employment tribunal against their employer States, alleging violations of a number of employment rights, notably unfair dismissal, failure to pay the minimum wage, racial discrimination, harassment and breach of the Working Time Regulations of 1998.

After the employment tribunals upheld the plea of sovereign immunity raised by the defendants, appeals from the two decisions were heard together by the Employment Appeals Tribunal, whose decision was then appealed to the Court of Appeal (England and Wales). This last Court decided the case without making any reference for a preliminary ruling to the CJEU.

The core legal issues of the case were the question of the compatibility of the applicable provisions of the State Immunity Act with the right to an effective remedy under both Article 6 ECHR and Article 47 CFR, and, in case of a negative reply, the consequences that should follow for the pleas of immunity.

The Court extensively referred to the case-law of the ECtHR about State immunity from civil jurisdiction, especially as far as Embassy employment disputes are concerned (paras. 11-30). In particular, the approach of the Strasbourg Court is recalled, according to which there is a violation of Article 6 ECHR when the grant of immunity is not required by international law and it does not lie within the margin of appreciation accorded to States to determine the extent of their obligations

under international law (para. 30).

Following this line of reasoning, the Court of Appeal excluded the compatibility with article 6 ECHR of Section 16(1)(a) of the State Immunity Act, a blanket provision recognizing the immunity in all cases concerning embassy or consular employment disputes, far beyond what is required by international law.

The Court of Appeal then examined the compatibility with the ECHR of Section 4(2)(b) of the State Immunity Act. This provision, giving effect to Article 5(2)(b) of the European Convention on State Immunity (Basel, 16 May 1972; ETS No.074)68, grants foreign States immunity from jurisdiction in respect to proceedings relating to a contract of employment, where the employee was neither a national of the United Kingdom, nor was habitually resident there at the time when the contract of employment was made. The Court of Appeal considers that Section 4(2)(b) is not required by international law and therefore constitutes a disproportional limitation of the right of access to justice contrary to Article 6 ECHR. Furthermore, the Court esteemed that the same Section was discriminatory on grounds of nationality and violated Article 14 ECHR.

Pursuant to Section 4(2) of the Human Rights Act, the Court therefore declared that the applicable provisions of the State Immunity Act infringed upon the ECHR.

The Court then examined whether, as argued by Ms Janah and Ms Benkharbouche, the case fell within the scope of EU law (paras. 69-74). Indeed, whilst the Human Rights Act (1998) does not allow British court to disapply a domestic provision in conflict with an ECHR right (they must instead issue a declaration of incompatibility; see point a) above), EU law requires all national courts not to apply domestic provisions conflicting with EU law provisions (thus, also Charter rights) that satisfy the requirements for direct effect.

The Court of Appeal considered that certain claimed raised by the appellants were derived from EU law measures. Although there is no express mention of any of them, the EU law measures relevant to the case are Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

Consequently, the Court of Appeal established that the relevant provisions of the State Immunity Act infringed upon Article 47 CFR, too. In support of this finding, it referred to the Official Explanations of the Charter to argue that, “in so far as relevant to the present case, the content of Article 47 is identical to that of Article 6 ECHR” (para. 71).

Since the case involved private citizens to third States, it could not be construed as a case involving the vertical direct effect of EU law (private citizen v. a Member State); rather, it was a matter of direct horizontal effect, which the CJEU has granted only to some EU law provisions of primary law, without, however, making clear whether additional requirements to the general ones for (vertical) direct effect must be satisfied (on this point, see the “Background issues” section above). The Court of Appeal recalled the judgments in *Mangold* (Case C-144/04) and *Kücükdeveci* (Case C-555/07), where the CJEU acknowledged the direct horizontal effect of the general principle of non-discrimination on grounds of age, now reaffirmed by Article 21(1) of the Charter.

It then observed that the CJEU has to an extent addressed the question of the capability of Charter provisions to have direct horizontal effect in its judgment in *AMS* (Case C-176/12), where

it has held that the principle of non-discrimination on grounds of age in Article 21(1) CFR is amenable to direct horizontal effect, whereas the right to information and consultation in the undertaking guaranteed by Article 27 CFR is not.

Though admitting that, in *AMS*, "[t]he CJEU did not (...) go on to make it clear which rights and principles contained in the EU Charter might be capable of having horizontal direct effect, and which would not", the Court of Appeal did not raise a reference for preliminary ruling to the CJEU; rather, it established on its own that Article 47 CFR is amenable to horizontal direct effect. In particular, it argued that, with respect to Article 47 CFR, the objection that "Article [cannot] be invoked horizontally because it [requires] specific expression in Union or national law (...) does not apply to Article 47, which does not depend on its definition in national legislation to take effect" (paras. 79-80).

Furthermore, the Court of Appeal observed that, according to its explanation, Article 47 CFR codified the case law of the CJEU acknowledging as a general principle of EU law the right to an effective remedy; this was regarded as an additional element in favour of the capability of Article 47 CFR to have direct horizontal effect (paras. 80 – 81). This circumstance allowed the disapplication of Sections 4(2)(b) and 16(1)(a) of the State Immunity Act, in relation to the claims of both claimants falling within the scope of EU law.

Relation to the scope of the Charter

According to the Court of Appeal, only some of the claims fell within the scope of EU law, notably those of both claimants in respect of the Working Time Regulations 1998 and the claims by Ms. Janah in respect of racial discrimination and harassment (para. 74). Although the Court of Appeal did not expressly identify the substantial link with EU law, just referring to the fact that these claims "are derived from EU measures" (para 74). However, the implicit reference is to the body of EU law on the matter, notably Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. The national provisions at issue were either adopted specifically in order to transpose EU law (notably, an earlier version of Directive 2000/43/EC) or concerned issues governed by an EU directive (the Racial Discrimination Directive).

Relation between the Charter and EHCR

Article 47 (1) CFR enshrines a "corresponding right" (to Art. 6(1) ECHR)within the meaning of Article 52(3) CFR, which lays down the general rules concerning the interpretation of Charter provisions that protect fundamental rights already guaranteed by the ECHR.

Charter "corresponding rights" must be granted the same scope and meaning of their homologues under the ECHR, taking into account also the case law of the ECtHR. In addition, based on the

explanation of Article 52(3) CFR, the parallel interpretation also extends to limitations, which, therefore, are the same allowed under the ECHR. At the same time, however, “corresponding rights” may be granted a broader protection under Union law.

Notes on the remedies dimension

The Court of Appeal:

(1) resorted to consistent interpretation of ECtHR case law, concluding that state immunity could not be invoked against all employment law claims, but only against those claims concerning core embassy staff – issuing a “declaration of incompatibility”;[1]

(2) ruled that the relevant provisions of the *State Immunity Act* had to be disapplied, to the extent that they were applied as a barrier to the claims based on EU law.[2]

Only the higher court could contemplate issuing a declaration of incompatibility with the ECHR; while courts of any level can disapply the law based on Article 47. Plus, the remedy of disapplication of the Act of Parliament is obviously stronger than the declaration of incompatibility, allowing the case to proceed on the merits (as far as it relates to EU law) rather than having to wait for Parliament to change the law in order to do so.

Of course the case has to be linked to EU law in order for the Charter to apply: only the race discrimination and working time claims benefit from the disapplication of provisions of the Act of Parliament, and so only those claims can proceed to court as things stand.[3]

[1] At lower levels, the tribunals cannot rule on the claims for breach of the ECHR, since the UK’s Human Rights Act establishes that only higher courts can issue a ‘declaration of incompatibility’ of an Act of Parliament based on a breach of the ECHR. So the Court of Appeal was the first court that could issue such a declaration, and it did so in this case.

[2] Any national court or tribunal has the power to disapply an act of parliament if necessary to give effect to EU law.

[3] For more information on the impact of this case see Barnard & Peers, Rights, remedies and state immunity: the Court of Appeal judgment in Benkharbouche and Janah, 6 February 2015, http://eulawanalysis.blogspot.com/2015/02/rights-remedies-and-state-immunity.html

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Diagram

Case timeline representation

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Impact on Legislation / Policy

The *Benkharbouche and Janah* judgment is particularly significant as it clearly shows the different effects that the conflict between domestic legislation and fundamental rights can produce in the UK legal order, depending on whether certain aspects of a case fall inside or outside the scope of the Charter. Whilst a conflict with an ECHR right can only result in a declaration of incompatibility pursuant to section 4(2) of the State Immunity Act, the incompatibility with a provision of the Charter having direct effect does lead to the disapplication of the conflicting domestic provision, also in horizontal relationships.

The Court of Appeal's thesis, according to which Article 47 of the Charter is suitable to produce horizontal direct effects, may have far-reaching implications on domestic procedural law if upheld

by the CJEU. These implications may concern cases in whatever fields covered by EU law, in light of the cross-sectoral nature of Article 47 CFR.

Sources - EU and national law

EU law

Although the judgment of the Court of Appeal does not explicitly mention the EU law measures that trigger the application of the Charter, the implicit reference is to:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time**.**

National law

Working Time Regulation (1998) State Immunity Act (1978)

Section 1 of the State Immunity Act confers a general immunity from jurisdiction:

Immunity from jurisdiction

(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.?(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

The following sections create exceptions to immunity. In particular, Section 4 makes specific provision for contracts of employment and provides in relevant part:

Contracts of employment

(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.?(2) Subject to subsections (3) and (4) below, this section does not apply if:

(a) at the time when the proceedings are brought the individual is a national of the State concerned; or?(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or?(c) the parties to the contract have otherwise agreed in writing.?(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not

exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.?(4) Subsection (2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.?...?(6) In this section “proceedings relating to a contract of employment” includes proceedings between the parties to such a contract in respect of any statutory

rights or duties to which they are entitled or subject as employer or employee.

Section 16 excludes certain matters from the scope of Part I of the Act. Of particular relevance in the present case is section 16(1):

Excluded matters

(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and?(a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968.

The effect of the exclusion of proceedings concerning the employment of the members of a mission from section 4 is that the exception to immunity created by that section does not apply to such cases and a state is therefore immune by virtue of section 1(1).

According to the Diplomatic Privileges Act (1964) the “members of a mission” include the members of the staff of a mission, amongst which domestic staff.

- Human Rights Act (1998)

The Human Rights Act incorporated the rights set out in the ECHR into domestic British law, thus allowing those whose rights are violated by this law to bring their case to a British court rather than having to seek justice before the Strasbourg Court. For the purpose of this case66, it is important to recall that, when a British court considers that a domestic provision is in conflict with an ECHR right, it can only issue a declaration of incompatibility; by contrast, it cannot disapply the domestic provision, as it could do if the conflict concerned a Charter right.

In particular, Section 4 of the Act, titled “Declaration of incompatibility”, provides as follows:

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.?(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

Sources - ECHR

Article 6, ECHR

Sources - CJEU Case Law

Charter scope of application

- Siragusa (C-206/13)
- Julian Hernandez and others (C-198/13)

Horizontal application of Article 21 Charter

- Mangold v Helm (C-144/04)
- Kücükdeveci v Swedex (C-555/07)
- Association de Mediation Sociale (AMS) (C-176/12)

Comments

Role of the Charter

The Charter was mentioned and analysed in the various national decisions as to its scope, direct enforceability, and compatibility of the rights conferred under it with rights conferred under national laws.

The two initial national judgments found the cases to be within the scope of the Charter, pointing to the second connection under *Siragusa* (C-206/13) and *Julian Hernandez and others* (C-198/13) case law (*national law is capable of hindering/affecting the level of protection that the EU act aims at establishing*).

The appellate decision considered the two initial claims to be within material scope of the EU law on discrimination in employment, and, in addition, within the EU fundamental right to access to court, while certain national provisions (of the SIA) by restricting access of the claimants to national jurisdiction courts, effectively restricted the scope of protection against discrimination afforded them under the EU law.

The second appellate decision recapitulates that under art. 51 and 52(5) Charter, the Charter does not apply to claims based solely on national law. The court considered that claimants had both kinds of claims – under national law only and under EU law (the latter being primarily the Working Time Regulation, racial discrimination and harassment claims).

The second appellate court also dealt with the question of the *horizontal direct effect of the Charter,* in order to answer the question whether the applicants can rely on the Charter even when Libya and Sudan are not EU member states or EU institutions. To do so, the court cites CJEU cases *Mangold v Helm, Kücükdeveci v Swedex,* and *Association de Mediation Sociale (AMS)* to conclude that:

- Art. 21 EU Charter now supports the existence of a general principle of non-discrimination;
- Art. 47 EU Charter now contains the right to an effective remedy which is a general principle

of EU law; and accordingly
- Both provisions have direct horizontal effect.

In sum, the first instance courts considered the conflict between art. 6 ECHR and art. 47 Charter on one hand, and the SIA provisions on the other, and decided not to disapply the SIA provisions.

These decisions were overturned on appeal(s), when the national provisions were disapplied for incompatibility with art. 6 ECHR and art. 47 Charter.

From the Charter application perspective, the most interesting point examined by the Court of Appeal was the application of the “horizontal direct effect” of Charter rights. Since non-EU States aren’t bound by EU law as States, the court assimilated them to private parties.