United Kingdom, Court of Appeal of England and Wales, Benkharbouche and Janah, judgement of 5 February 2015

Deciding bodies and decisions

Court of Appeal of England and Wales, Case No. A2/2013/3062, *Benkharbouche and Janah65*

Area of law

Effective judicial protection

Subject matter

Labour law proceedings - Immunity of a State from jurisdiction in labour law proceedings concerning an embassy' staff

- Whether granting immunity from suit under the UK State Immunity Act 1978 breaches the rights granted by Article 6 ECHR and 47 of the EU Charter
- Whether Article 47 CFR is capable of having direct effect, in particular in horizontal disputes
- Whether the Charter is applicable to civil and employment law disputes between the domestic staff of a third-state embassy and the third state concerned

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

Right to an effective remedy and to a fair trial (Article 47 EU 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).

By contrast, other claims (such as claims for unfair dismissal) were deemed as being exclusively based on domestic law (para. 74). However, the exclusion of these civil claims from the scope of EU law is questionable. A correct application of the CJEU's case law (in particular, Case C-154/11 *Mahamdia*) should have led the Court of Appeal to identify a connection with EU law also with respect to to claims for arrears of pay and failure to pay the minimum wage, notably through (EC) Regulation No. 44/2001 on the on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-*bis* Regulation).

A reference to *Mahamdia* was made by the Court of Appeal to support the view that international law does not require the grant of absolute immunity from all employment claims by employees of diplomatic missions (para. 48-52). However, the very same decision of the CJEU is mostly important because it clarifies that disputes concerning a contract of employment concluded by an embassy of a third State situated in a Member State falls within the material scope of the Brussells I-*bis* Regulation), where the functions carried out by the employee do not fall within the exercise of public powers (*Mahamdia*, paras. 56-57).

Relation between the Charter and EHCR

Article 47 (1) CFR enshrines a "corresponding right" 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.

Sources - EU and national law

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.

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**.**