



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BENKHARBOUCHE AND JANAH v. THE UNITED KINGDOM

(Applications nos. 19059/18 and 19725/18)

JUDGMENT

Art 6 (civil) • Art 14 (+ Art 6) • Access to court • Discrimination • Legislation granting immunity to foreign states from domestic court jurisdiction, thereby preventing applicants from bringing employment claims after dismissal from foreign embassies within the United Kingdom • Applications not struck from list in the light of inadequate redress offered • Acceptance of Government's concession as to breaches, empowering Court to award just satisfaction without itself examining substantive issues raised

STRASBOURG

5 April 2022

FINAL

05/09/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Benkharbouche and Janah v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President*,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges*,
Sir Paul Girvan, *ad hoc judge*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to the applications (nos. 19059/18 and 19725/18) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Moroccan nationals, Ms Fatima Benkharbouche and Ms Mina Janah (“the applicants”), on 13 April 2018;

the decision to give notice to the United Kingdom Government (“the Government”) of the complaints concerning Article 6 of the Convention, read alone and together with Article 14;

the decision taken by the President of the Chamber to appoint Sir Paul Girvan to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court), as Mr Tim Eicke, the judge elected in respect of the United Kingdom, had withdrawn from the case (Rule 28 of the Rules of Court);

the parties’ observations;

Having deliberated in private on 15 March 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. These two applications arise out of employment claims brought before the English courts by the applicants against their former employers. In each case the employer – the Republic of Sudan and the State of Libya respectively – successfully asserted that it was entitled to immunity from the jurisdiction of the English courts by virtue of the State Immunity Act 1978 (“the 1978 Act” – see paragraph 35 below). The 1978 Act renders a foreign state immune from the jurisdiction of a United Kingdom court in a claim based on the foreign state’s employment of the claimant, where the claimant, at the time of the contract, was neither a United Kingdom national nor habitually resident in the United Kingdom (section 4(2)(b) of the 1978 Act); or worked for the foreign State’s diplomatic mission (section 16(1)(a) of the 1978).

THE FACTS

2. The applicant in application no. 19059/18, Ms Fatima Benkharbouche (hereinafter “the first applicant”), is a Moroccan national who was born in 1964 and lives in London. She is represented before the Court by Ms S. Newman of Newman Law LLP, a lawyer practising in London.

3. The applicant in application no. 19725/18, Ms Mina Janah (hereinafter “the second applicant”), is a Moroccan national who was born in 1967 and lives in London. She is represented before the Court by Ms J. Duncan-Bosu of SaltWorks Law, and was previously represented by Ms E.A. Gibbs of SaltWorks Law, lawyers practising in London.

4. The Government were represented by their Agent, Ms L. Stallard of the Foreign, Commonwealth and Development Office.

5. The facts of the case may be summarised as follows.

I. THE BACKGROUND TO THE PRESENT COMPLAINTS

6. The first applicant started working for the Sudanese Embassy in Iraq in the 1980s. In 2000 she moved to the United Kingdom to work as a housekeeper/cook to the ambassador at the Sudanese Embassy in London. She went back to Iraq in 2002 and returned to the embassy in London in 2005. On 27 November 2010 her employment at the embassy was terminated summarily.

7. The second applicant came to the United Kingdom on 2 November 2005 to work as a domestic worker and nanny in the household of the Cultural Attaché at the Libyan Embassy in London. She worked at a number of residences connected to the embassy but she was dismissed by letter dated 24 January 2012.

II. THE PROCEEDINGS BEFORE THE EMPLOYMENT TRIBUNAL

A. The first applicant

8. Following the termination of her employment, the first applicant brought claims against her former employer for damages for failure to pay the National Minimum Wage over a period of nearly six years, unfair dismissal, wrongful dismissal, failure to provide an itemised pay statement, failure to provide written reasons for dismissal and breach of the Working Time Regulations 1998.

9. A schedule of loss submitted by the applicant valued her claims as follows (in pounds sterling (GBP)):

Unfair dismissal	37,229.93
Minimum wage	168,761.07

Working Time Regulations (annual leave)	4,264.44
Working Time Regulations (weekly rest)	TBA (To be assessed)
Wrongful dismissal	1,428.38

10. Default judgment was entered into on 20 May 2011 after the respondent failed to submit a Response Form and a remedy hearing was listed for 14 June 2011. The parties subsequently made submissions on the question of State immunity. In particular, the respondent argued that the Tribunal did not have jurisdiction to hear the claim because of the operation of section 16(1) of the 1978 Act, according to which a foreign State is immune from the jurisdiction of a United Kingdom court in a claim based on the foreign state's employment of the claimant, where the claimant worked for the foreign State's diplomatic mission (see paragraph 1 above and paragraph 35 below). Article 4(2)(b) of the 1978 Act (see paragraph 35 below), which provided that a foreign State was immune from the jurisdiction of a United Kingdom court in a claim based on the foreign state's employment of the claimant, where the claimant, at the time of the contract, was neither a United Kingdom national nor habitually resident in the United Kingdom (see paragraph 1 above and paragraph 35 below), was not in issue as there had been no finding regarding the first applicant's place of habitual residence at the date the contract was entered into.

11. At the pre-hearing review the first applicant argued first, that to allow a State to rely on immunity from legal proceedings in such a case would contradict the Human Rights Act 1998 (see paragraph 36 below) and Article 6 of the Convention because it did not afford her a fair hearing to determine her employment dispute; and secondly, that her claim involved rights within the scope of European Union (EU) law which would be frustrated if the 1978 Act was applied. She submitted that the Tribunal, if sympathetic to her arguments, had three options available to it: to read down the literal wording of section 16(1) of the 1978 Act so as to avoid the conclusion that her claim was barred; to refuse to apply section 16(1) on the ground that it was contrary to Article 47 of the Charter of Fundamental Rights of the European Union ("the EU Charter" – see paragraph 38 below); or make a provisional finding that the claim appeared to be barred but stay it pending an appeal to the Court of Appeal in order to obtain a Declaration of Incompatibility under section 4 of the Human Rights Act 1998 (see paragraph 36 below).

12. The Employment Tribunal gave judgment on 10 April 2012. Having regard to the case-law of the European Court of Human Rights (in particular, *Cudak v Lithuania* [GC], no. 15869/02, ECHR 2010, and *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011), and the private law nature of the first applicant's employment relationship, the Tribunal accepted that a human rights issue was engaged. However, it could not issue a Declaration of Incompatibility under section 4 of the Human Rights Act 1998 and, in its view, it could not use its powers under section 3 of the Human Rights Act

1998 (see paragraph 36 below) to read down the provisions of the 1978 Act in a way that would completely change, and possibly even reverse, its meaning. The Tribunal further found that it was not open to it to ignore the 1978 Act because an EU right was engaged in an employment dispute.

13. Having accepted the respondent's assertion of State immunity, the Tribunal stayed the first applicant's claim pending her appeal to the Court of Appeal.

B. The second applicant

14. Following her dismissal the second applicant brought claims against her former employer for unfair dismissal, failure to pay the minimum wage over a period of six years, failure to provide the documents required by Part 1 of the Employment Rights Act (written statement of the particulars of employment), breach of the Working Time Regulations 1998 and unlawful discrimination/harassment on the grounds of race.

15. The comparative value of her claims was estimated as follows (in GBP):

Working Time Regulations	1,012.34
Minimum Wage	149,347.79
Unfair dismissal	72,230.40
Employment Rights Act	1,704

16. At a pre-hearing review to determine whether the respondent would be entitled to immunity from the second applicant's claims by operation of section 16(1) and (as the second applicant had been found not to have been habitually resident in the United Kingdom at the date of the contract) section 4(2)(b) of the 1978 Act (see paragraph 35 below), it was agreed that the issues before the Employment Tribunal were: whether the barring of the second applicant's claims would be contrary to Article 6 and/or Article 14 of the Convention; whether the Tribunal should "read down" the literal wording of the 1978 Act to avoid the conclusion that her claims were barred; insofar as the second applicant's claims involved rights within the material scope of EU law, whether the Tribunal could disapply the relevant sections of the 1978 Act on the ground that they were contrary to Article 47 of the EU Charter (see paragraph 38 below); and, if the Tribunal did not "read down" or disapply the relevant sections of the 1978 Act, whether it should make a provisional finding that it had no jurisdiction to hear the claim and either stay it pending an appeal by the applicant or dismiss it.

17. Having regard to the case-law of the European Court of Human Rights (in particular, *Cudak* and *Sabeh El Leil*, both cited above), the Employment Tribunal concluded that as regards the respondent's immunity under section 16(1) of the 1978 Act (see paragraph 35 below), Article 6 of the

Convention was both applicable and had been breached, since the second applicant had not herself participated in acts involving the governmental authority of Libya and to invoke immunity would be disproportionate to the aim of protecting the functions of Libya as a State. The Tribunal did not consider itself to be in a position to make a finding that there had also been breaches of Articles 6 or 14 of the Convention in respect of section 4(2) of the 1978 Act (see paragraph 35 below).

18. Nevertheless, the Tribunal considered that “reading down” section 16(1) of the 1978 Act as suggested by the second applicant would effectively reverse the effect of the section and cross the boundary between interpretation and amendment. It therefore declined to do so. It further found that the second applicant had failed to make out her case that the 1978 Act should be disapplied as being contrary to EU law.

19. In conclusion, the Tribunal held that the respondent’s assertion of State immunity should succeed, but stayed the claim pending the second applicant’s appeal to the Employment Appeal Tribunal.

III. THE PROCEEDINGS BEFORE THE EMPLOYMENT APPEAL TRIBUNAL

20. Both applicants appealed to the Employment Appeal Tribunal, which heard the two cases together.

21. In a judgment dated 4 February 2013, the Tribunal found that there had been a breach of Article 6 of the Convention in so far as section 16(1) of the 1978 Act (see paragraph 35 below) was concerned. It was also prepared to assume for the purpose of argument that there was also a breach of Articles 6 and 14 in so far as section 4(2)(b) (see paragraph 35 below) was concerned.

22. The Employment Appeal Tribunal considered that there was no interpretative scope for “reading down” the provisions of the 1978 Act. However, insofar as the applicants’ claims fell within the material scope of EU law, it held that the relevant provisions of the 1978 Act should be disapplied. For the first applicant, this meant that insofar as she complained about a breach of the Working Time Regulations 1998, the provisions of section 16(1) of the 1978 Act were to be disapplied; and for the second applicant, insofar as she complained about racial discrimination and harassment, and breaches of the Working Time Regulations 1998, sections 16(1) and 4(2)(b) of the 1978 Act were to be disapplied. The appeal was therefore allowed to this extent.

IV. THE PROCEEDINGS BEFORE THE COURT OF APPEAL

23. The applicants were granted permission to appeal to the Court of Appeal to allow them to seek a Declaration of Incompatibility in respect of those parts of their claims which fell outside the material scope of EU law.

24. The Court of Appeal handed down its judgment on 5 February 2015. In respect of Article 16(1) of the 1978 Act (see paragraph 35 below), it found nothing in the European Convention on State Immunity 1972, the Vienna Convention on Diplomatic Relations 1961, the United Nations International Law Commission Draft Articles on Jurisdictional Immunities of States and Their Property 1991 (“the ILC Draft Articles”), Article 11 of the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 (“the 2004 UN Convention”) or State practice which would enable it to conclude that there was any rule of international law which required the grant of immunity in respect of employment claims by members of the service staff of a mission in the absence of some special feature, such as where the claim was for the recruitment, renewal of employment or reinstatement of an individual or where the proceedings would interfere with the security interests of the State.

25. It further held that section 4(2)(b) of the 1978 Act (see paragraph 35 below) was discriminatory on grounds of nationality and that no such limitation to the exception to immunity was required by customary international law, nor was it within the range of reasonably tenable opinion within the margin of appreciation granted to States in the assessment of their international obligations.

26. Turning to remedies, the court agreed with the Employment Appeal Tribunal that the relevant provisions of the 1978 Act could not be read down. It therefore made a Declaration of Incompatibility to the effect that section 16(1)(a), in its application to the claims brought by the applicants, infringed Article 6 of the Convention; and that section 4(2)(b) (see paragraph 35 below), in its application to the claims brought by the second applicant, infringed Articles 6 and 14 of the Convention.

27. In respect of the EU Charter, the court held that Article 47 fell into the category of Charter provisions that could be the subject of horizontal direct effect. As such, the court was required to disapply section 4(2)(b) and section 16(1)(a) of the 1978 Act in respect of those parts of the claims which fell within the scope of EU law.

V. THE PROCEEDINGS BEFORE THE SUPREME COURT

28. On 18 October 2017 the Supreme Court unanimously dismissed an appeal brought by Libya and the Secretary for State for Foreign and Commonwealth Affairs. In determining whether sections 4(2)(b) and 16(1) of the 1978 Act (see paragraph 35 below) were incompatible with Article 6

of the Convention and Article 47 of the EU Charter (see paragraph 38 below), it considered the relevant test to be whether or not they were consistent with a rule of customary international law that denied the English court jurisdiction in such cases. However, the court considered that the only consensus to be found in customary international law was in favour of a “restrictive doctrine”, whereby immunity was limited to acts by a State in the exercise of sovereign authority and did not extend to acts of a private law nature. As such, there was no basis in customary international law for the application of State immunity in an employment context to acts of a private law character (such as the employment of purely domestic staff in a diplomatic mission). It followed that neither section 4(2)(b) nor section 16(1) of the 1978 Act (see paragraph 35 below) could be justified by any principle of international law and, accordingly, they were incompatible with Article 6 of the Convention and Article 47 of the EU Charter (see paragraph 38 below).

29. Insofar as the second applicant had complained that section 4(2)(b) of the 1978 Act (see paragraph 35 below) was incompatible with Article 14 of the Convention, Lord Sumption, who delivered the leading judgment, said:

“Section 4(2)(b) unquestionably discriminates on grounds of nationality. The only question is whether the discrimination is justifiable by reference to international law. If state immunity is no answer to the claim under article 6 alone, then it is no answer to the claim under the combination of article 6 and article 14. In my view, the denial of access to the courts to persons in her position is unjustifiable whether it is discriminatory or not.”

30. In disposing of the case, the Supreme Court did not consider it necessary to decide whether Article 6 of the Convention would be engaged by a successful claim to state immunity in circumstances where the grant of immunity had no basis in customary international law.

VI. SUBSEQUENT DEVELOPMENTS

31. The result of the Supreme Court judgment was that sections 4(2)(b) and 16(1)(a) of the 1978 Act (see paragraph 35 below) did not apply to the applicants’ claims derived from EU law. The two cases were therefore remitted to the Employment Tribunal to determine the claims based on EU law on their merits.

32. By a settlement agreement dated 22 January 2019, Sudan agreed to pay the first applicant the sum of GBP 10,000 in settlement of her claim under the Working Time Regulations. The settlement agreement expressly stated that it did not compromise or in any way affect the applicant’s claim for damages against the United Kingdom before the European Court of Human Rights in respect of those domestic law claims which were barred by the 1978 Act (which included the claim for damages for failure to pay the National Minimum Wage, unfair dismissal and wrongful dismissal— see paragraph 9 above).

33. On 13 August 2018, Libya agreed to pay the second applicant GBP 1,012.34 together with costs in settlement of her claim under the Working Time Regulations 1998. She withdrew her discrimination/harassment claim (which was also based on EU law) in light of the Supreme Court judgment in *Taiwo v. Olaigbe* [2016] UKSC 31, which found that discrimination on grounds of immigration status did not amount to discrimination on grounds of race or nationality actionable under the Equality Act 2010.

34. According to the Ministry of Justice’s report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019-2020, dated December 2020, the Government “is considering options for addressing the declaration of incompatibility”. However, on 23 February 2021 the Government informed Parliament of its intention to make a remedial order pursuant to section 10(2) and schedule 2 of the Human Rights Act to remove the incompatibility identified by the Supreme Court (see paragraph 37 below).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The State Immunity Act 1978

35. The relevant provisions provide as follows:

“1(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.

... ..

3(1) A State is not immune as respects proceedings relating to -

- (a) a commercial transaction entered into by the State;
- (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

... ..

(3) In this section “commercial transaction” means -

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity (whether of a commercial industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

4(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.

... ..

16(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.”

B. The Human Rights Act 1998

36. The Human Rights Act provides, insofar as relevant:

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.”

4 Declaration of incompatibility

“(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.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.”

37. If a provision of legislation has been declared under section 4 to be incompatible with a Convention right, the Government have the power to make a Remedial Order. Details of this power are set out in section 10(2) and Schedule 2 to the Human Rights Act 1998.

II. EUROPEAN UNION LAW AND PRACTICE

A. The Charter of Fundamental Rights of the European Union

38. Article 47 of the EU Charter (Right to an effective remedy and to a fair trial) provides:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

B. Ahmed Mahamdia v. People’s Democratic Republic of Algeria (Case C-154/11 ECLI:EU:C:2012:491)

39. Mr. Mahamdia, who had both Algerian and German nationality, was employed as a driver in the Algerian embassy in Berlin. His contract contained a clause conferring exclusive jurisdiction, if there was a dispute, on the Algerian courts. He brought proceedings against Algeria in the Berlin Labour Court for unpaid overtime and unfair dismissal. Algeria contended that the German courts had no jurisdiction, relying on both State immunity and the exclusive jurisdiction clause. The Higher Labour Court referred two questions to the CJEU for a preliminary ruling. One of the questions asked whether the embassy of a non-member State, which was situated in a member State, was a “branch, agency or establishment” for the purposes of Article 18(2) of the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Brussels Regulation”). In considering the first question of customary international law on State immunity, the CJEU held that:

“It must be observed that under the generally accepted principles of international law concerning immunity from jurisdiction a State cannot be sued before the court of another State in a dispute such as that in the main proceedings. Such immunity of States from jurisdiction is enshrined in international law and is based on the principle *par in parem non habet imperium*, as a State cannot be subjected to the jurisdiction of another State.

However, as the Advocate General observes in points 17 to 23 of his Opinion, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. It may be excluded, by contrast, if the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers.

Consequently, in view of the content of that principle of customary international law concerning the immunity of States from jurisdiction, it must be considered that it does not preclude the application of Regulation No 44/2001 in a dispute, such as that in the main proceedings, in which an employee seeks compensation and contests the termination of a contract of employment concluded by him with a State, where the court seised finds that the functions carried out by that employee do not fall within the exercise of public powers or where the proceedings are not likely to interfere with the security interests of the State. On the basis of that finding, the court seised of a dispute such as that in the main proceedings may also consider that that dispute falls within the material scope of Regulation No 44/2001.”

THE LAW

I. JOINDER OF THE APPLICATIONS

40. Having regard to the similar subject matter of the applications, the Court finds it appropriate to order their joinder (Rule 42 § 1 of the Rules of Court).

II. THE GOVERNMENT’S REQUEST TO STRIKE OUT THE APPLICATION UNDER ARTICLE 37 OF THE CONVENTION

41. On 1 March 2021 the Government submitted a unilateral declaration with a view to resolving the issues raised by the present application. They further requested the Court to strike the application out of the list of cases in accordance with Article 37 of the Convention. In the unilateral declaration, they acknowledged that sections 4(2)(b) and 16(1)(a) of the 1978 Act resulted in a violation of Article 6 in respect of both applicants, and a violation of Article 14 in respect of Ms Janah. The Government undertook to pay each applicant GBP 20,000 in respect of pecuniary and non-pecuniary damages, and GBP 2,500 in respect of costs and expenses. They also undertook to issue a remedial order to amend the 1978 Act.

42. The applicants disagreed with the terms of the unilateral declaration.

A. Submissions to the Court

1. The Government

43. The Government asked the Court to strike the applications out of the list in accordance with Article 37 § 1 of the Convention as the requirements of Rule 62A § 1 (a) had been met: the applicants had refused a friendly settlement offer; and the Government had, in the Unilateral Declaration, both

clearly acknowledged a violation of Article 6 of the Convention in the case of the first applicant and violations of Articles 6 and 14 of the Convention in the case of the second applicant, and undertaken both to provide adequate redress and to take the necessary remedial measures.

44. With regard to the redress, the Government contended that in light of the Court's case-law (in particular, *Cudak v. Lithuania* [GC], no. 15869/02, § 79, ECHR 2010; *Sabeh El Leil v. France* [GC], no. 34869/05, § 72, 29 June 2011; *Wallishauser v. Austria*, no. 156/04, § 83, 17 July 2012; *Oleynikov v. Russia*, no. 36703/04, § 81, 14 March 2013; *Radunović and Others v. Montenegro*, nos. 45197/13 and 2 others, § 86, 25 October 2016; and *Naku v. Lithuania and Sweden*, no. 26126/07, § 110, 8 November 2016) the amount it had undertaken to pay the applicants was adequate. The aforementioned cases had made it clear that the Court was seeking to remedy the loss of an opportunity to pursue a civil claim before the domestic courts and not to hold the State which had granted immunity responsible for the alleged wrongs of a different State. The Government further contended that the sum it had undertaken to pay in respect of legal costs was also adequate in the circumstances, since the applicants, by virtue of the Unilateral Declaration, had not been obliged to incur the expense of a full examination of their complaints on the merits.

45. With regard to the remedial measures, the Government confirmed that it had commenced the process for making a remedial order to address the incompatibility of the State Immunity Act 1978 ("the 1978 Act" – see paragraph 35 above). According to a witness statement provided by the Deputy Director of the Protocol Directorate and Assistant Marshal of the Diplomatic Corps at the Foreign, Commonwealth and Development Office on 26 February 2021:

"HMG [Her Majesty's Government] propose to make this remedial order under the standard procedure. This requires the remedial order to be laid before Parliament for 60 days alongside an explanation of the incompatibility that the order seeks to remove, including the details of the relevant declaration, finding or order, and a statement of the reasons for proceeding under s. 10 of the Human Rights Act 1998 and making the remedial order in the proposed terms, in order to allow representations to be made.

Following this, the draft order may be revised in light of any representations received and will be laid before Parliament for a further 60 days, together with a summary of the representations made during the previous 60 day period and details of any amendments made as a result. The draft will then be put to approval by a resolution of each House of Parliament.

Before the remedial order can be laid before Parliament, HMG have considered it appropriate to inform Parliament of HMG's intention to lay the order via a written ministerial statement. This was provided to Parliament on 23 February 2021. HMG will now seek to lay the order before Parliament, but are unable to specify the precise timescale for passage of the order given Parliamentary time pressures and the possible need to review the drafting of the order in light of representations received in the first 60 day period set out above."

46. The Government had therefore given an undertaking both to Parliament and to the Court that it would introduce a remedial order. However, a precise timescale could not be given due to the pressures on Parliamentary time. Moreover, the Government could not guarantee that the remedial order would give the applicants an effective remedy in respect of their employment claims under English law; although a procedure existed for the reconsideration of claims, whether it would be available to the applicants (even on the basis that the remedial order had retrospective effect) would be a matter for the discretion of the Employment Tribunal.

47. Finally, the Government contended that the Court had had the opportunity to rule on very similar claims, and there was no issue between the parties as to the relevant facts (in this respect, the Government referred to *Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, §§ 76-83, ECHR 2003-VI). There was therefore no reason why respect for human rights would require the Court to continue its examination of the present applications.

2. *The applicants*

48. The applicants resisted the Government's request to strike the applications out of the list on the basis that the sum put forward in respect of compensation was too low; the sum put forward in respect of their costs was too low; and the Government had not taken any steps to amend the impugned provisions of the 1978 Act (see paragraph 35 above).

49. In respect of their pecuniary loss, the applicants clarified that they were not seeking to recover in their entirety the sums which they had claimed before the Employment Tribunal. However, they contended that it was clear on the evidence that they would have had a very high chance of recovering a substantial proportion of the sums claimed and the compensation payable by the Government should reflect that fact. The first applicant had claimed GBP 168,761.07 for failure to pay the National Minimum Wage for a period of six years (see paragraph 9 above), a claim substantiated by documentary evidence in the form of her contract of employment. She had further claimed GBP 37,229.93 for unfair dismissal (see paragraph 9 above). In this regard she claimed that she had been summarily dismissed for explaining that she would be unable to prepare a meal for thirty people at short notice, which clearly was not a lawful reason for dismissal under the Employment Rights Act 1996. The second applicant, on the other hand, had claimed GBP 149,347.79 in respect of an alleged failure to pay the National Minimum Wage over a period of six years (see paragraph 15 above) and before the Employment Tribunal Libya had accepted her factual claims as to her hours of work and rates of pay. She claimed a further GBP 72,230.40 for unfair dismissal (see paragraph 15 above), alleging that she had been dismissed because the Ambassador's wife did not like her. Both applicants also claimed smaller amounts (less than GBP 2,000) for failure to provide a written

statement of reasons for dismissal (see paragraphs 9 and 15 above). Finally, the applicants argued that they were entitled to non-pecuniary damages as they had spent seven and five years respectively challenging the bar on their fundamental right of access to court and this had been a source of distress.

50. The applicants further submitted that their costs, which had been reasonably incurred, had far exceeded the sum offered by the Government. The cases concerned complex issues of international law and in the three years that they had been pending before the Court a substantial amount of correspondence had been generated.

51. Finally, the applicants drew the Court's attention to the fact that no draft of the remedial order had been published or laid before Parliament. As such, there was a lack of clarity as to when the Government might commence the process of amending the 1978 Act.

B. The Court's assessment

1. General principles

52. It may be appropriate in certain circumstances to strike out an application, or part thereof, under Article 37 § 1 of the Convention on the basis of a Unilateral Declaration by the respondent Government even where the applicant wishes the examination of the case to be continued. Whether this is appropriate in a particular case depends on whether the Unilateral Declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*; see, *inter alia*, *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26307/95, § 75, ECHR 2003-VI, and *Radoszewska-Zakościelna v. Poland*, no. 858/08, § 50, 20 October 2009).

53. Relevant factors in this respect include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue. It may also be material whether the facts are in dispute between the parties, and, if so, to what extent, and what *prima facie* evidentiary value is to be attributed to the parties' submissions on the facts. Other relevant factors may include whether in their Unilateral Declaration the respondent Government have made any admissions in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which the Government intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation and the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application, the Court, as always, retaining its power to restore the application to its list as provided in

Article 37 § 2 of the Convention and Rule 43 § 5 of the Rules of Court (see *Tahsin Acar*, cited above, § 76).

54. The foregoing factors are not intended to constitute an exhaustive list of relevant factors. Depending on the particular facts of each case, it is conceivable that further considerations may come into play in the assessment of a Unilateral Declaration for the purposes of Article 37 § 1 of the Convention (see *Tahsin Acar*, cited above, § 77).

2. *Application of the general principles to the present case*

55. In the present case there is no dispute between the parties as to the facts, and the Government have acknowledged that there has been a breach of the first applicant's Article 6 rights and the rights of the second applicant under Article 6, read alone and together with Article 14 of the Convention. Furthermore, the Court has previously considered similar complaints to those raised by the applicants (see, for example, *Cudak*, *Sabeh El Leil*, *Wallishauser*, *Oleynikov*, *Radunović and Others*, and *Naku*, all cited above). Therefore, the decision whether to strike the present applications out of the Court's list depends on whether the Government's Unilateral Declaration affords the applicants adequate redress.

56. As the Court is not in a position to calculate the value of the lost opportunity by carrying out a detailed analysis of the strength of the applicants' cases and/or any likely awards, any redress can only be based on the fact that the applicants, who were deprived of the opportunity to pursue their claims before the domestic courts, did not have the benefit of the guarantees of Article 6 (see, *mutatis mutandis*, *Cudak*, cited above, § 79, and *Sabeh El Leil*, cited above, § 72). Nonetheless, the Court has consistently treated loss of an opportunity as pecuniary damage (see, for instance, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). It is therefore axiomatic that, provided a causative link can be established between the breach and the loss of opportunity, in assessing the appropriate level of compensation the Court cannot be blind to the potential value of the opportunity that was lost.

57. In the present case, the applicants had initiated their claims before the Employment Tribunal only for the Tribunal to find that they were barred by virtue of the 1978 Act (see paragraphs 13 and 19 above). There was therefore a direct causal link between the acknowledged breach of Articles 6 and 14 of the Convention and the applicants' loss of opportunity to pursue their claims. Furthermore, both applicants' claims under domestic law exceeded GBP 200,000, and a significant proportion of the amount claimed concerned their employers' alleged failure to pay the National Minimum Wage (the first applicant claimed GBP 168,761.07 under this head, and the second applicant GBP 149,347.79 – see paragraphs 9 and 15 above). Despite the fact that the veracity of these claims could readily be established from the applicants'

contracts of employment, the Government have not suggested either that the applicants' claims lacked merit, or that the sums claimed were unreasonable.

58. Moreover, the Court has repeatedly stated that where an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation (see *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006-II; *Cudak*, cited above, § 79; and *Naku*, cited above, § 110). While the Government have undertaken to introduce a remedial order to address the acknowledged incompatibility of the 1978 Act with Articles 6 and 14 of the Convention, they have provided no guarantee that the applicants would have any possibility of having their cases reheard by the Employment Tribunal (see paragraph 46 above). Despite the fact that some seven years have passed since the Court of Appeal first made a Declaration of Incompatibility (see paragraph 26 above), and more than four years have passed since the Supreme Court dismissed the Government's appeal (see paragraph 28 above), no draft of the remedial order has been published (see the applicants' submissions, summarized in paragraph 51 above). It is therefore not clear whether it will have retrospective effect. Even if it does, the possibility for the applicants to have their claims reconsidered will fall squarely within the discretion of the Employment Tribunal (see paragraph 46 above).

59. In light of the foregoing, the Court considers that the awards proposed by the Government in respect of pecuniary and non-pecuniary damage fall significantly short of the amounts that it would award in respect of just satisfaction.

60. In addition, the Court comes to the same conclusions as far as the amounts offered by the Government in respect of the applicants' legal costs are concerned. It is true that by virtue of the Government's acknowledgment that there has been a violation of the applicants' Convention rights, they have not been required to make any submissions on the admissibility and merits of their complaints. Nevertheless, the applicants' complaints were communicated to the parties on 17 September 2019. During the eighteen months that followed, the parties were engaged in friendly settlement negotiations. Furthermore, the applicants have had to respond to the Government's Unilateral Declaration, and make their claims for just satisfaction. It is reasonable to assume that this has entailed significant legal costs.

61. The Court therefore rejects the Government's request to strike the applications out of the Court's list of cases under Article 37 § 1 (c) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6, READ ALONE AND TOGETHER WITH ARTICLE 14 OF THE CONVENTION

62. The applicants complained that the operation of the 1978 Act had denied them access to court in breach of Article 6 § 1 of the Convention. The second applicant further complained under Article 14 read together with Article 6 § 1 of the Convention that section 4(2)(b) of the 1978 Act treated her differently to United Kingdom nationals who were seeking to pursue a similar claim.

Article 6 § 1 of the Convention provides, insofar as it is relevant:

“1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

and Article 14 of the Convention provides that:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

63. The Government acknowledged that there had been a breach of the first applicant’s rights under Article 6 § 1 of the Convention and the second applicant’s rights under Article 6 § 1 of the Convention, read alone and together with Article 14, by virtue of the operation of sections 4(2)(b) and 16(1)(a) of the 1978 Act, insofar as those provisions had prevented each of the applicants from bringing an employment claim against a foreign State in circumstances where the United Kingdom was not required under customary international law to provide immunity to the foreign State in question.

64. Having regard to the particular circumstances of the present case, the Court would accept the Government’s concession, with the consequence that it is empowered to make an award of just satisfaction to the applicants under Article 41 of the Convention (see, *mutatis mutandis*, *Caballero v. the United Kingdom* [GC], no. 32819/96, § 21, ECHR 2000-II). In doing so, it does not consider it necessary to itself examine the substantive issues raised by the applicants’ complaints, or to resolve any potential differences between the Supreme Court’s view as to what was required by customary international law (see also the view taken by the Court of Justice of the European Union in *Ahmed Mahamdia v. People’s Democratic Republic of Algeria*, summarised in paragraph 39 above) and the view expressed by the Court in its case-law (see, for example, *Cudak*, *Sabeh El Leil*, *Wallishauser*, *Oleynikov*, *Radunović and Others*, *Naku*, all cited above, and *Ndayegamiye-Mporamazina v. Switzerland*, no. 16874/12, 5 February 2019).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

66. The applicants each claimed the sum of 60,000 British pounds (GBP—approximately 71,000 euros (EUR)) in respect of pecuniary and non-pecuniary damage.

67. In respect of the claim for pecuniary damage, they argued that the award should adequately reflect the fact that they had a very high chance of recovering a substantial proportion of the sums claimed before the Employment Tribunal.

68. In respect of non-pecuniary damage both applicants sought compensation on an equitable basis to reflect the fact that they had suffered the inconvenience of litigation lasting seven and five years respectively to challenge a bar on their fundamental right of access to court.

69. The Government argued that the sums claimed by the applicants were excessive.

70. There is undoubtedly a causative link between the conceded breach and the applicants’ loss of opportunity. Therefore, having regard to the overall value of the applicants’ claims against their former employers (see paragraphs 9, 15 and 57), which originally exceeded GBP 200,000, and in particular the value of their claims in respect of the failure to pay the national minimum wage, which appear to have been borne out by the terms of their contracts of employment, the Court, making an assessment on an equitable basis, awards each of the applicants EUR 50,000 in respect of pecuniary damages. It further awards the first applicant EUR 5,000, and the second applicant EUR 6,500, in respect of non-pecuniary damage.

B. Costs and expenses

71. For the costs and expenses incurred before the Court, the applicants claimed respectively GBP 25,005.00 and GBP 34,125.00 (for both of them inclusive of tax). They asserted that as their lawyers had been working under conditional fee arrangement they would be liable to pay their layers’ legal fees the moment the Government paid them compensation for a breach of their Convention rights. They therefore contended that if their representatives were not awarded their full costs their liability to pay them could wipe out their awards of compensation.

72. The Government contended that the costs claimed were excessive, given that the complex legal issues had been dealt with before the domestic courts. They further contended that the financial arrangements between the applicants and their lawyers were irrelevant, and that the applicants would have been advised about the potential outcomes of the fee arrangements to which they had agreed.

73. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 12,500 to each of the applicants for the proceedings before the Court.

C. Default interest

74. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Rejects* the Government's request to strike the applications out of the Court's list of cases;
3. *Declares* the applications admissible;
4. *Accepts* the Government's concession that there has been a violation of Article 6 § 1 of the Convention in respect of the first applicant;
5. *Accepts* the Government's concession that there has been a violation of Article 6 § 1 of the Convention, read alone and together with Article 14, in respect of the second applicant;
6. *Holds*,
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 50,000 (fifty thousand euros), plus any tax that may be chargeable, to each of the applicants in respect of pecuniary damage;
- (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, to the first applicant in respect of non-pecuniary damage;
- (iii) EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, to the second applicant in respect of non-pecuniary damage;
- (iv) EUR 12,500 (twelve thousand five hundred euros) to each of the applicants in respect of costs and expenses, plus any tax that may be chargeable to them;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 5 April 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Yonko Grozev
President