

Diplomatic immunity and leapfrog

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Basfar v Wong UKEAT/0223/19/BA

The EAT has given permission to appeal directly to the Supreme Court for the first time, on the issue of scope of diplomatic immunity.

Background

The Respondent, Mr Basfar (who was the Appellant at this hearing), is a diplomat. The Claimant, Ms Wong, worked as a domestic servant for the Respondent, originally in Saudi Arabia and then in the UK.

The Claimant brought complaints of wrongful (constructive) dismissal, failure to pay the National Minimum Wage, unlawful deductions from wages, claims under the Working Time Regulations 1998, failure to provide written wage slips and failure to provide written employment particulars. She further contended that she was a victim of international trafficking by the Respondent and had been employed in conditions amounting to modern slavery.

The Respondent applied to have the claims struck out on the basis of diplomatic immunity.

Issues

There are two key issues in this case:

- (1) Whether the employment of the Claimant constituted a 'commercial activity exercised...outside official functions' within the meaning of Article 31(1)(c) Vienna Convention on Diplomatic Relations 1961 (as enacted into domestic law by s2(1) Diplomatic Privileges Act 1964);

- (2) The extent to which previous decisions of the Court of Appeal and Supreme Court on a similar issue are binding.

The Law

Article 31(1) Vienna Convention on Diplomatic Relations 1961 states:

“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction except in the case of: ... (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” (emphasis added)

Article 39(2) provides:

“When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time... However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.”

***Reyes v Al-Malki* [2015] EWCA Civ 32 and [2017] UKSC 61:** This was a case with substantially similar facts to the case at hand. The Court of Appeal held that employing a domestic servant was not a ‘commercial activity’ nor was it exercised ‘outside official functions’. However, the Supreme Court allowed the appeal on the basis that the Respondent’s posting (and therefore his diplomatic immunity, pursuant to Article 39(2)) had come to an end and employing a domestic servant did not attract the ‘residual immunity’ protection in Article 39(2). However, the majority of the Supreme Court (3:2) went on, obiter, to disagree with the Court of Appeal’s decision on whether employing a domestic servant is ‘commercial activity’.

ET decision

The Employment Tribunal held that the decision of the Court of Appeal in *Reyes* was not binding and that the majority view in the Supreme Court ought to be preferred. It therefore dismissed the strike out application.

EAT decision

The EAT allowed the appeal. It agreed with the ET that the Court of Appeal decision in *Reyes* was not binding. However, it held that it was still of persuasive authority. It noted that

the Court of Appeal and the minority view in the Supreme Court had all reached fully reasoned conclusions based on a detailed review of the assumed facts. By contrast, the majority in the Supreme Court did not a clear conclusion to the contrary, instead expressing doubt as to the minority's view and indicating a preference for the International Law Commission to review the matter. As such, the EAT held that the Court of Appeal's decision and the view of the minority in the Supreme Court represented the current state of the law on the issue of 'commercial activity'. It therefore allowed the appeal on this ground and held that the defence of diplomatic immunity succeeded.

Leapfrog appeal

The EAT gave permission to appeal directly to the Supreme Court (a 'leapfrog' appeal). This can be done where: (1) there is a point of law of general public importance is involved; (2) the result of the proceedings is so significant that a hearing by the Supreme Court is justified; and (3) earlier consideration by the Supreme Court outweighs consideration by the Court of Appeal (pursuant to section 37ZA(1) Employment Tribunals Act 1996). This is the first time the EAT has given permission via this route.



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