

**Immunity v Human Rights – or Harmonious Interpretation?  
Incompatibility of the State Immunity Act with the Human Rights  
Act and the Right to a Remedy under International and European  
Law after *Benkharbouche***

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**ABSTRACT**

The article critically analyses the judgment in the case of *Benkharbouche* in which the Court of Appeal declared Sections 16(1)(a) and 4(2)(b) of the State Immunity Act 1978 to be incompatible with Article 6 ECHR because they disproportionately restricted access to justice of service staff of embassies in relation to their employment contracts. At the same time it disapplied these provisions because they breached the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights. The judgment is welcomed for highlighting the overly restrictive scope of the SIA in relation to certain employment relationships with diplomatic missions in the UK, for contributing to the international law of state immunity and for clarifying the national application of the EU Charter. However, the very cautious approach to the interpretation of a UK statute in the light of international law is criticised. Interpreting the SIA in conformity with international law and legislative intent would not have crossed the boundaries of interpretation but would have avoided divergence between remedies available to individuals under the HRA and those available under EU law.

**KEYWORDS:** state immunity (employment contracts with embassies), interpretation in conformity with public international law, duty to interpret under Section 3(1) of the Human Rights Act, right of access to justice (Article 6(1) ECHR), right to an effective remedy (Article 47 EUCFR), application of the EU Charter of Fundamental Rights in the UK

## 1. INTRODUCTION

The Court of Appeal of England and Wales, on 5 February 2015, handed down an important judgment in the cases of *Benkharbouche v Embassy of Sudan* and *Janah v Libya*.<sup>1</sup> The cases concerned the issue of state immunity in regard to employment

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contracts at embassies. The judgment is significant for several reasons. It provides a detailed and thorough analysis of the relevant immunity rules of international law and their evolution. In doing so, it demonstrates a trend towards greater justiciability, and thus protection from exploitative employment relationships. Furthermore, the case is an interesting example of the interaction of international, European and national (UK) law, as seen by a national court, raising a number of issues about the relationship between international law and English law.

Firstly, it highlights the approach of a national court in a scenario of conflict between international law on the one hand and domestic statute and (judicial) precedent on the other hand. Secondly, it contributes to the shaping of an evolving relationship between Article 6 ECHR and the international rules on immunity at the international level and at the level of their national implementation. Last, but not least, it provides an example of how different remedies available at national level may operate in an asymmetric way in a multipolar European human rights setting, in particular in regard to the Human Rights Act (HRA) and EU Charter on Fundamental Rights<sup>2</sup> (EUCFR),<sup>3</sup> providing background for reflection on the positive and negative effects of such interaction. The judgment provides welcome clarification of the legal status and effect of the EUCFR in the UK. It is thanks to the EUCFR that individual justice is achieved in the case. However, at the same time the case highlights the potential for ostensibly random outcomes within a domestic legal order when a case intersects with a number of other legal orders, so that a remedy depends on whether a case happens to fall within the scope of EU law. Such divergence in relation to a fundamental concept of human rights law, such as the right to a remedy, is problematic *per se* and from the perspective of coherence of a domestic legal order. While some tensions and incoherences may be unavoidable when legal orders intersect, it is argued that the *Benkharbouche* case was not such a case. The discrepancy could and should have been avoided by going further in interpreting a national statute (the SIA) in conformity with international law and Article 6 ECHR in

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referee and the editors of *Human Rights Law Review* for comments/discussion. The usual disclaimer applies.

<sup>1</sup> *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* [2015] EWCA Civ 33.

<sup>2</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>3</sup> *Benkharbouche and Janah* (n 1) at para 72.

conjunction with Section 3(1) HRA. The article will, therefore, analyse the potential for interpretation as a tool to avoid unnecessary conflicts and incoherence between and within legal orders.

## **2. FACTS, PROCEDURAL BACKGROUND AND SUMMARY OF THE JUDGMENT**

The cases result from the employment relationships of two Moroccan women who worked as domestic staff at the London Embassies of the Republic of Sudan and Libya. Their duties related to provide services such as cooking, cleaning and laundering. They brought claims for unfair dismissal and breaches of legislation protecting employees.<sup>4</sup> The respondent states invoked state immunity under Section 1 of the State Immunity Act 1978 (SIA). The legal provisions at issue under UK law are Sections 4 and 16 SIA. Section 4 SIA provides in principle an exception from immunity for employment contracts of states made or performed in the UK unless certain further conditions are present.<sup>5</sup> However, Section 16(1)(a) SIA<sup>6</sup> contains a sweeping exception from the exception of Section 4 SIA: it contains a cross-reference to the Diplomatic Privileges Act 1964, which implements the 1961 Vienna

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<sup>4</sup> The claims were based on unfair dismissal, failure to pay the minimum wage, and breach of the Working Time Regulations (Ms Benkharbouche) and unfair dismissal, arrears of pay, racial discrimination and harassment as well as breach of the Working Time Regulations (Ms Janah).

<sup>5</sup> ‘*Section 4 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...’ (emphasis added).

<sup>6</sup> Section 16, under the heading ‘Excluded matters’ states that Part I of the SIA, laying down exceptions from immunity, ‘does not affect any immunity of 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 members of a mission within the meaning of the Convention scheduled to the said Act of 1964’.

Convention on Diplomatic Relations (VCDR),<sup>7</sup> excluding the application of Section 4 SIA to employment contracts with ‘members of a mission within the meaning of the [VCDR]’. As Article 1 VCDR defines members of the service staff as members of the staff of the mission, this has the effect of reinstating immunity of employment contracts even of service staff. In practice Section 16(1)(a) SIA has been interpreted broadly to exclude from the regime of Part I of the SIA all employment relationships at diplomatic missions.<sup>8</sup> Thus the respondent states could successfully invoke immunity in UK courts – unless the immunities were in breach of the right of access to justice and to an effective remedy under Article 6 ECHR or Article 47 EUCFR.<sup>9</sup>

There was an additional issue whether the habitual residence requirement of Section 4 SIA was compatible with fundamental rights, in particular the principle of non-discrimination. Section 4 SIA makes an exception from immunity for employment contracts. In contrast to other, in particular more recent, codifications and practice, Section 4(1)(b) SIA requires that a person bringing a claim is ‘habitually resident’ in the United Kingdom. It was conceded that Ms Janah did not meet the criterion of ‘habitual’ residence, in spite of having been resident long-term in the UK, and it was unclear for Ms Benkharbouche.<sup>10</sup> However, the Section 4 SIA issue was only relevant to the case if the employment contracts with diplomatic missions were not a priori excluded under Section 16 SIA.

Both claims were dismissed at first instance by the Employment Tribunal because state immunity was held to apply under Section 1 SIA. In Ms Janah’s case

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<sup>7</sup> Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95.

<sup>8</sup> Fox and Webb, *The Law of State Immunity* (3rd edn, 2013) at 167, 199 with references to case law in n 172 (*Ahmed v Saudi Arabia*, *Sengupta v Republic of India* [1983] ICR 221, both EAT); Garnett, ‘The Precarious Position of Embassy and Consular Employees in the United Kingdom’ (2005) 54 *International and Comparative Law Quarterly* 705 at 709 f with overview of case law. For a discussion in the wider context of public v private employment relationships see Rodgers, ‘Public Employment and Access to Justice in Employment Law’ (2014) 43 *Industrial Law Journal* 373 at 373 ff, 387 ff (with regard to the decision of the EAT).

<sup>9</sup> ‘Article 47 Right to an effective remedy and to a fair trial

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....’

<sup>10</sup> *Benkharbouche and Janah* (n 1) at paras 4, 9.

the tribunal had concerns but felt bound by statute to apply immunity. The remedy of a declaration of incompatibility was not available to the first instance tribunal.<sup>11</sup>

The Employment Appeal Tribunal set aside the decisions. The EAT considered that the SIA, in the light of developments restricting immunity, no longer struck an appropriate balance between immunity and access to the courts, and therefore breached Article 6 ECHR. But the EAT could not provide a remedy because it considered that it was not possible to read down the SIA in accordance with Section 3(1) HRA. Although a higher court, the declaration of incompatibility is not available to the EAT. However, the EAT went further than the ET and disapplied the SIA for breach of Article 47 EUCFR in so far as the rights asserted were within the scope of EU law, so that the claimants were partly successful.<sup>12</sup> Libya and the Republic of Sudan appealed against this decision.<sup>13</sup>

The Court of Appeal upheld the EAT on two grounds. Firstly, the relevant sections of the SIA<sup>14</sup> breached Article 6 ECHR (in part in conjunction with Article 14 ECHR). Like the previous instances, the Court of Appeal felt it could not interpret the statute (SIA) in conformity with Article 6 ECHR under Section 3(1) HRA. It therefore issued a declaration of incompatibility under Section 4(2) HRA with respect to Sections 16(1)(a) and 4(2)(b) SIA. Secondly, insofar as the claims fell within the scope of EU law (in regard to breach of the Working Time Regulations, racial discrimination and harassment) the Court disapplied the relevant sections of the SIA as they breached the right to an effective remedy in Article 47 EUCFR.

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<sup>11</sup> See S 4 (5) HRA which lists the competent (higher) courts.

<sup>12</sup> *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* UKEAT/0401/12/GE and UKEAT/0020/13/GE, [2014] ICR 169 at paras 37 ff, 40-1, per Langstaff, J; see also *Benkharbouche and Janah* (n 1) at para 5.

<sup>13</sup> As Sudan was not represented in the proceedings, reference is made to Libya by the Court and in the following.

<sup>14</sup> Section 16(1)(a) and 4(2)(b) SIA.

### 3. THE SUBSTANTIVE ISSUE: THE SCOPE OF STATE IMMUNITY IN RELATION TO EMPLOYMENT CONTRACTS WITH SERVICE STAFF AT DIPLOMATIC MISSIONS IN THE UNITED KINGDOM

In order for the CA to decide whether the employment contracts of members of the service staff of a mission qualify for state immunity in the UK, two questions needed to be answered:

(1) How are the relevant provisions of the SIA to be interpreted as a matter of domestic law?

(2) How is the domestic statutory interpretation modified by international law? There are two sub-questions to the second question:

(a) What is the relevant contemporary content of the international rule? and

(b) how far can the rule at international level inform the interpretation of the domestic statute (SIA)? Again, there are two aspects to the interpretation in sub-question (b) which are similar but not identical:

(i) interpretation of the SIA in conformity with (general) international law (i.e. the international law of state immunity) and

(ii) interpretation of the SIA in conformity with the ECHR (Article 6 ECHR in conjunction with Section 3(1) HRA).

The CA addressed both the interpretation of the SIA as a matter of domestic law (considering the clear wording and ‘legislative scheme’<sup>15</sup> of the SIA) and the content of the contemporary rule of international law (questions (1) and (2)(a) above). The CA analysed meticulously and thoroughly the relevant international law as well as recent developments in the law of immunity among other states.

Regarding the content of the domestic immunity rule, the basic approach of the CA to both provisions of the SIA (Section 16 and 4 SIA) was the same. The CA distinguished at least implicitly two questions: first, whether international law has evolved since the adoption of the SIA 1978 and as a result now *prohibits* granting

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<sup>15</sup> *Benkharbouche and Janah* (n 1) at para 67.

immunity to employment contracts with service staff<sup>16</sup>; secondly, whether international law (still) *requires* the granting of immunity in relation to employment contracts with service staff. The CA limited itself to answering the second question. This means that it is sufficient to prove that there is no absolute immunity rule, and that a definitive pronouncement as to the contemporary content of the rules of immunity in relation to employment contracts at international level is not necessary for its analysis.<sup>17</sup>

After affirming that Section 16(1)(a) SIA indeed confers immunity regarding employment contracts with service staff of diplomatic missions,<sup>18</sup> large parts of the judgment are dedicated to analysing whether the international law of state immunity *requires* such a wide immunity rule. Examining treaty<sup>19</sup> and widespread state practice submitted by the parties in support of their views, the CA concluded that a) state practice is diverse; b) although there is some state practice supporting the position of Libya, there is a much more widespread trend to move away from a blanket immunity in relation to all employment claims of service staff at embassies – in line with the general move towards a restrictive approach to state immunity in international law. In fact, the UK seems to be ‘almost alone among developed countries in continuing to deprive embassy employees occupying subordinate positions of rights of redress in the event of *any* dispute arising in respect of their employment’.<sup>20</sup>

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<sup>16</sup> The question whether international law now prohibits more far-reaching immunities is not answered by the CA, but the underlying assumption of the judgment seems to be that it is not, due to the lack of clarity of a single rule of international law. Even if this is accurate in terms of the international rules of the law of state immunity themselves, a broader perspective on the interpretation of the international rules in the light of other areas of international law, i.e. human rights law, may at least strongly point into this direction.

<sup>17</sup> The Court of Appeal posed the question ‘whether state practice supports the existence of a rule of customary international law which requires the grant of immunity in employment claims brought by service staff of a mission in the circumstances of the present case’. *Benkharbouche and Janah* (n 1) at para 42.

<sup>18</sup> *Ibid.* at paras 9, 31.

<sup>19</sup> In particular the European Convention on State Immunity 1972, ETS 72, the Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95 and the United Nations Convention on Jurisdictional Immunities of States and their Property 2004, A/RES/59/38 (not yet in force).

<sup>20</sup> *Benkharbouche and Janah* (n 1) at para 47 (emphasis in original), quoting Garnett (n 8) at 707.

The CA is able to point to, amongst others, the USA, Australia, New Zealand, Japan, the ratification record or process of a number of states in relation to the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 (UNCIS), as well as the case law of numerous European states,<sup>21</sup> and the case of *Mahamdia v Algeria* in the Court of Justice of the EU (CJEU).<sup>22</sup> In other words, national approaches are diverse mostly *in regard to the detail and criteria* by which states restrict immunity in regard to employment contracts of service staff. National legal orders, however, are virtually uniform in granting only restrictive immunity in relation to commercial transactions and requiring a special justification of immunity by the governmental nature of the activity or overall context.

The CA therefore concludes that because international law *does not require* such a strict immunity rule today, Section 16(1)(a) SIA restricts access to a remedy beyond what is necessary, so the CA finds it to be incompatible with Article 6 ECHR.

Although the conclusions sound modest in the light of the CA's detailed analysis revealing the far-reaching scope of immunity granted by the UK in international comparison, these findings speak for themselves. It was unnecessary for the CA to actually recognise a specific binding international rule replacing the one which was found to be in conflict with the HRA and EU Charter. Several formulations, all on the basis of a restrictive immunity of employment contracts with diplomatic missions, would have been possible in the light of state practice, which the CA had found to be varied at the level of detail. It is the merit of the judgment to point to the widespread nature of a restrictive trend in relation to immunity of employment contracts of service staff at diplomatic (and consular) missions. Nonetheless, the question of principle of the reach of state immunity could have been stated more clearly,<sup>23</sup> i.e. that there is a widespread consensus for restricting immunity

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<sup>21</sup> Ibid. at para 45 (at no 6).

<sup>22</sup> C-154/11 *Ahmed Mahamdia v République algérienne démocratique et populaire* ECLI:EU:C:2012:491.

<sup>23</sup> Support for this can also be drawn from the ECtHR which held that Article 11 UNCSI reflected customary law today: *Cudak v Lithuania* Application No 15869/05, Merits, 23 March 2012 at para 67; *Sabeh El Leil v France* Application No 34869/05, Merits, 29 June 2011 at para 58; *Wallishausser v Austria* Application No 156/04, Merits, 17 July 2012; *Oleynikov v Russia* Application No 36703/04, Merits, 14 March 2013.

in the context under consideration, whatever the detailed criteria that may be used in individual states.

However, the main problem with the judgment is that it could and should have gone further in interpreting national law in conformity with international law, providing a coherent approach to a right to a remedy (i.e. questions (2)(b) above). It could have interpreted the SIA in conformity with Article 6 ECHR via Section 3(1) HRA to avoid the conflict with Article 6 ECHR and other rules of international law; and it could have aligned the SIA with the contemporary international law of state immunity. A deeper analysis of legislative intent could have assisted with that. The CA adopts a very narrow interpretation of the intent behind the SIA. It reduces legislative intent to the objective of laying down absolute immunity rules within an overall balanced scheme, which somewhat distorts the picture. A different perspective on the legislative intent, as will be shown below, would have opened up broader options for a more dynamic interpretation of UK statutes in conformity with international law. This would not only reduce the potential for unnecessary conflict between the UK and international law but also for incoherence within the UK legal order as a result of different regimes and remedies being available in comparable situations. The CA's approach must be described as cautious in this regard. Although the availability of a declaration of incompatibility may, to an extent, have discouraged a more dynamic interpretation, this comes at the expense of a remedy and justice in an individual case. Even if Parliament may ultimately resolve the conflict, it may not intervene in all cases, or at least not for some time. To be sure, due to the availability of a remedy under EU law for parts of the claim, that result was mitigated in the case at issue, but the wider questions of individual remedy and coherence of the interpretation of a basic legal right remain, as well as that of the relationship between international law and English law more generally. The following sections will therefore analyse how the CA could have interpreted the SIA in conformity with international law and avoided disparate regimes of remedies.

#### 4. HARMONIOUS INTERPRETATION IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW AND SECTION 3(1) OF THE HUMAN RIGHTS ACT

##### A. Interpretation of the Blanket Immunity Rule of Section 16(1)(a) of the State Immunity Act

###### (i) *Interpretation from a domestic law perspective*

Section 16(1)(a) SIA explicitly excludes proceedings concerning employment contracts *of members of a mission* from the exception of Section 4 for contracts of employment, thus establishing state immunity. This generally is interpreted to exclude the whole category of persons in relation to employment contracts from the scope of Part I of the SIA,<sup>24</sup> rather than allowing for a graduated system according to function at the mission. Such a reading is problematic, however, as has been criticised before.<sup>25</sup> It causes conflict with human rights law: the right of access to courts under Article 6 ECHR, as is demonstrated by the case. It also gives Section 16 an over-broad scope in comparison with contemporary international law of state immunity, which the CA has set out in detail. Both points raise the question whether Section 16(1)(a) can be construed in a way that aligns it with human rights law and contemporary international law, which holds that employment contracts with certain categories of persons are excepted from immunity. The question of interpretation is of relevance beyond the specific case in defining the relationship between international law and national law in the UK legal order.

Looking at the domestic statute alone, it can be said that the *wording* clearly excludes all employment contracts with ‘members of a mission’ within the meaning of Article 1 VCDR, which includes domestic service staff. The wording is technically precise and unambiguous.

Looking at the immediate *context* in the structure and system of the SIA, the first sentence of Section 16(1) SIA, which immediately precedes subsection (a), states: ‘This Part of this Act *does not affect* any immunity or privilege conferred by the Diplomatic Privileges Act 1964...’ The clause preserves the graduated system of

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<sup>24</sup> The CA seems to follow this approach when it refers to Section 16 excluding certain matters, *Benkharbouche and Janah* (n 1) at para 7. See also Fox and Webb (n 8) at 167.

<sup>25</sup> *ibid.* (n 8); Garnett (n 8).

diplomatic privileges and immunities of the VCDR with limited functional immunities of service staff.<sup>26</sup> But this cannot be used to correct the clear wording of subsection (a), which concerns a totally different question: the rationale for *state* immunity regarding employment litigation has nothing to do with the *diplomatic* immunity status of the employee. If anything, the fact that paragraph (1) recognises that different types of immunity (state, diplomatic) exist under international law provides an argument for special treatment of diplomatic missions. The point may be made that diplomatic immunities are needed to protect embassies and other missions in a particularly vulnerable situation – because they are located in foreign territory. Diplomatic law therefore still generally follows a more absolute approach to immunities than the law of state immunity. Section 16(1) SIA recognises this and ensures that exceptions from state immunity are not necessarily transferable to diplomatic immunities.<sup>27</sup> However, it is not the diplomatic immunity status of the person, which is at issue in the case but the state immunity of the employer or employment relationship. Hence the first sentence of Section 16(1) is of not relevant in the present context.

However, the *legislative intent*<sup>28</sup> behind the SIA in relation to customary international law may point in a different direction from its actual wording. The SIA intended to mould customary international law rules<sup>29</sup> at the time into a UK statute in order to facilitate their application by UK courts and to ensure compliance with international obligations.<sup>30</sup> The CA, like the President of the EAT, did not take this

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<sup>26</sup> Article 37(3) VCDR.

<sup>27</sup> See in this vein *Ms C Reyes and Ms T Suryadi v Mr J Al-Malki and Mrs Al-Malki* [2015] EWCA Civ 32 at para 74.

<sup>28</sup> *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

<sup>29</sup> It must be noted, however, that even then ECSI 1972 did not provide for such far-reaching immunities.

<sup>30</sup> It is not clear how the point was argued in the CA as the judgment is brief in its rebuttal, see para 67. However the Employment Appeal Tribunal's judgment reveals such an argument, *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* (n 12) at para 39: 'The judge considered (at [40]) that the Parliamentary intent expressed in the SIA was to confer immunity subject to specific exceptions. In his view the Act was framed so as to create a careful, detailed and clear pattern which balances considerations known to the legislature. He considered that if a court or tribunal were to alter the width of a provision limiting an exception to immunity (section 4(2)) or of a clear statement that section 4 does not apply to particular people (section 16)

aspect of legislative intent into account but just considered the SIA as a ‘closed’ scheme reflecting an ‘overall balance struck by the legislature’.<sup>31</sup> Even if accepting this premiss, it may be doubted whether limiting an exception to the general rule that employment contracts are *not* immune really would have such a significant impact on the overall scheme.

More significantly, this ‘closed’ interpretation ignores the SIA’s link with international law, which allows a wider approach to ‘historic’ interpretation referring to legislative intent.<sup>32</sup> To be sure, the SIA of 1978 adopted a more absolute approach to immunities than the European Convention on State Immunity 1972 (ECSI), of which the UK was an original signatory in 1972.<sup>33</sup> It might, therefore, be objected, that this shows that the UK deliberately wanted to depart from the rules of international law at the time. Two replies may be made to such an objection. Firstly, ECSI may be considered to develop customary law in this regard. Or in other words, the existing customary law may still have been compatible with an absolute immunity approach, if intended by the SIA, though this would put the UK at risk of contradicting a rule it only recently had signed up to. Secondly, such legislative intent is not supported by the records of the State Immunity Bill in Parliament. The introduction of the bill and the parliamentary debates overwhelmingly point to an intent to align UK law with international law. One of the purposes of the SIA explicitly mentioned was to enable the UK’s ratification of ECSI, based on a restrictive immunity approach (which duly occurred).<sup>34</sup> Among the reasons for the SIA mentioned in both Houses of Parliament were: to provide redress to contracting

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there would be a danger of its affecting the overall balance struck by the legislature whilst lacking Parliament’s panoramic vision across the whole of the landscape. We agree. Any attempt to read down these provisions so as to remove immunity would be to adopt meanings inconsistent with fundamental features of the legislative scheme.’

<sup>31</sup> *Benkharbouche and Janah* (n 1) at para 67. E.g. in relation to the incorporation of international conventions reference can be made to the *travaux préparatoires* as a matter of domestic law.

<sup>32</sup> *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 278 per Lord Wilberforce and at 282-3 per Lord Diplock. See also Gardiner, ‘Treaty Interpretation in the English Courts since *Fothergill v. Monarch Airlines* (1980)’ (1995) 44 *International and Comparative Law Quarterly* 620 at 621.

<sup>33</sup> The UK ratified it on 3 July 1979 after the SIA had paved the way for it.

<sup>34</sup> See statement of The Lord Chancellor, HL Deb, Vol 388, col 51-9 (17 January 1978) and of The Solicitor-General (Mr Peter Archer), HC Deb, Vol 949, col 405-9, 411-12 (3 May 1978).

parties of states, reflecting the changing nature of activities of states, especially in the commercial field beyond acts *iure imperii*, addressing a longstanding criticism of the UK's absolute approach to immunity; to implement, keep pace with and further develop international law, which had moved to a restricted notion of immunity; to increase legal certainty insofar as the scope of immunity became doubtful; to enable the UK to ratify ECSI; and, last but not least, to ensure that the financial and legal markets of London could continue to compete with the USA and that English law retained its role as a law governing international transactions. The USA had recently passed the Foreign Sovereigns Immunity Act in 1976 (following the restrictive immunity rule) and it was considered a matter of urgency to address a concern that the UK would lose business to a more investor-friendly market place and jurisdiction.<sup>35</sup> Moreover, the SIA was intended to go further than the common law in shifting towards restrictive immunity. The common law notion of commercial transactions was potentially narrower at the time than that of the SIA.<sup>36</sup> All these aspects of legislative intent would have opened up options for a more dynamic interpretation of the SIA, correcting what might have been a drafting mistake and failure to synchronise the SIA with the obligations undertaken in ECSI.

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<sup>35</sup> See statement of The Lord Chancellor, HL Deb, Vol 388, col 51-9 (17 January 1978) and of The Solicitor-General (Mr Peter Archer) HC Deb, Vol 949, col 405-9, 411-12 (3 May 1978); see also Baroness Elles, HL Deb, Vol 388, col 59-64 (17 January 1978); Sir Michael Havers, HC Deb Vol 949, col 414-15 (3 May 1978).

<sup>36</sup> The Solicitor-General (Mr Peter Archer), HC Deb, Vol 949, col 412 (3 May 1978), referring, amongst others to *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529. The fact that s 14 SIA affords central banks and the property of central banks a wider immunity than was the case in the common law does not seem to defeat this argument; rather, the stricter approach to central banks seems to have been motivated more by laying down a consistent approach between enforcement and interlocutory proceedings in relation to central bank assets (taking into account the peculiar nature of central banks as separate entities but exercising core state functions and holding state property) than by a fundamental departure from the restrictive immunity approach, cf also Sir Michael Havers, HC Deb, Vol 949, col 416-18 (3 May 1978); The Lord Chancellor, HL Deb, Vol 394, col 318 (28 June 1978).

The CA pointed out (in another context)<sup>37</sup> that the SIA may also have broadened immunities which were available under common law at the time. However, there is no evidence in the parliamentary material of an intent to strengthen absolute immunity specifically in the case of service staff of embassies.<sup>38</sup> There is, however, widespread expression of legislative intent to align the SIA with international law (including ECSI, which does not provide for immunity in the case of service staff) and the notion of restrictive immunity generally.<sup>39</sup> In the light of this, the mere possibility that the legislature wanted to depart from customary international law and a treaty it had recently signed in favour of a more absolute formulation of immunity should not be sufficient to limit the scope of interpretation of SIA.

(ii) *Interpretation in conformity with international law*

On the basis of this domestic perspective on interpretation, we now turn to interpretation in conformity with international law which has two aspects in the present scenario: firstly, harmonious interpretation of the SIA with international law generally (customary international law and international treaties) and, secondly, the specific case of interpretation in conformity with the Convention rights in accordance with Section 3(1) HRA to avoid a conflict. The CA only dealt with the second aspect, as interpretation in conformity with international law more generally is limited: it is not possible under the current approach of the UK legal order to interpret a statute in conformity with international law where the wording of a statute is unambiguous.<sup>40</sup>

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<sup>37</sup> *Sengupta v Republic of India* [1983] ICR 221. See also immunity of central banks under s 14(4) SIA in regard to their commercial transactions which overrules the common law rule held to apply in *ibid.*, see also *supra* n 36.

<sup>38</sup> The wording of s 16 (1)(a) SIA in itself may arguably be interpreted to reflect an intent to preclude diplomatic employment more broadly than was the case in ECSI. Article 32 ECSI corresponds to the first sentence of s 16(1) SIA, but ECSI does not contain an equivalent to s 16 (1)(a) SIA.

<sup>39</sup> See *supra* n 35: for a particularly clear statement that the UK law ‘should be in line with, or at any rate should not be more restrictive than, the international law’ see Lord Wilberforce, HL Deb, Vol 388, col 65-6 (17 January 1978); Lord Denning, commenting on the amendment widening of the definition of ‘commercial transaction’, HL Deb, Vol 389, col 1505 (16 March 1978).

<sup>40</sup> *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 at 141 per Lord Denning, and at 143 per Lord Diplock – in relation to unincorporated treaties.

(iii) *Interpretation in conformity with the ECHR under Section 3(1) HRA*

This leaves the question whether an interpretation in conformity with Article 6 ECHR is possible under the more far reaching duty to interpret legislation ‘so far as it is possible’ in line with the ECHR under Section 3(1) HRA. The case is a ‘classic’ example of the debate about the dividing line between interpretation and declaration of incompatibility under Sections 3 and 4 HRA, or in other words between judicial and legislative competence.<sup>41</sup> Section 3(1) HRA has been construed to go beyond interpreting ambiguous statutes. It was used to, in effect, disapply<sup>42</sup> provisions of a statute by interpretation. It is worth recapitulating the words of Lord Nicholls in *Ghaidan v Godin-Mendoza*, describing the wide scope of the interpretive duty:

...[T]he interpretative obligation decreed by section 3 is of an *unusual and far-reaching character*. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear... Section 3 may require the court *to depart from this legislative intention*, that is, depart from the intention of the Parliament which enacted the legislation...

[O]nce it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, *it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman* in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery...

[T]he mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes

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<sup>41</sup> See on the issue C Gearty, ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) *Law Quarterly Review* 248; A Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act’ (2004) 24 *Oxford Journal of Legal Studies* 259; A Kavanagh, *Constitutional Review under the UK HRA* (Cambridge University Press 2009) at 319.

<sup>42</sup> *R v A (no 2)* [2001] UKHL 25. See also confirmation of this principle in *Google Inc v Judith Vidal-Hall, Robert Hann and Marc Bradshaw* [2015] EWCA Civ 311 at para 90.

further than this. *It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant....*<sup>43</sup>

However, the scope for interpretation ends where it would be ‘inconsistent with a fundamental feature of legislation’. Interpretation ‘must go with the grain of the legislation’<sup>44</sup> to preserve the competences of Parliament. In the words of Lord Nicholls:

Parliament, however, cannot have intended that in the discharge of this extended interpretative function *the courts should adopt a meaning inconsistent with a fundamental feature of legislation*. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be *compatible with the underlying thrust of the legislation being construed*. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, ‘*go with the grain of the legislation*’. Nor can Parliament have intended that section 3 should require courts to make *decisions for which they are not equipped*. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.<sup>45</sup>

Lord Nicholls summarises the far-reaching nature of the duty to interpret under Section 3(1) HRA, against wording and the (original) legislative intent of a statute. Such legislative intent can be overcome by the legislative intent of Parliament passing the HRA. Whether interpretation goes ‘against the grain’ or is ‘inconsistent

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<sup>43</sup> *Ghaidan v Goidin-Mendoza* [2004] UKHL 30, (2004) 2 AC 557 at paras 30-32, per Lord Nicholls (emphasis added).

<sup>44</sup> *Ibid.* (n 43) at para 32, per Lord Rodger.

<sup>45</sup> *Ibid.* at paras 30-33, per Lord Nicholls (emphasis added).

with a fundamental feature' of the legislation is of course itself a matter for interpretation.<sup>46</sup>

Applying these principles to the *Benkarbouche* case shows that the limits to interpretation were not reached. The SIA could have been interpreted in line with legislative intent in conformity with Article 6 ECHR. Although the wording of the relevant provisions of the SIA was clear, a corrective interpretation would not have gone 'against the grain' of the statute for a number of reasons. The most important is that such interpretation would have been in line with original legislative intent. The CA, following the President of the EAT, considered the legislative intent to be an argument against the possibility of interpretation, but it construed legislative intent too narrowly: it focussed solely on the fact that the SIA laid down an 'overall balance struck by the legislature'. However, the SIA not only intended to lay down a regime for state immunity, but also, and significantly, intended to ensure compliance with the UK's international obligations (e.g. ECSI) as is evidenced by the parliamentary process leading to the adoption of the SIA.<sup>47</sup> It is worth noting that in large parts the SIA, which has been widely followed in other Commonwealth jurisdictions,<sup>48</sup> is considered to reflect international law to an extent that it is referred to as an illustration of custom. Furthermore, the aim of the SIA itself was to clarify the move to restrictive immunity in UK law, following international law, to provide clarity to UK courts. Its overall legislative intent was considered to be to liberalise the law of state immunity in the UK.<sup>49</sup> Because of this, the interpretation in the light of Article 6 ECHR does not run against the legislative intent of the SIA, but is aligned with it. Therefore, it cannot be said that it would be inconsistent with a fundamental feature of the statute and to fall into the sphere of legislation.<sup>50</sup>

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<sup>46</sup> See also on the issue *R (Chester) v Secretary of State for Justice, McGeoch v The Lord President of the Council* [2013] UKSC 63, [2014] AC 271 at paras 70 ff, per Lord Mance; *Google* (n 42) at paras 86 ff, albeit in the scope of EU law.

<sup>47</sup> See supra text around n 35-6.

<sup>48</sup> Fox and Webb (n 8) at 168.

<sup>49</sup> Garnett (n 8) at 708.

<sup>50</sup> It may be asked whether the CA applies the line of cases from *Ghaidan v Godin-Mendoza* (n 43) too restrictively in the current context. The reference to paragraph 40 of the President of the EAT's judgment (*Benkarbouche and Janah* (n 1) at para 67) indirectly refers also to the quotations from *Ghaidan* in that judgment. But they appear to be taken out of context: *Ghaidan*

More technically, looking at what would be ‘read down’, the suggested dynamic interpretation does not concern the basic rule for the ‘ordinary’ case (no immunity for commercial transactions, including employment contracts) but the exception from it (the blanket rule that *all* employment contracts at embassies entail state immunity). As a result, concerns about the overall balance of the SIA seem to overstate the interference of a correcting interpretation at the very margins of the exception (immunity of service staff contracts). It is worth noting that the CA was not concerned about the impact on the overall legislation when discussing the effect of disapplying Section 16(1)(a) SIA in the scope of EU law: it did not consider this to lead to a lack of clarity or a legislative void.<sup>51</sup> These considerations are equally relevant for the duty to interpret under Section 3(1) HRA. Interpretation would therefore not run counter to a fundamental feature of the SIA because of the relatively minor nature of the correction by interpretation.

If the interpretation does not significantly bypass legislative intent or run counter to a fundamental feature or the thrust (or ‘the grain’) of the SIA, the final concern is whether the court is equipped to make the decision or whether it should be left to Parliament – as it amounts to legislation rather than adjudication. How this question is decided ultimately cannot be separated from the preconceptions of the appropriate role of the courts vis-à-vis Parliament in the UK constitution. However, what can be said on the grounds of existing case law on the dividing line between interpretation and legislation is that the present case should be a relatively straightforward one for interpretation because of the factors already mentioned (only eliminating an exception, in line with a development of international law, in line with legislative intent). More specifically, the interpretation would not involve significant decision-making in relation to a wider policy area where several fundamentally different approaches are conceivable. It would result in a relatively minor, but

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involved an interpretation *contra* the wording of the relevant statute, and also most likely an interpretation that would *not* have been in line with the legislative intent at the time of adoption of the Rent Act in 1977: the extension of a statutory right to succeed into tenancies to same-sex partners in order to avoid discrimination. This (rightly) was considered not to go ‘against the grain’ of the relevant legislation and ‘to be consistent with the scheme of the legislation.’ But this required a dynamic interpretation of the statute *and* legislative intent.

<sup>51</sup> See *Benkharbouche and Janah* (n 1) at para 85 and *infra* text near n 83.

important, correction leading to an interpretation in conformity with individual rights. Arguably, the interpretation of the Rent Act 1977 in *Ghaidan* in conformity with the prohibition of discrimination went much further in shaping policy than the relatively technical corrective interpretation of the SIA in conformity with Article 6 ECHR.<sup>52</sup>

However, it cannot be denied that an interpretive solution would have involved some decisions on specific points of detail but with far-reaching significance. For example in *Benkharbouche* the CA would have had to decide how far it would disapply the exception from immunity for employment contracts beyond the scope of EU law, in particular whether only for claims relating to the conditions of employment (unpaid wages, discrimination etc) or also in regard to claims of unfair dismissal. As the CA has shown, international practice varies in this regard and perhaps it was this point which caused the unease with interpretation: some of the specific claims, e.g. dismissal, potentially touch the specific privileges and immunities in the context of diplomatic law more deeply. A wider discussion of the relationship between state and diplomatic immunities is, however, largely absent from the judgment. But this is not accidental. The freedom of the sending state to ‘freely appoint’ – interpreted by some to ‘hire and fire’ – members of the staff of a mission as part of the operation of an embassy (Article 7 VCDR) was raised by the Secretary of State for Foreign and Commonwealth Affairs as intervener.<sup>53</sup> The CA, however, rightly dismisses this view. It does so by pointing to the somewhat formalistic argument that Article 7 VCDR had not been incorporated into domestic law by the Diplomatic Privileges Act 1964.<sup>54</sup> But it also hints at the fact that – substantively – Article 7 VCDR *did not require* a blanket immunity rule. Article 7 VCDR must also be seen in the light of the customary law content of UNCSI. Article 11 UNCSI allows for the exercise of some jurisdiction over claims of employees of a diplomatic mission unless ‘recruited to perform particular functions in the exercise of governmental authority’ and unless they have the status of a diplomatic agent. This more modern rule protects the interests of the sending state in the selection, appointment and dismissal of staff at

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<sup>52</sup> See above (n 50).

<sup>53</sup> *Benkharbouche and Janah* (n 1) at para 35. See overview of case law by Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations* (2008) at 63-66.

<sup>54</sup> It is thought that Section 16(1)(a) SIA provides the domestic implementation of Article 7 VCDR: *ibid.* at 63, with further reference to UK case law.

a mission sufficiently.<sup>55</sup> Thus, the more general terms of Article 7 VCDR cannot be interpreted to require the more far-reaching blanket immunity of Section 16(1)(a) SIA. So, in substance, diplomatic law would not have required immunity in the case. Hence it does not require an interpretation of the SIA which required blanket immunity or precluded an interpretation in conformity with human rights under the HRA.

**B. Harmonious Interpretation with International Law and the European Convention on Human Rights: Habitual Residence Requirement under Section 4(2)(b) of the State Immunity Act**

The CA also does not see sufficient scope for an interpretation of the habitual residence requirement in conformity with the HRA. Section 4(2)(b) SIA which mirrors Article 5(2)(b) ECSI, lays down an additional hurdle excluding claims resulting from employment contracts unless they are brought by UK nationals or those habitually resident in the UK. This hurdle only becomes relevant if claims are not already excluded by a blanket application of Section 16(1)(a) SIA. The approach of the CA and the issues involved are largely parallel to those discussed above in relation to the interpretation of Section 16(1)(a) SIA in conformity with international law and the ECHR. However, a separate effect of Section 4(2)(b) SIA is that it excludes those from access to justice who are unable to bring a claim in a court abroad, for whatever reason, e.g. cost of litigation, knowledge of a foreign legal system, access to evidence, potential partiality of courts abroad etc. The problem is exacerbated by the fact that although embassy service staff frequently do not have habitual residence in the state of the mission, they in fact often have resided there for a long time, as was the case for Ms Benkharbouche and Ms Janah.

As with Section 16(1)(a) SIA, the CA examines international law and practice. It concludes that although a number of states have habitual residence provisions, they are not required by international law,<sup>56</sup> at least where they conflict with fundamental rights of access to justice. The CA was able to draw strong support for the view that Section 4(2)(b) SIA created immunity beyond what was required by (customary)

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<sup>55</sup> Likewise *ibid.* at 66.

<sup>56</sup> *Benkharbouche and Janah* (n 1) paras 56, 62.

international law from the drafting history of Article 11 UNCSI.<sup>57</sup> The Draft Articles of the International Law Commission (ILC) originally contained a habitual residence condition, but it was thought to be contrary to the principle of non-discrimination on grounds of nationality. It was, therefore, deleted in the drafting stage and is not contained in the final text of the Convention.<sup>58</sup> The CA is not explicit about the (binding) effect of ECSI on the UK.<sup>59</sup> However, it is important that the CA rejects in strong terms the possibility of justifying discrimination on grounds of nationality by interests of the sending state ‘to protect the sovereign functions of the embassy’, doubting both the legitimate objective and proportionality of such an interference.<sup>60</sup> As the CA rightly points out, referring to the ILC Commentary, the habitual residence criterion is one of jurisdictional link and not an immunity criterion. Its aim is to ensure that there is a sufficient interest in adjudicating, meaning that the facts of a case should have a link to the forum in the form of a territorial connection. To treat it as an immunity criterion would not be justifiable as it would restrict access to justice in the UK in a discriminatory manner: the place of performance of a contract of employment establishes a sufficient jurisdictional link.<sup>61</sup> As a result, the CA finds Section 4(2)(b) discriminatory on grounds of nationality, not required by international law and therefore in breach Article 6 in conjunction with Article 14 ECHR.<sup>62</sup>

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<sup>57</sup> UNCSI’s focus on departs in this regard from Article 5(2)(b) ECSI which like the SIA contains the habitual residence criterion; cf amendment to the State Immunity Bill proposed by Baroness Elles, HL Deb, Vol 389, col 1511-12 (16 March 1978) for a more far-reaching criticism of the territorial nexus and alternative proposal (no limit by place of employment but recruitment and conclusion of contract in the UK should be sufficient) which was not adopted.

<sup>58</sup> *Benkharbouche and Janah* (n 1) at paras 59-60.

<sup>59</sup> An argument in support of the CA’s result may be derived from treaty interpretation in the light of superseding customary law. See generally in this context the work of the United Nations International Law Commission on ‘Subsequent agreements and subsequent practice in relation to interpretation of treaties’, in particular the first and second report of Special Rapporteur Georg Nolte, A/CN.4/660 (2013) at paras 91 ff and A/CN.4/671 (2014) at paras 42 ff.

<sup>60</sup> *Benkharbouche and Janah* (n 1) at para 63.

<sup>61</sup> *ibid.* The CA also responds to Libya’s argument that in other places discrimination on the basis of nationality is accepted, with reference to the exclusion of nationals of the employing state from the jurisdiction of the courts of the forum state. The CA distinguishes the justification for this clause which is about the priority of two competing jurisdictions over claims.

<sup>62</sup> *ibid.* at paras 65-6.

Although it is not relevant to the outcome of the case, as Section 16(1)(a) SIA already provides for immunity of the employment contract, it is surprising that the CA does not adopt a stronger interpretive approach in conformity with international law and the ECHR in order to provide at least potentially a remedy in the light of the widely acknowledged discriminatory nature of a habitual residence requirement and existing rules of international law contrary to Section 4(2)(b) SIA. The CA dismisses interpretation under Section 3(1) HRA, referring rather crudely to the ‘overall balance struck by the legislature’ in the SIA. This stands in sharp contrast not just to the tone of the preceding paragraphs in which the CA has condemned discrimination on grounds of nationality, but also to case law in which discrimination was corrected by interpretation.

**C. Conclusions on the Harmonious Interpretation with general International Law and under Section 3(1) of the Human Rights Act**

The discussion of the scope for interpretation in conformity with international law highlighted a number of issues.

Firstly, as is well known, the rules of harmonious interpretation of statutes with general international law are very limited where the wording is unambiguous.

Secondly, the CA was extremely reluctant to use its more far-reaching competence of interpretation under Section 3(1) HRA.

Thirdly, this has the effect of levelling the difference of interpretation in conformity under the HRA and in regard to general international law.

As will be argued, this approach and its effects are problematic, not only under the HRA but also in relation to general international law. The competences of interpretation under Section 3(1) HRA should be used. However, in addition, a more flexible, open approach should be adopted in relation to international law even outside the scope of the HRA. Such an approach, to an extent, would accommodate better, the increasingly intertwined factual scenarios across several legal orders and the interaction of international and national law as a result.

The case demonstrates the different approaches in English law to interpretation in conformity with the ECHR under the HRA and in relation to general international law which exist in parallel in principle. However, the consequence of a strict approach under the HRA is that the two scenarios of interpretation are in effect treated in the same way. Although the courts can, under Section 3(1) HRA, interpret a

statute against its wording, the wording became in fact the decisive factor in *Benkharbouche* which determined the intent and legislative scheme of the SIA. Such emphasis on the wording is unnecessarily restrictive, even when acknowledging the underlying reasons for it, namely to protect the authority of Parliament and the more directly democratically legitimated law-making process in a domestic legislature. Other methods of interpretation need to be considered and given weight in an overall exercise of interpretation. Prioritising wording over all other methods of interpretation where international law is involved means that a rigid hierarchy in regard to different methods of interpretation is established.<sup>63</sup> Such an emphasis on wording would lead in effect to a presumption that the legislature *intended to act in conflict with international law* and may turn the will of Parliament on its head. It does not sufficiently allow for other aspects of interpretation to outweigh the wording, in particular context, purpose and legislative intent – as may be the case in situations without an international context.<sup>64</sup>

This is of particular concern for international law because of its evolutive character, which means it is more likely to clash with statute and precedent<sup>65</sup> where English law has ‘incorporated’ rules of international law. But the concern is, and should not be, just one-sided: the result of such an approach is that the English legal order is closed off to a far-reaching extent from the international sphere and international developments, and at greater risk of breaching international law. The scope the courts have given interpretation ‘as far as possible’ under the HRA (if correctly applied) strikes a more appropriate balance. It provides a more flexible approach that allows for a comprehensive interpretation of a statute by reference to all methods of interpretation and does not privilege automatically wording over all other methods of construction when establishing the intended meaning of a statute.

A further reason for a carefully calibrated, but more flexible approach to interpretation where international law is involved is the fact that a very formalistic approach does not sufficiently take into account the extent to which international law pervades national law, as a result both of simply more regulation at international level

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<sup>63</sup> Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, vol II (2001) at 1099-100, 1223.

<sup>64</sup> In detail *ibid.* at 1003 ff, 1299-1300.

<sup>65</sup> As has been recognised in *Trendtex* (n 36).

and of more intertwined, factual scenarios which cross the boundaries of legal orders. Moreover, such ‘internationalisation’ is not two-dimensional but multi-dimensional or multi-polar, as the present case has shown with the immunity rules: Article 6 ECHR and Article 47 EUCFR enter the UK legal order in slightly different ways. Different regimes of international law may enter UK law at the same time, potentially clashing with national law and with one another within UK law. Such multi-polar situations may stretch the coherence of the domestic legal order. If different approaches of the domestic legal order to the interaction with international legal orders lead to diverse and potentially discriminatory outcomes, depending on which set of international rules is applicable, this may raise questions about the legitimacy of such outcomes, even if they may be legally justifiable. One concern is that the rigid approach to statutory interpretation in the context of general international law may not be sufficient and appropriate to reach coherent solutions in these scenarios and may cause unnecessary conflict between legal obligations. Another concern is a levelling down effect to the lowest common denominator of diverse approaches. The approach to interpretation under the HRA should therefore be implemented and adopted in regard to all international law as a tool to provide a moderate degree of flexibility which would help to safeguard coherence of the UK legal order at the intersection of international/European legal orders. This will be further highlighted in the context of the EU Charter below.

## **5. EU CHARTER ON FUNDAMENTAL RIGHTS: TO THE RESCUE!<sup>66</sup>**

The CA’s judgment is, in spite of its brevity in this regard, a landmark judgment because of its application of the EU Charter on Fundamental Rights. It is only because of the Charter that the CA granted an individual remedy. Furthermore, the CA clarified the application of the Charter in the UK.

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<sup>66</sup> See in a similar vein recently Garnett, ‘State and Diplomatic Immunity and Employment Rights - European Law to the Rescue?’ (2015) 64 *International and Comparative Law Quarterly* 783 at 808 ff.

The application of the Charter in national law has been of some concern and debate. Concerns about its scope of application and its content, specifically in regard to its potential horizontal application and its distinction between rights and principles, have been expressed in particular in the UK.<sup>67</sup> Underlying this is a fear of an expansive reading of the Charter and ‘competence creep’ of the EU via the European human rights instrument. Furthermore, Protocol 30<sup>68</sup> on the UK ‘opt out’ has created some confusion as to its legal effects, which persisted even though the Supreme Court had already held the Charter to be binding and (vertically) directly effective in 2012.<sup>69</sup> Evidence of such confusion can also be found in the submission on behalf of Libya that the UK retained ‘discretion in relation to the EU Charter not to disapply domestic statutes which are incompatible with an EU law, right or principle’<sup>70</sup> and in the doubts the first instance judge is reported to have had about the enforceability of the Charter in UK courts.<sup>71</sup> The CA judgment clarifies some of these shadows of doubt that were triggered in the internal debates in the UK. At the same time, the brevity of the passages of the judgment dealing with the Charter further suggests that the CA felt that it was dealing with a ‘clear’ case (if there is such a thing).

First, the CA confirmed that Article 47 EUCFR and Article 6 ECHR were identical in terms of protection<sup>72</sup> but distinct in the remedies they provided. The consequences of a breach of the Charter followed squarely from the doctrines of direct effect and supremacy of EU law in the UK legal order. It clearly rejects an argument derived from *Chester and McGeoch* that the CA had discretion in its decision to disapply the SIA because a new legislative scheme was required to replace

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<sup>67</sup> See Douglas-Scott, ‘Fundamental Rights, Not Euroscepticism: Why the UK Should Embrace the EU Charter of Fundamental Rights’ in Ziegler, Wicks and Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (2015) 249.

<sup>68</sup> Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, [2012] OJ C 326/1 at 313.

<sup>69</sup> *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55.

<sup>70</sup> *Benkharbouche and Janah* (n 1) at para 82.

<sup>71</sup> *ibid.* para 4 and *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* (n 12) at paras 9, 13-14 (citing the Employment Tribunal).

<sup>72</sup> *Ibid.* at para 71.

it.<sup>73</sup> The CA thus held that a violation of the Charter *obliged UK courts to disapply* conflicting statutes. As the CA points out, this means that the remedy under EU law – disapplication of the conflicting provisions of the SIA – goes further than the declaration of incompatibility under Section 4 HRA.<sup>74</sup> Without EU law there would not have been an individual remedy in the case. It was thus crucial for some of the claims to succeed where all that English law provided was a call on the legislature to act.

Secondly, regarding the question whether the claims fell *into the scope of the Charter* (Article 51 (1) EUCFR), the CA was able to breeze through the issue. This is the often controversial first hurdle a claim under the Charter must pass, but the CA held that it was common ground that claims under the Working Time Regulations and concerning racial discrimination fell within the scope of EU law.<sup>75</sup> Yet even in this apparently clear case the question of the scope of EU law caused some muddle, i.e. arguably was not so ‘clear’, as demonstrated by the fact that the Employment Tribunal judge at first instance considered the claim to be ‘freestanding’ under EU law, i.e. outside of the scope of the Charter.<sup>76</sup>

The third aspect with which the CA dealt in more detail was the question whether and how far a domestic court would give horizontal direct effect to the EU Charter. The right at issue, the right to an effective remedy in Article 47 EUCFR, must be considered to be a relatively uncontroversial example. The question arose because the claims were directed against employers which were non-member states of

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<sup>73</sup> Ibid. at para 85. See also *Chester and McGeoch* (n 46) at paras 72-3, per Lord Mance. See in this regard also *Google* (n 42) at paras 93 ff.

<sup>74</sup> *Benkharbouche and Janah* (n 1) at para 72. For a similar use of the EUCFR see *Google* (n 42) at paras 95 ff.

<sup>75</sup> *Benkharbouche and Janah* (n 1) para 74 (other aspects fell outside the scope, e.g. the claim of unfair dismissal). For contrast see Case C-466/11 *Gennaro Currà and Others v Bundesrepublik Deutschland* ECLI:EU:C:2012:465 where the CJEU held that a claim based on the Charter did not fall within the scope of EU law (compensation claim in regard to war-time atrocities committed by Germany against Italian nationals). See also Fontanelli, ‘The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights’ (2014) 20 *Columbia Journal of European Law* 193. The scope of application of the Charter is also subject of the ongoing *CharterClick!* project, see <http://www.charterclick.eu/> which will provide guidance.

<sup>76</sup> *Benkharbouche and Janah* (n 1), para 4 and *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* (n 12) at para 13.

the EU. As such the Charter did not apply to them in a vertical dimension. The CA held that Article 47 EUCFR did have horizontal effect conceptually, relying not only on the case law on general principles of the CJEU<sup>77</sup>, but also pre-Charter case law relating to the right to an effective remedy as a general principle of EU law. It then concluded that Article 47 EUCFR falls into the category of Charter provisions having horizontal direct effect. It noted that the CJEU distinguished between different Charter rights in *Association de Médiation Sociale*,<sup>78</sup> depending on whether they needed further implementation.<sup>79</sup> It is noteworthy that the CA considered the Charter right through the lens of general principles<sup>80</sup> – which may be seen as an attempt to limit a broader horizontal effect of Charter rights. However, general principles of EU law also at least potentially open up the domestic legal order more widely.

Finally, the CA dismissed Libya's argument that the SIA could not be disapplied as it would leave a legislative void which required a legislative scheme to replace it. This would have required postponing the implementation of Charter obligations until legislation would have been amended.<sup>81</sup> This aspect of the judgment stands in contrast to the reluctant interpretation under Section 3(1) HRA discussed above.<sup>82</sup> The CA did not consider that disapplication of the relevant sections of the SIA would lead to a lack of clarity because in effect only the exception from the exception would be disapplied and only for a very specific category of staff – 'service staff whose work does not relate to the sovereign functions of the mission'<sup>83</sup>. The CA was thus very clear in affirming the supremacy of EU law, limiting the challenge resulting from *Chester and McGeoch*<sup>84</sup> in the context of prisoner voting.

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<sup>77</sup> C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

<sup>78</sup> C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2 at para 47: no horizontal effect of Article 27 EUCFR, the right to information and consultation of workers within undertakings as it needed further definition.

<sup>79</sup> *Benkharbouche and Janah* (n 1) at para 79.

<sup>80</sup> *Ibid.* para 81.

<sup>81</sup> See in this regard, however, *Chester and McGeoch* (n 46) at paras 72-3, per Lord Mance.

<sup>82</sup> See supra 4. B. (ii) and (iii).

<sup>83</sup> *Benkharbouche and Janah* (n 1) at para 85.

<sup>84</sup> See supra (n 81).

The judgment neither had the opportunity to clarify the relevance of Protocol 30 referring to the justiciability of solidarity rights in Title IV of the Charter in the UK,<sup>85</sup> nor did it deal with a scenario where UK law did not provide the rights in question<sup>86</sup> (subject to the immunity issues argued in the case). The case demonstrates, however, that, although the Charter did not change the substance of EU human rights and their direct applicability, having made the Charter binding and more visible as a result of the Treaty of Lisbon<sup>87</sup> has some effect. The fact that it has been pleaded in the present scenario highlights this. After all, the right to a remedy is hardly a novelty in EU law and could have been argued before under unwritten EU human rights law under the general principles jurisprudence of the CJEU in comparable scenarios that fall into the scope of EU law.

## **6. INTERPRETATION IN A MULTI-POLAR HUMAN RIGHTS SETTING**

The judgment raises the wider issue of the relationship and role of the specialist international/European law regimes and tribunals both in relation to general international law and when specialist international legal regimes intersect within a domestic legal order.

Firstly, the misconception needs to be highlighted that specialised courts and tribunals somehow should refrain from making pronouncements on issues of general international law. Both the CA and the government criticised the ECtHR and the CJEU for making such a pronouncement. The CA commented that ‘it is not the function of the Strasbourg court to make definitive rulings as to the position in international law’, in particular where this might result in a pronouncement on the international obligations of the states parties to the ECHR.<sup>88</sup> The government was reported to have submitted that it ‘was outside the competence of the CJEU to decide questions of international law’.<sup>89</sup> These conceptions of the relationship between

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<sup>85</sup> See Article 1(2) of Protocol 30.

<sup>86</sup> See Article 2 of Protocol 30.

<sup>87</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1.

<sup>88</sup> *Benkharbouche and Janah* (n 1) at para 21.

<sup>89</sup> *Benkharbouche and Janah* (n 1) at para 51.

general international law and its partial legal orders are potentially distorting and misconceived. They are accurate in that pronouncements on ‘other’ areas of international law are not ‘definitive’. That is in the nature of international law and the international legal order, which has no single adjudicative authority. The characteristics of the international legal order must, however, also be borne in mind, and in particular, its decentralised nature: there is no universally binding adjudicative authority and no ‘definitive’ ruling in the sense of a supreme court setting precedent in the international legal order. The closest international law must be considered to get to this national law analogy is the International Court of Justice (ICJ). But even though its judgments are of highly persuasive authority for the interpretation of international law and fulfil a unifying function as such, they are not formally binding beyond the parties. There is no interpretive monopoly of the ICJ over general international law. Moreover, the ICJ deals with only a very small sample of international disputes which are further limited by the voluntary nature of submitting to its jurisdiction. This is not to belittle the significance of the ICJ in the international legal order, but rather to highlight the interpretive role and responsibility of other international courts and tribunals, such as the ECtHR, in interpreting international law – and indeed of national courts: their pronouncements on international law are an important contribution to state practice in regard to international rules, and a rare occasion where *opinio iuris* may become explicit. The CA’s interpretation of the scope of the international rules on immunity in the context of employment in embassies contributes significantly to the development of international law in this sensitive area where there is otherwise little protection for employees from exploitation.<sup>90</sup>

References to the lack of competence of other international courts to consider and use, and therefore make pronouncements on, international law are therefore misconceived. They are in the nature of international law, and the existence and development of international law depends on the application, reinforcement and enforcement of international law in such a decentralised way. This can obviously cause conflicts and friction. The CA is right in pointing to the sensitivity of the issue,

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<sup>90</sup> Interestingly, the pronouncement of the CJEU on general international law issues seems to be much less an issue for the CA than such pronouncements by the ECtHR – as it considers the CJEU to be in an equivalent position to national courts, see *ibid.* at para 52.

and that the relationship between different parts of international law needs to be handled carefully. The relationship and role of the specialist regimes and tribunals in relation to general international law is a large topic that has also been extensively studied by the International Law Commission.<sup>91</sup> The relationship of the ECHR and ECtHR as well as that of the CJEU and general international law has also been subject to the consideration of those courts themselves and more specific academic study.<sup>92</sup> The complex substantive question of how different legal orders may be applied as far as possible in a harmonious way cannot be discussed in detail in this article. The Vienna Convention on the Law of Treaties 1969 (VCLT), in particular the rules of interpretation (including that of systemic integration) in Article 31 VCLT, provides a starting point.

So in response to the first issue it must be emphasised that a careful and responsible approach by specialised regimes (as well as national courts) is necessary towards other areas of international law, but not a ‘hands-off’ approach which would not be conducive to the continuous development of international law.

The second issue concerns the intersection of national law (the SIA) with three sets of international law: the EU Charter, the ECHR (with their respective rights to a remedy) and general international law (with its rules on state immunity), and the various ways in which these sets of international law operate within the national legal order. It is acknowledged that national legal orders can act as gatekeepers to the

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<sup>91</sup> M Koskeniemi (Special Rapporteur), Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (13 April 2006).

<sup>92</sup> Merrills, *The Development of International Law by the European Court of Human Rights* (1995); Forowicz, *The Reception of International Law in the European Court of Human Rights* (2010); Binder and Lachmayer (eds), *The European Court of Human Rights and Public International Law: Fragmentation or Unity?* (2014). For the relationship of general international law and EU law see Ziegler, ‘International Law and EU law: Between Asymmetric Constitutionalisation and Fragmentation’ in Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (2011) 268 and more recently Ziegler, ‘The Relationship between EU Law and International Law’ in Patterson and Södersten (eds), *A Companion to EU Law and International Law* (2016) 42.

operation of international law<sup>93</sup> within their domestic legal order and define the criteria of interaction differently for different types or parts of international law. However, as the *Benkharbouche* case shows, domestic law cannot be unconcerned about incoherences this may cause in the domestic legal order, in particular in the context of fundamental human rights. Such incoherences are revealed in the different treatment of the various types of claims, depending on whether they fell into the scope of EU law. Such ‘preferential treatment’ is in the nature of EU law and leads to a privileged position of situations which fall into the scope of EU law (and potentially reverse discrimination of those which do not). However, the consequences of incoherence are less of concern for the international/European legal orders than for the UK legal order. This must be particularly the case where a solution by interpretation was reasonably available via the HRA. The CA granted a remedy not through (constitutional) interpretation of English law in conformity with human rights, but because EU law requires it. Fundamental rights protection in the *Benkharbouche* case thus ultimately depended formalistically on the extent to which competences were conferred on the EU in the field of employment law.

The approach of the CA reveals timidity towards the implementation of human rights even where the court is sympathetic to the substantive outcome. After all it made the declaration of incompatibility and considered the right to a remedy as reflected in Article 47 EUCFR to be a general principle of law. A deeper analysis could have started from the fundamental nature of the substantive right to a remedy in English law, its status as a general principle, and it could have considered the interpretations under EU law and the ECHR as guiding the interpretation of the right in English law. Perhaps the right would have gained sufficient momentum to outweigh the concerns about interpretation which contradicts the wording of a statute. It is unfortunate for the status of fundamental rights in the UK legal order that they had to depend on the supremacy of EU law to be effective. This not only seems inappropriate for an essentially constitutional subject matter. It also causes gaps and inconsistencies in the protection of fundamental rights in the UK.<sup>94</sup> Furthermore, it

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<sup>93</sup> This includes EU law. The UK must be deemed to have agreed to the rules of interaction (direct effect, supremacy) between EU and UK law, amongst others, in the accession to the treaties.

<sup>94</sup> While it is acknowledged that Parliament, following a declaration of incompatibility may amend the law and would be expected to do so, and so far has in fact done so, apart from the case of

precludes resorting to fundamental rights as the substantive limit of last resort also to EU law.

## 7. CONCLUSIONS

The CA has handed down an important judgment in several respects: it provides an opportunity to enforce employment rights of those not involved in sovereign activities of diplomatic missions in the UK at least when they fall within the scope of EU law. Considering EU law and the UK's relationship with the Charter, the judgment provides an important statement clarifying some of the existing confusions around the scope and horizontal effect of the Charter as well as the effect of the 'opt-out' of Protocol 30. It does so by squarely and with brevity discussing and rejecting misconceptions. No more is required by the issues raised.

The declaration of incompatibility in relation to the SIA adds welcome judicial weight to voices which have long criticised the SIA for leading to injustice and for being largely out of line with other western democracies in the extent to which the SIA made immune employment contracts at diplomatic missions for staff not involved in the exercise of governmental or sovereign functions. The CA exposes the habitual residence requirement of the SIA for employment claims in strong terms as discriminatory. It also makes clear that the broad-sweeping exclusion of all employment claims by the SIA is to be required by international law. The declaration of incompatibility thus provides an immediate impulse for reform of the SIA in this regard – and legislation elsewhere modelled on the SIA.<sup>95</sup> Such a reform, which has been considered necessary for a while,<sup>96</sup> could follow Article 11 UNCSI which only foresees state immunity over claims of employees of a diplomatic mission if they are 'recruited to perform particular functions in the exercise of governmental authority' or

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prisoner voting, such consequences do not provide an individual remedy and remain legally at the discretion of Parliament.

<sup>95</sup> Even if a state with such legislation is not party and hence not directly compelled by Article 6 ECHR, the guarantee of access to justice may be considered to reflect a general principle of law which requires a modern interpretation of state immunity even where there are no formally binding corresponding rules. It may also inform the interpretation of the right to a remedy in other contexts.

<sup>96</sup> Fox and Webb (n 8) at 171.

have the status of a diplomatic agent. Article 11 UNCSI thus takes a more balanced approach to the potential conflict between immunity and human rights. The case may have implications not just for state immunity in relation to ordinary employment claims against the state but also for diplomatic immunity regarding claims of employees of diplomats (e.g. personal or domestic staff) and scenarios which might involve human trafficking.<sup>97</sup> From the perspective of international law, the CA contributes to the interpretation of the international rules on state immunity (ECSI, UNCSI) and adds weight to the restrictive interpretation of some clauses in those Conventions which were cause for concern and confusion. The judgment is authority, joining scholarly opinion,<sup>98</sup> for the interpretation of some issues of doubt in regard to UNCSI which can be resolved by following established rules of interpretation, e.g. systematic interpretation and referring to the *travaux préparatoires*.<sup>99</sup>

It remains to be seen whether and how fast Parliament will respond to the declaration of incompatibility of Sections 16(1)(a) and 4(2)(b) SIA, but it can be expected that it will amend the SIA, not least because it is closely watched how Parliament deals with declarations of incompatibility with the ECHR. It will be significant for the question whether the ECtHR may consider declarations of incompatibility to be an effective ‘domestic remedy’ in the future.<sup>100</sup>

However, the case also demonstrates the weakness of the declaration of incompatibility. If it were not for the EU Charter, which came to the rescue and under

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<sup>97</sup> See in this regard Kartusch, *Domestic Workers in Diplomats' Households: Rights Violations and Access to Justice in the Context of Diplomatic Immunity. Analysis of Practice in Six European Countries* (2011) at 5. See however also *Al-Malki* (n 27) at paras 71 ff, decided on the same day as *Benkharbouche* (n 1), where the court adheres to the classical functional distinction between state and diplomatic immunity. Critically Garnett (n 66) at 825-6.

<sup>98</sup> Foakes and O'Keefe, ‘Article 11’ in O'Keefe and Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (2013) 183 at 191, 201-2; Fox and Webb (n 8) at 450.

<sup>99</sup> Article 11 (2) (b) (iv) – ‘any other person enjoying diplomatic immunity’; Article 3(1)(b) – ‘persons connected with them’, at paras 39-40; Fox and Webb (n 8) at 449-50; in addition it is submitted that a systematic reading of Article 3 UNCIS and the VCDR suggests that Article 3 refers to the privileges and immunities of ‘persons connected with’ diplomatic missions etc, i.e. the differentiated system of privileges and immunities for different categories of staff of a mission provided for by the VCDR and the VCCR.

<sup>100</sup> *Burden v United Kingdom* Application No 13378/05, Merits, 29 April 2008 at paras 41 ff.

which the claims succeeded to a significant extent, the case would have been a pyrrhic victory for the claimants. The declaration of incompatibility will only have an effect for the future once the SIA is amended, which potentially raises issues with individual justice in a case, or it will force applicants to pursue their case further in Strasbourg. Moreover, as the procedural history of the case shows, it took three instances to even get to a court that was able to issue a declaration. The case might have been resolved more quickly if the Employment Tribunal could have referred a question of compatibility to a higher court.

The CA's approach to interpretation of national law in the light of international law is disappointing. It must be described as overly reluctant in making use of the scope Article 3(1) HRA for interpretation of UK legislation (the SIA). A more far-reaching interpretation would hardly have been a trail-blazing precedent, neither in terms of the approach to interpretation, nor in the underlying interpretation of international law which rests on widely accepted grounds. The case would have been unlikely to have exposed the CA as proactive, so that it may be asked why the CA was so reluctant – a question that can only be rhetorical or speculative. The availability of an alternative remedy under the EU Charter is likely to have played an unacknowledged role. Also speculative is whether a role was played by considerations of good relations with foreign states or the fact that the HRA and the ECHR are currently under attack by the political leadership. However, the unnecessary reluctance to embark on an interpretative route is deplorable on many levels, not only because the case has the potential to muddy rather than clarify the line between interpretation and legislation. It also has wider implications for the place of domestic fundamental rights in the UK legal order, and the approach of the UK to international law. In a situation where the UK constitution is in a state of development, in particular regarding the division of competences between the courts and Parliament, this may not only be detrimental for doctrine and principle but also ultimately affect the standing of the courts in that balance. It is laudable that courts as the ultimate arbiters approach the issue of competence with the necessary sensitivity. But where sensitivity permutates into deference it could prove risky, and may not even lead to respect of the will and authority of Parliament.

Beyond the criticism that the CA has not made full use of the tool of interpretation, the article also critically highlighted some problems and inconsistencies with the current approach to the interaction of international and

national law in the UK. Such problems result from the understanding that the principal aim of interpretation is to preserve the original intent of the legislature. Such an understanding is reflected in giving absolute priority to the wording of a statute even in the light of other interpretative criteria and methods. This means that the scope to reconcile the conflict of a clear statute with international law by interpretation is too limited. This is unnecessarily restrictive – as the HRA solution shows. The very rigid threshold should be lowered as there is no need to protect the authority of the legislature where an international rule is not contrary to the hypothetical or presumed intent of the legislature, had it known about the conflicting rule. In contrast, it is in the interest of the UK to avoid breaches of international obligation.

It is symptomatic of the points made above in relation to interpretation, that 14 years after the ECtHR's decision in *Fogarty v UK*,<sup>101</sup> in spite of developments in international law which are highlighted well in the CA's judgment,<sup>102</sup> the only way forward for the CA is EU law. It is worth noting that the judgment is almost clinical in its separation of the discussion of the Charter and the HRA, which is perhaps telling, given the disparate remedies the judgment finds to be applicable. There is no trace that might give rise to a concern of 'spill-over' of one European human rights instrument into a different context. The flipside of this is that there is also no exploration of a creative or more general cross-fertilising transformative effect of the Charter – or of home-grown fundamental rights. This is so even though there are inequalities, which result from the applicability (or not) of the Charter in situations where the only criterion of distinction may be whether a situation (also) falls within the scope of EU law. These need to be addressed. Nevertheless, the contrast between the application of the Charter and Article 6 ECHR is revealing. More positively, the application of the EU Charter provides an example that the externalisation of human rights<sup>103</sup> may also be a useful transformative tool, cutting what at times may be a

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<sup>101</sup> *Fogarty v United Kingdom*, Application No 37112/97, Merits, 21 November 2001.

<sup>102</sup> See cases cited in n 23 pointing to Article 11 UNCSI reflecting the customary international law.

<sup>103</sup> Such externalisation is more frequently seen when human rights are used to 'scapegoat' difficult outcomes, see Wicks, Ziegler and Hodson, 'The UK and European Human Rights: Some Reflections' in Ziegler, Wicks and Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (2015) 495 at 506-7.

Gordian knot of national constitutional traditions. The right to a remedy in Article 47 EUCFR, clearly acknowledged to be a general principle of EU law applicable horizontally, may prove at least as important as the substantive rights of the Charter.