

# State immunity and employment relationships before the European Court of Human Rights

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**Abstract** This article considers challenges to state immunity under Article 6 ECHR (the right to a fair trial) in relation to employment disputes. It is argued that the development of the adjudication of these disputes in the ECtHR has been positive for Applicants, with the Court willing to find that state immunity is not a proportionate response in the context of Article 6. However, it is also argued that there are a number of tensions which exist in the adjudication of these disputes, and these tensions are only increasing with the more ‘progressive’ findings of the Court.

**Keywords** State immunity · Employment · Right to a fair trial

## 1 Introduction

Public international law allows the possibility for states to claim immunity from jurisdiction in relation to claims brought in foreign courts. It was felt that this immunity was necessary in order to respect state sovereignty and to promote good international relations and comity between states. At the outset, these rules were absolute, in the sense that there existed a customary rule that no state could be brought before the courts of another state for any matter. However, following the Second World War, the idea appeared in European jurisprudence particularly that where the state acted as a private party, it was no longer appropriate for that state to take advantage of the rules on immunity under public international law.<sup>1</sup> As a matter of justice, the interests of

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<sup>1</sup> Garnett [1], p. 644.

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the private parties interacting with states in this instance had to be considered. As a result, there developed the idea of ‘restrictive immunity’, under which a state could not claim immunity for matters which involved the exercise of private functions. One important example of the operation of the doctrine of restrictive immunity is in relation to employment contracts, under which a state can be deemed to be acting in the same capacity as any (other) private person.

However, there are a number of exceptions which apply in relation to the removal of state immunity in the employment context. This implies that there are a number of situations in which employees may still be refused access to employment rights through the operation of immunity. Recently, employees have sought to challenge their exclusion from access to employment rights on the basis that this exclusion is a breach of their right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) is then tasked to decide whether the exclusion that they experience is a proportionate means of meeting the legitimate aim of maintaining good international relations and comity between states (the legitimacy of this aim has been accepted and is not itself subject to challenge). In making this assessment, the Court must consider how far these employees fall within the exceptions to the general rules on employment contracts under the rules of public international law.

It is fair to say that the adjudication of these claims is an extremely complex matter. These complexities arise for a number of reasons. First, there is the problem of the determination of the public/private divide in relation to employment relationships. This is a problem of the criteria to be used in order to determine the divide, but it is also a question of who should decide on that divide in this context. The question is whether and how far the European Court of Human Rights should show deference to the criteria used to determine the public/private divide at state level, but also whether the Court should use that criteria (or other criteria) itself in determining the divide. This is made particularly complicated by the interaction of different legal modes with different ideas of where the public/private divide should fall. Second, determining the content of the rules of ‘customary’ international rules is difficult in the context of a lack of ratification of those rules or necessarily agreement over their content. Third there is the potential interaction between public and private international law rules which is unclear when it comes to embassy employees.

This article considers these complexities, looking particularly at how these complexities were played out in recent cases. The first section looks at the importance of the public/private divide in relation to employment contracts, considering in particular the position of ‘public’ employees. The second section outlines the definitional complexities in terms of the public/private divide, whilst the third section considers the definitional complexities in relation to the interpretation of international law. The fourth section investigates the geographical balance and complexities at operation in this context in relation to the definitions outlined in the second and third sections.

## 2 State immunity disputes and the public private divide

By their nature, issues surrounding state immunity and employment arise in relation to ‘public’ employees. This is important, as the publicness of the employment rela-

tion has a number of implications for the rights which those employees can access and also the challenges which can be made to the access of those rights. Certainly, the public/private divide in employment relations is important as a matter of national law. This is because different national systems allocate different rights to public as opposed to private employees; indeed, in some instances public employees are excluded from private employment rights altogether. For example, in France, there is a different statutory system which applies to public servants (*fonctionnaires*) as opposed to private employees. There are also a number of ‘*regimes spéciaux*’ which exist mainly in the public sector and include more advantageous employment rights than apply in the private sector.<sup>2</sup> In the UK, there does not exist an entirely different set of regulations for ‘public’ as opposed to ‘private’ employees. Rather there is a much more variegated picture, with public sector groups often included within the private employment rights regime in some respects, and subject to separate statutory regimes in others. For example, prison officers are now distinguished in functional terms from police officers and so can take advantage of most employment protection rights.<sup>3</sup> They are still though subject to limitations on their ability to take industrial action, as a result of a statutory duty arising from the provisions of the Criminal Justice and Public Order Act 1994. They are also still subject to rules under the Prison Act 1952 which determine the scope of misconduct in the prison service in line with the particular responsibilities and sensitivities of the employment.<sup>4</sup>

The public/private divide is also central to European understandings of obligations towards state embassy employees. Under Article 6, claims can only be brought before the ECtHR if they concern a ‘civil right’ or ‘obligation’. In this past, this has meant that public employees have been excluded from Article 6 claims because they have not been able to show that their claim is a matter of civil right or law.<sup>5</sup> However, over time, public employees have increasingly come within the scope of Article 6, either because their claims have been included at a national level within the bounds of ‘private’ employment law or because from a functional perspective they do not display characteristics which set them apart from other private employees.<sup>6</sup> The position now is that public employees must be considered within the scope of Article 6 unless they fall within the scope of the test set out in the case of *Eskilinen*.<sup>7</sup> This test requires an ‘express exclusion’ for public employees from bringing a private employment claim as a matter of national law, and that exclusion must be justified on objective grounds

<sup>2</sup>For example, Cheminots (railway workers) have access through the job for life (except in the case of gross misconduct) which is also the case for public servants (*fonctionnaires*), a retirement age which can be from the age of 50 for train drivers and from 55 for other railway employees (from 2024 this will be 52 and 57 respectively—in the private sector the retirement age is 62), a final-salary pension scheme, access to specific health care, and free and/or reduced price travel for direct family.

<sup>3</sup>The Criminal Justice and Public Order Act 1994, s 126 provides that prison officers are not to be treated as being in ‘police service’ for the purposes of the Employment Protection (consolidation) Act 1978 (now the Employment Rights Act 1996 and the Trade Union Labour Relations (consolidation) Act 1992). See *Rodgers* [4].

<sup>4</sup>*R v King (Rebecca Mary)* [2013] EWCA crim 1599.

<sup>5</sup>*Rodgers* [5].

<sup>6</sup>*Olujic v. Croatia* (2011), no. 22330/05, 52 EHRR 15.

<sup>7</sup>*Eskilinen v. Finland* (2007), no. 63235/00, 45 EHRR 43.

in the public interest. An example of that public interest reason is a special bond of trust and loyalty between the civil servant and the state.

When it comes to public international law, the public/private divide again becomes important in the consideration of employment disputes. It is generally accepted that as a matter of customary international law state immunity claims can be restricted in the case of public employees claiming under private law. In this instance it is considered that the state party is acting as any other private party to an employment relationship and hence should not be able to take advantage of public rules of jurisdictional exclusion.<sup>8</sup> However, as in the case for access to Article 6 claims, the restrictions on state immunity are limited by certain functional and also jurisdictional criteria. Under the UN Convention on Jurisdictional Immunities of States and their Property 2004, which sets out the rules of public international law relating to state immunity, immunity from jurisdiction is restricted in employment claims under Article 11. That immunity is reinstated for functional reasons, namely where the claimant is involved in sovereign activities (Article 11(2)(a)) or for reasons of jurisdiction, namely that the claimant is not a national of the employer state (Article 11(2)(e)). It is also reinstated where the dispute concerns the recruitment, renewal or reinstatement of the individual (Article 11(2)(c)), as it is argued that the state must have control over these matters for reasons of public security.<sup>9</sup>

It appears then that at every level, the public/private divide is an important consideration in which rights state employees have access to, and in which courts claims can be brought. The next section considers how this divide has been interpreted in immunity claims at the level of the ECHR prior to 2016. Section 4 moves to consider more recent developments in the interpretation of the immunity doctrine in relation to the employment plea in the ECtHR. Section 5 investigates some of the implications of these cases for the relationship of the immunity plea and state immunity going forward.

### 3 The interpretation of the employment plea and immunity in the ECHR

The ECtHR first considered the relationship between the employment plea and state immunity in the case of *Fogarty*.<sup>10</sup> This case concerned an employee of the United States embassy in London. Her position at the embassy was unfairly terminated and she successfully gained compensation for sex discrimination. She then applied for a further position at the embassy and her application was rejected. She claimed sex discrimination in the UK courts. The United States invoked state immunity in relation to this claim, which was subsequently challenged by the claimant under Article 6 ECHR. The ECtHR discussed the nature of the Article 6 right. The Court found that the right to a fair trial under Article 6 was not absolute and that it could be subject to limitations. The question was whether the limitation on Article 6 imposed

<sup>8</sup>Garnett [1], p. 644.

<sup>9</sup>Garnett [2], p. 786.

<sup>10</sup>*Fogarty v. United Kingdom* (2002), no. 37112/97, 34 EHRR 12.

on the claimant in the form of state immunity met the conditions of proportionality; namely whether the state immunity limitation was a proportionate means of meeting a legitimate aim.

In the *Fogarty* case the question of whether state immunity represented a legitimate aim was dispensed with fairly swiftly. The ECtHR held that the aim of state immunity in promoting comity and good relations between states was legitimate. The more vexed question was whether state immunity was a proportionate means of meeting a legitimate aim in this case. This involved determining the state of public international law at that time, and its relationship to the law of the UK. At the time, the provisions on state immunity in the UK represented the absolute model of immunity: immunity applied in respect of all consular or embassy employment. The Court found that there was a move at international level towards a more restrictive immunity approach in employment matters, particularly in relation to administrative or low-level embassy positions. However, there was still sufficient variation in state practice at international level to negate the argument that restrictive immunity was a matter of customary international law. The UK's absolute immunity position was therefore justified. Moreover, there was no indication that there was any move at international level towards the relaxation of immunity rules in relation to disputes concerning recruitment or reinstatement. In these cases international law still required that state immunity could be imposed in order to protect the sensitive and confidential nature of the issues relating to the diplomatic and organisational policy of a foreign state. Therefore, the imposition of state immunity in this case met the conditions of proportionality.

This case was concerning, particularly as it suggested that absolute immunity was justified in relation to employment cases. This implied that embassy employees would have no means of challenging state immunity in respect of any of their employment claims.<sup>11</sup> However, following this case, international state immunity rules were codified in the form of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNJISP). These rules recognised an exception to state immunity 'in a proceeding which relates to a contract of employment' for work performed in the territory of the forum. Moreover, in Article 11(2)(a) UNJISP it was stated that immunity would only apply where the employee has been recruited to perform particular functions in the exercise of governmental authority. This suggested that lower level administrative and technical staff would still be able to challenge immunity on the basis that they were not sufficiently involved in the 'exercise' of governmental authority. Indeed, this interpretation is consistent with the approach taken by the chairman of the ILC Working Group who drafted the finally accepted wording of this Article. The result was potentially transformative as it suggested a move towards a customary position which accepted a more nuanced reading of the application of immunity in relation to embassy staff.

Indeed, the next cases which arose in the ECtHR confirmed this point, and upheld the challenges brought by embassy staff against the imposition of state immunity in respect of their employment claims. In the case of *Cudak*<sup>12</sup> the ECtHR referred to

<sup>11</sup>Garnett [2], p. 787.

<sup>12</sup>Cudak v. Lithuania (2010), no 15869/02, 51 EHRR 15.

Article 11 UNJISP, and suggested that this provision was representative of an ‘emerging trend of the legislative and treaty practice of a growing number of states’.<sup>13</sup> As a result, the restrictive immunity position represented in Article 11 could be elevated to the position of customary international law, and hence would apply to all states even where that state had not ratified the Convention. This was important in the *Cudak* case as the claim concerned state immunity invoked by Poland in the Lithuanian courts in respect of claims of unfair dismissal. Although Lithuania had not ratified the Convention, the Court found that the provision of Article 11 would still apply, particularly as Lithuania had not specifically objected to the provision. This position allowed the Court to conclude that the application of state immunity in this case was not proportionate. It found that none of the exceptions set out in Article 11, which would have restored immunity to Poland, applied in the present case. In particular, the Court found that the case involved a non-national of the employer state, and did not involve claims relating to recruitment renewal or reinstatement. Furthermore, it found that the embassy employee did not perform any functions closely related to the exercise of governmental authority and hence fell outside Article 11(2)(e). Interestingly, the Court suggested that in relation to administrative and technical staff there was a presumption that immunity would not apply, a presumption which could then be rebutted. The responsibility for that rebuttal lay with the employer state (or the Member State in an Article 6 case at the ECtHR).

Further cases followed this trend. For example, in the case of *Sabeh-el-Leih*,<sup>14</sup> the ECtHR considered the immunity response of the Kuwaiti government in respect of employment claims made by an employee of the Kuwaiti embassy in Paris. It found that the UNJISP applied to the case, and that none of the exceptions to Article 11 were relevant on the facts. The Court found that the claimant was not a diplomatic or consular agent, and did not carry out any functions in the exercise of governmental authority. Furthermore, the case concerned unfair dismissal and so did not fall under the exception under Article 11(2)d UNJISP which reinstated immunity for disputes concerning recruitment renewal or reinstatement. As a result, the application of state immunity in this case was a disproportionate response by the French courts and a breach of Article 6 ECHR. The case of *Wallishauser*<sup>15</sup> also followed *Sabeh-el-Leih* in finding that the foreign State employer could not rely on immunity. The Court found that the embassy employee was not performing duties in the exercise of governmental authority and so his employment claims should be heard.

These cases produced favourable outcomes for the employees involved, but they also appeared to represent a positive development in the law more generally. First, they suggested a more in-depth factual analysis was necessary in order to decide whether the assumptions relating to the public/private divide were accurate in any particular case. For those employees who were carrying out ‘private’ functions not linked to the exercise of governmental authority, there was no reason for the state to be able to claim immunity in respect of the enforcement of their employment rights. This makes sense in the context of the embassy acting as any other private

<sup>13</sup>Ibid., para. 66.

<sup>14</sup>*Sabeh-el-Leih v. France* (2012), no. 34869/05, 54 EHRR 14.

<sup>15</sup>*Wallishauser v. Austria*, no. 156/04, 17 July 2012.

employer, a context upon which restrictive immunity relies. Second, elevating Article 11 UNJISP to the level of customary international law means that there is scope for employees to challenge the imposition of immunity in employment cases even where a particular state has not ratified the Convention, or adopts a less progressive position than that represented in the Convention.

#### 4 The *Naku* and *Radovic* cases

The trend set in the cases of *Cudak*, *Sabeh-el-Leih* and *Wallishauser* was followed in two further cases considered by the ECtHR in 2016. The first of these cases, *Radunovic v Montenegro*<sup>16</sup> concerned three employees of the US embassy in Montenegro. One of the embassy employees worked as a protocol/technical specialist, whereas the other two employees worked as security guards. All the employees were local staff. The employees claimed that they had been unfairly dismissed and brought their cases in the Montenegrin courts. Two of the employees requested both compensation and reinstatement, with the third claiming compensation only. The USA then raised state immunity to block the claims in the local courts, and the employees brought their claims to the ECtHR, citing a breach of Article 6 ECHR.

The ECtHR followed the approach in the former cases, in respect of determining the admissibility of the claims, and also in terms of determining the substantive rights. The ECtHR found that Article 11 UNJISP constituted a rule of customary international law, such that, subject to certain exceptions, immunity was not permitted in employment cases. It referred to the *Cudak* ruling in stating that it was immaterial that Montenegro had not ratified the UNSJISP. As Article 11 was a rule of customary international law, it applied irrespective of ratification. The Court then went on to discuss the nature of the claims and whether any of the exceptions under Article 11 applied so as to restore immunity. It found none of the exceptions applied. The employees were not employed to perform any particular duties in the exercise of governmental authority, they were not diplomatic or consular agents of the USA, nor were they nationals of that state. The fact that the claims concerned dismissal was not problematic, given that it had not been shown by the domestic courts or the Montenegrin government that such a dismissal would impinge on the security interests of the state. As a result, these claims would not fall under the exception in Article 11(2)(d) UNJISP. In respect of Article 11(2)(c), the ECtHR accepted that although immunity could be granted in the case of claims where the 'subject-matter' was reinstatement, this did not preclude claims for damages arising from wrongful dismissal. The employees' claims for compensation could therefore still be considered.

The analysis by the Court of the responsibilities of the employer state and the courts in relation to the determination of whether the employees carried out any activities 'in the exercise of governmental authority' is interesting. It set a rather high burden on the courts in this regard, citing the fact that the exceptions under Article 11(2)(a) UNJISP must be strictly interpreted.<sup>17</sup> The ECtHR stated that the domestic court at first instance (in relation to the first claimant) had 'considered only

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<sup>16</sup>*Radunovic v. Montenegro*, nos 45197/13, 53000/13 and 73404/13, 25 October 2016.

<sup>17</sup>*Ibid.*, para. 80.

in general that working for embassies might be sensitive or of a confidential nature' and had not examined whether the functions carried out by that employee involved sensitive or confidential issues in practice. This meant that the domestic court had made its determination 'without giving relevant or sufficient reasons' and in doing so had failed to meet the level of proportionality required under Article 6 ECHR.<sup>18</sup> The suggestion is that even where the 'facts' of the case indicate that functions of an employee could involve an exercise of governmental authority there will be no determination in favour of immunity if the Court is not specifically addressed on this point.

This position was developed even further in the case of *Naku*.<sup>19</sup> The case concerned a Lithuanian national employed at the Swedish embassy in Vilnius. She began as a receptionist and translator and was later promoted to be cultural, information and press officer. She was dismissed from her post on the ground of misconduct, and she brought a case of unlawful dismissal in the local courts under Lithuanian law. The Kingdom of Sweden claimed immunity from jurisdiction and the Lithuanian Court of Appeal upheld that immunity following the approach adopted in the domestic court of first instance. The Court of Appeal acknowledged the doctrine of limited immunity in respect of employment contracts, but only where those contracts constituted an 'employment legal relationship' rather than a 'civil service legal relationship'. It found that the title of the claimant's job 'shows that the duties assigned to the applicant helped the Kingdom of Sweden to a certain extent to execute its sovereign functions'.<sup>20</sup> As a result, *Naku* held a civil service contract which was therefore regulated by public law. She had not provided any evidence to the court that her job functions were not related to the implementation of Sweden's sovereignty, and so immunity could be reinstated.

The decision was appealed to the Supreme Court of Lithuania. The Supreme Court noted that the public/private divide in relation to the determination of contractual arrangements was a matter for each state, and there were no international obligatory norms which governed this matter. The Supreme Court agreed with the Court of Appeal that in this instance the claimant was involved in public functions and therefore held a civil service contract governed by public law. Indeed, the assessment of the court was that according to the case law of Lithuania 'everyone who works in a diplomatic representation of a foreign State [...] in one way or another contribute[s] to the performance of the sovereign rights of a represented State, carrying out public-law functions, and therefore they are considered to be [employed] in the civil service of that State'.<sup>21</sup> As the claimant was a member of the administrative-technical staff of the Lithuanian contract she had a civil service contract governed by public law. As a result, the Kingdom of Sweden was entitled to invoke the doctrine of immunity such that the Lithuanian courts have no jurisdiction to decide the dispute.

The claim was then appealed to the ECtHR on the basis of a breach of Article 6 ECHR. The ECtHR found that the claim of immunity constituted a legitimate aim

<sup>18</sup>Ibid., para. 80.

<sup>19</sup>*Naku v. Lithuania and Sweden*, no. 26126/07, 8 November 2016.

<sup>20</sup>Ibid., para. 34.

<sup>21</sup>Ibid., para. 38.



which could be used to limit the right to a fair trial, provided it also met the conditions of proportionality. The Court noted the international trend towards limited state immunity in employment-related disputes, a trend which formed the context of Article 11 UNJISP. Accordingly, the exceptions under Article 11 had to be interpreted restrictively. The Court noted that the claimant was not a Swedish national, nor was she a diplomatic or consular agent. Although she claimed reinstatement, the essence of her claim was a breach of contractual rights and so did not fall under Article 11(2)(d) UNJISP. In relation to the claimant's functions, the Court admitted that the claimant was 'involved in the embassy's activities' in the field of culture and information.<sup>22</sup> However, it also noted that she worked 'in consultation' with Swedish diplomatic staff and so did not have sole responsibility for any exercise of governmental authority.<sup>23</sup> In any event, the ECtHR argued that the Lithuanian courts failed to make a proper determination of whether or not the claimant performed particular functions in the exercise of governmental authority for the purposes of the Article 11(2)(d) UNJISP. Indeed, the Lithuanian court's assumption that everyone working at a diplomatic representation was involved in meeting the sovereign goals of the represented State meant that those courts 'impaired the very essence of the applicant's right to a fair trial'.<sup>24</sup> There had thus been a violation of Article 6 ECHR on the part of Lithuania.

The *Naku* decision was subject to extensive consideration and critique in two concurring judgments. There were a number of issues raised, some more specific to the case and others of more general application. The first concern was that the ECtHR did not make clear the responsibilities of the Lithuanian courts in giving 'relevant and sufficient reasons' which would justify the exclusion of the claimant from the bounds of Article 6 ECHR. Unlike in previous cases, the ECtHR did not consider the application of Article 11 UNJISP in detail in relation to the claimant's case. In particular, it did not consider how Article 11(2)(a) should be applied in this case to determine how the claimant was acting in the exercise of governmental authority. Judge Motoc suggested that the ECtHR was not willing to enter this debate in this case precisely because there were significant indications from the domestic proceedings that the claimant *did* come within the bounds of Article 11(2)(a) UNJISP. For example, during the domestic proceedings, the applicant presented herself as 'Head of Culture and Information Projects', and also the Swedish government noted that the applicant had the power to decide, unsupervised, how financial support for cultural and related proposals should be granted. This suggested a level of involvement in the confidential security aspects of state action to justify the reinstatement of immunity for Sweden under Article 11(2)(a) UNJISP.<sup>25</sup>

The second set of criticisms concerned the role of the Court in applying Article 11 as 'customary international law'. Judge Motoc suggested that the Court was too quick to accept that international law applied in this case without assessing whether such application was in fact appropriate. He suggested that the Court's approach to Article 11 and the application of the rules on state immunity was out of line with practice

<sup>22</sup>Ibid., para. 93.

<sup>23</sup>Ibid., para. 93.

<sup>24</sup>Ibid., para. 95.

<sup>25</sup>Ibid., Section III, Concurring Opinion of Judge Motoc.

in other jurisdictions, where there was more reluctance to consider these rules of general application. Indeed, the fact that the domestic Courts in the case adopted an approach to state immunity which did not graft clearly onto the Article 11 provisions was problematic as this brought into question the customary nature of these rules.<sup>26</sup> Thirdly, Judge Motoc questioned the implications of the case for the relationship between human rights and employment law more generally. He suggested that the position adopted by the ECtHR in relation to the customary nature of the rules under Article 11 UNJISP was an example of the trend of the ‘growing interference by the Strasbourg Court in the regulation of employment disputes’. This gave insufficient deference to the ‘flexibility of the contract to fairly distribute the contradictory interests of all parties, and the role of internal dispute resolution to resolve such disputes’.<sup>27</sup> The suggestion of this latter argument is that these kind of employment related issues are not human rights arguments at all: they are much better dealt with as claims related to employment rights under European Union legislation and their applicability decided according to the provisions of the Charter of Fundamental Rights and Freedoms (in particular Article 47 which covers the right to a fair trial). This particular suggestion will be dealt with further in Sect. 5.

Finally, there appeared to be considerable disagreement and confusion over the application of private international law to this dispute. Judge Motoc criticised the ECtHR’s position on the application of Article 35(1) ECHR, and suggested that this position was out of line with EU rules on private international law.<sup>28</sup> Article 35(1) requires an applicant to exhaust domestic remedies in the employer state before bringing an Article 6 claim. Lithuania claimed that the applicant had not fulfilled the conditions of Article 35(1) as she had not sought to bring claims in Sweden. The ECtHR rejected this position on the grounds that the exhaustion of remedies only applies in the respondent state. Furthermore, the applicant was a Lithuanian national with a contract determined by Lithuanian law. Whilst in theory the applicant could have brought a claim in Sweden, this path was ‘not a particularly realistic one in the circumstances of the case’.<sup>29</sup> Naku’s claim was therefore admissible. Judge Motoc argued that practicality was not a relevant consideration in terms of the application of Article 35(1) ECHR stating that ‘[e]ven if the application of the foreign law is difficult, time-consuming and costly, it does not make this remedy theoretical and illusory. It is even more difficult to agree with this assessment in the present case in the context of Council Regulation (EC) No. 44/2001 [Brussels I Regulation].’<sup>30</sup>

Although not explicitly stated, Judge Motoc appears to rely on the position under private international law that the domicile of the employer is a permissible forum under which to bring a claim.<sup>31</sup> The implication is that in this case Sweden represents

<sup>26</sup>Ibid., Section II, Concurring Opinion of Judge Motoc.

<sup>27</sup>Ibid., Section I, Concurring Opinion of Judge Motoc.

<sup>28</sup>Ibid., Section IV, Concurring Opinion of Judge Motoc.

<sup>29</sup>Ibid., para. 82.

<sup>30</sup>Ibid., Section IV, Concurring Opinion of Judge Motoc.

<sup>31</sup>Article 21(1)(a) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ibis Regulation) [2012] OJ L 351/1.

a valid forum under which possible remedies have to be exhausted before a human rights claim can be brought under Article 6. However, in fact, the Brussels I Regulation also gives a choice to the employee to sue the employer in the employee's domicile in this situation.<sup>32</sup> This reflects the ethos of the rules under EU private international law relating to employment claims. It is recognised in the preamble to these rules that employees should be given special protection, given that they are the weaker party to the employment relationship, with more limited resources.<sup>33</sup> They should therefore have the greater choice in deciding on the forum in which to bring disputes and should also have available a greater range of forum depending on the practicalities of bringing claims. It therefore appears that the Court's assessment is perfectly in line with the rules on private international law in this regard: the practicalities of bringing a claim do impact on the essence of the right. The Court's judgment that it is unreasonable to expect an employee to attempt to sue his or her foreign state employer in the courts of the employer's domicile before being able to bring a claim under Article 6 ECHR is therefore correct.<sup>34</sup>

## 5 Subsidiarity, the public/private divide and the employment plea

The concerns about the encroachment of employment law into the field of human rights appear unfounded given the particularity of the fact pattern which gives rise to these disputes. What it does demonstrate is the unworkability and unsuitability of the functional determination of contractual terms as the basis for determining state immunity. In terms of the unsuitability in legal terms, a functional connection suggests that there is something special or extra-contractual in the functions that an embassy employee carries out. These functions make a private contractual relationship into a public relationship characterised by public law. This is an entirely artificial position and one which appears to be negated by the 'private' nature of the contract in all other senses, and by the increasing contracting out of government and security functions to private bodies. For example, in the *Naku* case, the Court accepted that 'Sweden could be likened to a private individual against whom proceedings have been instigated'.<sup>35</sup> It was also noted that the Public Employment Act (1994: 260) of the Kingdom of Sweden does not apply to employees who are taken on locally by the Swedish State abroad and who are not nationals. Therefore as a matter of fact the applicant's contract was not of a public law nature and was otherwise regulated under private law.

Furthermore, the Court was unwilling to consider the applicant's take on her duties. Judge Kuris noted that this was 'right' because litigants are free to employ different strategies in court proceedings'.<sup>36</sup> Therefore there is reliance on the employer to determine the 'publicness' of the duties carried out by the individual, the significance of which is not explained in advance. This goes to the very essence of the inequalities

<sup>32</sup>Article 21(1)(b)(i) Brussels Ibis Regulation.

<sup>33</sup>Recital 18 Brussels Ibis Regulation.

<sup>34</sup>Garnett [3], p. 596.

<sup>35</sup>*Naku* (supra, fn. 19), para. 78.

<sup>36</sup>*Ibid.*, para. 3, concurring judgment of Judge Kuris.

between the parties and demonstrates an area in which it is necessary for the Court to intervene, or for a different legal solution to be found. A potential legal solution could rest in the removal of Article 11(2)(a) UNJISP. It might be suggested that the risks involved in this abolition are extremely small, given the small number of staff which it would potentially involve, and the fact that Article 11 only applies to staff who are not diplomatic or consular agents and who are not nationals of the employer state. In the rare case where the employer state deems it necessary to assert particular security features, then these could be dealt with contractually by means of confidentiality clauses. This would mirror the practice in the private sector, and reflect more closely the position that employment contracts between embassies and foreign nationals are deemed private as a matter of customary law. It would also mean that the security features of a particular employment contract are more open and transparent to both parties from the outset of the relationship. Any variation of these features would then have to be made by applying contractual principles involving notification and consent of the employee party. From the point of view of the ECtHR, this abolition would mean that the Court would not be tasked with delving into the minutiae of the contractual relations between the parties, in order to decide whether particular functions could be considered of a particularly ‘public’ nature. The evidence from the case law examined in this article is that this is a task which is fraught with difficulty.

Finally it is worth considering further the suggestion made by Judge Motoc that the Charter should have featured in the assessment of the ECtHR in this case. Certainly, the Charter may have an impact on the operation of state immunity in employment cases. This has been demonstrated at the national level by the case of *Benkharbouche*.<sup>37</sup> This case concerned a set of employment claims made by embassy employees against Sudan and Libya respectively. State immunity was raised against the claims. The embassy employees challenged this immunity and in particular argued that the provisions of the State Immunity Act 1978 which allowed this immunity to stand were in breach of their right to a fair trial under Article 47 of the Charter. This position was accepted by the Supreme Court, with significant consequences. In the UK, EU law rules have ‘direct effect’ in domestic law. This means that in respect of any employment claims brought within the scope of EU law, the offending provisions of the SIA had to be set aside. This represents a stronger remedy for the claimants than the ‘declaration of incompatibility’ which the Court could make in relation to a finding of a breach of Article 6 ECHR. Judge Motoc suggested that the ECtHR could refer the matter back to domestic court on the basis of the breach of Article 47 of the Charter by domestic legislation (the Lithuanian Immunities Act). This would avoid the awkwardness of adding Sweden as party to the dispute.

Certainly pleading Article 47 of the Charter does represent an alternative strategy for claimants, particularly in domestic court proceedings. However, the applicability of Article 47 is not settled, and the ‘horizontal’ effect of Article 47 remains the subject of dispute. As argued by Sanger, although it is accepted that Article 47 has indirect effect, such that domestic law should be interpreted in a way which is compatible with the right to a fair trial, it is ‘far from clear that the right of access to a court is generally capable of being enforced against a private party’.<sup>38</sup> Furthermore, for UK

<sup>37</sup> *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

<sup>38</sup> Sanger [6], p. 3.

claimants it appears that post-Brexit the Charter-based remedy in *Benkharbouche* will no longer apply. This is because in the EU (Withdrawal) Act 2018, which came into force in June of this year, it is clearly stated at section 5(4) that the Charter 'is not part of domestic law on or after exit day'. Any fundamental rights or principles which exist will do so 'irrespective of the Charter.' For UK claimants therefore it is essential that the recourse to Article 6 ECHR is maintained, in order for some legal certainty to remain for embassy employees seeking to challenge state immunity.

## 6 Conclusions

The adjudication of disputes concerning employment and state immunity is an extremely complex exercise. These disputes straddle the public/private divide, both in functional and legal terms. In legal terms, issues of public and private international law are raised and have to be reconciled with each other. In functional terms, the 'publicness' of an employment contract and the legal dispute respectively determine the applicability of the legal claim and how that claim is adjudicated. However, this 'public' element is very difficult to determine and can be differently interpreted according to the application of different legal rules, or different practical understandings of the nature of the public/private divide. Moreover, there is considerable tension over the appropriate forum to decide the public/private nature of an employment contract. Whilst some adopt the position that this is a matter for national law, the ECtHR has displayed a greater willingness to get involved in these questions in a number of recent cases.

The outcome for claimants of the action of the ECtHR has been largely positive. Embassy employees can now challenge the application of state immunity in employment cases on the basis of a breach of Article 6 ECHR even where national governments have not ratified the legal rules which make the challenge possible. The restrictive approach to immunity is now the accepted legal position, with exceptions to this approach understood as having to be strictly interpreted. For example, in relation to the exception relating to the 'public' functions of the employee, a domestic court will not be able to rely on the position that the very fact of being employed at an embassy implicates the employee in the exercise of governmental authority. The domestic court must show expressly and in detail how the claimant's functions mean that they are involved in the exercise of governmental authority in order for the immunity claim to be considered proportionate in the context of Article 6 ECHR.

However, the most recent case of *Naku* demonstrates that the tensions involved in the adjudication of these disputes have not disappeared. The judgment of the ECtHR was criticised in particular by two judges of the Court. In these comments, it was suggested that the Court may have gone too far in the protection of embassy employees under Article 6 ECHR. The concern was raised about the problems for legal certainty and subsidiarity of the Court getting too involved in the determination of the public functions of embassy employees. There was also the concern of the peculiarly European reading of provisions of international law. Ultimately these concerns did not lead to these judges to dissent from the majority decision. They do demonstrate however the very great complexities involved in these kinds of cases.

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