On 18 October 2017, the UK Supreme Court (the **UK Supreme Court**) handed down a judgment (**Benkharbouche v. Secretary of State and Libya v. Janah**) in which it considered the scope of State immunity and held that it could be limited by human rights legislation in the context of the employment of domestic staff.

The cases concerned two domestic workers (the **Applicants**) hired by foreign embassies in London. They held Moroccan citizenship and were employed by the embassies of Sudan and Libya. They were dismissed from their employment after a number of years in service, and brought proceedings before the Employment Tribunal, claiming unfair dismissal and unpaid wages, amongst others. Although their claim was initially dismissed on the basis that Sudan and Libya enjoyed State immunity by virtue of the State Immunity Act 1978 (the **Act**), the case was then appealed as far as the UK Supreme Court, where the Applicants argued that the Act unjustifiably barred their right of access to a court as provided for in Article 6
of the European Convention on Human Rights (ECHR).

Sudan and Libya argued that the Act conferred on foreign States immunity from the jurisdiction of the UK courts in relation to claims based on the foreign State’s employment of a claimant who is (i) neither a UK national nor UK resident (Section 4(2)(b) of the Act) or (ii) is employed by the foreign State’s diplomatic mission (Section 16(1)(a) of the Act).

Note that neither Sudan nor Libya appeared before the UK Supreme Court. As a result, the UK Secretary of State for Foreign and Commonwealth Affairs was the lead defendant.

**Doctrine of State immunity**

In its judgment of 18 October 2017, the UK Supreme Court held that the doctrine of State immunity was not absolute, and that there was an international consensus in favour of a restrictive interpretation (China being the only notable exception to this). In particular, the UK Supreme Court noted that the doctrine of State immunity flowed from the "equality of sovereigns" and therefore applied to instances of the exercise of sovereignty and State power, but did not apply to acts which were of a private or civil nature.

Referring to case-law from the United States, the European Union and the ECHR, the UK Supreme Court found that it was thus possible but unlikely for a State to claim immunity even against an employment claim, unless it "arises out of an inherently sovereign or governmental act". In this context, the Vienna Convention on Diplomatic Relations 1961 offers a useful categorisation of embassy staff, namely diplomatic agents, administrative and technical staff, and staff in domestic service. While some administrative and technical staff may support diplomatic staff in exercising State or governmental functions (and may thus enjoy diplomatic immunity), the UK Supreme Court noted that employing domestic
staff “is an act of a private law character such as anyone with the necessary resources might do” and would not normally engage State immunity.

**Incompatibility of UK law**

In its judgment, the UK Supreme Court found that, under Section 4(2)(b) of the Act, the question of whether a State enjoys immunity depends on the nationality or residence of the claimant at the date of entering into a contract of employment. Although the UK Supreme Court recognised that some other States followed a similar approach in order to bring limitations to the doctrine of State immunity, it found that this approach had no basis in customary international law. Since only the distinction between acts of a sovereign nature (for which a State enjoys immunity) and acts of a private nature (for which a State does not enjoy immunity) is used as a basis for limiting State immunity in customary international law, the UK Supreme Court thus held that Section 4(2)(b) of the Act improperly denied the Applicants’ access to the courts in respect of employment matters.

With respect to Section 16(1)(a) of the Act (which extends State immunity to all employees of a diplomatic mission), the UK Supreme Court held that the immunity was not absolute. It noted in particular that while Article 7 of the Vienna Convention on Diplomatic Relations 1961 precludes a court from ordering the employment or reinstatement of a specific person, it did not preclude an award of monetary damages for breach of employment law.

Having established that customary international law did not confer immunity on Sudan and Libya in respect of their employees’ claims, the UK Supreme Court held that the Employment Tribunal did have jurisdiction to hear the Applicants’ claims against Sudan and Libya. The fact that the Employment Tribunal did not exercise its jurisdiction meant that the Applicants’ right of access to justice under Article...
6 ECHR was breached. Consequently, the UK Supreme Court held that sections 4(2)(b) and 16(1)(a) of the Act were incompatible with Article 6 ECHR and the corresponding provisions of the EU Charter of Fundamental Rights.

The full judgment is available here.