

2023 No. 112

INTERNATIONAL IMMUNITIES AND PRIVILEGES

The State Immunity Act 1978 (Remedial) Order 2023

Made - - - - *2nd February 2023*

Coming into force - - *23rd February 2023*

The immunity of a state in proceedings relating to a contract of employment between a state and a person who at the time of the contract is neither a national of the United Kingdom nor resident here, as well as in proceedings concerning the employment of members of a diplomatic mission (including its administrative, technical and domestic staff) has been declared(a) under section 4 of the Human Rights Act 1998(b) to be incompatible with a Convention right(c).

The Secretary of State considers that there are compelling reasons for proceeding by way of remedial order(d) to make such amendments to the State Immunity Act 1978(e) as she considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State, in exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a), (1)(b) and (3) of Schedule 2 to, the Human Rights Act 1998, makes the following Order:

Citation, commencement, extent and application

- 1.—(1) This Order may be cited as the State Immunity Act 1978 (Remedial) Order 2023 and comes into force 21 days after the day on which this Order is made.
- (2) This Order extends to England and Wales, Scotland and Northern Ireland.
- (3) This Order applies in relation to proceedings in respect of a cause of action that arose on or after 18 October 2017 (whether those proceedings were initiated before, on or after the day on which this Order is made).

(a) By the Supreme Court in the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

(b) 1998 c. 42.

(c) See section 1(1) of the Human Rights Act 1998 for the definition of “the Convention rights” and section 21(1) of that Act for the definition of “the Convention”.

(d) See section 21(1) of the Human Rights Act 1998 for the definition of “remedial order”.

(e) 1978 c. 33.

Amendments of the State Immunity Act 1978

2. The State Immunity Act 1978 is amended as follows.

3. In section 4 (State not immune as respects proceedings relating to certain contracts of employment)—

- (a) in subsection (2) (exceptions) in paragraph (b) at the beginning insert “the State concerned is a party to the European Convention on State Immunity^(a) and”, and
- (b) omit subsection (6).

4.—(1) Section 13 (other procedural privileges) is amended as follows.

(2) After subsection (2) insert—

“(2A) Subject to subsection (3) below—

- (a) where, on a complaint under section 111 of the Employment Rights Act 1996^(b), an employment tribunal finds that a member of the staff of a diplomatic mission or a member of the consular staff of a consular post was unfairly dismissed, relief shall not be given against the State concerned by way of an order under section 113 of that Act; and
- (b) where, on a complaint under Article 145 of the Employment Rights (Northern Ireland) Order 1996^(c), an industrial tribunal finds that a member of the staff of a diplomatic mission or a member of the consular staff of a consular post was unfairly dismissed, relief shall not be given against the State concerned by way of an order under Article 147 of that Order.”.

(3) In subsection (3) for “Subsection (2) above does” substitute “Subsections (2) and (2A) above do”.

(4) After subsection (6) insert—

“(7) In subsection (2A) above—

“member of the consular staff of a consular post” is to be construed in accordance with Article 1(h) of the Vienna Convention on Consular Relations done at Vienna on 24 April 1963; and

“member of the staff of a diplomatic mission” is to be construed in accordance with Article 1(c) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961.”.

5.—(1) Section 16 (excluded matters) is amended as follows.

(2) In subsection (1) for paragraph (a) substitute—

“(a) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a diplomatic agent or consular officer;

(aa) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a member of a diplomatic mission (other than a diplomatic agent) or as a member of a consular post (other than a consular officer) and either—

(i) the State entered into the contract in the exercise of sovereign authority; or

(ii) the State engaged in the conduct complained of in the exercise of sovereign authority;”.

(3) After subsection (1) insert—

“(1A) In subsection (1)—

(a) Cm. 7742.

(b) 1996 c. 18.

(c) S.I. 1996/1919 (N.I. 16).

“consular officer” is to be construed in accordance with Article 1(d) of the Vienna Convention on Consular Relations done at Vienna on 24 April 1963;

“diplomatic agent” is to be construed in accordance with Article 1(e) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961;

“member of a consular post” is to be construed in accordance with Article 1(g) of the Vienna Convention on Consular Relations done at Vienna on 24 April 1963;

“member of a diplomatic mission” is to be construed in accordance with Article 1(b) of the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961.”.

6. In section 17 (interpretation of Part 1) after subsection (4) insert—

“(4A) In sections 4 and 16(1) above references to proceedings relating to a contract of employment include references to proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.”.

2nd February 2023

David Rutley
Parliamentary Under Secretary of State
Foreign, Commonwealth and Development Office

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the State Immunity Act 1978 (c. 33) (the “1978 Act”) to remove the incompatibility, identified in sections 4(2)(b) and 16(1)(a) of that Act, with a Convention right.

Section 4(2)(b) of the 1978 Act provides that States are immune from UK jurisdiction in relation to employment claims brought by individuals who were neither a UK national nor resident in the United Kingdom at the time the contract was made. Section 16(1)(a) of the 1978 Act provides that States are immune from UK jurisdiction in relation to employment claims brought by the staff of diplomatic and consular missions.

In the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, the Supreme Court affirmed the Court of Appeal’s finding that sections 4(2)(b) and 16(1)(a) of the 1978 Act were incompatible with Article 6 and Article 14 of the European Convention on Human Rights because they prevented the claimants from bringing their employment claims and those sections of the 1978 Act were not consistent with the UK’s international law obligations.

In order to remedy the incompatibility, Article 3 amends section 4(2)(b) of the 1978 Act by restricting the immunity of States in relation to employment claims brought by individuals who were neither a UK national nor resident in the United Kingdom at the time the contract was made to cases involving a State that is party to the European Convention on State Immunity, as is required by the UK’s obligations as a party to that Convention.

Article 5 amends section 16(1) of the 1978 Act by limiting the immunity of States in relation to employment claims brought by the staff of diplomatic and consular missions to the immunities required under customary international law. These are claims involving the contracts of employment of an individual as a diplomatic agent or consular officer, or claims involving the contracts of employment of other members of a diplomatic mission or consular post where the State entered into the contract in the exercise of its sovereign authority or where the conduct complained of was undertaken in the exercise of sovereign authority.

Article 4 amends section 13 to address the consequence of restricting the immunity provided in section 16(1) of the 1978 Act on the UK's obligations under Article 7 of the Vienna Convention of Diplomatic Relations, which provides that a State may "freely appoint the members of the Staff of the mission", and the obligation in Article 19 of the Vienna Convention on Consular Relations, which provides that a State may "freely appoint the members of the consular staff". The current version of section 16(1)(a) of the 1978 Act gives effect to these international obligations, as it provides that a State is immune in all proceedings concerning the employment of the members of a diplomatic mission or consular post, so that a court cannot enforce a contract of employment or make a reinstatement order in favour of a member of a mission or consular post. The amendment to section 16(1)(a) of the 1978 Act in Article 5 restricts the immunity in that provision (as described above), and the amendments to section 13 ensure that a court hearing proceedings that it would not have been able to hear under the unamended section 16(1)(a) is prevented from making an order that would infringe on a State's right to freely appoint members of its diplomatic or consular staff.

The amendments made in this Order will apply in relation to proceedings in respect of a cause of action that arose on or after the date of the Supreme Court judgment in the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*, 18 October 2017.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

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