

# STATE IMMUNITY AND THE RIGHT OF ACCESS TO A COURT UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS

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## I. INTRODUCTION

As interpreted by the European Court of Human Rights (ECtHR), the right of access to a court guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR) means that States cannot lawfully grant immunity beyond what is strictly required by international law.<sup>2</sup> The right is not an exception to the law of immunity, but a limitation on domestic courts' discretion on the exercise of jurisdiction. Article 47(2) of the EU Charter of Fundamental Rights (the Charter), which is applicable to EU Member States when they are implementing or giving effect to EU law, contains a right of access to a court identical to that of Article 6(1) ECHR. Consequently, claimants seeking to enforce rights derived from the EU before UK courts can now rely on Article 47(2) of the Charter to require UK courts to examine whether the grant of immunity under the State Immunity Act 1998 (SIA) or the common law gives effect to an international obligation to grant immunity, and if not, to require the domestic grant of immunity to be set aside.<sup>3</sup> The first immunity case to rely on the right of access to a court under the EU Charter is *Benkharbouche v Sudan*, which involved employment claims by domestic service staff against the London embassies of Sudan and Libya respectively.<sup>4</sup> The English Court of Appeal ruled that, as the scope of the provisions of the SIA granting immunity to these States was not strictly required by international law, they conflicted with the complainants' right of access to a court and, pursuant to the rule that EU law must be given priority over inconsistent domestic law, cannot be applied. The decision has raised a few eyebrows because it is

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<sup>2</sup> See, most recently, *Jones v United Kingdom* (2014) 59 EHRR 1, paras 188–189.

<sup>3</sup> Pursuant to section 2(4) European Communities Act 1972.

<sup>4</sup> *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33.

the first time that an English court has applied the EU Charter to set aside provisions of an Act of Parliament in a dispute between private parties.<sup>5</sup>

This article discusses the right of access to a court under the EU Charter and the way in which it is given effect in UK law, before critically examining the application of the right in the *Benkharbouche* case. In particular, it considers the analysis of the Court of Appeal that suggests a grant of immunity means that a court has no jurisdiction to exercise such that the right of access to a court is not engaged, and whether such a right must have horizontal effect in order to be applicable in a case involving private parties. It argues that the Court's reasoning on these issues is erroneous. First, the right of access to a court is *always* engaged in immunity cases because immunity does not deprive the courts of jurisdiction *ab initio*. Second, the right of access to a court is always enforced against the *forum State*; it therefore has *indirect*—not horizontal—effect in a case between private parties: the Charter right is not being enforced by one private party against the other, but rather, against the State, the effect of which is to modify the scope of the SIA.

## II. THE 'RIGHT OF ACCESS TO A COURT' UNDER THE EU CHARTER

### A. *The EU Charter of Fundamental Rights in English Law*

The EU Charter of Fundamental Rights<sup>6</sup> *codifies* fundamental rights drawn from the European Convention on Human Rights (ECHR), the Community Social Charter 1989, the Council of Europe's Social Charter 1961, the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU),<sup>7</sup> and the constitutional traditions common to the EU Member States as general principles of Union law. The Charter is accompanied by a document entitled 'Charter Explanations', which was prepared under the authority of the Praesidium of the Convention that drafted the Charter and which provides additional guidance for

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<sup>5</sup> The foreign State is treated a private entity for the purpose of the employment claim. The Employment Appeals Tribunal reached the same conclusion as the Court of Appeal: [2014] 1 CMLR 40, and for comment A Sanger, 'The State Immunity Act and the Right of Access to a Court' (2014) 73(1) CLJ 1, (2014) 84 BYBIL 444–50.

<sup>6</sup> Final recast version of the Charter: OJ 2010 C/83/389 (hereinafter 'EU Charter').

<sup>7</sup> Preamble, EU Charter, *ibid*.

interpreting the Charter rights. The CJEU and Member State courts are required by EU law to consider the *Explanations* alongside the Charter provisions.<sup>8</sup>

Article 6(1) of the Treaty on European Union (TEU), as amended by the Treaty of Lisbon,<sup>9</sup> made the EU Charter part of the primary law of the EU by providing that it ‘shall have the same legal value as the Treaties’. The Charter rights are applicable to—that is, they bind—the institutions, bodies, offices and agencies of the EU, with due regard for the principle of subsidiarity, and the EU Member States when they are implementing Union law.<sup>10</sup> As the CJEU has explained: ‘[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter’.<sup>11</sup>

EU Charter rights are given effect in UK law in two ways. First, by incorporation of Article 6(1) TEU: when the Treaty of Lisbon came into force on 1 December 2009,<sup>12</sup> it amended Article 6(1) TEU, which was already included in the list of treaties in section 1(2) of the European Communities Act 1972 (EC Act) that are given direct legal effect within UK law.<sup>13</sup> As Article 6(1) TEU stipulates that the Charter has the same legal effect as the EU treaties, the result is that UK courts must now give legal effect to directly effective Charter rights<sup>14</sup> when applying or interpreting EU law in accordance with the provisions of section 2 of the EC Act. This includes circumstances in which courts are applying or interpreting UK legislation that seeks to *give effect* to EU rights or obligations. Crucially for immunity cases, in situations where the SIA conflicts with the right of access to a court under the Charter, section 2(4) of the EC Act would require UK courts to give priority to the Charter right and set aside conflicting provisions of the SIA.

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<sup>8</sup> Art 52(7) EU Charter, art 6(1) TEU.

<sup>9</sup> OJ 2007 C303/1 (entered into force 1 December 2009).

<sup>10</sup> Art 51(1) EU Charter.

<sup>11</sup> Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] STC 1905, para 21.

<sup>12</sup> The UK ratified the Treaty of Lisbon by enacting the European Union (Amendment) Act 2008, which amended section 1(2) of the European Communities Act 1972 to include the Treaty of Lisbon as one of the list of treaties that must be given effect in UK law.

<sup>13</sup> Section 2(1) EC Act stipulates that they ‘are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly’.

<sup>14</sup> It is not clear that all Charter rights have direct effect, or which rights have direct effect and which require further legislation before they can be applied by domestic courts. In *Association de Médiation Sociale* [2014] ECR I-000, the CJEU ruled ‘it is clear from the wording of art 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law’ (para 45). The Court did not clarify what it meant by fully effective, but it did distinguish art 21 of the EU Charter on the basis that it ‘is sufficient in itself to confer on individuals an individual right which they may invoke as such’.

Charter rights must also be given effect in UK law if they reflect or embody general principles of EU law; that is ‘unwritten principles extrapolated by the [Union] Court[s] from the laws of the Member States by a process similar to that of the development of the common law by the English courts’.<sup>15</sup> Examples include the principle of equality, the protection of fundamental rights, the protection of proportionality and the principle of equal treatment or non-discrimination. General principles have a ‘constitutional status’ within the EU:<sup>16</sup> the Union courts use the principles to assist in the interpretation of the EU treaties and to assess the validity of other Union acts. They are also binding on Member States.<sup>17</sup> In the controversial decision of *Mangold v Helm*,<sup>18</sup> the CJEU held that general principles of EU law are directly effective in domestic law, including in cases between private parties.<sup>19</sup> National courts must therefore ensure that domestic legislation giving effect to EU law is compatible with the general principles of EU law, which includes setting aside incompatible domestic law.<sup>20</sup> In the UK, the judicial power to do so is provided by section 2(1) of the EC Act, which stipulates that all directly effective EU law should be given legal effect in UK law, and section 2(4), which has been interpreted to mean that directly effective EU law takes priority over incompatible Acts of Parliament.<sup>21</sup>

Although the CJEU was accused of judicial activism in *Mangold*, and of applying a general principle ‘to the detriment of a private party’,<sup>22</sup> it nevertheless adopted the same reasoning in *Küçükdeveci*.<sup>23</sup> In that case, which was heard after the Charter became legally binding, the CJEU noted that the principle of equal treatment is now given expression in Article 21 of the Charter, but the Court did not explain whether Article 21 reflected a pre-existing general principle of EU law (not all Charter rights are derived from general principles of EU law), or whether the Treaty of Lisbon elevated all of the Charter rights to the status of general principles of EU

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<sup>15</sup> T Tridimas, *The General Principles of EU Law* (OUP 2006) 5.

<sup>16</sup> *ibid* 6.

<sup>17</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125.

<sup>18</sup> Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

<sup>19</sup> *ibid* para 74.

<sup>20</sup> *ibid* para 78.

<sup>21</sup> *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

<sup>22</sup> B de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in P Craig and G De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 339. See also A Dashwood, ‘From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?’ in C Barnard (ed), *Cambridge Yearbook of European Law*, vol 9 (2007) 8.

<sup>23</sup> Case C-555/07 *Küçükdeveci v Swedex GmbH* [2010] IRLR 346, para 20. See A Albors-Llorens, ‘Keeping Up Appearances: The Court of Justice and the Effects of EU Directives’ (2010) 69(3) CLJ 455.

law. In *Association de Mediation Sociale* ('AMS'),<sup>24</sup> the Grand Chamber of the CJEU did not address this question directly, but it did hold that the wording of Article 27 of the Charter, which stipulates that workers must be guaranteed information and consultation in good time 'in the cases and under the conditions provided for by Union law and national laws and practices', suggests that 'it must be given more specific expression in European Union or national law' before it can be 'fully effective', ie directly effective.<sup>25</sup> Consequently, Article 27 of the Charter could not be invoked in a dispute between a trade union and a non-profit association.<sup>26</sup> The Court expressly distinguished Article 27 from Article 21(1), considered in the *Küçükdeveci* case, on the basis that

the principle of non-discrimination on grounds of age at issue in [*Küçükdeveci*], laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.<sup>27</sup>

The decision in *AMS* therefore suggests that only *some* Charter rights are general principles of EU law directly effective in national legal systems. In determining which rights are general principles of the EU law, national courts will no doubt have to rely on the Charter *Explanations* and the jurisprudence of the CJEU.

In summary, under the terms of the EC Act, (1) the Charter—having the status of a EU treaty—is given direct effect within UK law, and (2) Charter rights, insofar as they reflect general principles of EU law, are directly effective as such. However, in both instances, the fundamental rights guaranteed by the EU Charter are only applicable when the UK is giving effect to EU rights or obligations.<sup>28</sup>

### *B. The Right of Access to a Court*

The Charter does not expressly set out a right of access to a court, but Article 47, which is based on Articles 6 and 13 of the ECHR, implies such a right. The relevant part of Article 47 provides that:

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<sup>24</sup> Case C-176/12 *Association de Mediation Sociale* [2014] ECR I-000 (hereinafter '*AMS*').

<sup>25</sup> *AMS*, *ibid* paras 43 and 45.

<sup>26</sup> *ibid* para 52.

<sup>27</sup> *ibid* para 47 (emphasis added).

<sup>28</sup> *Åklagaren* (n 11) para 19.

1. 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.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

According to the Charter *Explanations* and the jurisprudence of the CJEU,<sup>29</sup> Article 47(1) corresponds to Article 13 ECHR (the right to an effective remedy) and 47(2) corresponds to Article 6(1) ECHR (the right to a fair trial). As Article 52(3) of the Charter stipulates that where Charter rights correspond to rights under the ECHR, ‘the meaning and scope of those rights shall be the same’, the meaning and scope of Article 47(1) and (2) corresponds to Articles 13 and 6 ECHR respectively.<sup>30</sup>

Article 47(1) corresponds to Article 13 ECHR, but it differs in one crucial respect: whereas Article 13 guarantees an effective remedy before a ‘national authority’, Article 47(1) guarantees an effective remedy before a ‘tribunal’. In *Golder v United Kingdom*, the ECtHR concluded that Article 13 ECHR does not imply a right of access to a court because (1) it only guarantees a remedy before a ‘national authority’, which might not be a court or tribunal;<sup>31</sup> and (2) it only guarantees a remedy for the violation of a right under the ECHR, and not for the enforcement of civil rights or criminal charges generally.<sup>32</sup> Neither of these factors apply to Article 47(1), as it refers to a remedy before a tribunal, not a national authority, and it guarantees an effective remedy where *any* and *all* rights and freedoms guaranteed by the law of the Union are violated, not just when Charter rights are violated. The *right of access* to a tribunal must, by definition, be inherent in the right to an effective remedy before a tribunal, notwithstanding that the effect of Article 52(3) of the Charter and the Charter *Explanations* is that Article 47(1) has the same meaning and scope of Article 13 ECHR.

The ECtHR has held that the right of access to a court constitutes an inherent element of the right to a fair trial under Article 6(1).<sup>33</sup> As Article 47(2) corresponds to

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<sup>29</sup> Case C-334/12 *RX*, *RX-II Réexamen Arango Jaramillo and Others v EIB*, para 42; Case C-279/09, *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, para 32; Case T-360/10, *Tecnimed Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, para 33.

<sup>30</sup> Although note that art 52(3) of the EU Charter also states that ‘this provision shall not prevent Union law providing more extensive protection’, which means that the right of access to a court under the EU Charter could be more extensive than under the ECHR if Union law so requires.

<sup>31</sup> *Golder v United Kingdom* (1979–80) 1 EHRR 524, para 33.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid* para 36.

Article 6(1) ECHR, it follows that the right of access to a court is also an inherent element of the fair trial guarantees in that article. However, Article 47(2) is not confined to civil law rights and obligations and criminal charges: it applies to *any* and *all* rights and freedoms guaranteed by EU law, and is engaged whenever Member States are applying or giving effect to EU law.<sup>34</sup>

Although Article 47(2) and Article 6(1) have the same scope, the legal effect of their violation in UK law is significantly different. In cases involving the EU Charter, if a compatible interpretation of the national legislation cannot be found, the court is required by EU and UK law to give priority to the Charter. As many of the Charter rights are coextensive with ECHR rights, this arguably creates an arbitrary distinction between human rights claims that involve EU law, where domestic law that prevents individuals from realizing their EU rights will not be applied, and human rights claims that ‘only’ come within the ECHR, where, if a compatible interpretation between the domestic law and the ECHR right cannot be found, the only ‘remedy’ would be a declaration of incompatibility under section 4 of the HRA.<sup>35</sup> Such a distinction is not only difficult to justify in its own right, but it also circumvents the constitutional division of competence in the HRA between the judiciary and Parliament.

### III. ARTICLE 47 AND STATE IMMUNITY: THE *BENKHARBOUCHE* CASE

#### A. *The Benkharbouche Claims and the State Immunity Act*

*Benkharbouche* involved two sets of employment claims brought by embassy service workers against the Libyan and Sudanese embassies in London. Ms Benkharbouche, a Moroccan national, was employed as a cook at the Sudanese embassy in London before her dismissal in November 2010. She brought claims against the embassy for wrongful dismissal, failure to pay the minimum wage and breach of the Working

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<sup>34</sup> Art 51, EU Charter.

<sup>35</sup> As R Garnett, ‘State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?’ (2015) 64(4) ICLQ 783, 816 has noted ‘employees will be encouraged to circumvent State immunity restrictions under domestic law by pleading breaches of EU regulations without the need (in the UK context at least) of having first to comply with the interpretative requirement of section 3 of the HRA’.

Time Regulations 1998.<sup>36</sup> Ms Janah, also a Moroccan national, had been employed as a member of the domestic staff at the Libyan embassy in London, where her duties ‘included cooking, cleaning, laundering, shopping and serving meals’.<sup>37</sup> She brought claims against the Libyan embassy for wrongful dismissal, arrears of pay, racial discrimination and harassment (relying on law incorporating the Race Discrimination Directive),<sup>38</sup> and breach of the Working Time Regulations. Both States claimed immunity under section 1 of the SIA and relying on sections 4(2)(b) and 16(1)(a) SIA. Although section 4(1) SIA removes immunity in proceedings relating to a contract of employment made or due to be performed wholly or partly in the UK, section 4(2)(b) reinstates immunity where, if at the time the contract was entered into, the employee was neither a national of the UK nor habitually resident in the UK. It was conceded that Ms Janah was not habitually resident in the UK when her contract of employment was made, and the question whether Ms Benkharbouche was habitually resident had not yet been resolved.<sup>39</sup>

Section 16(1)(a) of the SIA provides that the exception to immunity under section 4(1) does not apply to proceedings concerning the employment of members of a mission within the meaning of the Vienna Convention on Diplomatic Relations (VCDR) or of the members of a consular post within the meaning of the Vienna Convention on Consular Relations (VCCR). Article 1 of the VCDR, as incorporated into English law by Schedule 1 of the Diplomatic Privileges Act of 1964, includes as part of the mission ‘members of the service staff’, which are defined as ‘members of the staff of the mission in the domestic service of that mission’. Ms Benkharbouche and Ms Janah were both members of the service staff of an embassy and therefore members of the mission for the purposes of Section 16(1)(a) SIA.

### *B. Challenging the State Immunity Act*

The claimants argued that the grant of immunity under the SIA infringed their right of access to a court guaranteed by Article 6(1) ECHR and, in respect of the employment claims involving EU law, by Article 47 of the EU Charter. Lloyd Jones LJ began by

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<sup>36</sup> The Working Time Regulations incorporated Directive 2003/88/EC, OJ [2003] L 299/9 into English law.

<sup>37</sup> *Benkharbouche* (n 4) para 4.

<sup>38</sup> Directive 2000/43/EC, OJ [2000] L 180/22.

<sup>39</sup> *Benkharbouche* (n 4) para 54.



observing that there are divergent approaches to the question whether State immunity is actually a restriction on the right of access to a court.<sup>40</sup> The ECtHR has always treated immunity as *prima facie* interfering with the right of access to a court. However, there is some divergent authority in English courts that suggests the right of access to a court is not even engaged where international law requires States to grant immunity because the grant of immunity deprives the courts of jurisdiction *ab initio*. In *Holland v Lampen Wolfe*, Lord Millett, with whom Lords Cooke and Hobhouse agreed (forming the majority on this point), observed that

[a]t first sight [Article 6] may appear to be inconsistent with a doctrine of comprehensive and unqualified State immunity in those cases where it is applicable. But in fact there is no inconsistency. This is not because the right guaranteed by art 6 is not absolute but subject to limitations, nor is it because the doctrine of State immunity serves a legitimate aim. It is because art 6 forbids a contracting State from denying individuals the benefit of its powers of adjudication; it does not extend the scope of those powers.

[...]

[Article 6] presupposes that the contracting states have the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting states adjudicative powers which they do not already possess. State immunity ... is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself.

... The United Kingdom cannot, by its own act of acceding to the [ECHR] and without the consent of the United States [the foreign State defendant in this case], obtain a power of adjudication over the United States which international law denies it.<sup>41</sup>

Lord Millett's view was later endorsed in dicta by Lords Bingham and Hoffmann in *Jones v Saudi Arabia*, with Lord Hoffmann stating that 'there is not even a *prima facie* breach of article 6 if a state fails to make available a jurisdiction which it does not possess'<sup>42</sup> and Lord Bingham reasoning that

[b]ased on the old principle *par in parem non habet imperium*, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give.<sup>43</sup>

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<sup>40</sup> *ibid* para 12.

<sup>41</sup> *Holland v Lampen-Wolfe* [2000] 3 All ER 833, 846–847.

<sup>42</sup> *Jones v Saudi Arabia* [2007] 1 AC 270, 298, para 64.

<sup>43</sup> *ibid* para 14. cf the Court of Appeal decision in *Jones v Saudi Arabia* [2005] QB 699, 747, para 82 ('In the light of the reasoning in *Al-Adsani*, there can be no doubt (contrary to dicta of Lord Millett in *Holland v. Lampen-Wolfe* at p.1588) that article 6(1) is also *prima facie* engaged in a case such as the present.').

In *Benkharbouche*, Lloyd Jones LJ explained that the Court of Appeal found Lord Millett’s reasoning in *Holland v Lampen Wolfe* ‘compelling’, stating:<sup>44</sup>

[i]t is difficult to see how Article 6 can be engaged if international law denies to the Contracting State jurisdiction over a dispute. There can be no denial of justice for which the State is responsible if there is, as a matter of international law, no court capable of exercising jurisdiction. Moreover, Article 6 cannot have been intended to confer on Contracting States a jurisdiction which they would not otherwise possess, nor could it have conferred a jurisdiction denied by general international law in such a way as to be binding on non-Contracting States. It is unfortunate that in none of its many decisions in which the point has raised has the Strasbourg court grappled with these considerations.<sup>45</sup>

Ultimately Lloyd Jones LJ found that it was unnecessary to choose between the approach of the ECtHR and the approach of the majority in *Holland v Lampen Wolfe*, despite the fact that, as a decision of the House of Lords, *Holland* is binding precedent. The Lord Justice proceeded on the basis that under both approaches there must be an examination of the law of immunity; it is only that, under the approach taken by the ECtHR, ‘any debate as to what are the applicable rules of international law is transferred to a later stage of the analysis and dressed in the context of Article 6’.<sup>46</sup> In *Belhaj v Straw*, Lloyd Jones LJ adopted the same position, explaining that ‘Article 6 can have no application in situations where international law denies jurisdiction to a national court on grounds of state immunity’,<sup>47</sup> and in *Rahmatullah v Ministry of Defence*, Leggatt J noted that the decision in *Holland* ‘seems to me to be compelling’.<sup>48</sup>

With respect, Lord Millett’s reasoning in *Holland v Lampen Wolfe*—and the supportive dicta it receives from Lords Bingham and Hoffman, and by Lloyd Jones LJ is erroneous: it confuses the question whether a UK court *possesses* jurisdiction (both as a matter of domestic law, and international law) with whether the UK is under an international obligation not to exercise its jurisdiction over foreign States.

First, it should be noted that generally the jurisdiction of a domestic court is determined by relevant rules of domestic law and not whether the exercise of

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<sup>44</sup> Writing extrajudicially on *Lampen-Wolfe*, Lloyd Jones LJ ‘commend[ed]’ the approach adopted by Lord Millett: DL Jones, ‘Article 6 ECHR and Immunities Arising in Public International Law’ (2003) 52 ICLQ 463, 470.

<sup>45</sup> *Benkharbouche* (n 4) para 16.

<sup>46</sup> *ibid.*

<sup>47</sup> *Belhaj and another v Straw and others (United Nations Special Rapporteur on Torture and others intervening)* [2014] EWCA Civ 1394, [2015] 2 WLR 1105, 1156, para 122.

<sup>48</sup> [EWHC] 3846 (QB) (Leggatt J) para 90.

adjudicative jurisdiction is permitted under international law.<sup>49</sup> In England and Wales, a court will have jurisdiction in a civil case as soon as a valid claim form (historically known as a ‘writ’) has been correctly served on the defendant.<sup>50</sup> If it has not been correctly served, the case will be struck out for lack of jurisdiction before the question of immunity is even considered.<sup>51</sup>

Second, State immunity operates as a *bar* to jurisdiction; it does not connote the absence of jurisdiction.<sup>52</sup> It is only once an English court has jurisdiction that it then will consider whether that jurisdiction is debarred by immunity arising under the SIA or under customary international law as incorporated into the common law. Under international law, States generally have discretion to exercise their jurisdiction in civil cases, but an obligation to bar the exercise of that jurisdiction when the defendant is a foreign State engaged in *acta jure imperii*. The bar to jurisdiction does not mean that a State cannot exercise jurisdiction, only that if it does so, it will be in breach of its obligation under international law to refrain from exercising jurisdiction.<sup>53</sup> Some support for this interpretation of immunity can be found in the Joint Separate Opinion of Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case before the International Court of Justice:

the impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.<sup>54</sup>

This is why—as O’Keefe explained in his comment on *Jones*—Lord Bingham’s reliance on the maxim ‘*par in parem non habet imperium*’, which is commonly used

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<sup>49</sup> This point is also made by R O’Keefe, ‘Domestic Courts as Agents of Development of the International Law of Jurisdiction’ (2013) 26(3) LJIL 541, 543.

<sup>50</sup> Civil Procedure Rules, rule 7.2 (prior to 26 April 1999, a ‘writ’ had to be served on a defendant). See also *Canada Trust Company v Stolzenberg (No 2)* [2000] 1 AC 1, 21–22.

<sup>51</sup> See Civil Procedure Rules, rule 11. A defendant may apply to the court for an order declaring that it has no jurisdiction and in the alternative, should not exercise any jurisdiction that it may have.

<sup>52</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 2002, p. 3, at 24–5, para 59. See also X Yang, ‘State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions’ (2003) 74 BYBIL 333, 340.

<sup>53</sup> See Article 6 of the UN Convention on Jurisdictional Immunities of States requires State parties to ‘give effect to State immunity ... by *refraining from exercising jurisdiction* in a proceeding before its court against another State’ (emphasis added) (not in force).

<sup>54</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 71. See also para 59 of the judgment (n 52) above.

to justify State immunity, to suggest that the forum State *cannot* exercise jurisdiction when recognizing the immunity of a foreign State is inaccurate: the maxim ‘is not intended to deny that a State may *in fact* exercise its domestic jurisdiction over another’, but rather that ‘an equal does not *rightly* have jurisdiction over an equal’.<sup>55</sup> This understanding of immunity is also demonstrated by the right of States to waive immunity, both as a matter of international law and under the SIA in the UK:<sup>56</sup> the waiver enables the domestic court to exercise its underlying jurisdiction; it cannot properly be understood as constituting a *conferral* of jurisdiction by a foreign State on the forum court.<sup>57</sup> It only means that the UK may lawfully exercise its jurisdiction as a matter of international law and the English court may exercise its jurisdiction under UK domestic law.<sup>58</sup>

Third, in light of the above analysis, it is clear that Lord Millett and Lloyd Jones LJ’s conclusion that Article 6(1) ECHR cannot have been intended to confer a jurisdiction that States would not otherwise possess, ‘nor [confer] a jurisdiction denied by general international law’ misses the point: Article 6 only requires that States exercise jurisdiction that they already possess, but might otherwise have chosen not to exercise pursuant to another rule of international law.

In contrast to Lord Millett’s position, the ECtHR has repeatedly treated Article 6 as *prima facie* engaged in immunity cases.<sup>59</sup> Recognizing that the right of access to a court is not absolute, the Court has held that (1) ‘the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty’,<sup>60</sup> and (2) ‘measures taken by [States] which reflect

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<sup>55</sup> R O’Keefe, ‘Decisions of British Courts during 2006 Involving Questions of Public International Law’ (2006) 77 BYBIL 458, 516.

<sup>56</sup> See section 2 SIA and art 7, UN Convention on Jurisdictional Immunities of States and Their Property; Yang (n 52 340 and O’Keefe *ibid* 516).

<sup>57</sup> Such an interpretation would run counter to the understanding that ‘[j]urisdiction is an aspect of sovereignty: it refers to a state’s competence under international law to regulate the conduct of national and juridical persons’. Crawford, *Brownlie’s Principles of Public International Law* (OUP 2012) 456. *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, 123, para 57.

<sup>58</sup> See section 2, SIA.

<sup>59</sup> See *Jones v United Kingdom* (n 2) paras 188–189 and *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 57.

<sup>60</sup> *Al-Adsani* (2001) 123 ILR 24, 40, para 54. See also *Kalogeropoulou v Greece* (2002) 129 ILR 537, 546; *Fogarty v United Kingdom* (2001) 123 ILR 53, 65, para 34; *McElhinney v Ireland* (2001) 123 ILR, 85, para 35; *Cudak v Lithuania* (2010) 51 EHRR 15, para 60; *Sabeh El Leil v France* (2012) 54 EHRR 14, para 52; *Wallishauser v Austria*, App No 156/04, 17 July 2012, para 64; *Oleynikov v Russia* (2013) 57 EHRR 15, para 60; *Jones v United Kingdom* (n 2) para 188.

generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6(1)'. Save in some specific treaty provisions,<sup>61</sup> international law generally does not require States to exercise their adjudicative jurisdiction; it only requires that States decline to exercise their jurisdiction where a foreign State or official has a right to immunity. For State parties to the ECHR, the right of access to a court reverses this position: States *must* exercise their jurisdiction in cases involving a civil right or obligation, or a criminal charge, unless international law requires the State to grant immunity to a foreign State or State official. The right of access to a court ensures that States only grant immunity to the extent required by international law. State parties must ensure their immunity legislation only grants immunity to the extent required by customary international law;<sup>62</sup> they may not grant immunity beyond those strict requirements.<sup>63</sup> Understood in this way, the right of access to a court will never be the basis for an *exception* to State immunity,<sup>64</sup> but it does require States to limit their grant of immunity in accordance with what is required by international law.

### *C. Whether International Law Requires Sections 16(1)(a) and 4(2)(b) SIA*

In *Benkharbouche*, after undertaking an analysis of relevant international instruments and an extensive review of State practice, Lloyd Jones LJ concluded that, sections 16(1)(a) and 4(2)(b) SIA, in their application to the facts of the present case, went beyond what is required by international law and were therefore a disproportionate infringement of Article 6(1) ECHR. The basis of his analysis is discussed below.

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<sup>61</sup> See eg art 5, Convention against Torture and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, 451, para 75 and 454–461, paras 89–117.

<sup>62</sup> A State may also be under an obligation to grant immunity pursuant to a treaty obligation (that is not reflective of customary international law). It is not clear whether this would be sufficient to amount to a proportionate restriction on the right of access to a court. See discussion in Section III(c)(2) below.

<sup>63</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, 123, para 55 ('States sometimes decide to accord an immunity more extensive than that required by international law').

<sup>64</sup> Compare to the argument that the alleged violation of a *jus cogens* norm creates an exception to State immunity. This argument has now been rejected by a number of domestic and international courts: *Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ Rep 99, 140–2; *Jones v United Kingdom* (n 2) paras 197–198; *Jones v Saudi Arabia* [2007] 1 AC 270, 292–295; *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62.

### 1. Section 16(1)(a) SIA

The SIA was enacted largely to give effect to the UK's obligations under the European Convention on State Immunity (ECSI), a treaty drafted under the auspices of the Council of Europe. As the Court noted, the Treaty does not contain a provision requiring immunity to be granted in employment cases involving service members of a diplomatic mission,<sup>65</sup> and so the Court considered whether customary law recognized such a rule. It spent considerable time examining Article 11 of the UN Convention on Jurisdictional Immunities of States (not currently in force), but not before noting that it was 'questionable' whether the provision constituted customary international law at all, let alone whether it could 'be taken to be a definitive statement of the extent of state immunity required by international law in embassy employment disputes'.<sup>66</sup> Article 11(1) of the UN Convention provides that unless they agree otherwise, States cannot invoke immunity in employment proceedings for work that has been or will be performed in the forum State, unless one of the exceptions in Article 11(2) applies. One such exception is contained in Article 11(2)(b)—State immunity is available in employment disputes if the employee is:

- (i) a diplomatic agent, as defined in the [VCDR];
- (ii) a consular officer, as defined in the [VCCR]; [... *or*]
- (iv) any other person enjoying diplomatic immunity[.]

As Article 37(3) VCDR provides that '*[m]embers of the service staff* of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity' (emphasis added), a literal reading of Article 11(2)(b)(iv) above—'any other person enjoying diplomatic immunity'—suggests that the *exception to immunity* in Article 11(1) does not apply to proceedings involving members of the service staff. Therefore, on this reading, Article 11 requires contracting parties to grant immunity in employment cases involving embassy service members of staff like those in *Benkharbouche*. However, relying on Foakes and O'Keefe's authoritative commentary to Article 11<sup>67</sup> and the views of Fox and Webb,<sup>68</sup> Lloyd Jones LJ

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<sup>65</sup> *Benkharbouche* (n 4) para 34.

<sup>66</sup> *Benkharbouche* (n 4) paras 30, 29(3) and 36. cf the ECtHR's assertion, without supporting evidence, that art 11 reflects customary law: *Sabeh El Leil* (n 60) para 58; *Oleynikov v Russia* (n 60) para 66.

<sup>67</sup> J Foakes and R O'Keefe, 'Article 11' in R O'Keefe and C Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* 191, 201–2.

concluded that such a literal interpretation of Article 11(2)(b)(iv) would ‘run plainly contrary to the rationale for the restrictive wording of Article 11(2)(b)(i)’ (which makes special provision for a diplomatic agent) and the *travaux préparatoires*, which demonstrate that Article 11(2)(b) ‘was not intended to require immunity in respect of employment claims by all members of a mission’.<sup>69</sup> Therefore, not only is it questionable whether Article 11 reflects customary international law, but a reasonable interpretation of that provision indicates that it does not require the scope of immunity provided by the effect of section 16(1)(a).<sup>70</sup>

Turning to State practice, Lloyd Jones LJ concluded on the basis of ‘extensive research’<sup>71</sup> that it was

impossible to conclude that there is any rule of international law which requires the grant of immunity in respect of employment claims by members of the service staff of a mission in the absence of some special feature such as where the claim is for recruitment, renewal of employment or reinstatement of an individual or where the proceedings would interfere with the security interests of the state.<sup>72</sup>

Accordingly, section 16(1)(a) SIA ‘is not required by international law and is not within the range of tenable views of what is required by international law’.<sup>73</sup>

The Court was correct to conclude that there is no generally accepted rule that State immunity must be granted in employment cases involving service members of a mission. As Garnett has demonstrated persuasively,<sup>74</sup> the UK is ‘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>75</sup> However, this divergent practice—which does at least include some States whose law grants immunity in cases involving members of the service

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<sup>68</sup> H Fox and P Webb, *The Law of State Immunity* (OUP 2013) 450.

<sup>69</sup> *Benkharbouche* (n 4) para 36. See Foakes and O’Keefe (n 67) 201–2, who suggest that the drafters’ intention was to ‘limit this residual category of employees [art 11(2)(b)(iv)] to miscellaneous persons of diplomatic status not already mentioned in Article 11(2)(b)’.

<sup>70</sup> See Garnett (n 35).

<sup>71</sup> *Benkharbouche* (n 4) para 42.

<sup>72</sup> *ibid* para 46.

<sup>73</sup> *ibid* para 53.

<sup>74</sup> See R Garnett, ‘State Immunity in Employment Matters’ (1997) 46 ICLQ 81–124; R Garnett, ‘The Precarious Position of Embassy and Consular Employees in the United Kingdom’ (2005) 54(3) ICLQ 705–18; and Garnett (n 35).

<sup>75</sup> *Benkharbouche* (n 4) para 47, referring to Garnett (2005) (n 74) 707.

staff of a diplomatic mission<sup>76</sup>—arguably undermines the court’s conclusion that the UK position is not even within the ‘range of tenable views’ (Lloyd Jones LJ did not elaborate on what he meant by this).<sup>77</sup> In *Jones v United Kingdom*, the UK argued that it had adopted a ‘tenable view’ of its obligations under international law.<sup>78</sup> The ECtHR did not respond to this point, but when concluding that the findings of the House of Lords on the question of immunity in that case were ‘neither manifestly erroneous nor arbitrary’, it did note that their Lordships had based their decision on ‘extensive references to international law materials and consideration of the applicant’s arguments and the judgment of the Court of Appeal’, and crucially that ‘[o]ther national courts have examined in detail the findings of the House of Lords in the present case and have considered those findings to be highly persuasive’.<sup>79</sup> If the ECtHR was suggesting that the House of Lords offered at least a ‘tenable view’ as to the customary law of immunity, then it is a high threshold, and one that section 16(1)(a) would struggle to meet.

## 2. Section 4(2)(b) SIA

Lloyd Jones LJ also concluded that section 4(2)(b) SIA, which grants State immunity under UK domestic law if the employee was not habitually resident when the contract was made or carried out, was not required by customary international law. This provision implements the UK’s obligation under Article 5(2)(b) of the ECSI, which grants immunity to States in employment disputes if ‘at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State’. As neither Libya nor Sudan was a contracting party to the ECSI, the question remained whether customary international law itself required immunity in such circumstances. However, it is not clear that even if the defendant State were party to the ECSI that the grant of immunity by a UK court

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<sup>76</sup> See eg practice discussed in *Benkharbouche* (n 4) paras 43–44, Foreign States Immunities Act 87 of 1981, section 5 (South Africa) and State Immunity Ordinance 1981, sections 6 and 17(1)(a) (Pakistan).

<sup>77</sup> The Court also did not outline the criteria for identifying customary international law.

<sup>78</sup> The ‘tenable view’ approach has been adopted by some UK judges when assessing whether a decision-makers’ reliance on an unincorporated treaty provision has given rise to a legitimate expectation that the decision-maker act in accordance with the correct interpretation of that provision. See *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756, 852 (Lord Brown), referring to the argument made by P Sales and J Clement, ‘International Law in Domestic Courts: The Developing Framework’ (2008) 124 LQR 388, 405–6.

<sup>79</sup> *Jones v United Kingdom* (n 2) para 214.



would be considered a proportionate restriction on the complainants' right of access to a court. The ECtHR has always referred to 'generally recognized rules of public international law' as being, in principle, a proportionate restriction on the right of access to a court; a rule in a treaty to which there are only eight States parties arguably does not amount to a 'generally recognized' rule of international law. Equally, however, if restricting access to court pursuant to a treaty obligation were not a proportionate limitation on the right of access to a court, this would present a conflict of obligations between the ECHR and ECSI, two treaties that originate from the same international organization (the Council of Europe). It is not clear as a matter of treaty law that the ECHR should be prioritized over the ECSI, which for several of the eight State parties was ratified *after* the ECHR.<sup>80</sup> It is equally unclear whether the EU Charter—as primary law of the EU—should be prioritized over an EU Member State's obligations under the ECSI.

On the question whether Article 5(2)(b) ECSI also constituted a rule of customary international law, Lloyd Jones LJ observed that other State parties to the ECSI had only applied Article 5(2)(b) in claims where the defendant State was also a State Party,<sup>81</sup> which provided 'compelling support for the view that there is no rule of [general] international law which requires the grant of immunity in the circumstances identified in section 4(2) SIA'.<sup>82</sup> The Court also noted that a similar provision to section 4(2)(b) was included in the ILC Draft Articles 1991 but not included in the final text of the UN Convention on State Immunity, its deletion having been recommended by the ILC Working Group, on the basis that the provision 'could not be reconciled with the principle of non-discrimination based on nationality'.<sup>83</sup> Finally, Lloyd Jones LJ went on to consider whether there were any other legitimate objectives that might be achieved by section 4(2)(b), but concluded that there were none.<sup>84</sup> Section 4(2)(b) was therefore discriminatory on grounds of nationality and not required by international law.<sup>85</sup>

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<sup>80</sup> However, see *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, paras 150–156 (and more recently, *Al-Saadoon v United Kingdom* (2010) 51 EHRR 9, paras 126–128), where the ECtHR effectively suggests that the *lex posterior* rule does not apply to obligations under the ECHR, and States' EU obligations must be carried out in a way that respects the ECHR.

<sup>81</sup> *Benkharbouche* (n 4) para 56. See *French Consular Employee Claim* 86 ILR 583 (Austrian Supreme Court) and *De Queiroz v State of Portugal* 115 ILR 430 (Labour Court of Brussels).

<sup>82</sup> *Benkharbouche* (n 4) para 56.

<sup>83</sup> *Benkharbouche* (n 4) para 59, referring to UNYBILC (1999) vol II [87].

<sup>84</sup> *Benkharbouche* (n 4) para 63, rejecting several objectives, including protection of the sovereign functions of an embassy, ensuring a sufficient jurisdiction link between the claim/employee and the

On the basis of the above analysis, the Court of Appeal concluded that the application of sections 16(1)(a) and 4(2)(b) SIA in *Benkharbouche* constituted a disproportionate limitation to the complainants' Article 6(1) ECHR right of access to a court. The Court issued a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act (HRA).<sup>86</sup> However, as the appellants' claims involved rights under the Working Time Regulations and EU racial discrimination and harassment law, the Court also had to consider the compatibility of the above provisions of the SIA with the EU Charter.

#### *D. Application of Article 47 EU Charter*

Arden LJ wrote for the Court on the question of the compatibility of sections 16(1)(a) and 4(2)(b) SIA with the EU Charter. She began by citing Article 47(1) EU Charter and noting that it was common ground among the parties that the content of Article 47 is identical to that of Article 6(1) ECHR.<sup>87</sup> Strictly speaking, this is not correct: as noted above, Article 47(1) is equivalent to *Article 13* ECHR, and only 47(2) is equivalent to Article 6(1). This is important because 47(1) guarantees an effective remedy, but 47(2) 'only' provides a right of access to a court. The complainants' in *Benkharbouche* are not arguing that the UK law fails to provide an effective remedy as such; but rather, that the UK has denied them access to a court in order to enforce that remedy. Nevertheless, Arden LJ proceeded on the basis that because the grant of immunity under the SIA breached Article 6(1) ECHR, it also infringed Article 47 of the EU Charter.<sup>88</sup>

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UK (art 4(1) ensures a sufficient link), avoiding opportunistic changes of nationality or habitual residence, and preventing the prioritization of the employment law of the forum State over that of the foreign State.

<sup>85</sup> *Benkharbouche* (n 4) para 64. See H Fox and P Webb, *The Law of State Immunity* (OUP 2013) 454 and H Fox, 'Employment Contracts as an Exception to State Immunity: Is All Public Service Immune?' (1995) 66 BYBIL 97, 172.

<sup>86</sup> *Benkharbouche* (n 4) para 68.

<sup>87</sup> *ibid* para 71.

<sup>88</sup> Art 52(3) of the EU Charter stipulates that the Charter rights have the same meaning and scope of ECHR as the equivalent ECHR rights, but 'this provision shall not prevent Union law providing more extensive protection'. R Garnett (2015) (n 35) has explained that 'an argument could be made that to give full effect and "extensive protection" to EU rules, international law principles that obstruct their operation, such as State immunity, must give way in all circumstances. While such a result creates a difference in scope between the rights under the ECHR and the Charter, such discrepancy could be justified by the need to fully implement EU law, even where it conflicts with international law.' Although depending on the extent of the protection provided by EU law, this may result in making 'immunity rules redundant'.

Arden LJ then went on to consider whether Article 47 has horizontal direct effect, so that ‘the appellants can rely on it even though Libya is not a Member State or one of the EU institutions referred to in Article 51 of the EU Charter’.<sup>89</sup> However, with respect, this assertion is not quite correct: it is far from clear that Article 47 is capable of having horizontal effect as such, ie that it is capable of being enforced against a private party, let alone that it is required to be understood as having horizontal effect in the present case; that is, because neither Libya nor Sudan is an EU Member State. On the contrary, the right of access to a court is a right enforced against *the State*—ie it is effective against the forum State *in which* the claim is brought, not against the defendant state, ie, the private party *against whom* the claim is brought. In *Benkharbouche*, the Court conflated the employment claim between the parties (for the purposes of this claim, a dispute between private parties)<sup>90</sup> with the separate claim that the grant of immunity by the UK court infringed the complainants’ right of access to a court in the UK as guaranteed under Article 47(2). The complainants were seeking to enforce a right against the UK. Although the enforcement of that right *indirectly* affected the relationship between the private parties insofar as it allowed the complainants to bring their claim before a UK court, it did not impose additional obligations on the foreign States, which were already bound by UK law, including the Working Time Regulations (incorporating the Working Time Directive) and the Equality Act 2010 (incorporating parts of the discrimination and harassment Directive), by virtue of engaging in an employment relationship within UK jurisdiction.<sup>91</sup> The right of access to a court under the EU Charter therefore has indirect effect, in that it modifies the scope of the SIA, the consequence of which is to allow a private party to bring a claim against another private party. This is conceptually different to horizontal effect, which would involve one private party enforcing a Charter right against another; ie the Charter right is imposed on the other party.

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<sup>89</sup> *ibid* para 75.

<sup>90</sup> It is worth underscoring that the parties in *Benkharbouche* are private parties not because Libya and Sudan are not EU Member States, but because they are engaged in a private activity (*‘acta jure gestionis’*).

<sup>91</sup> The immunity is from the State’s adjudicative jurisdiction and not immunity from application of the law or immunity from legal liability. See in relation to diplomatic immunity *Dickinson v Del Solar v Mobile and General Insurance Company, Limited (Third Parties)* [1930] 1 KB 376, 380 (Lord Hewart CJ) (*‘Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction.’*).

As the Charter right was being enforced against the UK, it was irrelevant that Libya and Sudan were not EU Member States. The issue in the case was not between the foreign State's right of immunity and the complainants' right of access to a court, but simply whether the UK—in barring its court's jurisdiction in a case involving the application of EU law—had violated Article 47 of the EU Charter, a general principle of EU law. It is also irrelevant to the application of the EU Charter, and to the rights derived from EU law, that the plaintiffs were not UK citizens: the EU Charter applies to *Member States* when they are 'implementing Union law'; it is not restricted to EU or UK citizens. The purpose of the EU Charter is to ensure that while applying and implementing EU law, Member States do so in a manner that is compatible with basic fundamental rights applicable at the EU level, one of which is to provide for the right of access to a court where it is alleged that those rights have been breached.

After finding that Article 47 is a general principle of EU law because it 'does not depend on its definition in national legislation to take effect' and has long been stated as a general principle by the CJEU,<sup>92</sup> Arden LJ concluded that the right has horizontal direct effect in UK law. She then considered whether the ruling in *R (Chester) v Secretary of State for Justice* applied to *Benkharbouche*. In *Chester*, Lord Mance, writing for the Supreme Court, held that a court has discretion to choose not to set aside domestic statutes where to do so would require the court to effectively design a new statutory scheme.<sup>93</sup> The reason for this is that both as a matter of EU law and under section 2(4) of the EU Act, a national court is only required to give effect to EU law 'within the limits of its jurisdiction'. In *Chester*, which concerned prisoners' voting rights, those limits were defined by the constitutional principles underpinning the separation of powers doctrine,<sup>94</sup> which led the Supreme Court to conclude that it was not institutionally competent to 'devise an alternative scheme of voting eligibility that would or might pass muster in a domestic or supra-national European court'.<sup>95</sup> In *Benkharbouche*, this was not an issue for Arden LJ, who found

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<sup>92</sup> *Benkharbouche* (n 4) para 80.

<sup>93</sup> [2014] AC 271.

<sup>94</sup> This includes defence to Parliament on constitutional grounds (the proper allocation of responsibility between branches of government) and on institutional grounds (practical limits on the court's adjudicative capacity and/or that another branch of government might have superior institutional competence).

<sup>95</sup> [2014] AC 271, 316, para 74.

that the ‘scope of disapplication in this case is clear’,<sup>96</sup> and sections 16(1)(a) and 4(2)(b) SIA should therefore be set aside pursuant to section 2 of the EC Act.

## V. CONCLUSION

The *Benkharbouche* decision provides a careful and welcome examination of State immunity in employment cases involving domestic service members of an embassy. The Court’s conclusion that immunity is not required by customary international law on the facts of *Benkharbouche* is surely correct, even if the Court perhaps went too far in stating that the UK’s position is not even within the range of tenable views. However, the Court’s analysis of the right of access to a court—particularly its application of Article 47 of the Charter—is less convincing. Contrary to the analysis set out by the Court, a more convincing interpretation of sovereign immunity is that it bars, but does not remove *ab initio*, the jurisdiction of a court. The right of access to a court is breached by the *forum State* whenever a court declines to exercise jurisdiction it otherwise possesses. Article 47 does have an indirect effect on the parties to the original dispute in that it lifts the bar to the court’s jurisdiction, but it cannot properly be understood as placing the forum State in breach of international law, notwithstanding the diplomatic consternation that it may cause.

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<sup>96</sup> *Benkharbouche* (n 4) para 85.