Foreign, Commonwealth & Development Office

Response to the Joint Committee on Human Rights second report of session 2022–23: Proposal for a draft State Immunity Act 1978 (Remedial) Order 2022: State Immunity & The Right of Access to a Court

7 September 2022

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Response to the Joint Committee on Human Rights second report of session 2022–23: Proposal for a draft State Immunity Act 1978 (Remedial) Order 2022: State Immunity & The Right of Access to a Court

Presented to Parliament pursuant to paragraph 3(2) of schedule 2 to the Human Rights Act 1998

7 September

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Background to the Draft Remedial Order

Introduction

On 23 February 2021, the Government announced its intention to amend provisions of the State Immunity Act 1978 (the "SIA") to implement the judgment of the Supreme Court judgement in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62.

A document containing a draft of the proposed Remedial Order was laid before Parliament on 11 May 2022 in accordance with paragraph 3(1) of Schedule 2 to the Human Rights Act 1998 (the "HRA"), setting out the reasons for the proposal – the "required information" of paragraph 3(1)(a) of Schedule 2 to the HRA. The Joint Committee on Human Rights (the Committee) held an inquiry into the proposal and published its report on 12 July 2022. This paper constitutes the Government's response to that report.

The Incompatibility

The SIA governs the immunities to be afforded to any state in proceedings before the courts of the United Kingdom. In *Benkharbouche*, the Supreme Court considered two employment claims from respondent foreign national employees claiming damages against their foreign embassy employers. The Supreme Court found that two provisions of the SIA, section 4(2)(b) and section 16(1)(a), are incompatible with Article 6, including as read with Article 14, of the European Convention on Human Rights (the "ECHR") and,

on the basis of the incompatibility identified, it was conceded that those sections were also incompatible with Article 47 of the Charter of Fundamental Rights of the European Union.

Section 4(2)(b) of the SIA confers immunity on a state with respect to proceedings relating to a contract of employment between a state and a person who at the time of the contract is neither a UK national nor UK resident. Section 16(1)(a) confers immunity on a state in respect of proceedings concerning the employment of members of a diplomatic mission or consular post, including its administrative, technical and domestic staff.

In *Benkharbouche* the Supreme Court, whilst emphasising that a foreign state is immune where a claim is based on a sovereign or governmental act, held that whether the employment of an individual constituted a sovereign act would depend on the employer-employee relationship. The Supreme Court held that employment of purely domestic staff in a consular post or diplomatic mission was a private act, rather than a sovereign act. The Supreme Court also held that a person's nationality and residence at the date of the employment contract are not proper grounds for denying a person access to the courts in respect of their employment in the UK.

Summary of representations

We are grateful to the Committee for their consideration of the draft of the proposed Remedial Order and their conclusions and recommendations, which we have considered carefully.

Introduction

The Committee welcomes the Government's action in proposing the draft Remedial Order to remedy the incompatibility in the State Immunity Act 1978 with the right to access a Court, protected under the Convention rights to a fair trial and to non-discrimination. (Paragraph 5)

Procedural Requirements

Overall, we are satisfied that there are compelling reasons to proceed by Remedial Order and that this is a valid use of the remedial power. We consider that the non-urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay in remedying the incompatibility with human rights standards and the need to afford a proper opportunity for parliamentary scrutiny of changes to primary legislation. (Paragraph 63)

We are pleased to note that the Committee is satisfied that there are compelling reasons to proceed by Remedial Order, that this is a valid use of the power to make a Remedial Order, and that the non-urgent procedure is appropriate in this case.

The Government should be mindful of its legal obligations to respect human rights, both under UK law and under international law. The UK does have legal obligations, and Government Ministers have obligations under their own Ministerial Code, to comply with international human rights law and legal obligations flowing from it. To the extent that a Declaration of Incompatibility (or an ECtHR judgment) makes clear that the UK is in breach of its legal obligations, then the UK Government has a duty to take action to address such failings and to give effect to its legal obligations to respect and protect the human rights of people in the UK. (*Paragraph 56)*

A declaration of incompatibility does not affect the continuing operation or enforcement of the legislation in question, nor does it bind the parties to the proceedings in which it is made. This respects the supremacy of Parliament in the making of the law. Under the HRA, there is no legal obligation on the Government to take remedial action following a declaration of incompatibility or on Parliament to accept any remedial measures the Government may propose.

However, we are concerned at the length of time that it has taken successive Foreign Secretaries to act to remove this incompatibility, which has clearly affected a not insignificant number of domestic workers in the UK for whom prompt access to a court would have been very valuable. (Paragraph 64).

We recognise that the delay was sub optimal. The Foreign, Commonwealth and Development Office is committed to working with the Ministry of Justice to ensure that procedures are put in place to mitigate the risk that this could happen again.

We consider that better procedures should be put in place, with a structured system for setting timescales and methods, in agreement between Parliament and the Government, for addressing situations where UK laws are known to breach the human rights of people in the UK. (Paragraph 65).

The Government want to require the Secretary of State to formally notify Parliament when adverse ECtHR judgments are received by the UK. This will contribute to respecting Parliament's key role in the UK's constitutional arrangements.

As such, the Bill of Rights includes an obligation requiring that when a final adverse ECtHR judgment is made, or the UK makes a unilateral declaration acknowledging that it has failed to comply with a Convention obligation, the Secretary of State lays the judgment, or declaration, before Parliament. Parliament will therefore have been formally made aware of the judgment but is not obliged to take any action in respect of it.

It will remain the responsibility of the Government to implement any adverse ECtHR judgments against the UK.

The Criteria of the JCSI are broadly met, subject to two minor drafting clarifications:
a) In the final paragraph of the preamble to the Remedial Order, it cites the enabling powers as "paragraph 1(1)(a), 1(b) and (3) of Schedule 2". The reference to "1(b)" isn't right—it should read either "(1)(b)" or "1(1)(b)".
b) The reference to the date in Articles 1(1) and 1(3) should use the same phrasing to ensure consistency and to avoid confusion. The words "on which" should either be added to the wording in Art 1(1) or deleted from the wording in Art 1(3). (Paragraph 66).

We thank the JCSI for its comments, which we have addressed in the revised draft Remedial Order.

Does the proposed Order address the incompatibility & does the proposed Order omit additional provisions which it should have contained?

However, we note that ATLEU "consider there are credible arguments that section 4(2)(b) remains incompatible with Articles 6 and 14 ECHR in respect of employees of ECSI signatory states". We have not seen any evidence that that the judgments of the ECHR or domestic courts have, as yet, gone so far as to conclude that compliance with regional state immunity Conventions, in relations as between states parties to those Conventions, is incompatible with the right of access to a court. Moreover, we have not seen anything to suggest that the ECHR would conclude that the Council of Europe's own regional state immunity Convention is incompatible with the right of access to a court under Article 6

ECHR. Whilst we feel unable to conclude that section 4(2)(b), as amended, would be incompatible with the right of access to a court under Article 6 ECHR, we nonetheless invite the Government to consider this point in its response. (Paragraph 70)

As the Committee notes, the amendment to section 4(2)(b) removes the incompatibility in respect of persons employed by foreign states other than States party to the ECSI. With regard to States party to the ECSI, we have considered the arguments made by ATLEU and agree with the Committee that there is no evidence to suggest that the ECtHR would conclude that the Council of Europe's own state immunity convention, the ECSI, is incompatible with Article 6 ECHR rights. The UK as a party to the ECSI is bound by the terms of that Convention and that is why state immunity is retained in relation to cases involving another state that is party to the ECSI.

The Government should consider whether it is possible for the drafting in section 16(1)(aa)(i) to give greater legal certainty to employees and employers as to which roles would and would not normally be considered to be covered as an employment contract which the State entered into "as an exercise of sovereign authority" (Paragraph 74)

We thank the Committee for its comments, which we have considered in reviewing the drafting of section 16(1)(aa)(i). In preparing the proposed Remedial Order, careful consideration was given to whether it would be possible to set out in more detail the instances in which a contract of employment had been entered into in the exercise of sovereign authority. However, because of both the ambiguity in the existing international case law that the Committee has noted and the possibility that new instances of the exercise of sovereign authority may emerge, we concluded that the appropriate approach was that adopted in section 16(1)(aa)(i), which would allow the courts to assess whether a contract was entered into in the exercise of sovereign authority on a case-by-case basis.

We have again reviewed the drafting approach adopted in light of the Committee's comments and the points made by ATLEU. While we acknowledge that the drafting approach proposed leaves room for interpretation, for the reasons given above, we remain on the view that this is the appropriate approach and provides sufficient legal certainty while eliminating the incompatibility identified by the Supreme Court. We consider that the courts will be best placed to assess cases on an individual basis with the assistance of arguments by the parties at the time those cases arise.

There is some doubt as to whether limb 16(1)(aa)(ii) grants greater immunity than that required by customary international law and therefore may not be compatible with the right to access a court under Article 6 ECHR. The Government should provide detailed analysis to justify why this limb is required by customary international law and to explain the sorts of conduct that it envisages it catching. Alternatively, the Government should consider redrafting limb 16(1)(aa)(ii) to ensure it goes no further than the immunity required by customary international law. (Paragraph 76)

We have considered the Committee's comments about section 16(1)(aa)(ii) and whether it is required by customary international law. In our view, this provision is required by customary international law and that is why it is included in the draft Remedial Order, as it is necessary to remedy the incompatibility identified by the Supreme Court.

Specifically, the Supreme Court in *Benkharbouche* noted that:

> As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune. It is not always easy to determine which aspects of the facts giving rise to the claim

> are decisive of its correct categorisation, and the courts have understandably avoided over-precise prescription.[1]

The Supreme Court then considered the categorisation of an employment relationship or action as "sovereign" and noted that in the majority of cases the nature of the relationship will be an important factor. However, the Court also guarded against the notion that "the character of the employment is always and necessarily decisive".[2] Crucially, one of the examples provided by the Supreme Court was that:

> a state's immunity under the restrictive doctrine may extend to some aspects of its treatment of its employees or potential employees which engage the state's sovereign interests, even if the contract of employment itself was not entered into in the exercise of sovereign authority. Examples include claims arising out of an employee's dismissal for reasons of state security. They may also include claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which in the nature of things impinge on the state's recruitment policy. These particular examples are all reflected in the United Nations Convention and were extensively discussed in the preparatory sessions of the International Law Commission. They are certainly not exhaustive. In re Canada Labour Code [1992] 2 SCR 50, concerned the employment of civilian tradesmen at a US military base in Canada. The Supreme Court of Canada held that while a contract of employment for work not involving participation in the sovereign functions of the state was in principle a contract of a private law nature, particular aspects of the employment relationship might be immune as arising from inherently governmental considerations, for example the introduction of a no-strike clause deemed to be essential to the military efficiency of the base. In these cases, it can be difficult to distinguish between the purpose and the legal character of the relevant acts of the foreign state. But as La Forest J pointed out (p 70), in this context the state's purpose in doing the act may be relevant, not in itself, but as an indication of the act's juridical character.[3]

The intention of section 16(1)(aa)(ii) is to address circumstances where it is not the nature of the state's employment contract with the employee that is an exercise of sovereign authority, but rather where the state's treatment of its employees "engage the state's sovereign interests" to use the language of the Supreme Court. The Supreme Court pointed to some examples of this type of circumstances. In the light of the Committee's report we carefully considered whether these could be set out in more detail in the draft Remedial Order. However, and for the same reasons set out in response to the Committee's comments on section 16(1)(aa)(i), we consider that the courts will be able to assess this on a case-by-case basis and that the drafting does not grant greater immunity than is required by customary international law.

Other Matters arising

The Foreign Secretary should remain vigilant and, where relevant, proactively review the state of UK law giving effect to immunities to ensure that immunities do not go further than the extent necessary, and therefore do not unjustifiably interfere with human rights in the UK, and in particular the right of access to a court. (Paragraph 85)

The Government notes the Committee's recommendation on this issue. As set out in Lord Ahmad's letter of 13 July 2022 to the Chair of the Committee, the Government does not consider that immunities conferred by the SIA, Diplomatic Privileges Act 1964 or Consular

[1] Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah [2017] UKSC 62 at para 53.
[2] Ibid. at para 57.
[3] Ibid. at para 58.

Relations Act 1968 are incompatible with access to a court beyond what is required by international law.

Conclusion:

The Government has given careful consideration to the Committee's recommendations. We are committed to ensuring that robust procedures are put in place to mitigate the risk that such a lengthy delay could be repeated.

We are grateful to the Committee, have considered its recommendations and remain of the view that the order, as drafted, properly addresses the incompatibility in Benkharbouche.

Draft Remedial Order

Draft Order laid before Parliament under paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2022 No. 0000

INTERNATIONAL IMMUNITIES AND PRIVILEGES

The State Immunity Act 1978 (Remedial) Order 2022

Made - - - -	***
Coming into force	***

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([4]) under section 4 of the Human Rights Act 1998([5]) to be incompatible with a Convention right([6]).

The Secretary of State considers that there are compelling reasons for proceeding by way of remedial order([7]) to make such amendments to the State Immunity Act 1978([8]) as she considers necessary to remove the incompatibility.

([4]) By the Supreme Court in the case of Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62.
([5]) 1998 c. 42.
([6]) 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".
([7]) See section 21(1) of the Human Rights Act 1998 for the definition of "remedial order".
([8]) 1978 c. 33.

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 2022 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).

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([9]) 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([10]), 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([11]), 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

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([9]) Cm. 7742.
([10]) 1996 c. 18.
([11]) S.I. 1996/1919 (N.I. 16).

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

(3) After subsection (1) insert—

"(1A) In subsection (1)—

"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.".

Name
Minister of State
Foreign, Commonwealth and Development Office

Date

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.

EXPLANATORY MEMORANDUM TO

THE STATE IMMUNITY ACT 1978 (REMEDIAL) ORDER 2022

[2022] NO. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Foreign Commonwealth and Development Office ("FCDO") and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

2.1 This Remedial Order will amend the State Immunity Act 1978 (c. 33) ("SIA") to allow a category of claimants to bring claims against their diplomatic mission or consular post employers. This is to implement the Supreme Court judgment in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 ("*Benkharbouche*").

2.2 This Remedial Order will remove the incompatibility identified by the Supreme Court between Article 6 of the European Convention of Human Rights ("ECHR") (right to a fair trial), including as read with Article 14 (protection from discrimination), and the SIA.

2.3 The Order has retrospective effect from the date of the *Benkharbouche* decision in the Supreme Court on 18 October 2017.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

3.1 A document containing a draft of a proposed Remedial Order and the required information has been laid before Parliament in accordance with paragraph 3(1) of Schedule 2 to the Human Rights Act 1998 ("HRA"), and representations have been received from the Joint Committee on Human Rights. This Remedial Order is accompanied by a statement containing a summary of the representations and the Government's response to those representations, laid in accordance with paragraph 3(2) of that Schedule.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 Lord Ahmad of Wimbledon, Minister for South and Central Asia, North Africa, United Nations & the Commonwealth has made the following statement regarding Human Rights:

"In my view the provisions of the State Immunity Act 1978 (Remedial) Order 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument is being laid in response to the declaration of incompatibility by the Supreme Court in *Benkharbouche,* which determined that the statutory limits to the availability of bringing an employment claim under the existing sections 4(2)(b) and

16(1)(a) of the SIA are incompatible with Article 6 of the ECHR, including as read with Article 14. The Government proposes to implement the judgment by amending the SIA to remove the incompatibility.

6.2 Section 10 of the HRA provides that if a provision of legislation has been declared under section 4 to be incompatible with a Convention right, and the Minister considers there are compelling reasons to do so, the Minister may proceed by way of Remedial Order to amend the legislation in order to remove the incompatibility. It appears to Ministers that the amendments to the SIA proposed in the Remedial Order are necessary to remove the incompatibility identified by the Supreme Court and that there are compelling reasons to proceed by way of Remedial Order. Current pressures on the legislative timetable means there is little prospect of using primary legislation to remove the incompatibility.

7. Policy background

What is being done and why?

7.1 The proposed Remedial Order would make targeted amendments to the SIA to ensure that certain categories of claimants are able to exercise their rights under Article 6, including as read with Article 14, of the ECHR by bringing employment claims against their diplomatic mission or consular posts employers.

7.2 The Government proposes to amend section 4(2)(b) of the SIA to restrict the immunity of states in relation to employment claims brought by individuals who were neither a United Kingdom national nor resident in the United Kingdom at the time the contract was made. State Immunity will be retained where the case involves a state that is party to the European Convention on State Immunity as is required by the United Kingdom's obligations as a party to that Convention.

7.3 The Government also proposes to amend section 16(1) of the SIA to limit 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.

Explanations

What did any law do before the changes to be made by this instrument?

7.4 Section 4(2)(b) of the SIA confers immunity on a state with respect to 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 in the United Kingdom.

7.5 Section 16(1)(a) confers immunity on a state in respect of proceedings concerning the employment of members of a diplomatic mission or consular post, including its administrative, technical and domestic staff.

Why is it being changed?

7.6 The Supreme Court found that section 4(2)(b) and section 16(1)(a) of the SIA, are incompatible with Article 6, including as read with Article 14, of the ECHR and it was conceded that as a result, there was a breach of Article 47 of the Charter of Fundamental Rights of the European Union.

7.7 The declaration of incompatibility does not create legal obligations for the Government. However, as long as the incompatibility remains, similar cases may be brought against the United Kingdom before the European Court of Human Rights, giving rise to risk that the

Government will be required to compensate individuals whose real complaint lies against another State.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Government does not intend to consolidate the legislation.

10. Consultation outcome

10.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for a targeted amendment, which is required in order to implement a court judgment.

11. Guidance

11.1 The Government will not be publishing guidance on this amendment.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because we have assessed the likely impact to be too small to justify preparing a full Impact Assessment for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The effect of this amendment will be monitored on an ongoing basis by the Foreign Commonwealth and Development Office. Any declarations of incompatibility made by the domestic courts and judgments of the European Court of Human Rights on related matters will be included in the Government's annual reports to the Joint Committee on statutory Instruments.

15. Contact

15.1 Gary Benham at the FCDO, telephone: 07881836141 or email: gary.benham@fcdo.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jeremy Pilmore-Bedford, Deputy Director for Protocol, at the FCDO can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Ahmad of Wimbledon, Minister for South and Central Asia, North Africa, United Nations & the Commonwealth, at the FCDO can confirm that this Explanatory Memorandum meets the required standard.