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.