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Case No: FD19P00246, FD19P00380, FD19F05020, FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2020

Before :

The Rt Hon Sir Andrew McFarlane
President of the Family Division

Re Al M (Assurances and Waiver)

Lord Pannick QC, Alex Verdan QC, Sudhanshu Swaroop QC, Desmond Browne QC, Lewis Marks QC, Patrick Gibbs QC, Daniel Bentham and **Adam Speker** (instructed by **Stewarts Law**) for the **Applicant Father**
Charles Geekie QC, Tim Otty QC, Guglielmo Verdirame QC, Sharon Segal, Kate Parlett and **Isabel Buchanan** (instructed by **Payne Hicks Beach**) for the **Respondent Mother**
Deirdre Fottrell QC, and **Thomas Wilson** (instructed by **Cafcass Legal**) for the second and third **Respondent Children**

Hearing dates: 11th, 12th, 13th and 15th November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANDREW MCFARLANE

The release of this judgment to nominated members of the UK press is subject to a four hour embargo ending at 4pm on 5 March 2020 pursuant to the Order of the President of the Family Division dated 5 March 2020. Publication of any part of this judgment before that time is prohibited by that Order.

After the judgment has been published at 4pm on 5 March 2020 it is important to stress that certain reporting restrictions will remain in force pursuant to the Reporting Restriction Orders made by the President of the Family Division dated 28 January 2020 and 3 February 2020. The Reporting Restriction Orders have been served on the media; copies are available from the Royal Courts of Justice Press Office.

Sir Andrew McFarlane P :

1. This is a further judgment in the proceedings relating to the children of His Highness Sheikh Mohammed bin Rashid Al Maktoum ('the father') and Her Royal Highness Princess Haya bint Al Hussein ('the mother'). The background to these proceedings were rehearsed in detail in the fact-finding judgment which was handed down on 11 December 2019 and will not, therefore, be repeated here.

2. The focus of this judgment is upon certain assurances and waivers given by the father in order to meet the mother's concerns that, as the Ruler of Dubai and Head of Government of the United Arab Emirates ('UAE'), the father's position under international law may protect him from any of the enforcement powers that this court might otherwise have were he to breach the terms of any order this court may make with respect to the two children.

3. The protection offered by the father falls into two categories. Firstly, a series of assurances ('the assurances') set out in a formal document signed by the father, as Vice President and Prime Minister of the UAE and Ruler of Dubai made on his own behalf and on behalf of the UAE and the Emirate of Dubai. The document is also signed by the Minister of State for Foreign Affairs of the UAE and the Director General of the Government of Dubai Legal Affairs Department. The assurances document was signed by each of the three signatories on 4 October 2019. On its face it is addressed to the Foreign and Commonwealth Office of the United Kingdom Government, to this court and to the mother.

4. The assurances document records that the father "is entitled to and enjoys privileges, immunities and inviolability under international law and under English Law, by reason of his position as Vice-President of the United Arab Emirates ("UAE") and/or as Prime Minister (Head of Government) of the UAE and/or as Ruler of the Emirate of Dubai."

5. Five assurances are given by the father personally, by the UAE and by the Emirate of Dubai. In summary, they are:

   (1) The UAE will not seek to invoke the father's immunity as to the applications before this court, or his immunity or inviolability as to the execution or enforcement of any orders made in those applications;

   (2) If any "special missions immunity or inviolability" is obtained for the father for a special mission to the UK, it will be waived for the purposes of the applications, including execution or enforcement;

   (3) "Neither His Highness, nor any person acting on his behalf, nor any person acting on behalf of the UAE or the Emirate of Dubai will remove the children from the jurisdiction of England and Wales, unless in accordance with any order of the English courts made in the applications";

   (4) The children will be returned to the mother's care after any period of contact in the UK in accordance with any order of this court made in the applications;

(5) The children will be returned to the mother's care after any period of time spent with the father in the UAE, in accordance with any order of the English court made in the applications.

6. The assurances document defines "the applications" as being the four applications with the case numbers FD19P00246, FD19P00380, FD19F05020 and FD19F00064." The assurances are stated to apply only to the applications and to orders made to the applications. The assurances expressly exclude any matters relating to the father attending the English court and/or giving oral evidence. The assurances are expressly stated as "intended to be legally binding."

7. In a second document, signed by the same three signatories on 4 October 2019, various of the immunities enjoyed by the father as Vice-President of the UAE and/or as Prime Minister (Head of Government) of the UAE and/or as Ruler of the Emirate of Dubai are expressly waived ('the waiver document'). The waiver, which the document expressly confirmed is made by the father personally, by the UAE and by the Emirate of Dubai, relates to the following:

> (1) The immunity of the father as to the applications and only the applications is waived;
>
> (2) The immunity of the father as to execution of any order made in the applications is waived;
>
> (3) The inviolability of the father in relation to enforcement of any order made in the applications is waived;
>
> (4) The inviolability of the premises of the father in the UK (including certain properties named in the waiver document) in relation to enforcement of any order made in the applications is waived.

8. The waiver document defines "the applications" as set out in paragraph 6 above. The waivers are stated only to apply to the applications and to orders made in the applications. Again, the waiver document expressly excludes any matters relating to the father attending the court proceedings in England and/or giving oral evidence.

9. The case put forward before this court by the father and, conversely, the mother can be shortly stated. The father asserts that the assurances and the waiver provide a robust, reliable and legally sound regime which will be sufficient for the mother and this court to have confidence that the father, and those responsible for the actions of the Emirate of Dubai and the UAE, will abide by the terms of any contact orders made with respect to the time that the father wishes to spend with the children. The mother's position is to the contrary. She submits that, both in terms of form and substance, neither the assurances nor the waivers have any value in terms of providing protection for the children or reassurance for the mother or the court.

10. In more ordinary circumstances, where an individual lay party is offering undertakings to the court, the precise wording of the undertaking given might be the subject of detailed negotiation between the parties and scrutiny by the judge. That is not so in this case. The father's legal team stand and present his case on the basis of the precise

wording contained in the two documents dated 4 October 2019, subject to the possibility of a minor extension to include the address of a further UK property. Lord Pannick QC, leading for the father, explained the position in opening:

> "…but can I make it very clear, although we are prepared, of course, to discuss with my friends the drafting of the declaration, in particular to include in it notes which record the assurances we have given, my very firm instructions are not to go any further, we are not going to give further waivers, we are not going to give further assurances. …Can I just briefly say why that is the father's position. His position is that he has given a series of waivers, a series of assurances, he has made a [number] of concessions in this case and it is quite something of significance from his perspective for a Sovereign State, the UAE, to give assurances and waivers of the sort that Your Lordship has in this court."

The father's position is that each time he has offered some concession, the mother's side have asked for more. He has therefore drawn a line and stands on the extent and detail of the two documents to which I have referred.

11. Although the giving of formal assurances on behalf of a Sovereign State in order to support a private law application by a parent to spend time with their children is a rare, if in fact unprecedented, occurrence in the English courts, there is, in the event, little dispute between the two sides as to the legal context within which both the assurances and waivers fall to be considered. Such dispute as there is, and where there is dispute it is important, relates to matters of form and procedure rather than to the overall standing in law of these two mechanisms by which the ordinary respect to be afforded to a Sovereign State and to the Head of its Government might be reduced, limited or neutralised in certain circumstances. It is not therefore necessary for me to now embark upon a detailed exposition of the legal background. The matter can be taken very shortly.

12. An assurance may be given by or on behalf of a Sovereign State as to its future conduct. Whilst in force the assurance stands and will be given force under international law. An assurance can, however, be withdrawn by the State at any subsequent time.

13. Waiver of immunity, which more typically applies to individual diplomats working in a foreign state, may also apply to (for example) the Head of State, the Foreign Minister and the Defence Minister. Unlike an assurance, a waiver of immunity, once given, cannot be withdrawn.

14. The detail of the dispute between the parties as to process will become apparent during the summary of the parties' submissions which now follows. In headline terms the mother's team make two overarching points. Firstly, so far as the assurances are concerned, it is submitted that, contrary to the normal forum within which one state may make assurances to another, the assurances made in this case are unilateral. The Emirate of Dubai and the UAE offer these assurances to the court and to the Government of the United Kingdom in order to support the father's position in these proceedings. They have not been negotiated with the UK Government and, indeed, save for passively receiving them at the Foreign and Commonwealth Office ('FCO'),

the UK Government has played no part in the process. Further, the point is taken that the assurances have not even been reduced to the normal formalities of a *Note Verbale* which would be the custom for any formal declaration between one State and another. Thirdly, the delivery to the FCO took the form of a junior member of the firm of solicitors instructed by the father delivering the document by hand to the FCO for the attention of the Deputy Head of Protocol. The court has no evidence from the FCO describing its response to or evaluation of either the assurance document or the waiver document.

15. The second headline submission made on behalf of the mother is that the waiver only relates to the father and does not encompass any other person, in particular, any individual who might otherwise have diplomatic or other immunity within the UK and who might be acting on the father's behalf. For any waiver to be effective, in terms of protecting the children, it is submitted that, in the event of a breach of a court order, for example the attempted abduction of the children in a car, the tipstaff or any police officer needs to know whether or not the driver of the car and those in control of the children, if they do not include the father, have or do not have immunity at the precise moment of any police intervention.

The father's case:

16. Lord Pannick QC, who is assisted particularly by Sudhanshu Swaroop QC, Penelope Nevill and Daniel Bentham in this regard, submits that the legally binding nature of the assurances under international law trumps any point about process, procedure or means of delivery. Lord Pannick relies particularly on the judgment of the International Court of Justice ("ICJ") in the case of *Australia v France* [1975] ICJ Reports 253 which related to declarations made by the French authorities as to future atmospheric nuclear tests being conducted in the South Pacific. At paragraph 43 the court said this:

> "It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature if the juridical act by which the pronouncement by the State was made."

17. Understandably, Lord Pannick rightly places considerable reliance on this important passage. It establishes, I accept, that a State may make a unilateral declaration and, if the declaration is clearly to that effect, it will be legally binding on the State as a matter of international law whether or not it has been accepted elsewhere.

18. In the present case, the assurances document expressly states that "these assurances are intended to be legally binding". Lord Pannick's primary submission is, therefore, that, irrespective of any arguments of form, this unilateral statement in which a Sovereign State, the UAE, commits itself to giving specific assurances which are intended to be legally binding, can be relied upon by the court as representing that State's intention with respect to the matters covered within the document.

19. Turning to questions of form Lord Pannick, firstly, relies upon a further passage, paragraph 45, in *Australia v France*:

> "With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus, the question of form is not decisive".

20. With respect to form, both sides make reference to the case of *Othman v United Kingdom* (2012) 55 EHRR 1. Mr Othman, who was being held in the UK, and who was accused of terrorism-related matters, was subject to an order requiring his deportation to Jordan. He objected on the basis that if he were sent to Jordan, he would be likely to be tortured. The UK sought assurances from Jordan that he would be properly treated and in particular not tortured. The quality of the assurances that were given by the State of Jordan was therefore the subject of scrutiny both in the courts in this country (*RB (Algeria) (FC) v SSHD* [2009] UKHL 10) and before the European Court of Human Rights ("ECtHR") in the *Othman v UK* decision.

21. At paragraph 189 onwards of the ECtHR's judgment a list of relevant factors is set out to assist the court in evaluating whether or not a State's assurances given in a particular case can be relied upon. The factors are:

> "189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:"
>
> "(i) whether the terms of the assurances have been disclosed to the Court;
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> (ii) whether the assurances are specific or are general and vague;
>
> (iii) who has given the assurances and whether that person can bind the receiving State;
>
> (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;

> (v) whether the assurances concerns treatment which is legal or illegal in the receiving State;
>
> (vi) whether they have been given by a Contracting State;
>
> (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;
>
> (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
>
> (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
>
> (x) whether the applicant has previously been ill-treated in the receiving State; and
>
> (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State." (References omitted)

22. In short, Lord Pannick submits that, save where the factors are not relevant to the present case, the assurances given to support the father's position in these proceedings meet each one of the stated criteria. The assurances have been disclosed to the court. They are specific and neither vague nor general. They are given at the highest level by the UAE and by the Emirate of Dubai. They bind the federal government, namely the UAE, and the Emirate of Dubai. There is no legal impediment to the State of UAE complying with the assurances. Finally, there are strong, well established and close relations between the UAE and the United Kingdom.

23. In summary, on the issue of the assurances, Lord Pannick submits that these are clear, formal and legally binding statements of intent made by the UAE and the Emirate of Dubai by and on behalf of the State. As a matter of international law, a unilateral declaration does not require any action by any other state and is, of itself, to be taken as legally binding. When one drills down to the substance of the assurance and the circumstances of the State that has given it, measured against the Othman criteria, these assurances pass all of the relevant tests and can be relied upon by the mother and the court as providing real protection for these two children with respect to whatever regime of court orders may, in time, be put in place for their future welfare.

24. In relation to waiver of immunity the father's position is plainly and shortly stated. So far as he personally is concerned, the waiver of immunity, the details of which I have set out at paragraph 7, amount to an all-encompassing waiver in matters relating to the circumstances of the children within the context of any orders made in this court. Were

the father to act in a manner which was contrary to the orders of this court, he could not rely upon any immunity by reason of his position as Vice-President of the UAE and/or as Prime Minister (Head of Government) of the UAE and/or as Ruler of the Emirate of Dubai and he, and his extensive property in the UK, would be subject to the ordinary enforcement procedures of the court.

The mother's case:

25. Mr Otty QC, who takes the lead on the topic of international assurances on behalf of the mother, made three core submissions.

26. Firstly, in assessing the weight that can be given to diplomatic assurances, there is, he submits, no principle of law that assurances from a friendly State must be treated as reliable. The correct approach is to have regard to all the circumstances prior to the court forming a judgment as to the extent of the reliance, if any, that may be placed on any particular assurance that has been given. Where, submits Mr Otty, fundamental human rights are in play, particularly those of the gravity of Articles 3 and 5 of the European Convention on Human Rights ("ECHR"), it is very well established that any court or tribunal must engage in an appropriately rigorous analysis and would have to be satisfied through a close testing of the evidence that there is a sound objective basis for relying upon the assurances.

27. Mr Otty's second core proposition is that, in the particular circumstances of this case, and on the evidence before the court, the assurances provide no material comfort. In particular, it is submitted that the father has simply failed to provide the court with the tools necessary to assess the assurances.

28. The final core submission is that the assurances should, in any event, have been communicated through proper channels under cover of a *Note Verbale* to the FCO. The father has not done this and there has been no explanation for the unusual course taken, namely hand delivery via a solicitor's firm acting for the father in his personal capacity, rather than by formal and well-established diplomatic channels.

29. In developing his first submission in favour of a bespoke assessment of reliability being undertaken in every case, Mr Otty relied upon the following three principal authorities:

> *Lodhi v Secretary of State for the Home* Department [2010] EWHC 567 (Admin);
>
> *RB (Algeria) (FC) v SSHD* [2009] UKHL 10;
>
> *Othman v The United Kingdom* (2012) 55 EHRR 1.

In addition, Mr Otty relies upon paragraphs 258 to 278 in the judgment of Lord Sumption JSC in the case of *Belhaj v Straw* [2017] AC 964.

30. In the case of *RB* before the House of Lords at paragraph 23 of the judgment of Lord Phillips of Worth Matravers a description is given of the approach taken by Mitting J at first instance to the assessment of assurances:

> "23. Mitting J stated that assurances given by the Algerian Government were central to the issue of safety on return. He then

> set out four conditions that had to be satisfied if the assurances were to carry the credibility necessary to permit RB's return to Algeria:
>
> i) the terms of the assurances had to be such that, if they were fulfilled, the person returned would not be subjected to treatment contrary to Article 3;
>
> ii) the assurances had to be given in good faith;
>
> iii) there had to be a sound objective basis for believing that the assurances would be fulfilled;
>
> iv) fulfilment of the assurances had to be capable of being verified.
>
> The first two conditions were axiomatic. The third required a settled political will to fulfil the assurances allied to an objective national interest in doing so. It also required the state to be able to exercise an adequate degree of control over its agencies, including its security services, so that it would be in a position to make good its assurances. As to verification, this could be achieved by a number of means, both formal and informal, of which monitoring was only one. Effective verification was, however, an essential requirement. An assurance the fulfilment of which was incapable of being verified would be of little worth."

31. These four "RB criteria", as Mr Otty characterised them, were not, other than being recorded in Lord Phillips' judgment, either expressly endorsed or disapproved by the House of Lords. They were, however, referred to with apparent approval in a judgment of the Administrative Court (Laws LJ and Ouseley J), in the *Lodhi* case at paragraph 65. As that judgment demonstrates, the Administrative Court in that case conducted an extensive assessment of the assurances that were being put forward.

32. It is possible to round off Mr Otty's first core submission shortly because it is, as he confirmed in response, effectively accepted as a matter of principle by Lord Pannick. There is, therefore, no dispute that the court must assess the reliability of any assurances given from a friendly state by having regard to all the circumstances and that will include in this case, as Lord Pannick accepts, any findings that the court may make in relation to Princesses Shamsa and Latifa in so far as they may be relevant to these proceedings.

33. The issue, such as it is, between Lord Pannick and Mr Otty is at a lower level of detail and relates to the list of factors put forward by Mitting J in *RB* and later, seemingly, adopted by the Administrative Court in *Lodhi*, as opposed to the factors spelled out by the ECtHR in *Othman* which was, of course, the *RB* case reformulated under a different name in Strasbourg. Lord Pannick therefore prefers the checklist put forward by the ECtHR.

34. For my part, neither of these two checklists could be said to be proscriptive or, indeed, very detailed. They are not at odds with each other and both are aimed at assisting those who have to undertake the assessment of the reliability of any assurances given. The matter of principle is accepted which is that the court must have regard to all the circumstances.

35. Mr Otty then turned to the particular circumstances of this case which, he submitted, were of greatest note. Firstly, in contrast to other reported cases, where there had been genuine government-to-government engagement and international diplomacy, the assurances offered here could only properly be characterised as entirely unilateral promises. Secondly, they were hand delivered to the front desk of the FCO without formal warning, without covering letter, without context and without a request for any acknowledgment let alone a request for some form of substantive response.

36. Thirdly, in carrying out its assessment, Mr Otty submits that the court must drill down into the detail of international diplomacy to see what these particular assurances actually mean. He draws attention to the fact that the court has no evidence at all to indicate what countermeasures the UK might take or even whether the UK would even be interested in policing this unilateral declaration. In the same vein, there is no evidence, says Mr Otty, of the downside, in terms of diplomatic capital that the UAE might consider it would suffer were the assurances to be breached. There is simply no evidence as to how the UK would regard these assurances, and, because of his refusal to engage in the court process, the court has not had the opportunity to cross-examine the father as to the diplomatic weight that might be attached by the UAE to any potential breach. It is submitted that the father could have filed evidence from a diplomat to deal with these points even if he is not able to do so himself.

37. Fourthly, Mr Otty emphasised that, if the court were to make the findings sought by the mother with respect to Princess Shamsa and Princess Latifa (as it has now done), the risk of abduction and long term deprivation of liberty for these children, and indeed the mother, would be high and would engage potential breaches of their human rights sufficient to engage Article 3 of the ECHR. If the court were to find that the father was the prime mover in the abduction and detention of Princess Shamsa and Princess Latifa that would, he submitted, represent a breach of a norm of international law of the highest possible standing, yet the court is now being asked to weigh assurances being given by the same individual in relation to two of his other children. In those circumstances, Mr Otty submitted that the assurances offered to date can be given no weight whatsoever. He explained that it is the mother's case that the father has it within his gift to go very far beyond what he has so far given in terms of waivers, so as to encompass all those individuals and agents who might take action in this jurisdiction and then assert diplomatic or other form of immunity and thus avoid any attempt to enforce the court's order. The mother's case is that if further waivers were given in broad and clear terms that expressly embraced any agent acting for the father and addressing all the deficiencies that the mother's team have identified, then that would, at least, give the mother comfort in knowing that if the children were late back, or there was some other reason for concern, the police in the UK could be contacted and that the officers attending would not become bogged down in the niceties of diplomatic or other form of immunity.

38. Turning to his second core submission considering how the principles apply to the facts of this case, Mr Otty relies, firstly, upon the general human rights record of the UAE in

terms of Rule of Law and human rights protection more generally which, he submits, is poor. The court has evidence filed on behalf of the mother to that effect. More particularly, the court now has the findings of fact that have been made with respect to Princess Shamsa and Princess Latifa.

39. Secondly, Mr Otty points to there being a fundamental mismatch between the assurances and the waivers that have been proffered in this case. The assurances are in the widest possible terms and purport to bind just about everybody, the father, the UAE, Dubai, all state agents and all the father's agents, whereas the waivers apply to the father alone. The waivers do not even cover his agents, let alone other state agents. No explanation is offered other than the bald statement that the father asserts that the waivers are sufficient to meet the risks.

40. Thirdly, the father has not assisted the court by filing evidence either personally or by offering a witness on his behalf.

41. Fourthly, there is no evidence of the FCO's view of the assurances and waivers that have been given.

42. Fifthly, Mr Otty points to the apparent failure of the British authorities to intervene with respect to the abduction of Princess Shamsa.

43. Finally, Mr Otty points to the lack of any evidence as to how UK court orders and findings of contempt might be enforced under the assurances in any process in Dubai.

44. Mr Otty concluded his submissions on this point on the basis that any rational approach to the application of the *RB*/*Othman*/*Lodhi* criteria to the present case would lead to the conclusion that there is no weight that can be placed upon the assurances that have been given.

45. By way of an additional submission Mr Otty drew attention to the need, in international law, for there to be a mechanism to resolve any dispute that might arise if, in this case, the UAE were to default on the assurances that have been given. Such a mechanism would depend upon another state being able to invoke some international dispute resolution mechanism and be willing to do so. The jurisdiction of the ICJ depends upon states submitting to its compulsory jurisdiction. The UAE is not one of the seventy-four states which has done so. Thus, enforcement via the International Court of Justice is not available. Even if it were so, there is no evidence that the UK Government would, in this case, seek to enforce the court's order against the UAE.

46. Finally, Mr Otty submits that, despite the clarity that they provide at a high level, the terms of the assurances are fundamentally and fatally undermined in terms of their substance. The behaviour purportedly covered by the assurances is behaviour that would be occurring within the jurisdiction of England and Wales and which would, therefore, on normal principles, attract diplomatic or state immunity concerns. Where, as here, the assurances given by the state are not accompanied by waivers which precisely mirror their terms, the assurances are no more than empty promises. They may look attractive on paper but they would be of no assistance to a police officer on the ground deciding at short notice whether or not to intercept a diplomatic car, for example.

47. Mr Otty's third core submission was taken shortly. The ordinary channel through which documents of this nature are communicated by one state to another state is via the relevant embassies and via a *Note Verbale*. Whilst the lack of form may not invalidate the legally binding nature of the assurances themselves, in terms of them being given weight and enforceability within the UK, Mr Otty submits that this semi-informal method of transmission to the FCO can only weaken the confidence that the court may have in the overall validity of the process and the underlying ability of the court to rely upon the assurances.

48. Mr Verdirame QC led on the issue of waiver of immunity on behalf of the mother. First of all Mr Verdirame pointed to two documents that have been produced by the mother's side. One indicates the additional matters that would need to be added to the waiver of immunity document signed by the father in order to include within its terms additional promises that the father has made elsewhere in these proceedings. The second document indicates what would be needed in terms of waiver of immunity in order for the waiver document to be a mirror companion of the assurances document. I understand the points made in detail there and it is not necessary for me to repeat them in this judgment.

49. Secondly, Mr Verdirame drew attention to the decision in *R* (*Freedom and Justice Party and others) v FCO* [2016] EWHC 2010 (Admin). The point simply made based upon that authority is one on the facts. Following an arrest, the question of diplomatic immunity arose and it is plain from the judgment in that case that the Metropolitan Police were, in the event, guided in their decision whether to detain by advice from the FCO. It is, therefore, submits Mr Verdirame crucial to understand how the FCO would regard the father's waiver of immunity to form a view as to the level of protection that it would provide for the children.

50. Although Mr Verdirame made a number of other helpful submissions, at the end of the day the mother's key point on waiver is that the only individual to whom the waiver document relates is the father and it is unlikely that the father himself would be directly involved in any action to take control of the children and remove them from this jurisdiction, any more than he was directly involved in the episodes relating to Princess Shamsa and Princess Latifa.

The father's response:

51. In reply Lord Pannick, as I have indicated, accepted that the assessment of the reliability of assurances given, legally binding though they are, was a matter for the court on a consideration of all the circumstances in each case. He favoured the criteria identified by the ECtHR in the *Othman* case and the rigorous scrutiny which he accepted the court would apply, must be in accordance with those criteria.

52. On the point regarding the father not being the prime mover in any particular episode which might be an attempt to breach the court order, Lord Pannick made the point that each circumstance to which the order might relate deals with contact that the father himself is to have with the children. He said, "We are not talking about the risk of the children from anywhere else". Lord Pannick said "The concern is that [the children] will be abducted at the orders, at the behest, of the father, and therefore, for the father to waive the relevant immunities is quite sufficient for present purposes. He is the one who it is said would be directing the activity."

53. Lord Pannick submitted, and I accept, that whilst it is a matter of law that the UAE might withdraw these assurances at any stage, it would be unlawful for them to do so, and an act of bad faith, were they to seek to do so after any event to which the assurances might relate.

54. Lord Pannick did not accept that the court would be assisted by any evidence from a UAE diplomat or from the FCO as to the impact of the particular assurances given in this case as between the two States. The father's position is that the assurances are binding and that should be sufficient where the words of the assurance are sufficiently clear.

55. So far as waivers are concerned Lord Pannick's final position was that the waivers had been given and no further extension of their scope was on offer. The matter was put in terms: "We recognise that Your Lordship may say that it is not good enough, that it is necessary for the father to do more in order to satisfy [the guardian] and the court, but those are the waivers that Your Lordship has, and for the reasons given in opening, we are not prepared to give any further waivers in this case. That is our position."

Discussion:

(a) The Assurances

56. For a foreign Sovereign State to give legally binding assurances in order to support the private law interests of an individual and, by doing so, bind itself to act in accordance with any relevant order made in private law proceedings in this jurisdiction relating to that individual's children is, so far as the experience of this court is concerned, without precedent. It is, as Lord Pannick submitted, something of real significance that a Sovereign State has acted in this way. For my part I am grateful for, and afford great respect to, the fact that the UAE and the Emirate of Dubai have given these assurances to this court. It is no ordinary matter and it is one to which I accord significant weight.

57. The assurances themselves are in wide and clear terms. No particular point of importance is taken concerning their substance; indeed, part of the mother's case is that the terms of the assurances should be replicated in the waivers of immunity.

58. On the basis of the ICJ decision in *Australia v France,* I accept that, if it clearly purports to do so, a declaration of this nature will be legally binding in international law even where there is no context of international negotiation and there is nothing in the nature of a *quid pro quo* or statement of acceptance by any other relevant State, in this case the UK. I also accept that this clear statement of assurance is 'intended to be legally binding'. I therefore will proceed that this is indeed the case and I also accept that, whilst an assurance once given may subsequently be withdrawn, any such withdrawal would not impact upon its legally binding nature with respect to any antecedent act to which it relates.

59. In short, this statement of assurances given by and on behalf of the UAE and the Emirate of Dubai not only commands respect as an unprecedented attempt to assist and reassure the court, it is a statement which is likely to be legally binding upon the UAE and the Emirate of Dubai as a matter of international law. As it contains a clear, relevant and unequivocal description of the State's intention with respect to the matters covered within it, the starting point of any evaluation, and subject to assessment against all the

circumstances of the case, is that it falls to be relied upon by this court when contemplating the future risk of harm to these children.

60. Turning, then, to the evaluation of the assurances against the background of all the circumstances of the case, and adopting the first five elements in the checklist described in *Othman*:

    i) the terms of the assurances have been disclosed to the Court;

    ii) the assurances are specific and clear;

    iii) they are given by those who are in a position to bind the UAE and Dubai;

    iv) they do bind the UAE and the Emirate of Dubai;

    v) there is no evidence that abiding by the assurances would be unlawful in the UAE or Dubai.

61. The remaining elements in the *Othman* checklist are of limited relevance as they concentrate on matters more directly relating to the structure of the ECHR or the factual circumstances of that case. Two are, however, of importance. Firstly item (vii) relating to the state of relations between the two states and the track-record of the state giving assurance in abiding by similar statements. On one view there is, of course, no such track-record as assurances of this nature have not been given before. But, to a degree, the facts that I have now found as to the treatment of Princess Shamsa, and the inability of the UK authorities to take effective action to protect her, are of some relevance here.

62. Secondly, item (viii) which deals with 'whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers' is of relevance. One of the most persuasive arguments raised by Mr Otty related to the absence of any mechanism under international law for the monitoring or enforcement of these assurances in the event of an alleged breach. The UAE is not subject to the ICJ and there is no other independent diplomatic or legal forum which might be deployed to ensure compliance in the event of an alleged breach. Further, and on a different point, the findings made with regard to Princess Shamsa and Princess Latifa, strongly suggest that there would be substantial difficulties in the children having access to their own lawyer in the event that they were held in Dubai contrary to any order of this court.

63. When the assurances are measured up against the first two of the four *RB* criteria:

    i) if the assurances are fulfilled, the father's immunity is waived (to the extent specified in the document) and the children would not be removed or held contrary to any pre-existing order of this court; and

    ii) the assurances have been freely given by the UAE in good faith.

    In relation to item (iii) however, as I will describe further, there is an absence of evidence upon which the court might conclude that there was a sound objective basis for believing that the assurances would be fulfilled, and, in relation to (iv), as I have already concluded, there is no mechanism by which fulfilment of the assurances can be monitored and enforced.

64. Looking more generally at the circumstances here, I regard Mr Otty's submissions concerning the absence of any evidence relating to the impact of these assurances upon the authorities in the UK to be of substantial weight. Whilst the assurances themselves are intended to be legally binding, they will only in fact bind the UAE, in the event of an alleged breach, if another state, in this case the UK, were to seek to enforce them and there was a forum/ mechanism for doing so. I have already dealt with the latter point; there is no relevant forum or mechanism and Lord Pannick does not submit to the contrary. In the world of diplomacy, the absence of a legal forum may not be the end of the issue. There may always be the possibility of diplomatic pressure being applied by one state upon another, irrespective of the absence of a strict legal remedy. It is in this context that the father's case is extremely weak. There is a total absence of evidence relating to the UK's likely response to any breach. In the circumstances, it is difficult to have confidence that the UK would seek to enforce compliance by the UAE through diplomatic channels if this court were to find that a breach had occurred at some future point.

65. I accept that it is possible for a state to give a legally binding assurance on a unilateral basis but, in the absence of any history of state-to-state negotiations, where that is the case it must become all the more important for a court evaluating what reliance may be placed on that assurance to understand how the other state, the UK in this case, will view the assurance and may act if it is alleged that there has been a breach. Here there is simply no evidence of how the UK would regard the assurances that have been given.

66. The father's case becomes weaker still when consideration is given to the form and process by which the assurances have been communicated to the FCO. Whilst, again, I accept the submission that a failure to follow one process or another may not affect the underlying legally binding nature of the assurances, where the all-important question, as I see it, is 'what will the receiving state do in the event of a breach?', transmission by informal and unconventional means, and an absence of any statement by the receiving state as to its position, can only generate significant and unresolved doubt as to the reliability of the document as a means of protecting the children in this jurisdiction.

67. In the same vein, I accept that the absence of any evidence from a witness authorised to speak on behalf of the UAE as to the downside in terms of diplomatic capital in the event of a breach, presents a further hurdle to the court being able to place reliance upon the assurances. Diplomatic relationships between any two states will, of necessity, be complicated and multi-faceted. The fact that the two states are on well-established friendly terms does not reduce that level of complexity. Indeed, one could suppose that the closer the relationship may be, the more multi-layered and sophisticated the connective elements between the two states are likely to be. Without evidence both on behalf of the government of the UAE and on behalf of the government of the UK as to the likely diplomatic consequences of a breach of any of these assurances, this court is simply in the dark when trying to discern what, if anything, would follow such a breach.

68. A further relevant point, but one in my view that falls to be given closer scrutiny at the overall risk assessment stage of these proceedings, and following further submissions by the parties, arises from the court's findings of fact as to the father's role in the events relating to Princess Shamsa and Princess Latifa. Depending on that further scrutiny, it may be that, in the particular circumstances of this case, the fact that the assurances are being given effectively on the direction of the father, as Head of Government of the

UAE, coupled with the court's findings as to the father's previous actions, may reduce yet further the degree of weight that can be afforded to them.

69. Although different, the impact of the assurances and the waivers that have been offered is related; I will therefore set out my final conclusion with respect to the assurances after giving consideration to the waivers.

(b) The Waivers

70. In like manner to the assurances, this court fully understands the significance of the step that the father, as a Head of Government, has taken in waiving the substantial immunity that he would otherwise enjoy under international law with respect to orders that may be made by this court in the course of determining the applications that are before it with respect to these two children. The fact that he has made such waivers is, in my view, a clear indication of the importance that he places upon re-establishing a viable, regular relationship with each of the children; it is also a clear statement of his intent to be bound by any orders that this court may make for the children's future welfare.

71. Further, the clear statement within the document as to waiving the inviolability of the father's UK premises in relation to the court's powers of enforcement is, on any view, a significant concession and one which, if it ever fell to be pursued, would be likely to have a substantial impact upon the father. Again, the fact that the father has given this waiver is both respected and appreciated by this court.

72. Despite these two substantial positive features, the waivers are primarily to be assessed in terms of their ability to protect the two children from any potential breach of the court's orders for their welfare. The focus must therefore be upon the effectiveness of the waivers if any breach were to occur in this jurisdiction. The principal risk is of abduction and forced removal to Dubai, and the primary concern is for those charged with enforcing the court's orders to be able to apprehend any individual thought to be involved in an abduction attempt and thereby thwart its completion. As was the case, on the court's findings, in relation to both Princess Shamsa and Princess Latifa, their seizure and repatriation was undertaken by employees and/or agents acting on behalf of the father, and not by the father personally. For any waiver of immunity to be relevant and effective in terms of meeting the risk of the abduction of either of these two children, it would need to relate to those agents or employees of the father who may be involved on the ground at the time and who may otherwise enjoy, or at least be able to claim, diplomatic immunity. An attempt at abduction is likely to be a fast-moving event; any lack of clarity as to the legal position of an individual apprehended by the police could only be contrary to the prospects of ensuring that the court's orders are complied with.

73. In the event, as the waiver that has been given by the father plainly only relates to himself and does not purport to cover any other individual who may enjoy diplomatic immunity, there is no lack of clarity. The waiver document plainly does not relate to anyone else and, if an individual apprehended during the course of an abduction attempt were able to claim diplomatic immunity, this document would not be of any relevance or, importantly, provide any protection for the children.

74. In the circumstances, whilst, as I have already concluded, the waivers given may well provide a significant avenue of enforcement against the father's UK properties in the

aftermath of a breach having taken place, they do not provide any element of protection against, and indeed are irrelevant to, the primary risk which is of abduction by others acting on the father's instructions.

75. It is not strictly necessary in the light of that conclusion to go further, but I record my acceptance of Mr Verdirame's submission that the value of the waiver document is substantially weakened by its limited nature in that it neither accords with the more widely drawn assurances document nor includes additional concessions that the father has otherwise made within these proceedings.

Conclusion:

76. In the light of the matters of concern that I have identified, and despite the appreciation and respect that this court readily affords to the State of the UAE and to the Emirate of Dubai for giving these assurances, I am, at present, unable to place any weight upon them in terms of regarding them as providing protection for the children from the risk of abduction within England and Wales.

77. Whilst the assurances, on their face, undoubtedly establish a legally binding promise that the terms of any order of this court will be respected and enforced, the court is, for the reasons that I have given, at present wholly unable to discern whether, and if so how, such an assurance would be enforced by the UK, either as a matter of international law or diplomatically, in the event of a breach.

78. The waiver of immunity that has been given by the father may be significant in terms of enforcement against his UK properties after the event of any breach of the order, but it is limited solely to his own status and does not engage with the primary need which is to prevent a breach occurring and, more particularly, to ensure that any person acting on behalf of the father is unable to claim diplomatic immunity if apprehended during the course of an attempted abduction.

79. In paragraphs 77 and 78 I have deliberately used the phrase 'at present'. These proceedings are a dynamic process and they have not yet concluded. The children are relatively young, and the court is interested in establishing robust long-term arrangements for their care and protection. Despite the father's clearly stated position that he stands by these two documents as they are presently drawn and by the evidence that is currently before the court, it remains open to the father to review his position in the light of this judgment and to address the areas of concern and the lacunae that the court has identified in the evidence and in the scope of the waiver of immunity. However, to be influential in altering the current analysis, any initiative to address these matters would need, as essential elements, to include (a) clear evidence of the likely approach of the UK government to any breach of the assurances that have been given by and on behalf of the State of the UAE and the Emirate of Dubai, and (b) a comprehensive waiver of immunity with respect to any employee or agent acting on behalf of the father in an attempt to breach the terms of an order made by this court.

80. Subject to those observations, this case will now proceed to the concluding stages during which consideration will be given to the risks to the children in the light of the court's findings of fact and in the light of the analysis of the assurances and waivers set out in this judgment. Any risks identified will then fall to be drawn into a final, all encompassing, welfare evaluation within which they will be balanced against the

advantages to the children of re-establishing and then maintaining their relationship with their father together with all other relevant factors.