Neutral Citation Number: [2022] EWCA Civ 1052

Case No: CA-2022-001029

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
Mr Justice Nicklin
[2022] EWHC 668 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
and
LORD JUSTICE PETER JACKSON

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Between :

Corinna Zu Sayn-Wittgenstein-Sayn	**Claimant/ Respondent**
- and -	
His Majesty Juan Carlos Alfonso Victor Maria de Borbón y Borbón	**Defendant/ Applicant**

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Timothy Otty QC and **Paul Luckhurst** (instructed by **Clifford Chance LLP**) for the **Applicant**
James Lewis QC (instructed by **Kobre & Kim (UK) LLP**) for the **Respondent**

Hearing date: 11 July 2022

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Approved Judgment

Lord Justice Underhill :

1. The Defendant in these proceedings is the former King Juan Carlos II of Spain and father of the present King, Felipe VI. He abdicated on 18 June 2014 although he remains entitled to use the title King and the style "His Majesty". He formally retired from public life on 2 June 2019 and from August 2020 has lived in Abu Dhabi.

2. The Claimant and the Defendant were in an intimate relationship from 2004 to 2009. The Claimant alleges that from 2012 the Defendant has engaged in a course of conduct towards her which constitutes harassment in breach of the Protection from Harassment Act 1997. Her claim form was issued on 16 October 2020. In her Particulars of Claim she seeks damages and injunctive relief.

3. On 18 June 2021 the Defendant issued an application seeking an order declaring that the Court had no jurisdiction to try the claim because he was entitled to immunity under the State Immunity Act 1978 and/or the Diplomatic Privileges Act 1964 as extended by the 1978 Act. That application was dismissed by Nicklin J by an order dated 29 March 2022, giving effect to a judgment handed down on 24 March.

4. The Judge refused the Defendant permission to appeal against that decision. By an Appellant's Notice filed on 24 May 2022 he has applied to this Court. By an order dated 15 June 2022 I directed an oral hearing of both applications. The application was first listed on 11 July but had to be adjourned and took place before myself and Peter Jackson LJ on 18 July. The Defendant was represented before us by Mr Timothy Otty QC leading Mr Paul Luckhurst and the Claimant by Mr James Lewis QC.

5. At the conclusion of the hearing we indicated that we would refuse permission to appeal on two of the five grounds but grant it on the remaining three and that we would give our reasons later. These are my reasons for that decision.

6. Given the nature of the application to this Court I need give no more detail of the claims or of Nicklin J's judgment than is necessary to explain my reasons. Those wanting further detail can find it in the judgment of Nicklin J which is available online with the reference [2022] EWHC 688 (QB). I should emphasise that at this stage there has been no decision about whether the Claimant's allegations are true and the Defendant emphatically denies any wrongdoing.

7. We are concerned with two species of statutory immunity, which I take in turn.

8. First, Part I of the 1978 Act is concerned with "Proceedings in the United Kingdom by or against Other States". Section 1 reads:

> "(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

Section 14 (1) (a) provides that "references to a State include references to … the sovereign or other head of that State in his public capacity". Immunity on the basis that

a head of state was acting "in [their] public capacity" was described before us as "functional immunity".

9. Second, the 1964 Act gives effect in UK law to articles of the Vienna Convention on Diplomatic Relations granting immunity to diplomats and some of their family members, including (by article 31) immunity from civil jurisdiction. Section 20 of the 1978 Act, which falls within Part III ("Miscellaneous and Supplementary"), extends that immunity, broadly speaking, to heads of state. It reads (so far as material for our purposes):

> "(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to —
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> (a) a sovereign or other head of State;
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> (b) members of his family forming part of his household; and
>
> (c) his private servants,
>
> as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.
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> …
>
> (5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity."

10. The Defendant claims both immunity under Part I as regards certain acts alleged against him prior to his abdication and immunity under the 1964 Act, as extended by section 20 of the 1978 Act, as regards the entirety of the claim. Since the main ground on which we have refused permission, ground 3, concerns the latter I will take that first.

11. Although before the Judge the Defendant asserted that even since his abdication he remains a "sovereign" within the meaning of section 20 (1) (a), that claim is not now pursued, and he advances only an alternative contention that he is a member of the family of his son and his successor, King Felipe VI, "forming part of his household" within the meaning of section 20 (1) (b).

12. As to that, Mr Otty relied principally on evidence contained in a Joint Memorandum from two expert witnesses on "the Constitutional and Legal Status in Spanish Law of His Majesty King Juan Carlos de Borbón y Borbón". The essential part of the Joint Memorandum for the purposes of his argument is the statement that:

> "The Defendant is a member of the Spanish Royal Family, according to the provisions of Royal Decree 2917/1981; being an ascendant in the first degree of King Felipe VI. The members of the Royal Family of Spain changed after King Felipe VI was proclaimed the King. … Once King Felipe VI became King, the members of the Royal Family of Spain became: King Felipe VI; Queen Doña Leticia; the King's

> daughters, Princess of Asturias Doña Leonor and infanta Doña Sofia; and the King's parents, the Defendant and Doña Sofia."

Mr Otty emphasised that the Royal Family so defined constituted a very tight group of those most closely connected to the King – his spouse, his parents and his children – referred to in the argument before us as "the core Royal Family".

13. The expert evidence also established:

    (a) that the core Royal Family was also known as "the King's House" ("*Casa de Su Majestad El Rey*"); and

    (b) that the Constitution provides for a separate body, to which the Defendant has not belonged at least since 2019, known as "the Royal Household" whose purpose is "to serve as support for the King in all the activities derived from the exercise of his functions as head of state".

14. The Judge rejected the claim to immunity under section 20 at paras. 61-64 of his judgment. I can summarise his reasoning as follows.

15. At para. 61 he notes, while saying that it was "not determinative", that the evidence filed by the Defendant did not state that he was a member of King Felipe's household. He also noted that there was no evidence filed on behalf of King Felipe or the Spanish state and no claim to state immunity by either; also that no certificate had been provided by the Secretary of State under section 21 of the 1978 Act.

16. At para. 62 the Judge says:

> "Whether the Defendant does fall within the definition of 'household' is a matter of the proper construction of s. 20(1)(b). The substance of Sir Daniel's arguments focused, again, on the special – even unique – position that the Defendant enjoys under the Constitution following his abdication. There is no doubt that he remains a member of the Spanish Royal Family, as an ascendant in the first degree of the current King. The real issue is whether the Defendant is, now, a member of the King's household so as to bring him within s.20(1)(b). I am satisfied that he is not and does not."

(The reference to "Sir Daniel" is to Sir Daniel Bethlehem QC, who was leading counsel for the Defendant before the Judge.)

17. At para. 63 the Judge says that, although the question whether the Defendant was a member of the King's "household" was one of fact, the factual assessment had to be conducted in accordance with the principles identified by this Court in *Al Saud v Apex Global Management Ltd* [2013] EWCA Civ 642, [2014] 1 WLR 492. The issue in that case was whether two Saudi princes – one the half-brother of the King and the other his nephew – were members of his household within the meaning of section 20 (1) (b). This Court upheld the decision of the High Court that they were not. Its essential reasoning is summarised in the WLR headnote as follows:

> "… [T]he phrase 'members of his family forming part of his household' … was restricted to spouses, civil partners, dependent children and dependent relatives; that, therefore, the princes, both of whom were adults living apart from the King with households of their own, were not members of the Saudi Arabian King's 'household'."

That involved taking the same approach to the meaning of "household" in the case of a monarch as was established in the case of a diplomat. In a published lecture entitled *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* the late Sir Arthur Watts KCMG QC had suggested that that was the wrong approach and had said:

> "In the circumstances of a diplomatic mission membership of an ambassador's household may be thought to require an element of dependence on the ambassador, and residence under the same roof. But a Head of State's circumstances may be very different; if a monarch, his household may well be regarded as containing adult members of the immediate Royal family who, although living in a separate establishment from that of the monarch, nevertheless share in and assist with the exercise of certain Royal constitutional and representational functions.
>
> These considerations are particularly relevant where a member of the family has a separate constitutional role closely connected to the office of Head of State. Such may well be the case, for example, in respect of an heir to the throne of a monarchy."

In short, he suggested that "household" should be regarded as covering not only the household of a head of state in the domestic sense but also those members of their immediate family who "share in and assist with" their functions. This Court declined to endorse that approach.

18. Applying the approach in *Apex* the Judge says, at para. 63:

> "The plain fact is that the Defendant is not a dependent of King Felipe VI, the key factor identified by the Court of Appeal to qualify as a member of the 'household'. More widely, the Defendant does not live with the current King; he does not even live in Spain. The Court of Appeal rejected the functional definition of 'household' to embrace those closely assisting the head of state to discharge his responsibilities, but even had that been the test, the Defendant would not have qualified. Whatever the extent of the assistance the Defendant provided prior to his retirement from public life, since then he has discharged no such function."

19. At para. 64 he goes on to say:

> "Even had I not been bound by *Apex*, and had a free hand to interpret s.20(1)(b), I would still have comfortably rejected the Defendant's arguments. The claim that the Defendant is a member of the current

> King's household is based on little more than a combination of his constitutional status and his position as the King's father. Being simply a member of the King's family clearly cannot be sufficient as otherwise the reference to '*household*' in s.20(1)(b) would be redundant. The position occupied by the Defendant under the Constitution is entirely honorary, respecting his position as the former King and father of the current King. Whilst the Constitution therefore acknowledges and respects the Defendant's position, and confers certain honours and privileges to reflect this, it provides no continuing role for the Defendant to perform. As matters stand presently, and since his retirement from public life, the Defendant has discharged no public functions in support of the Royal Family or Spanish state, and he has lived in the United Arab Emirates since August 2020. I asked Sir Daniel during his submissions whether the Defendant would nevertheless remain part of King Felipe VI's '*household*' under s.20(1)(b) if he moved to Siberia and had no further communication with his family or anyone in Spain. Sir Daniel said that he was reluctant to put the position in such stark terms, but that was the effect of his submissions. In my judgment, that demonstrates that, in the Defendant's argument, the term '*household*' means nothing more than '*family member*'. That submission must be rejected on a simple reading of s.20(1)(b). Once *Apex* is applied, the Defendant's argument is untenable on the facts as to the current position and role of the Defendant."

20. The Judge's conclusion and reasoning on this issue are challenged by ground 3 of the Grounds of Appeal, which reads:

> "*Errors of fact and law in relation to the test under s.20(1)(b) SIA and the Diplomatic Privileges Act 1964 ('DPA')* (Judgment, [61]-[64])
>
> a. The learned Judge misdirected himself on the evidence on the issue of whether the Appellant was entitled to immunity in his capacity as a member of the family of King Felipe VI of Spain '*forming part of his household*', under s.20(1)(b) SIA and relevant provisions of the DPA.
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> b. Further and relatedly, the learned Judge erred in law on the issue of whether the Appellant was entitled to immunity in his capacity as a member of the family of King Felipe VI of Spain '*forming part of his household*', under s.20(1)(b) SIA and relevant provisions of the DPA. The learned Judge erred in concluding that he was bound by the Court of Appeal in [*Apex*], which is not controlling authority on this issue, and in any event, is distinguishable. Further, he failed to address, or indeed to refer at all, to the 'subject … to any necessary modifications' language of s.20(1) SIA, which is highly relevant to the Appellant's claim to immunity."

21. A substantial part of Mr Otty's submissions was directed to the Judge's conclusion that he was bound by *Apex* – i.e. head (b) under ground 3. He submitted that it could be distinguished; alternatively that its ratio was wrong, and that even though we also would

be bound by it we should give permission to appeal in order to give the Supreme Court the opportunity to decide whether Sir Arthur Watts' approach should be preferred.

22. I need not engage with those submissions because even if they are arguable I do not accept that the Defendant has any real prospect of establishing that he is, or was at the time the proceedings were issued, a member of the household of King Felipe VI, whether on Sir Arthur Watts' approach or any other arguable approach. I am prepared to accept (putting *Apex* to one side) that the term "household" may be used in a sense that goes beyond the purely domestic and extends also to family members who are involved in sharing, or assisting in, the functions of the head of state, as Sir Arthur suggested. But on the facts of the present case the Defendant cannot conceivably be described as part of the King's household in either sense. He neither lives with his son (or indeed even in the same country) nor plays any part in supporting his work.

23. Mr Otty's case as regards this aspect was based on the proposition that an important aspect of the discharge of the functions of a head of state, and particularly perhaps a monarch, was the maintenance of the "dignity" necessary to that role. He referred us to the recent judgment of Sir Andrew McFarlane in *Re the Will of His Late Royal Highness the Prince Philip, Duke of Edinburgh* [2021] EWHC 77 (Fam), and in particular to the statement at para. 55 of his judgment that "there is real constitutional importance in maintaining the dignity of the monarchy". He submitted that the exposure of members of the family of a head of state to civil proceedings in an overseas jurisdiction was liable to prejudice the "dignity" which was necessary to their role; and that the immunity granted by section 20 (1) (b) was primarily concerned with that risk (though he referred also to the risk of the head of state being distracted from the exercise of their functions by the existence of such proceedings). He said that the reference to family members who formed part of the "household" was evidently intended to limit the immunity to those persons whose relationship with the head of state was such that that risk was particularly serious – where, as he put it, there were "close ties and special circumstances" (a phrase derived from the *travaux préparatoires* for the Vienna Convention). That being the underlying purpose, the meaning of "household" should be treated as flexible and fact-sensitive: it is "a concept and not a place". The two cases mentioned by Sir Arthur Watts are only examples of the underlying principle and should not be taken as exhaustive. If that approach were taken in the present case the fact that the Defendant was a member of the "core" Spanish Royal Family clearly demonstrated peculiarly close ties with the current King, and/or special circumstances, such that his exposure to civil proceedings in this country was liable to prejudice the King's dignity and thus to impact on the performance of his duties, even though the Defendant neither lived with him nor assisted him in his work. The Judge had not in the relevant paragraphs of his judgment referred to the agreed evidence about the Defendant's membership of the core Royal Family (see para. 12 above): that omission is the "misdirection" referred to under head (a) of ground 3.

24. I do not believe that that argument has any real prospect of success. I am content to accept for the sake of argument that the purpose underlying section 20 (1) (b) is at least partly as Mr Otty says, but the statute cannot be construed as granting immunity to family members wherever there was a risk of prejudice to a head of state's "dignity". It is necessary to give effect to the language used, which is expressly confined to those who are members of the head of state's "household". As I say above, that language, however purposively construed, is simply not capable of covering someone in the

Defendant's position, who neither lives with the King nor shares or assists in his work; and I am not surprised that Sir Arthur Watts did not suggest that it could cover anything other than those two cases. If in consequence there will be some cases where the dignity of the head of state will be prejudiced, and their execution of their duties accordingly impaired, by a family member who is not a member of their household being involved in proceedings abroad, that only means that Parliament did not think it right to extend immunity so widely as to cover every possible case where that might occur.

25. Mr Otty attached importance to the phrase "subject to … any necessary modifications" which prefaces section 20 (1) and complains that the Judge did not consider its effect. But I cannot see how that gets over the difficulty. There is nothing in the application of the 1964 Act to heads of state and their family members that makes it necessary to give the term "household" the meaning for which he contends.

26. I should record for completeness that Mr Otty made it clear that he placed no weight as such on the description of the members of the core Royal Family as constituting the "Royal House": see para. 13 (a) above. That is obviously right. That label is simply a peculiarity of Spanish terminology, which can cast no light on the meaning of the Vienna Convention or the 1978 Act, and still less where the Spanish constitution itself recognises a distinct "household": see para. 13 (b).

27. Accordingly I do not believe that head (a) under ground 3 is well founded. My reasons substantially correspond to the Judge's in paras. 62 and 64 of the judgment. Mr Otty was critical of him for not referring explicitly to the evidence quoted at para. 12 above; but it is quite clear from the language of para. 62 that he had it well in mind, and in any event his conclusions is unarguably correct.

28. Mr Otty was also critical of para. 61 of the judgment, where the Judge notes the absence of any claim to immunity, or evidence, from King Felipe or the Spanish state, or of any certificate under section 21, since none of those was necessary to establish a claim to immunity. There is nothing in this point. Para. 61 is avowedly only prefatory, and the Judge did not say that these omissions were relevant to his reasoning on section 20 (1) (b).

29. It is for those reasons that I refused permission on ground 3.

30. I turn to the grounds on which we gave permission – grounds 1, 2 and 4. They concern allegations pleaded at paras. 15-23 of the Particulars of Claim about acts of harassment of the Claimant, including a covert search of her home in Monaco, done or procured by the Head of the Spanish National Intelligence Agency ("the CNI"), General Sanz Roldan, "under the direction or with the consent" of the Defendant. The acts in question pre-date the Defendant's abdication, and on at least one reading of the pleading the Defendant and/or General Sanz Roldan were acting in their public capacity – that is, it was being said that the Defendant was using his power as Head of State to procure the state security services to harass the Claimant. (That would no doubt be an abuse of power but that would not necessarily mean that he was not acting in his public capacity: see, for example, *Jones v Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270.) The Defendant contends that on that basis he is entitled to immunity as regards the acts in question under section 1 of the 1978 Act read with section 14 (1) (a).

31. At the hearing before the Judge Mr Lewis disavowed any intention to allege that the Defendant was acting in his public capacity in relation to the episodes in question and offered to amend the Particulars of Claim to make that plain. The Judge proceeded on that basis. In his eventual order (see para. 6) he gave the Claimant permission to amend in accordance with Mr Lewis's offer. The Amended Particulars of Claim as served following that order contained an averment (at para. 13) that:

> "General Sanz Roldan acted in his personal capacity on behalf of the Defendant and not in any official capacity in respect of this and every other allegation involving him made in these Amended Particulars of Claim."

There were various other amendments consistent with that plea which I need not detail. (I should record, though this may or may not in the end be material, that there is no averment as to the capacity in which the Defendant, as opposed to General Sanz Roldan, was acting.)

32. The Judge's conclusion was that as regards the covert search of the Claimant's home a case of functional immunity was not made out on the basis of the case as it then stood, though he observed that if evidence subsequently emerged which suggested that those who arranged or undertook the search were "state-sponsored" the issue could be revisited: see para. 72 of his judgment. As regards the other "pre-abdication acts of alleged harassment", which were alleged to have been done by General Sanz Roldan, he said that the mere fact that the General was Head of the CNI was not enough to justify treating the acts in question as having been done in that capacity.

33. Grounds 1, 2 and 4 challenge, respectively, the Judge's substantive decision that functional immunity was not made out; his having proceeded on the basis of an anticipated amendment which had not been pleaded; and what is characterised as his deferment of the resolution of the immunity plea rather than deciding it as a preliminary issue.

34. It is not necessary, or generally appropriate, in a case where this Court gives permission for it to engage in an elaborate discussion of the grounds. It is sufficient to say that I consider it arguable that the original pleading – which averred, in essence, that the King, who is the head of state, had procured the head of the state security service to organise acts of harassment (partly at least by state agents) – was necessarily alleging conduct by him (however abusive) in his public capacity; and that that difficulty cannot be simply resolved by a last-minute amendment that does no more than aver that those involved were acting in a private capacity. I am not to be taken as expressing a positive (albeit preliminary) view that the Judge was wrong. On the contrary, I think the issue is not straightforward, and it may in the end be that the issue of immunity cannot be properly resolved (as regards all or part of the pleaded acts) at this stage. But I am satisfied that the question merits consideration by the Court at a full appeal. It may be that some of the particular points made in the pleaded grounds are not truly arguable, but this is not a case where it would be safe or useful to attempt any fine surgery.

35. It is common ground that even if the Defendant succeeds on grounds 1, 2 and 4 that will not be fatal to the Claimant's claim, since she pleads "post-abdication" acts of harassment in respect of which immunity under section 1 cannot arise. But so long as they remain part of her case the Defendant is entitled to pursue his objection to them. I

would have been willing to consider whether the remainder of the claim should proceed notwithstanding the pendency of the appeal on this aspect, but Mr Lewis was content for the stay currently in place to continue provided that the appeal can be heard early next term, as seems likely to be possible.

36. I have not yet addressed ground 5, which seeks permission on the basis that there are other compelling reasons for the appeal to be heard. That is relevant now only to the challenge to the claim to immunity under section 20 (1) (b) – i.e. it is not so much a separate substantive ground as a different reason for allowing the challenge in ground 3 to go forward. The Defendant says that the issues raised by ground 3, which "relate to a fundamental principle of the international legal order", have not come before this Court previously, and also that "the requirements of comity dictate that His Majesty's claim to immunity warrants consideration by an appellate court". I do not regard it as justified to grant permission on a ground which I do not believe to have a real prospect of success on the facts of this case simply on the basis that it might give this Court – or, more likely, the Supreme Court – an opportunity to reach a definitive conclusion on the meaning of section 20 (1) (b) which might be of value in other cases (though in fact other "household" cases where the difference between the "*Apex*" and that advocated by the Defendant will be decisive are likely to be rare). Still less do I think that "comity" has any part to play in circumstances where the Kingdom of Spain itself has shown no interest in the issue of immunity in this case. I have considered whether that assessment is altered by the fact that we are giving permission on grounds 1, 2 and 4. But those grounds are wholly distinct, and I regard it as very unlikely that they would themselves attract the attention of the Supreme Court. It would not be right to expose the Claimant to further cost and the real risk of still further delay in order to allow ground 3 to proceed on the basis suggested.

Lord Justice Peter Jackson:

37. I agree.