Neutral Citation Number: [2020] EWHC 2883 (Fam)

Case No: FD19P00246 / FD19P00380
FD19F05020, FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2020

Before:

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
and
MR JUSTICE CHAMBERLAIN

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Re Al M

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Lord Pannick QC, Mr Nigel Dyer QC, Mr Sudhanshu Swaroop QC, Mr Nigel Dyer QC, Mr Godwin Busuttil, Mr Daniel Bentham, Mr Stephen Jarmain and Ms Penelope Nevill (instructed by **Harbottle & Lewis LLP**) for the **father**
Mr Timothy Otty QC, Ms. Sharon Segal and Ms Kate Parlett (instructed by **Payne Hicks Beach**) for the **mother**
Ms Deirdre Fottrell QC and **Mr Thomas Wilson** (instructed by **Cafcass**) for the **children**

Hearing date: 23 October 2020

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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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THE PRESIDENT AND MR JUSTICE CHAMBERLAIN

This judgment was delivered in private. It should not be made public in any manner or released to the press pending further direction.

Sir Andrew McFarlane P and Mr Justice Chamberlain:

Introduction

1 This is the judgment of the Court, to which both members have contributed.

2 It concerns a discrete issue arising from allegations made in these proceedings on 7 September 2020 by Her Royal Highness Princess Haya bint al Hussein (the mother).

3 The allegations are that the mother's mobile phone and those of some of her legal advisers, security staff and personal assistant have been the subject of hacking by agents of the Emirate of Dubai or the United Arab Emirates (UAE), acting on behalf of His Highness Sheikh Mohammed bin Rashid Al Maktoum (the father).

4 The father, Ruler of the Emirate of Dubai and Vice-President and Prime Minister of the UAE, submits that the allegations engage the foreign act of state doctrine (the FAS doctrine), with the consequence that the court lacks jurisdiction to adjudicate on them. The mother submits that the FAS doctrine is not engaged or, alternatively, that the public policy exception to that doctrine applies, with the consequence that the court can and must adjudicate.

Background

5 The present issue arises in the course of ongoing proceedings relating to the welfare of two children, Sheikha Al Jalila bint Mohammed bin Rashid Al Maktoum (Jalila), who is 12, and Sheikh Zayed bin Mohammed bin Rashid Al Maktoum (Zayed), who is 8.

6 In April 2019, the mother travelled with Jalila and Zayed from Dubai to England and made clear that they would not be returning. Shortly after their arrival in England, the father commenced proceedings in England and Wales under the inherent jurisdiction of the High Court, seeking orders for the children to be returned to Dubai. In July 2019, on the mother's application, the children were made wards of court. A guardian was appointed.

7 The President has given a number of judgments in these proceedings including: a fact-finding judgment on 11 December 2019 [2019] EWHC 3415 (Fam), [2020] 2 FLR 409 (the Fact-Finding Judgment); a judgment on 17 January 2020 concerning the status and effect of certain assurances and waivers given by the father, Dubai and the United Arab Emirates: [2020] EWHC 67 (Fam), [2020] 1 WLR 1858 (the Assurances and Waivers Judgment); and a judgment on 3 June 2020 in which the court refused the appointment of a security expert to consider the costs of the security arrangements required by the mother: [2020] EWHC 1464 (Fam) (the Security Expert Judgment).

8 It is not necessary to rehearse here much of the detail to be found in these judgments. The following summary contains those elements that are material for the purposes of the FAS issue.

9 In the Fact-Finding Judgment, the court made findings about the treatment of two of the father's other daughters, Sheikha Shamsa and Sheikha Latifa, and about his treatment of the mother. For present purposes, the key findings were these:

(a) In the early summer of 2000, Sheikha Shamsa went to ground while on a visit to England: [66]. Her father tracked her down through someone she had kept in touch with: [63]. In mid-August 2000 she was taken by three or four men working for her father to his home in Newmarket: [67]. She was held overnight there: [68]. On the following morning, Shamsa went with three of the men in a helicopter to France and then on to Dubai. One of the men was at the time in charge of the Dubai Air Wing: [69]. Since then she has been confined to one room, constantly supervised by nurses and a psychiatrist. She is given regular medication: [58]. She has been deprived of her liberty for much, if not all, of the past two decades: [137].

(b) In 2002 Sheikha Latifa (then 18) decided to leave the UAE. She was identified on the border with Oman and returned to the family home: [83]-[84]. On her return she was put in prison, where she was repeatedly beaten by her captors, who told her that this was on her father's orders: [85]. She remained there for three years and four months, where she endured sleep deprivation, beatings and insanitary conditions: [86]-[88]. She was injected with what she believes to be tranquilisers: [89]. After her release, her movements in Dubai were tightly restricted. She had no passport, could not drive and was not in a position to leave Dubai by any ordinary means: [91].

(c) On 24 February 2018, Sheikha Latifa made another attempt to escape, with the help of her friend Tiina Jauhiainen. They drove to Oman, where a friend met them with a dinghy, which they used to get to a yacht chartered by a French national Hervé Jaubert, to whom Sheikha Latifa paid a large sum of money: [98]-[102]. While on the yacht, Sheikha Latifa and Mr Jaubert communicated with various individuals and it may well be that this enabled the Dubai authorities to locate them: [103]. During the night on 4 March 2018, the yacht was in international waters about 30 miles off Goa, India, where it was boarded by a substantial number of Indian special forces. Sheikha Latifa and Ms Jauhiainen were detained: [104]. The Indian special forces soldiers left the boat and were replaced by members of the UAE armed forces: [105]. Sheikha Latifa, Ms Jauhiainen, Mr Jaubert and the yacht's crew were taken back to Dubai under guard, escorted by Indian coastguard vessels: [106]. Since that time, Sheikha Latifa has been detained in a locked and guarded house akin to a prison: [119] and [138].

(d) In the early part of 2019, the mother lost her official position in the Ruler's court: [144]. Those acting for the father began investigating her personal finances: [145]. The father divorced her under Sharia law: [148]. A helicopter arrived at her house and the pilot said he had come to take one passenger to Awir, a prison in the desert. One of the crew members was one of the three people who Sheikha Shamsa had said had been involved in her removal from England in 2000: [149]-[150]. The mother received a series of anonymous notes, left in her bedroom or elsewhere, making threats, for example "We will take your son – your daughter is ours – your life is over". On two occasions, a gun was left on her bed with the muzzle pointing towards the door and the safety catch off: [151]. It was in these circumstances that the mother resolved that her position in Dubai was unsafe and untenable and, on 15 April 2019, came to England: [152]. After she had done so, she received further threatening communications: [153]-[154]. A person who has occupied a position of significant responsibility in relation to the mother was told by a retired police

> officer acting on behalf of the father that allegations would be made against him/her damaging his reputation: [158]-[160]. In June 2019, this person was told by the same individual that "the media war has started": [161]. In a three-week period in June and July 2019, 1,100 media articles were published about the mother worldwide. Many contained defamatory inaccuracies: [162]. The father, or others on his behalf, made direct threats to the mother to remove the children. The father told Zayed that the mother was no longer needed.

10 At the end of the Fact-Finding Judgment, at [182], the court said this:

> "The next stage of these proceedings, once my further judgment on immunities and assurances has been handed down, will be to evaluate the impact of these findings upon the two children who are at the centre of this case and, on that basis, to evaluate the risk of either or both of them being removed from their mother's care and taken to Dubai against her will."

11 In the Assurances and Waivers Judgment, the court held that assurances given by the father, though unilateral in nature, were binding as a matter of international law, but that the court was unable to rely upon them as providing protection for the children from the risk of abduction within England and Wales, given the lack of evidence to show that they would be fulfilled and the lack of any enforcement mechanism. The waivers of immunity related only to the father, not to others who might be involved in an attempt to breach the court's orders and might be entitled to claim immunity, and so did not provide any protection to the children against those others.

12 There are currently five applications pending before the court. These are:

(a) the father's application for interim child arrangements (i.e. contact with the children);

(b) the mother's wardship application;

(c) the mother's application for a final non-molestation order;

(d) the mother's application for a "lives with" (residence) order; and

(e) the mother's application under Schedule 1 to the Children Act 1989 for financial support for herself and her children. This application has been vigorously contested and has resulted in a number of hearings over the summer of this year. The Security Expert Judgment was given after one such hearing. There was another before Moor J on 27 July 2020.

The present allegations

13 The allegations which give rise to the FAS issue were first brought to the attention of the court in a Note filed on behalf of the mother on 7 September 2020. The Note was accompanied by witness statements of Baroness Shackleton and Nick Manners, two members of the mother's team of solicitors at Payne Hicks Beach (PHB), and Dr William Marczak, a cyber-security expert.

14 In their note to the court, the mother's counsel indicated that, to the extent that the allegations were disputed, she would seek a fact-finding hearing. She made the point that the findings, if made, would be relevant to security arrangements both generally and in relation to contact and that the financial consequences, in terms of the funds required for appropriate protection, would be significant.

15 On 2 October 2020, following directions from the court, the mother produced a draft order, together with a schedule of findings which she invites the court to make. The order does not include any requirement on the father to give disclosure in relation to the allegations. It leaves it to him to decide to what extent, if any, he wishes to be involved in the fact-finding exercise. The findings sought are as follows:

(a) The mobile telephones of the mother, her solicitors, Baroness Shackleton and Nick Manners, her personal assistant and two members of her security staff have been the subject of unlawful surveillance during the course of the present proceedings and at the time of significant events in those proceedings.

(b) This surveillance has been carried out by using software licensed to the Emirate of Dubai or the UAE.

(c) The surveillance has been carried out by servants or agents of the Father, the Emirate of Dubai or the UAE.

(d) The software used for this surveillance included the capacity to track the target's location, the reading of SMS and email messages and other messaging apps, listening to telephone calls and accessing the target contact lists, passwords, calendars and photographs. It would also allow recording of live activity and taking screenshots and pictures.

(e) The surveillance has occurred with the express or implied authority of the father.

16 In a response dated 14 September 2020 to the mother's initial application, the father said that the application raised two questions: first, whether there has been surveillance or interference with the mobile phones of the mother, her legal advisers and/or staff; second, if there has been some surveillance or interference, who is responsible. The father said that he could not assist the court in relation to the first question. In relation to the second, this was said:

> "(i) the allegation that the father has been involved in the use of [the] software to access the mobile telephones of the mother, her legal advisers and/or staff is denied; (ii) the father has no knowledge of any such activity taking place, and has not authorised it, or instructed, encouraged or in any way suggested that any other person should use [this] (or any) software in this way; (iii) nor is the father aware of having received any knowledge as a result of any such activity."

17 In a further position statement on 2 October 2020, the father submitted that, before the court could conduct any fact-finding exercise it would need to consider whether, under the FAS doctrine, the court can or should enquire into matters relating to the national

security of a foreign state and whether the Foreign Commonwealth and Development Office (FCDO) should be invited to make representations.

18 The FCDO were invited to make representations, but indicated that they did not wish to do so at this stage.

The submissions

19 In order to establish the context in which this judgment is given, we will first summarise the rival submissions of the parties before turning to a more detailed description and analysis of the relevant authorities.

The father's submissions

20 For the father, Lord Pannick QC began by submitting that the factual findings which the mother invites the court to make would involve an enquiry into: whether a foreign sovereign state uses particular spyware technology; if so, who within that state has access to that technology and subject to what safeguards; and what role the father has in authorising its use. They would also involve findings as to the likelihood that the hacking alleged may have been done by other states, potentially ones seeking to undermine or embarrass the father and through him the UAE for geopolitical reasons. These, Lord Pannick submits, are matters into which the court cannot enter, because of the FAS doctrine, which – where it applies – deprives the court of jurisdiction to determine the relevant issue, even in a case where the state has itself brought proceedings: *High Commissioner of Pakistan v Prince Mukkaram Jah* [2016] EWHC 1465 (Ch), [87] (Henderson J). In this case, the state is not a party to the proceedings.

21 Lord Pannick's submissions have two inter-related strands. First, it is said that the father's unwillingness to disclose information relating to intelligence or security matters concerning the UAE or Dubai is consistent with the policy of "neither confirm nor deny" (NCND). That policy is adopted by many states, including the United Kingdom, in any public discussion of their intelligence-gathering activities. As practised by the UK intelligence agencies, it has been recognised as legitimate by the courts in this jurisdiction: see e.g. *Al Fawwaz v Secretary of State for the Home Department* [2015] EWHC 166 (Admin), [74] (Burnett LJ). The father cannot be criticised for adopting the same policy in relation to the alleged intelligence gathering activities of Dubai or the UAE. Moreover, the courts have recognised that if one party to litigation is disabled from defending its position on a particular issue because of its inability to deploy sensitive material, it may be impossible for that issue to be tried and the claim may fall to be struck out: see *Carnduff v Rock* [2001] 1 WLR 1786, [37] (Laws LJ).

22 Second, against that background, Lord Pannick submits that the determination of the mother's allegations would contravene the third rule identified by Lord Neuberger in *Belhaj v Straw* [2017] AC 964, [123], which operates to prevent the determination by courts in this jurisdiction of issues involving "a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it". These include paradigmatically making war and peace, making treaties with foreign sovereigns and annexation and cessions of territory. They also include "acts of a foreign government in the conduct of foreign affairs". At [237], Lord Sumption gave intelligence gathering as an example of the kind of sovereign act to which the third rule

may apply. Lord Pannick submits that the mother's allegations "go to the heart of the security systems which are alleged to be operated by a sovereign state, the UAE, and indeed by other sovereign states"; and there are no judicial or manageable standards by which to determine the issues raised. He contends that the rule applies notwithstanding that the acts alleged are unilateral ones and despite the fact that they had effects outside the territory of the state concerned. He denies that the public policy exception is engaged, because that exception should be reserved for acts, such as torture, which violate *ius cogens* norms. The acts alleged do not fall into that category.

The mother's submissions

23 For the mother, Mr Timothy Otty QC submits that the hacking allegations are directly material to the substantive issues falling for consideration in each of the five contested applications currently pending before the court. He notes that in relation to each of these applications the father has expressly consented to the court's jurisdiction, either by issuing the application himself or, in relation to those applications issued by the mother, by waiving his immunities.

24 As to the FAS doctrine, Mr Otty submits that the third rule identified by Lord Neuburger in *Belhaj v Straw* applies to issues which it is inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which a municipal judge could not or should not adjudicate on. Examples are the making of war and peace, conduct concerned with treaty making and the annexation or cession of territory: such issues are apt for resolution through diplomatic channels, not by proceedings before a municipal court. Although this third rule is not strictly confined to events occurring within a foreign state's territory, it has not in fact ever been applied to cases concerned with events occurring overseas. It is principally concerned with dealings or disputes involving actions by sovereign states on the plane of public international law. In this respect, there is a clear distinction between those cases where a state is acting as only a sovereign can and those cases where a sovereign state is doing things that a private individual could do.

25 Applying these principles to the facts of the present case, Mr Otty submits that the proposed fact-finding will involve no questioning of dealings between sovereign states. It has nothing to do with the conduct of foreign affairs. It arises in a context where individual fundamental rights are manifestly engaged, including the privacy rights of the mother and children at common law and under articles 6 and 8 ECHR. It involves conduct alleged to have occurred in the United Kingdom in relation to wards of the English court and in relation to proceedings pending before the English court in circumstances where serial breaches of domestic criminal law are alleged. It does not concern political conduct or conduct that only a sovereign state could engage in or whose legality can be judged only on the international law plane.

26 For these reasons, Mr Otty submits that the third rule is not engaged at all. In the alternative, he relies on the public policy exception identified in *Belhaj* at [154]-[155]. The exception is not limited to cases where there has been a "grave infringement of human rights" and does not require a litigant invoking it to establish that the treatment of which he or she complains involves a breach of international law. In considering whether the exception applies, it is relevant to consider the extent to which the party relying on it has invoked or submitted to the jurisdiction of the court and whether the legal standards

to be applied in determining the issue are well recognised. Reliance is placed on the decision of the Court of Appeal in *The Law Debenture Trust Corp plc v Ukraine* [2019] QB 1121, [175]-[178] (Sales and Richards LJJ and Dame Elizabeth Gloster).

The guardian's submissions

27 For the guardian, Ms Deirdre Fottrell QC makes no submission as to whether the FAS doctrine is engaged. If it is, however, she contends that the context in which the allegations arise are relevant to the applicability of the public policy exception and should be "at the forefront of the court's deliberations". She continues as follows:

> "The nature of the allegations made by the mother against the father in this case are markedly different to those which arose in the reported authorities on Foreign Act of State Doctrine in this jurisdiction because they involve harassing, controlling and threatening behaviour directed by the father towards her as the mother of the subject children and they arise from the …the parents' relationship with each other. The fact that the father may have pursued a campaign of harassment of the mother (and her legal advisers) by mobilising the security services of the State does not alter the potentially abusive nature or the character of his actions (if proven). If proven they are a form of intimate violence. The Family Court has an obligation to take a robust approach to any such allegations."

28 In that connection Ms Fottrell draws attention to the summary of the purpose of fact-finding in family proceedings in *Re R (Children) (Import of Criminal Principles in Family Proceedings)* [2018] 2 FLR 718, at [62] (McFarlane LJ):

> "The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established."

29 Ms Fottrell notes that Family Proceedings Rules 2010, Practice Direction 12J sets out the approach that a court is required to take in any case where child arrangements are to be determined against the backdrop of allegations of intimidation, harassment or abuse. She points out that the practice direction emphasises the seriousness of allegations of domestic abuse between parents and the potential direct and indirect impact of them on the welfare of children. The psychological consequences of abuse have been held to be capable of reaching the level of seriousness necessary to constitute ill-treatment for the purposes of Article 3 ECHR: see e.g. *Rumor v Italy* (App. No. 82964/10), 27 May 2014. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence recognises in Article 31 the need for the impact of domestic abuse on children to be taken into account when determining custody and visitation rights.

30 Against this background, Ms Fottrell submits that the factual findings which the mother invites the court to make are potentially relevant to the substantive sets of issues: first, the welfare issues (whether the quality of the current indirect contact and the children's views provide a solid foundation for the move to direct contact); second, the security

issues (whether the level of risk to the children posed by the father during any direct contact or otherwise can be safely managed). She notes that the court has already made grave findings against the father as to the kidnapping, maltreatment and abuse of two of his elder daughters. Those findings are directly relevant to the question of future risk of harm, which itself impacts on the circumstances of any direct contact between the father and children.

31 Ms Fottrell continues as follows:

> "However, the allegations made by the mother of hacking and surveillance, if proven, would elevate the risk. They go directly to the security of the mother and the children day to day. Significant questions arise as to the purpose of such actions against a factual backdrop of previous surveillance having pre-empted the abduction of Shamsa and Latifa. This court will have to consider whether there is a continuing pattern of intimidation and harassment within the proceedings. Findings that there is a continuing pattern are germane to the issue which the Court is being asked to decide at the November 2020 hearing. If proven that the father implicitly or explicitly sanctioned the intimidation of the mother this has profound implications for the children's welfare, both generally and in relation to the issues to be determined in these proceedings. As the Guardian has previously noted, the mother is the children's primary carer and the children rely on her to a huge extent for their day-to-day wellbeing. Anything which causes [the mother] a significant level of distress will inevitably impact on their emotional welfare."

32 Ms Fottrell submits that, if the court found itself to be lacking in competence or jurisdiction to evaluate the mother's allegations, it would be left in a "complex situation". The allegations would then play no role in informing the court's welfare determination. However, uniquely in the context of family proceedings, this will not be because the allegation has been tried and not established or because the court has determined that the fact-finding exercise is irrelevant or disproportionate to the welfare issues involved. Instead, it would be solely due to the court's lack of jurisdiction. Such an outcome would leave the court in a difficult and unprecedented position if it reached a view that the allegations were potentially relevant to the welfare determination and that a fact-finding hearing was in principle necessary but legally impossible.

Discussion

The relevance of the hacking allegations to the issues before the court

33 In *Law Debenture Trust*, the Court of Appeal provided at [155] a structure for consideration of the application of the FAS doctrine. Three questions have to be asked and answered. First: "Is there a domestic foothold – that is to say, a basis in legal analysis under English law – which requires or permits the court to embark upon an examination of [the relevant issue]?" Secondly: "If there is a domestic foothold, is the issue none the less beyond the competence of the English courts to resolve?" In the *Law Debenture Trust* case, which concerned a commercial dispute governed exclusively by private law, there was a third issue concerning what the court should do if it concluded that there was a domestic foothold but the issue was beyond the court's competence to determine.

34 Lord Pannick made clear that there was no dispute as to the existence of a "domestic foothold". We were initially disposed to think that this made it unnecessary to consider the matter further. Having considered the authorities, however, we have concluded that, before embarking on any analysis of the second question (whether the issues are beyond the competence of the court), we should squarely confront the nature of the allegations with a view to assessing the extent of their materiality, if proven, to the applications pending before the court.

35 We begin by noting that these are not simply private law proceedings between two individuals or entities. They are proceedings whose primary objective is to secure the welfare of two children who are wards of court. That objective has been held to justify departures from the procedural rules which govern other proceedings: see e.g. *Secretary of State for the Home Department v MB* [2008] AC 440, [58] (Lady Hale); *Al Rawi v Security Service* [2012] 1 AC 5, [63] (Lord Dyson). In this case, no-one is suggesting that the FAS doctrine is procedural, nor that it is in principle inapplicable in wardship proceedings. But the special function and focus of these proceedings must be firmly borne in mind when considering any submission that it is beyond the competence of the court to examine a factual allegation said to be material to them.

36 In our judgment, Mr Otty and Ms Fottrell were correct to submit that the hacking allegations are potentially material to each of the applications pending before the court. If proven, and depending on the precise facts found, they may demonstrate conduct expressly or impliedly authorised by the father in breach of English criminal law and in violation of fundamental common law and ECHR rights. Any such conduct, if proven, would involve a grave interference with the process of the court. It would also be directly relevant to each of the five applications pending before the court. In particular, it would be relevant to the type of contact arrangements the court might consider appropriate, the interim orders necessary to protect the mother and children and the type and cost of appropriate security arrangements. All of these matters are currently contested.

37 In the course of oral argument, Lord Pannick indicated that the FAS doctrine would present no bar to a limited fact-finding in relation to these allegations. There would, he submitted, be no difficulty with a finding that the hacking had occurred, nor even with a finding that there was a pool of possible states which might have been responsible for it. The thrust of his submission was that the FAS doctrine would bite only at the point where the court embarked on an enquiry as to whether UAE state agents were responsible.

38 If that is where the law draws the line between matters which fall within our competence and matters which fall outside it, so be it. But it is important to record at this stage that fact-finding limited to that which Lord Pannick accepted was legitimate would by no means cover all the issues relevant to the applications pending before the court. A finding that *someone* had hacked the mother's phones, and those of her legal representatives, security staff and personal assistant, would have a very different significance in these proceedings from a finding that agents of Dubai/the UAE had done so on the express or implied authority of the father. It may be, that, if the court finds that some hacking took place, the evidence will not permit a finding on the balance of probabilities as to who was responsible. In that case the allegation would have been examined and not established. A jurisdictional bar on the making of such a finding would, on the other hand, preclude the court from examining the question of responsibility at all. That would

represent a serious limitation on the court's powers to secure the welfare of its wards. We must turn to the authorities to see whether they mandate such a limitation.

The relevance of the NCND practice

39 When public allegations are made about the work of the intelligence services, it has been the long-standing practice of the United Kingdom government neither to confirm nor to deny them. The same practice is adopted by some other governments. NCND is "not a rule of law or legal principle but a practice which has been adopted to safeguard the secrecy of the workings of the intelligence agencies": *Al Fawwaz v Secretary of State for the Home Department* [2015] EWHC 166 (Admin), [74] (Burnett LJ). The practice is adopted because, if governments were to deny allegations in some cases, the absence of a denial in others might be taken as an indication of the truth of the allegation. The legitimacy of the NCND practice, as adopted by the UK government, has been recognised by the courts in this jurisdiction as a legitimate way of maintaining the secrecy of the work of the intelligence services: see e.g. the cases referred to in *Al Fawwaz* at [75]-[76].

40 It is important, however, to identify the legal framework within which the recognition of the practice has taken place. At [77] of his judgment in *Al Fawwaz*, Burnett LJ approved the observations of Maurice Kay LJ in in *Secretary of State for the Home Department v Mohamed* [2014] 1 WLR 4240, at [20]:

> "Lurking just below the surface of a case such as this is the governmental policy of 'neither confirm nor deny' ('NCND'), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so."

41 Thus, where a party to litigation considers that pleading to an allegation, or disclosing evidence relevant to it, would be contrary to the UK government's NCND practice, it is not enough simply to "hoist the NCND flag", i.e. invoke the practice. The party concerned must assert public interest immunity (PII). An assertion of PII requires a certificate or statement, generally given personally by a Minister of the Crown, identifying with particularity the matters to which the immunity is said to attach, explaining the respects in which public disclosure of those matters would damage the public interest and why it is considered that such damage outweighs the adverse effect of non-disclosure on the administration of justice. The court must then consider the material said to attract PII, together with the reasons for asserting PII, and decide whether to uphold the PII claim having considered for itself whether the harm that disclosure would cause to the public interest outweighs the adverse effect of non-disclosure on the administration of justice.

42 Where the court upholds a PII claim, the consequence is that the material which attracts PII becomes inadmissible: *Al Rawi v Security Service* [2012] 1 AC 531, [41] (Lord Dyson). That can give rise to a situation where one party is deprived by operation of law of the evidence needed to pursue or defend the case. The court may then conclude that

the case is untriable. In an ordinary civil claim where the party deprived of critical evidence is the defendant, this may lead to the claim being struck out: see e.g. *Carnduff v Rock* [2001] 1 WLR 1786. The Supreme Court in *Al Rawi* appears to have accepted the correctness in principle of the approach in *Carnduff*, while noting that no other case had been cited to them in which the operation of PII led to the conclusion that a trial was impossible: see [16] (Lord Dyson), [108] (Lord Mance). It should be emphasised that in an ordinary civil claim, even where very significant evidence attracts PII and is therefore inadmissible, the courts will strive to find a way of trying the case and will generally succeed.

43 The possibility of untriable claims was one reason advanced by the government in support of the Bill that became the Justice and Security Act 2013. That provides for a closed material procedure in which material whose disclosure would be damaging to one particular public interest – UK national security – can be considered in the absence of one or more of the parties, with special advocates appointed to attenuate the procedural unfairness to which this arrangement gives rise. A separate statutory regime, under the Regulation of Investigatory Powers Act 2000, confers jurisdiction on the Investigatory Powers Tribunal, which operates a different closed procedure to determine claims and complaints relating to surveillance, interception and other activities on the part of the intelligence services (among others).

44 Having considered the law relating to the NCND practice in some detail, we have come to the clear conclusion that, contrary to the submission of Lord Pannick, it is not relevant to the issue now before us – the application of the FAS doctrine. Even in an ordinary civil claim, a conclusion of the kind reached in *Carnduff v Rock* that an issue is "untriable" involves at least three steps: first, a reasoned assertion of PII; second, a decision by the court to uphold that assertion; and third, a judgment (of which there are very few examples) that, as a result, the claim or issue is "untriable". If we were to accept the father's case based on the asserted practice of NCND in the UAE, we would be bypassing all three of these important steps. Unlike in the case of a PII claim, there is no evidence before us as to the NCND practice of Dubai or the UAE. Even if there were, there is no way in which we could properly conduct a balancing exercise akin to that required when assessing a PII claim, because the public interest concerned is necessarily a UK public interest. Even if Dubai or the UAE were party to these proceedings (which it is not), the court would have no mechanism, and no standing, to balance the public interests concerned.

45 Lord Pannick accepts all of this and contends that, because PII is inapt to accommodate the legitimate national security interests of a foreign state, those interests can and should instead be brought into account under the rubric of the FAS doctrine. We do not agree. *Mohamed* and *Al Fawwaz* demonstrate the need to assess, rather than simply assume, the legitimacy of any invocation of the NCND practice. This court is in no position to assess the legitimacy of the father's invocation of that practice in this case. If we were to give effect to that invocation under the guise of the FAS doctrine, we would be simply "saluting the flag" which the father had hoisted, to adopt Maurice Kay LJ's memorable metaphor. We can see no reason why the court should simply accept a party's claim that an issue is untriable on the basis of an unevidenced assertion as to the practice of the government of a foreign state which is not party to the proceedings.

46 There are two further important points, which bolster our conclusion. First, it is not surprising that the public interests which the court considers and balances in deciding whether to uphold a PII claim are UK public interests. PII is a doctrine which permits (and may indeed require) a party to litigation to withhold materials whose disclosure would be damaging to a (UK) public interest. The doctrine is necessary because UK public authorities are amenable to the compulsory jurisdiction of the court. Foreign states are not so amenable. They are entitled to assert state immunity if impleaded in a domestic court. As we have noted, the father initiated these proceedings in his private capacity, not in his capacity as Ruler of Dubai or Vice-President or Prime Minister of the UAE. Neither Dubai nor the UAE is a party to these proceedings. If any application were made against them, they would be entitled to plead state immunity as of right. There can be no question of the court making any compulsory order against them, unless they were to consent to the court's jurisdiction.

47 Secondly, the principle that the operation of PII may render a case untriable was established in the context of a civil claim. The consequence is that the civil claim falls to be struck out. The approach developed by the Family Court in wardship and other cases relating to the welfare of children, whilst adhering to the ordinary principles of PII, is less binary and may require the court, in the interests of the subject child, to adopt a process which allows consideration of material covered by PII in a "closed" part of the proceedings: see for example *President's Guidance (8 October 2015): Radicalisation Cases in the Family Courts* and *Re C (Care Proceedings: Disclosure)* [2016] EWHC 3171 (Fam), [2017] 1 FLR 1665.

The scope of the FAS doctrine

48 The contours of the FAS doctrine are not yet wholly defined. They were, however, considered recently by a seven-justice panel of the Supreme Court in *Belhaj v Straw*. The court was considering two appeals. The first (*Belhaj*) was from the Court of Appeal. That was a private law action in which the claimants sought damages against those said to be responsible for the participation of UK intelligence agencies in a plan to detain, kidnap and deliver them to Colonel Gadaffi's regime in Libya, where they were detained extra-judicially and suffered mistreatment including torture. The defendants pleaded defences of state immunity and FAS. The second appeal was from Leggatt J at first instance in the case of *Rahmatullah v Ministry Defence*, in which the claimant sought damages for mistreatment by US authorities into whose custody he claimed he had been delivered by UK armed forces.

49 The government appellants argued that the FAS doctrine applied in both cases to prevent the English court from adjudicating upon "all acts of foreign states in the exercise of their sovereign governmental authority": see note of argument at 1040A. As to the territorial application of the doctrine, they argued as follows at 1041E-G:

> "Where acts of a foreign state are alleged to have occurred on United Kingdom territory, the United Kingdom's own sovereignty comes into the equation since what is in issue is the power of the English court to adjudicate. Where a foreign state chooses to act within United Kingdom territory and Parliament has determined that it would not have state immunity, it would not be an exorbitant arrogation of power for an English court to judge those acts: see *A Ltd v B Bank (Bank of X intervening)* [1997] FSR 165. In respect

> of acts occurring in the United Kingdom, the United Kingdom has a special status as a result of sovereign territory. Therefore, it accords with the rationale underpinning foreign act of state to limit the doctrine so that it does not apply to such acts. But if a United Kingdom court were to presume to judge the acts of a foreign state on the territory of another foreign state, the United Kingdom court would be acting contrary to sovereign equality."

50 The court was unanimous as to the result: the FAS defences did not apply. There were four judgments. The first was given by Lord Mance, the second by Lord Neuberger (with whom Lord Wilson agreed), the third by Lady Hale and Lord Clarke and the fourth by Lord Sumption (with whom Lord Hughes agreed). Lady Hale and Lord Clarke simply agreed with the reasoning and conclusion of Lord Neuberger. They also noted that Lord Mance had reached the same conclusion "for essentially the same reasons". We therefore start with the judgments of Lord Neuberger and Lord Mance. They agreed that the FAS doctrine did not apply at all on the facts of the *Belhaj* and *Rahmatullah* cases. Given the reliance placed by Lord Pannick on parts of the judgment of Lord Sumption, however, it will be necessary to consider that judgment in some detail too. In doing so, it is important to bear in mind that he and Lord Hughes differed from the majority on the applicability of the FAS doctrine, though they agreed that the public policy exception applied.

51 Lord Neuberger began at [118] by summarising the FAS doctrine in this way: "the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states". The doctrine, he said, "applies to claims which, while not made against the foreign states concerned, involve an allegation that a foreign state has acted unlawfully". He went on at [120]-[123] to say that there were three or possibly four rules which had been treated as aspects of the doctrine. The first rule was that "the courts of this country will recognise, and will not question, the effect of a foreign states legislation or other laws in relation to any acts which take place or take effect within the territory of that state". The second was that "the courts of this country will recognise, and will not question, the effect of an act of a foreign states executive in relation to any acts which take place or take effect within the territory of that state".

52 The third rule had more than one component, but each involved "issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it". Thus, "the courts of this country will not interpret or question dealings between sovereign states" of which obvious examples were "making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory". Similarly, they would not "determine the legality of acts of a foreign government in the conduct of foreign affairs". Another aspect of the third rule was that "international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts", since domestic courts "should not normally determine issues which are only really appropriate for diplomatic or similar channels". The latter proposition was established by the decision of the Supreme Court in *Shergill v Khaira* [2015] AC 359, at [40]-[41].

53 Lord Neuberger then identified a "possible" fourth rule, which had been described by Rix LJ in *Yukos Capital SARL v OJSC Rosneft Oil Co (No. 2)* [2014] QB 458, [65], that the courts would "not investigate acts of a foreign state where such an investigation

would embarrass the government of our own country". Rix LJ had added the caveat that "this doctrine only arises as a result of the communication from our own Foreign Office".

54 In the present case, the father has at no point relied on either the first or the second rule. We do not, therefore, need to express any view about the scope of those rules. He did at one stage rely on the (possible) fourth rule, but since the FCDO has declined to make any representations, he now accepts that it cannot assist him. We do not, therefore, need to express any view either on its existence or on its scope.

55 This means that we must focus on the third rule. Lord Neuberger's consideration of that rule was in the context of a private law claim. At [144], he said this:

> "There is no doubt as to the existence of the third rule in relation to property and property rights. Where the Doctrine applies, it serves to defeat what would otherwise be a perfectly valid private law claim, and, where it does not apply, the court is not required to make any finding which is binding on a foreign state. Accordingly, it seems to me that there is force in the argument that, bearing in mind the importance which both the common law and the Human Rights Convention attach to the right of access to the courts, judges should not be enthusiastic in declining to determine a claim under the third rule. On the other hand, even following the growth of judicial review and the enactment of the Human Rights Act 1998, judges should be wary of accepting an invitation to determine an issue which is, on analysis, not appropriate for judicial assessment."

56 At [146], Lord Neuberger noted that the third rule was "based on judicial self-restraint and is, at least in part, concerned with arrangements between states and is not limited to acts within the territory of the state in question, whereas the first and second rules are of a more hard-edged nature and are almost always concerned with acts of a single state, normally within its own territory". At [147], he continued as follows:

> "The third rule may be engaged by unilateral sovereign acts (e.g. annexation of another state) but, in practice, it almost always only will apply to actions involving more than one state (as indeed does annexation). However, the fact that more than one sovereign state is involved in an action does not by any means justify the view that the third rule, rather than the second, is potentially engaged. The fact that the executives of two different states are involved in a particular action does not, in my view at any rate, automatically mean that the third rule is engaged. In my view, the third rule will normally involve some sort of comparatively formal, relatively high-level arrangement, but, bearing in mind the nature of the third rule, it would be unwise to be too prescriptive about its ambit."

57 At [150], Lord Neuberger characterised the first rule as a general principle of private international law. The second rule, to the extent that it existed, was also close to being such a principle. The third rule, however, was "based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving": [151]. At this point, he made reference to the discussion of Lord Mance at [40]-[45] and of Lord Sumption at [234]-[239] and [244]. Finally, he noted that the third rule, unlike the first two, was based purely on the common law and "has no international law basis".

58 Lord Mance stated the third rule as follows at [11(iii)]: "a domestic court will treat as non-justiciable – or, to use language perhaps less open to misinterpretation, abstain or refrain from adjudicating upon or questioning – certain categories of sovereign acts by a foreign state abroad, even if they occur outside the foreign state's jurisdiction". At [11(iv)], the appellants' case that the rule covered "all sovereign *(iure imperii)* acts by a foreign state anywhere abroad outside the jurisdiction of the domestic court has jurisdiction is an issue" was rejected. The third rule was "not limited territorially" but the question whether the issue was non-justiciable fell to be considered on a case-by-case basis. In deciding that question, it would be relevant to take into account considerations both of separation of powers and of the sovereign nature of foreign state or inter-state activities. However, English law would also have regard to "the extent to which the fundamental rights of liberty, access to justice and freedom from torture were engaged by the issues raised".

59 The passages of Lord Mance's judgment referred to by Lord Neuberger included at [42] a discussion of the decision of the House of Lords in *Buttes Gas and Oil Co v Hammer (No. 3)* [1982] AC 888, which raised "a whole series of boundary and other international and inter-state law issues". Lord Wilberforce had said at p. 938 of his speech in that case that these issues had "only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass". There were "no judicial or manageable standards by which to judge these issues", with the result that "the court would be in a judicial no-man's land".

60 Lord Mance went on at [43] to cite *Shergill v Khaira*, which had recognised two categories of case which were non-justiciable: the first where the issue was "beyond the constitutional competence assigned to the courts under our conception of the separation of powers" and the second including "issues of international law which engage no private right of the claimant or reviewable question of public law". At [44], Lord Mance explained that the government appellants formulated the third rule as providing that "a domestic court will not adjudicate upon any sovereign or *iure imperii* act committed by a foreign state anywhere abroad". That formulation would lead to a "dramatic expansion of the scope of foreign governmental act of state as a bar to domestic adjudication against defendants otherwise amenable to the English jurisdiction".

61 Lord Sumption at [225] identified two rationales for the FAS doctrine. The first was sometimes called "comity" but was better understood as "an awareness that the courts of the United Kingdom are an organ of the United Kingdom" and that "the courts must respect the sovereignty and autonomy of other states". The second was the constitutional doctrine of the separation of powers, which "assigns the conduct of foreign affairs to the executive". Lord Sumption went on at [227] to identify two (not three or four) principles: municipal law act of state and international law act of state. The former encompassed Lord Neuberger's first and second rules. The latter covered cases concerning "the transactions of sovereign states". That principle is summarised at [234] as follows: "the English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states". Lord Sumption cited a number of authorities for that proposition, the most recent of which was *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872, in which the FAS doctrine had been applied in a judicial review claim seeking declaratory relief as to the legality of an alleged practice by UK intelligence agencies of sharing locational

intelligence with the US authorities to assist the CIA in launching drone strikes against suspected terrorists in Pakistan.

62 Lord Sumption went on to explain the justification for the international law act of state principle as follows:

> "Once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country… if a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as a mere private law tort giving rise to civil liabilities for personal injury, trespass, conversion, and the like."

63 At [236], Lord Sumption noted that the cases in which the FAS doctrine had been confined to acts within the territory of the state concerned were all examples of the first principle (municipal law act of state). At [237], he said that, with international law act of state, the position was different: "where the question is the lawfulness of a state's acts in its dealings with other states and their subjects, the act of state doctrine applies wherever the relevant act of the foreign state occurs (save, arguably, if it occurred in the United Kingdom)". The reason for this was "again, inherent in the principle itself", which was concerned with "acts whose lawfulness can be determined only by reference to international law, which has no territorial bounds". Lord Sumption went on to give some examples, on which Lord Pannick placed considerable emphasis:

> "In the nature of things a sovereign act done by a state in the course of its relations with other states will commonly occur outside its territorial jurisdiction. States maintain embassies and military bases abroad. They conduct military operations outside their own territory. *They engage in intelligence gathering.* They operate military ships and aircraft. All of these are sovereign acts. The paradigm cases are acts of force in international space or on the territory of another state." (Emphasis added.)

64 A close analysis of the judgments in *Belhaj* enables us to draw the following conclusions about the scope of the third rule identified by Lord Neuberger in that case:

(a) Although the rule applies to acts which fall to be judged "on the plane of international law", it is not itself a rule of international law. It is an artefact of the common law: see Lord Neuberger at [150].

(b) The rule is based on "judicial self-restraint" or abstention: see Lord Mance at [11(iv)], Lord Neuberger at [146] and [150]. It prevents the determination of issues which it would be inappropriate for the courts of the United Kingdom to resolve: Lord Neuberger [123] and [144].

(c) The rule can in principle extend to acts taking place or having effects outside the territory of the foreign state concerned: Lord Mance at [11(iii)]; Lord Neuberger at

[146]; Lord Sumption at [237]. However, even the government appellants did not contend that the rule applied to acts done or having effects in the UK (see the note of argument at 1041E-G) and Lord Sumption accepted at [237] that it was arguable that the doctrine did not apply to such acts.

(d) Likewise, the rule can in principle extend to unilateral acts. However, the acts to which the rule applies will "almost always" be ones involving more than one state and will "normally" involve "some sort of comparatively formal, relatively high-level arrangement", but these are not hard-edged requirements for the application of the rule: Lord Neuberger at [147].

(e) A paradigm instance of the application of the rule is the case where there are "no judicial or manageable standards" by which the domestic court can resolve the issue or where "the court would be in a judicial no-man's land": Lord Wilberforce in *Buttes Gas*, cited by Lord Mance at [44] in a passage referred to by Lord Neuberger at [150].

(f) In considering whether the rule prevents it from examining a particular issue, the court will have regard to the extent to which fundamental rights and access to justice are engaged by the issue: Lord Mance at [11(iv)]; Lord Neuberger at [144].

65 It should be plain from this distillation that deciding in a particular case whether a particular issue is covered by Lord Neuberger's third rule requires a careful analysis of the nature of the act, the legal standards by which it is to be judged, whether the issue engages fundamental rights or access to justice and, in the light of all these matters, whether the issue is constitutionally and institutionally suitable for determination by a domestic court. The fact that the issue concerns a sovereign *(iure imperii)* act does not on its own make it non-justiciable: see the express rejection of the appellant's formulation of the rule by Lord Mance at [11(iv)] and [44] and, more generally, the decision of the majority that the acts complained of, though plainly sovereign acts, were not covered by the third rule. Contrary to the submission advanced by Lord Pannick, Lord Neuberger's reference at [151] to Lord Sumption's judgment cannot have been intended to suggest that the third rule covers every act within the categories described by Lord Sumption at [237]. Otherwise, the nuanced, case-by-case approach espoused by Lord Neuberger and Lord Mance to the decision whether any particular issue is non-justiciable would be wholly unnecessary.

Does the "third rule" apply in this case?

66 The analysis in *Belhaj* proceeds on the footing that the acts complained of were all sovereign or *iure imperii* acts. It is not obvious to us that that is so here. If, for example, it were proven that the father had used state agents to hack the phones of those associated with the mother for his own personal ends, we doubt whether the acts concerned could properly be described as sovereign acts at all. But, for the purposes of deciding whether the FAS doctrine applies, we are prepared to assume in the father's favour that the allegations do indeed involve sovereign acts on the part of Dubai and/or the UAE. We have applied the principles set out above on that basis. Having done so, the present case seems to us to have five material features, all pointing in the same direction.

67 First, the acts alleged were directed against, and had direct effects on, persons in the United Kingdom and within the jurisdiction of this court. If proven, they would also constitute a serious interference with the process of this court. That distinguishes this case from *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*, which is generally regarded as a rare or unique example of the application of the third rule to acts taking place outside the territory of the state concerned. It is not necessary for us to express a view on whether acts directed at persons in the United Kingdom and designed to interfere with the process of a United Kingdom court could ever attract the operation of the FAS doctrine. The fact that the alleged acts were so directed is on any view an important factor to be borne in mind.

68 Secondly, and relatedly, the legality of the alleged acts falls to be judged by reference to the criminal and civil law of England, not by reference to international law, let alone contested international law. This is not a case in which the court lacks "judicial or manageable standards" by which to resolve the dispute. The court is not in a "judicial no-man's land". The central rationale for the application of the FAS doctrine in *Buttes Gas* (the leading case prior to *Belhaj*) does not apply.

69 Thirdly, the acts alleged are not only unilateral (in the sense that they do not involve dealings or transactions between states); they do not even involve any other state. There is no obvious basis on which it could be said that they fall to be judged "on the plane of international law".

70 Fourthly, the acts alleged engage the fundamental privacy rights of the mother and (derivatively) the children. Privacy "lies at the heart of liberty in the modern state": *Campbell v MGN Ltd* [2004] 2 AC 457, [12] (Lord Nicholls). It is protected both by the common law and by the ECHR. The acts alleged were also interferences with the mother's right of access to justice. All of this seems to us to be relevant to the decision whether we should "abstain" from adjudicating on them.

71 Fifthly, and in the light of the foregoing matters, to adjudicate on the mother's allegations would not demonstrate any lack of respect for the principles of comity or the sovereign equality of states. On the contrary, a decision to abstain from adjudicating on these allegations would seem to us to undercut the United Kingdom's sovereignty and to be inconsistent with the duty of the court, as an organ of the United Kingdom, to secure to the fullest possible extent the welfare of its wards.

72 We accordingly conclude that the FAS doctrine is not engaged.

The public policy exception

73 The existence of a public policy exception to the third rule was accepted by Lord Neuberger in his judgment in *Belhaj* at [157]. At [168], he said that treatment which amounted to a breach of *ius cogens* or peremptory norms would almost always fall within it, but that:

> "because the Doctrine is domestic in nature, and in agreement with Lord Mance and Lord Sumption JJSC, I do not consider that it is necessary for the claimant to establish that the treatment of which he complains crosses the

> international law hurdle before he can defeat a contention that the third rule applies".

74 Lord Sumption said this at [250]:

> "To say of a rule of law or an exception to that rule that it is based on public policy does not mean that its application is discretionary according to the court's instinct about the value of the policy in each particular case. But rules of judge-made law are rarely absolute, and this one like any other falls to be reviewed as the underlying policy considerations change or become redundant, or as it encounters conflicting policy considerations which may not have arisen or have the same significance before."

75 At [268], Lord Sumption said that it would not be consistent with English public policy to apply the FAS doctrine so as to prevent the court from determining allegations of torture. At [278], he reached the same conclusion in relation to allegations of extra-judicial detention and rendition.

76 Further guidance on the application of the public policy exception is provided by the Court of Appeal in the *Law Debenture Trust* case. In that case, the claimant sued for the repayment of transferable Eurobond notes held by Russia. The Court held that the public policy exception applied so as to permit Ukraine to rely on a defence of duress based on acts done by Russia on the basis of which Ukraine said it had issued the notes. The Court relied on six matters which had cumulative effect: [174]. The fourth was that there was "nothing inherently non-justiciable or unmanageable in the legal standards which the English court would be called on to apply in determining whether Ukraine's duress defence is made out". That was so despite the fact these were international law standards. The fifth matter was that the court would not, by adjudicating, usurp or cut across the proper role of the executive government, which has the primary responsibility for carrying on United Kingdom's foreign affairs. It follows that the constitutional considerations identified in *Shergill v Khaira* and *Buttes Gas* did not tell against adjudication: [179].

77 Lord Pannick accepts that, in assessing the public policy exception, the court is conducting a balancing exercise. He submits that the balance falls on the side of declining jurisdiction because:

(a) the present allegations concern matters less serious than alleged torture, unlawful detention and rendition;

(b) investigation would intrude into matters at the core of state actions in the field of intelligence and security;

(c) investigation would also require the court to assess and determine the competing likelihood of another state being responsible for any hacking (in order to discredit the father); and

(d) the father would be unable to defend the allegations, as to do so would involve him disclosing details of the intelligence and security operations of Dubai and the UAE.

78 The analysis in *Law Debenture Trust* seems to us to indicate that many of the factors relevant to the engagement of the third rule are also potentially relevant to the application of the public policy exception. Indeed, if the relevance of a particular factor is accepted, it may matter little whether it is understood as relevant to the engagement of the rule or the exception: see *Belhaj* [89] (Lord Mance) and [248] (Lord Sumption).

79 Accordingly, if, contrary to our view, Lord Neuberger's third rule applies at all, the five matters set out at [67]-[71] above would together justify the engagement of the public policy exception. We consider that these matters outweigh the points to the contrary made by Lord Pannick, most of which relate to the extent of the court's investigation (which will be at all times under the control of the court), rather than the decision to undertake that investigation.

80 In the context of public policy we would particularly stress that the court's obligation to secure the welfare of its wards supplies a particularly strong public interest, which is lacking in purely commercial or other private law contexts, in favour of adjudication. So does the fact that the allegations involve an interference with the court's own process. In those circumstances, we consider that it would be inimical to the rule of law, and for that reason contrary to English public policy, if the court were unable to investigate and adjudicate upon those allegations.

Conclusion

81 For these reasons, we conclude that the FAS doctrine does not prevent the court from adjudicating on the mother's allegations.