Neutral Citation Number: [2021] EWCA Civ 129

Appeal No: B4/2020/1824
Case Nos: FD19P00246 / FD19P00380
FD19F05020, FD19F00064

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SIR ANDREW McFARLANE
PRESIDENT OF THE FAMILY DIVISION
AND THE HONOURABLE MR JUSTICE CHAMBERLAIN
[2020] EWHC 2883 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2021

Before:
SIR GEOFFREY VOS, THE MASTER OF THE ROLLS
LORD JUSTICE MOYLAN
and
LADY JUSTICE ANDREWS

- -

Between:

HIS HIGHNESS SHEIKH MOHAMMED BIN RASHID AL MAKTOUM
Appellant

and

HER ROYAL HIGHNESS PRINCESS HAYA BINT AL HUSSEIN
First Respondent

and

AL JALILA BINT MOHAMMED BIN RASHID AL MAKTOUM
ZAYED BIN MOHAMMED BIN RASHID AL MAKTOUM
(by their guardian, Lynn Magson)
Second and Third Respondents

- -

Lord Pannick QC, Mr Richard Spearman QC, Mr Sudhanshu Swaroop QC, Mr Godwin Busuttil, Mr Daniel Bentham, Mr Stephen Jarmain, Ms Penelope Nevill, and **Mr Jason Pobjoy,** (instructed by **Harbottle & Lewis LLP**) for the **Appellant** (the "father")

Mr Timothy Otty QC, Professor Guglielmo Verdirame QC, Dr Kate Parlett, Ms Sharon Segal and Ms Kate Wilson (instructed by **Payne Hicks Beach**) for the **first Respondent** (the "mother")

Ms Deirdre Fottrell QC and **Mr Tom Wilson** (instructed by **Cafcass**) for the **childrens' guardian** (the "Guardian") **second and third Respondent children**

Hearing dates: 28th and 29th January 2021

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APPROVED JUDGMENT

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

Sir Geoffrey Vos, Master of the Rolls, delivering the judgment of the Court:

Introduction

1. The mother alleges in this long-running wardship case that her and her solicitors' mobile telephones were hacked by agents of the Emirate of Dubai ("Dubai") or the United Arab Emirates ("UAE"), acting on behalf of the father (the "allegations"). The father is the Ruler of Dubai and Vice-President and Prime Minister of the UAE. The High Court (Sir Andrew McFarlane, President of the Family Division, and Mr Justice Chamberlain) decided that the Foreign Act of State doctrine (the "FAS doctrine") did not prevent the court from adjudicating on the mother's allegations.

2. The issues raised by the father's appeal to this court have developed in argument, but are essentially threefold:-

   i) First, whether the High Court was wrong to conclude that the FAS doctrine did not apply. This issue involves an understanding of the third rule of the FAS doctrine explained by the UK Supreme Court ("UKSC") in *Belhaj v. Straw* [2017] UKSC 3 ("*Belhaj*").

   ii) Secondly, whether the High Court ought to have held that it was inappropriate for the court to determine the allegations or impossible to do so fairly.

   iii) Thirdly, whether, if the third rule of the FAS doctrine is applicable, the High Court ought to have applied the public policy exception to it.

3. The father argued that *Belhaj* decided that the court should simply ask itself whether it is inappropriate in all the circumstances of the specific case for the court to determine the matters raised because they involve issues of a sovereign nature. The father submitted that it was inappropriate here for the court to adjudicate upon core sovereign acts concerning the intelligence gathering powers of Dubai and the UAE. He gave three main reasons: (i) the nature of the acts alleged, namely the intelligence capability of a foreign state, (ii) the absence of any need to assess these issues in order to decide if the father was complicit in phone hacking, and (iii) the unfairness of doing so, when the father cannot adduce any evidence about the intelligence capabilities of Dubai and the UAE. The father submits that he can be expected neither to confirm nor deny ("NCND") intelligence matters. Since the UK's Parliament and courts have recognised that it is not appropriate to consider issues concerning the UK's intelligence capabilities in any legal proceedings outside the closely protected environment of the Investigatory Powers Tribunal ("IPT"), it would not be appropriate to determine such issues in relation to a foreign state when the court has no process akin to the IPT to enable it to do so fairly.[1]

4. The father relied on the decision in *Carnduff v. Rock* [2001] 1 WLR 1786 ("*Carnduff*"), where the Court of Appeal struck out as untriable a contractual claim by a registered

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[1] See the Justice and Security Act 2013, and *R (A) v. Director of the Establishments of the Security Service* [2010] 2 AC 1 at [14] per Lord Brown, and *Al-Rawi v. Security Service* [2012] 1 AC 531 ("*Al Rawi*") at [86] per Lord Brown.

police informer for payment for information which he said he had supplied, on the basis that deciding such a claim would require the court to examine "the operational methods of the police as they relate to the investigation in question" [34]. Laws LJ said at [37] that if the claim were allowed to proceed, an expectation would be generated that a means might be found to try it consistently with the public interest: "the parties are bound to attempt to configure their competing cases so as to get in evidence in the face of the obvious public interest difficulties; at once the very process of litigation, supposed to be even-handed, is gravely distorted. The basis on which either party's case is pleaded … is subject to pressures that should be irrelevant, and there will be pressures to compromise of a kind that ought not to be brought to bear. All this … tends to compromise the business of doing justice".[2]

5. The mother submitted that the High Court had been right for the reasons it gave. The Guardian supported the mother's submissions.

6. We will deal now with the precise allegations upon which the mother seeks an adjudication, the essential factual background, and the High Court's judgment before turning to the issues that require decision.

The allegations

7. The allegations can be summarised as follows:-

   i) the mobile telephones of the mother, her solicitors, Baroness Shackleton and Nick Manners, her personal assistant and two members of her security staff were the subject of unlawful surveillance in July and August 2020 at a time of significant events in these proceedings;

   ii) this surveillance was carried out using [NSO Group] software licensed to Dubai or the UAE;

   iii) the surveillance was carried out by agents of the father, Dubai or the UAE;

   iv) the software used 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's contact lists, passwords, calendars and photographs. It would also allow recording of live activity and taking screenshots and pictures; and

   v) the surveillance occurred with the express or implied authority of the father.

8. The allegations are supported by witness statements filed on behalf of the mother by a number of individuals including Dr William Marczak, who produces technical evidence allowing him to draw certain conclusions. It is unnecessary for us to undertake a detailed consideration of the evidence, which will (depending on the outcome of this appeal) be the task of the President at the forthcoming further fact-finding hearing.

9. The father denies all the allegations. Specifically, at [4] of his Written Response of 14 September 2020, the father denies that (a) he has been involved in the use of NSO

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[2] The father relies also on the fact that the European Court of Human Rights dismissed an application to challenge the decision in *Carnduff*, and the UKSC approved it in *Al Rawi* at [86] and [108].

software to access the telephones, (b) he has any knowledge of any such activity, (c) he has authorised it, or instructed, encouraged or in any way suggested that any other person should use NSO (or any) software in this way. The father has not, however, thus far filed any evidence on these points.

Further essential factual background

10. The High Court described the essential factual background in [5]-[12] of its judgment. The following summary is mostly an abbreviated version of those paragraphs.

11. The issue facing the High Court arose in the course of proceedings relating to the welfare of two children, Sheikha Al Jalila bint Mohammed bin Rashid Al Maktoum ("Jalila"), who is now 13, and Sheikh Zayed bin Mohammed bin Rashid Al Maktoum ("Zayed"), who is now 9.

12. 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 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. The Guardian was appointed.

13. The President and other judges have given a number of judgments in these proceedings including particularly the Fact-Finding Judgment of 11 December 2019 [2019] EWHC 3415 (Fam). In that 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. The key findings were these:

    i) In the early summer of 2000, Sheikha Shamsa went to ground while on a visit to England. Her father tracked her down through someone she had kept in touch with. In mid-August 2000 she was taken by three or four men working for her father to his home in Newmarket. She was held there overnight. 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. Since then she has been confined to one room, constantly supervised by nurses and a psychiatrist. She is given regular medication. She has been deprived of her liberty for much, if not all, of the past two decades.

    ii) 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. 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. She remained there for three years and four months, where she endured sleep deprivation, beatings and insanitary conditions. She was injected with what she believes to have been tranquilisers. 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.

    iii) 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. 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. 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. The Indian special forces soldiers left the boat and were replaced by members of the UAE armed forces. Sheikha Latifa, Ms Jauhiainen, Mr Jaubert and the yacht's crew were taken back to Dubai under guard, escorted by Indian coastguard vessels. Since that time, Sheikha Latifa has been detained in a locked and guarded house akin to a prison.

iv) In the early part of 2019, the mother lost her official position in the father's court. Those acting for the father began investigating her personal finances. The father divorced her under Sharia law. 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. 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. 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. 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. After she had done so, she received further threatening communications. 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 them damaging their reputation. In June 2019, this person was told by the same individual that "the media war has started". In a three-week period in June and July 2019, 1,100 media articles were published about the mother worldwide. Many contained defamatory inaccuracies.

14. At the end of the Fact-Finding Judgment at [182], the President 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".

15. In a further judgment on 17 January 2020 [2020] EWHC 67 (Fam), the President held that assurances given by the father, Dubai and the UAE, 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.

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

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

    ii) the mother's wardship application;

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

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

    v) 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 2020.

The judgment of the High Court

17. The High Court began by considering the relevance of the allegations to the issues before the court at [33]-[38]. It referred to the structure provided in *The Law Debenture Trust Corp plc v. Ukraine* [2019] QB 1121 at [155] for the consideration of the application of the FAS doctrine. Three questions had to be asked, the first two of which were: whether "there [is] 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]", and whether "if there is a domestic foothold, … the issue is none the less beyond the competence of the English courts to resolve". The domestic foothold in this case was not disputed.

18. The High Court then noted that the primary objective of the proceedings was to secure the welfare of two children who are wards of court. That objective had been held to justify departures from procedural rules governing other proceedings in *Secretary of State for the Home Department v. MB* [2008] AC 440 per Lady Hale at [58], and in *Al Rawi* per Lord Dyson at [63]. The special function of the proceedings had to be firmly borne in mind when considering the submission that it was beyond the competence of the court to examine the allegations.

19. The High Court held that the allegations were directly relevant to each of the five applications before the court, because they might "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", which would involve a grave interference with the process of the court. That would be relevant to appropriate contact arrangements, interim orders necessary to protect the mother and children and the type and cost of appropriate security arrangements, all of which were contested.

20. Before the High Court [37], Lord Pannick QC, leading counsel for the father, accepted that the court could determine whether hacking had occurred and whether there was a pool of possible states which might have been responsible for it. Before this court, Lord Pannick also accepted that the court could determine the fifth allegation, anyway as a

matter of inference, namely whether the father was complicit in the hacking. His submission was that the court could not adjudicate on the evidence of Dr Marczak.

21. At [39]-[47], the High Court dealt with the relevance of the NCND practice. It cited *Al Fawwaz v. Secretary of State for the Home Department* [2015] EWHC 166 (Admin), per Burnett LJ (i) at [74] as showing that NCND was not a rule of law or legal principle but a practice which had been adopted to safeguard the secrecy of the workings of the intelligence agencies, and (ii) as endorsing the well-known passage in Maurice Kay LJ's judgment in *Secretary of State for the Home Department v. Mohamed* [2014] 1 WLR 4240, at [20] that whilst there were circumstances in which the courts should respect it, it was "not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it". To invoke NCND, the party concerned had to assert public interest immunity ("PII"), which required a certificate from a Minister of the Crown. The High Court concluded on this point that NCND practice was not relevant to the application of the FAS doctrine. Even in an ordinary civil claim like *Carnduff*, the conclusion that an issue was untriable involved at least three steps: a reasoned assertion of PII, a decision to uphold that assertion, and a judgment (of which there were very few examples) that, as a result, the issue was untriable. The court would not bypass these steps, where there was no evidence as to the NCND practice of Dubai or the UAE. The High Court did not agree with the father's submission that the legitimate national security interests of a foreign state should instead be brought into account under the rubric of the FAS doctrine. To do so, the court would be simply "saluting the flag" which the father had hoisted without evidence. The court also relied on the points that (i) in deciding whether to uphold a PII claim, the court considered UK public interests, and the father had initiated these proceedings in his private capacity, and (ii) *Carnduff* decided that the operation of PII might render a civil case untriable, but the Family Court in wardship cases, whilst adhering to the ordinary principles of PII, "was less binary and [might] 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.[3]

22. The High Court then dealt in detail at [48]-[65] with the scope of the FAS doctrine, including extensive citation from the judgments of the UKSC in *Belhaj*.[4] It acknowledged at the outset that the contours of the FAS doctrine were not yet wholly defined.

23. The High Court concluded its "close analysis of the judgments in *Belhaj*" by drawing the "following conclusions about the scope of the third rule identified by Lord Neuberger":

    i) 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].

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3 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).

4 The two cases before the UKSC were (i) 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, to which the defendants pleaded defences of state immunity and FAS, and (ii) a case where the claimant sought damages for mistreatment by US authorities into whose custody he claimed he had been delivered by UK armed forces.

ii) The rule is based on "judicial self-restraint" or abstention: see Lord Mance at [11(iv)], and 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].

iii) 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.[5]

iv) 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].

v) 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 and Oil Co v. Hammer (No. 3)* [1982] AC 888 ("*Buttes Gas*"), cited by Lord Mance at [44] in a passage referred to by Lord Neuberger at [150].

vi) 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].

24. The High Court commented that deciding a particular case under the third rule required 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 concerned a sovereign act did not on its own make it non-justiciable.[6]

25. The High Court dealt at [66]-[72] with the question of whether the third rule was engaged in this case. It started by pointing out that, unlike in *Belhaj*, it was not so obvious here that the acts complained of were all sovereign acts. That would not be the case if the father had indeed used state agents to hack the phones for his own personal ends. The court nonetheless assumed in the father's favour that the allegations did indeed involve sovereign acts on the part of Dubai and/or the UAE.

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5 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.

6 The High Court referred to the express rejection of the appellant's formulation of the rule by Lord Mance at [11(iv)] and [44]. Lord Neuberger's reference at [151] to Lord Sumption's judgment could not have been intended to suggest that the third rule covered 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 would have been wholly unnecessary.

26. The High Court decided that the FAS doctrine was not engaged pointing to five material features, all of which it thought pointed in the same direction:

    i) The acts alleged were directed against, and had direct effects on, persons in the United Kingdom and within the jurisdiction of the court. That distinguished the case from *R (Khan) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872,[7] which was generally regarded as a rare example of the application of the third rule to acts taking place outside the territory of the state concerned. The fact that the acts were directed at persons in the United Kingdom and designed to interfere with the process of a United Kingdom court was on any view an important factor to be borne in mind.

    ii) The legality of the alleged acts fell to be judged by the criminal and civil law of England, not international law. This was not a case in which the court lacked "judicial or manageable standards" by which to resolve the dispute. It was not in a "judicial no-man's land". The central rationale for the application of the FAS doctrine in *Buttes Gas* did not apply.

    iii) The acts alleged were unilateral, did not involve dealings between states, and did not even involve any other state. There was no obvious basis on which they fell to be judged "on the plane of international law".

    iv) 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, per Lord Nicholls at [12]. The fact that such rights were protected by the common law and the ECHR was relevant to whether the court should abstain from adjudicating on the allegations.

    v) To adjudicate on the 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 doing so would undercut the United Kingdom's sovereignty and would 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.

27. Finally, the High Court decided at [73]-[80] that, if, contrary to its view, Lord Neuberger's third rule applied, the five matters it had relied upon to decide that the FAS doctrine was not engaged "would together justify the engagement of the public policy exception". These matters outweighed the points made by the father that mostly related to the extent of the court's investigation, which would anyway be under the control of the court, rather than the decision to undertake that investigation.

Issue 1: Was the High Court wrong to conclude that the FAS doctrine did not apply?

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7 In that case, the FAS doctrine was applied in a claim for 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.

28. In argument, we asked Lord Pannick to identify the errors in the High Court's judgment on the FAS doctrine. His answer was to point to the five material features on which the High Court had relied, and to submit that, on analysis, none of those features was of assistance. They were, he said, of limited, if any, weight. The High Court had, he submitted, "failed fundamentally to recognise that what it [was] being asked to assess and determine [was] a matter central to the sovereignty of the foreign state, that is its intelligence and security capability and the conditions by reference to which it is exercised". When he went through these features, he pointed out passages in *Belhaj* in which it was suggested, for example, that extraterritorial acts and unilateral acts **could** be the subject of the third rule. He did not go so far as to suggest that the features were irrelevant, only that they did not outweigh the undesirability of adjudicating upon a "core sovereign act".

29. In our judgment, the applicable test adumbrated by the UKSC in *Belhaj* is more nuanced than the father submits. Whilst it is clear that the judgments do not speak with one voice, [123] of Lord Neuberger's judgment was accepted by the majority and captures the essence of the test. It explains the approach and then gives examples, rather as the summary of the High Court did at [64]:

> "The third rule has more than one component, but each component involves 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; Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory: per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237. … Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule 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. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels: see *Shergill v Khaira* [2015] AC 359, paras 40, 42".

30. As both parties accepted, the third rule requires an analysis of whether a particular issue or claim is justiciable on a case-by-case basis.[8] We note that Lord Neuberger emphasised that the rule applies to issues which are inappropriate for the UK courts 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 to rule on it. This is an evaluative exercise. Lord Pannick described it as a question of law, in order to contend that this court did not need to identify an error in the High Court's judgment if, as a matter of law, the FAS doctrine was applicable. That may be correct in one sense, but it would be surprising, we think, if this court were to depart from a decision on such a question without a substantive reason for doing so. That is particularly so where such an experienced court has evaluated the circumstances.

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[8] See Lord Mance at [11(iv)] and [107(v)], and Lord Neuberger at [147].

31. In this connection, Lord Pannick submitted that we should overturn the High Court's view that the allegations were directly relevant to the applications before the court. We decline to do so. First, we think that the President, who has dealt with these proceedings all along, is in a far better position than we are to assess relevance. Secondly, it seems to us obvious that if it were shown that the father was complicit in illegal surveillance in the UK in relation to these proceedings, that would be relevant to the court's various determinations as to the future and safety of the children. Thirdly, we agree with the High Court's view. It is to be borne in mind that the President's findings thus far relate to the father's mostly historic conduct in relation to his other daughters.

32. In these circumstances, we need to ask whether the High Court was right to rule that the issues raised by the allegations were appropriate for the UK courts to resolve, and that they did not involve a challenge to the lawfulness of acts which were of such a nature that the court could not or ought not to rule. As we have mentioned, the specific focus of the father's argument is on Dr Marczak's evidence suggesting that the surveillance may have been undertaken by the security services of Dubai and the UAE. Put in that way, it does not look as if the determination sought by the mother is actually as to the lawfulness of the acts of any foreign state. After all, the hacking is accepted to be unlawful in the UK. This point seems to us, however, to have less substance than at first appears because what could have been alleged is that Dubai and the UAE acted unlawfully in using state power for the personal benefit of the father. We accept for the sake of argument, as the High Court did, that the third rule of the FAS doctrine could theoretically be engaged, and that it had to determine whether it was appropriate for it to determine the allegations as Lord Neuberger explained at [123].

33. We also accept that each of the five factors that the High Court relied upon is relevant to justiciability. The allegations related to unilateral (single state) acts against persons resident within the UK and within the jurisdiction of the UK courts, to be judged under English and Welsh law. They amounted to a serious alleged infringement of privacy.

34. The two factors mentioned by the High Court that we believe require special attention are the questions of (i) whether it lacked judicial standards by which to resolve the dispute, and (ii) whether to do so would demonstrate a lack of respect for comity or conversely undercut the UK's sovereignty.[9]

35. We believe that the evaluation of these questions is intimately connected to the second issue raised by the appeal. In short, we think that, if the High Court were right to say that it could judicially resolve the allegations, and that it was no breach of comity to do so, then it would be unlikely, in the other circumstances already mentioned, to be inappropriate for the court to determine the allegations or impossible to do so fairly.

36. Accordingly, we move to consider the second issue, before reaching a final conclusion on the first issue.

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[9] It is relevant in this connection to note that the Foreign, Commonwealth and Development Office declined to make representations about the application of the FAS doctrine both at first instance and on appeal.

Issue 2: Ought the High Court to have held that it was inappropriate for the court to determine the allegations or impossible to do so fairly?

37. We have already set out the father's main argument under this head, namely that, since it is clear that the father cannot, as Ruler of Dubai and Prime Minister of UAE, be expected to adduce evidence about Dubai's and the UAE's intelligence capabilities, the court cannot fairly or appropriately determine the allegations listed at [7(ii)-(iv)] above reflecting Dr Marczak's evidence.

38. On this point, we have formed the clear view that the court can and should resolve the allegations as the High Court decided. We can give our reasons shortly.

39. It may well be the case that the father cannot adduce evidence about the intelligence capabilities of Dubai or the UAE. But the central issue raised by the allegations is not as to the intelligence capabilities of Dubai or the UAE; it is as to whether private phones were hacked by software accessible only to foreign states including Dubai and the UAE. Once Lord Pannick had accepted that the court could fairly determine **by inference** that the father was complicit in the phone hacking, the issue narrowed. It became, in reality, a question of whether it would be fair to exclude the mother from adducing all available evidence as to the technical circumstances of the hacking. We do not think that would be fair or appropriate in the unusual circumstances of this case.

40. This is not a case, as Lord Pannick described it, that raises a core sovereign act concerning a foreign state's intelligence capabilities. It is a case in which a private father may, if the allegations are proved, have used state powers as the Ruler of the State of Dubai and/or as Prime Minister of the UAE for his own ends. The detail of the hacking is not the critical allegation. The critical allegation is the one that it is accepted the court can determine, namely the father's complicity in domestic UK illegal surveillance. That is an entirely justiciable issue.

41. For the same reasons, there is no infringement of comity. The central issue is not the lawfulness of the intelligence acts of a foreign state. The central issue is the father's complicity in illegal UK phone hacking. The father is not compelled to adduce any evidence at all. Whether or not he does so, the court will be able to fairly resolve the questions raised by the allegations.[10] It is commonplace for the court to resolve issues where one party declines for its own reasons to adduce any evidence. That does not automatically make the allegations non-justiciable.[11]

42. We return to issue 1, which is, in our judgment, the primary one. For the reasons we have given, we agree with what the High Court decided. The third rule of the FAS doctrine was not engaged because, undertaking the specific case-sensitive analysis required, it would not be inappropriate for the court to determine the allegations. The

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10 It may be noted that the court has appointed a single joint technical expert, and the father has also been permitted to have a privileged expert to advise and assist in the presentation of his case.

11 See Lord Mance at [100] in *Belhaj*: "But, even if the United States do not co-operate [with providing evidence as to what happened to Mr Rahmatullah in custody], evidential difficulties of this nature are, I think, far from what was in mind in the *Buttes Gas* case or any other of the relevant authorities and are not a basis for concluding that a claim is non-justiciable".

High Court correctly applied the examples given by the UKSC in *Belhaj* and concluded that, in the very specific wardship context of this case, it was not in any judicial no-man's land. It was not unfair or inappropriate to resolve the father's personal complicity in unlawful UK surveillance, and for that purpose it was not appropriate to prevent the mother relying on technical and other evidence as to how and by whom that hacking had been undertaken. There is no breach of comity, when the whole case is about the father's personal conduct and its impact on the future welfare of the children.

Issue 3: If the third rule of the FAS doctrine is applicable, ought the High Court to have applied the public policy exception to it?

43. This issue does not arise, but we agree with the High Court that, in the circumstances of this case, it raises precisely the same questions as arose in relation to the engagement of the FAS doctrine. Indeed, it may be, as Lord Mance suggested at [89] in *Belhaj*, that there is no need to consider the operation of an analytically subsequent exception to the third rule. Such policy considerations may simply form part of the court's wide-ranging determination on justiciability.

Conclusion

44. For the reasons given above, we conclude that the High Court was right to decide that the FAS doctrine was not engaged.

45. We dismiss the appeal.