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Case No: FD19P00246, FD19P00380, FD19F05020,
FD19F00064 and FD20F00034

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2021

Before :

THE PRESIDENT OF THE FAMILY DIVISION
and
MR JUSTICE CHAMBERLAIN

- -

Re Al M (Immunities)

- -
- -

Mr Tim Otty QC, Mr Nicholas Cusworth QC, Mr Guglielmo Verdirame QC, Mr Nicholas Wilkinson and **Ms Kate Parlett** (instructed by **Payne Hicks Beach**) for the **mother**

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

Hearing dates: 10 and 11 February 2021

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Approved Judgment

We 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 OF THE FAMILY DIVISION AND MR JUSTICE CHAMBERLAIN

Sir Andrew McFarlane P. and Mr Justice Chamberlain :

Introduction

1 This is the judgment of the court, to which we have both contributed. It is concerned with a discrete issue: whether His Highness Sheikh Mohammed bin Rashid Al Maktoum (the father) is entitled to immunity from jurisdiction in respect of two applications issued by Her Royal Highness Princess Haya bint al Hussein (the mother) in proceedings between them. That in turn depends on whether customary international law ("CIL") requires such immunity.

2 The proceedings in which these two applications arise have already resulted in many hearings and judgments. It is not necessary to summarise them all. The essential background is set out in a judgment we gave on another issue on 29 October 2020: see [2020] EWHC 2883 (Fam), at [5]-[12]. It is not repeated here. All that is necessary to understand the issues before us is the following summary.

3 The father is Ruler of the Emirate of Dubai and, materially for present purposes, Prime Minister (Head of Government) of the United Arab Emirates. He commenced proceedings on 14 May 2019 under the High Court's inherent jurisdiction seeking the return of his and the mother's children, J and Z, to Dubai. He invited the court to appoint a guardian to address issues concerning the children's welfare. Through Cafcass, a guardian was appointed.

4 In response, the mother made three applications of her own on 16 July 2019: the first invoked the Court's inherent jurisdiction and sought to make the children wards of court and prevent the father from removing them from the jurisdiction; the second was for a forced marriage protection order under Part 4A of the Family Law Act 1996 in relation to J; the third was for a non-molestation order.

5 On 24 July 2019, the father made an application for interim child arrangements under the Children Act 1989 ("CA 1989"). On 9 December 2019, the mother issued an application for financial support for her and the children under Sch. 1 to the CA 1989 ("the Schedule 1 application").

6 The father does not claim to enjoy immunity from jurisdiction in respect of any of these applications. His assertion of immunity from jurisdiction relates to two other applications made by the mother on 19 June 2020. They are:

(a) an application for permission to apply for financial support for herself and the children under Part III of the Matrimonial and Family Proceedings Act 1984 ("the Part III proceedings"); and

(b) an application under the inherent jurisdiction for financial support for herself and the children ("the IJ application").

The parties' positions

7 The father's position, in summary, is that:

(a) As Head of Government of a foreign State, he enjoys certain immunities under CIL: immunity from jurisdiction, inviolability and immunity from execution of any judgment. These immunities apply in both criminal and civil proceedings and whether the proceedings concern official State matters or personal matters. In other words, they apply *ratione personae* and not just *ratione materiae*.

(b) Although in principle the initiation of proceedings operates as a waiver of immunity from jurisdiction (though not in respect of execution of the judgment) both in respect of the claim and in respect of any counterclaim directly connected with it, the mother's Part III and IJ applications are not directly connected to any of the father's applications in these proceedings.

(c) Although the father (on 31 July 2019) and the UAE (on 4 October 2019) waived the father's immunity from jurisdiction (and also his immunity and inviolability in relation to the execution and enforcement of any order), these waivers were expressly limited to certain specified applications, not including the Part III or IJ applications, which had not been issued by that time.

8 The mother's position, in summary, is that:

(a) The father has failed to demonstrate that there is a rule of CIL conferring on Heads of Government immunity in respect of civil proceedings relating to personal and private matters.

(b) Even if there is such a rule, the father is precluded from invoking it in circumstances where he has initiated proceedings himself and where the Part III and IJ applications are properly characterised as counterclaims directly connected with the father's applications and arising out of the same relationship and facts.

(c) In any event, the Part III and IJ applications are covered by the father's express waivers.

Issue (a): Has the father demonstrated that CIL confers immunity on Heads of Government in respect of civil proceedings relating to personal and private matters?

The relevance of CIL in this case: common ground

9 Before summarising the parties' submissions, it is important to set out four points which are common ground.

10 First, certain immunities recognised in public international law are given effect in the UK by statute: see e.g. the Diplomatic Privileges Act 1964, the Consular Relations Act 1968, the International Organisations Act 1968 and the State Immunity Act 1978. There is no statutory immunity for Heads of Government.

11 Second, some of the immunities recognised by public international law are codified in treaties or conventions: see e.g. the Vienna Convention on Diplomatic Relations (1961: "VCDR") and the Vienna Convention on Consular Relations (1968) (to both of which the UK is party) and the Convention on Special Missions (1969) (to which it is not). There is no international instrument codifying immunities for Heads of Government.

12 Third, CIL recognises some immunities not codified in any international instrument. Where they are not incompatible with statute, rules of CIL shape the common law unless there is some constitutional or other special reason why they should not: *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2019] 2 WLR 578, [116] (Arden LJ). Applying this principle, domestic courts have given effect to CIL immunity *ratione personae* for Heads of State: *Mighell v Sultan of Johore* [1894] 1 QB 149, 159-160 (Lord Esher MR); *Aziz v Aziz* [2008] 2 All ER 501, [55]-[61]; *Harb v Aziz* [2014] 1 WLR 4437, [14] (Rose J) and [2016] Ch 308, [35]-[39] (Aikens LJ); and *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 201G-202A (Lord Browne-Wilkinson). They have not (yet) recognised an equivalent immunity for Heads of Government.

13 Fourth, if the father succeeds in establishing that CIL recognises an immunity for Heads of Government covering the circumstances of this case, it would not conflict with any domestic statute; and there is no policy reason, constitutional or otherwise, why it should not be recognised at common law. The question whether such an immunity is part of the law of England and Wales therefore turns on whether the father can demonstrate to the requisite standard that it is recognised in CIL.

The test for deciding whether a party has established an asserted rule of CIL

14 In *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777, Lord Sumption (with whom Lady Hale, Lord Wilson, Lord Neuberger and Lord Clarke agreed) said this, at [31]:

> "To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation *(opinio juris)*: see conclusions 8 and 9 of the International Law Commission's Draft Conclusions on Identification of Customary International Law (2016). There has never been any clearly defined rule about what degree of consensus is required. The editors of *Brownlie's Principles of Public International Law*, 8th ed. (2012), p. 24, suggest that 'complete uniformity of practice is not required, but substantial uniformity is'. This accords with all the authorities. In the words of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para. 186: 'The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule,

> not as indications of the recognition of a new rule.' What is clear is that substantial divergences of practice and opinion within the international community upon a given principle are not consistent with that principle being law: see *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131."

15 This was cited in the *Freedom and Justice Party* case, at [16]. In that case, the Court of Appeal (Arden, Sales and Irwin LJJ) had to consider whether the Chief of Staff of the Egyptian Armed Forces, who was visiting the UK as part of a special mission, was immune from arrest for alleged torture. Arden LJ (giving the judgment of the Court) at [17] cited with approval the view of the Divisional Court (Lloyd Jones LJ and Jay J) that, to qualify, "a practice need not be universal or totally consistent". At [18], she noted that, like the Supreme Court in *Benkharbouche*, the Court of Appeal had found the International Law Commission's ("ILC") *Draft Conclusions on the Identification of Customary International Law* (UN Doc A/73/10) of particular value. They were set out in an annex to the judgment. At [19], she said this:

> "What is immediately apparent... is that the ascertainment of customary international law involves an exhaustive and careful scrutiny of a wide range of evidence. Moreover, a finding that there is a rule of customary international law may have wide implications, including, as we discuss below, for the common law. As Lord Hoffmann held in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270, para 63...:
>
> > 'It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.'"

16 In the *Freedom and Justice Party* case, the Court of Appeal agreed with the Divisional Court's view that the stringent conditions for identification of a rule of CIL were met on the basis of:

(a) State practice arising in connection with two treaties: see [29] and [87]-[89];

(b) the work of the ILC considering State practice and *opinio juris*: [23]-[28] and [84]-[86];

(c) further examples of State practice from the UK, the US, Austria, Belgium, Finland, France, Germany, the Netherlands, Armenia, the Czech Republic, Romania, Serbia, Switzerland and Albania: [31]-[38] and [90]-[106]; and

(d) the views of legal scholars: [39]-[41] and [107].

17 It is of some relevance that, in the overview of its conclusions, the Court said that it did not doubt that "an international court would find" that there is a rule of customary international law of the kind asserted: see at [79]. This recognises the importance of judgments of international courts, to which we shall turn shortly.

18 Several parts of the ILC's *Draft Conclusions on the Identification of Customary International Law*, and the associated Commentary, are relevant here:

(a) Conclusion 3, headed "Assessment of evidence for the two constituent elements", provides:

> "1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law *(opinio juris)*, regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.
>
> 2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element."

(b) Conclusion 6, headed "Forms of practice", provides:

> "1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.
>
> 2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.
>
> 3. There is no predetermined hierarchy among the various forms of practice."

(c) Conclusion 10, headed "Forms of evidence of acceptance as law *(opinio juris)*", provides insofar as material:

> "1. Evidence of acceptance as law *(opinio juris)* may take a wide range of forms.
>
> 2. Forms of evidence of acceptance as law *(opinio juris)* include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference."

(d) Conclusion 13, headed "Decisions of international courts and tribunals", provides as follows:

> "1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of

rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules."

(e) The Commentary on the latter Conclusion includes this:

"3. Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law. Other considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and the procedures applied by the court or tribunal. It needs to be borne in mind, moreover, that judicial pronouncements on customary international law do not freeze the law; rules of customary international law may have evolved since the date of a particular decision.

4. Paragraph 1 refers to 'international courts and tribunals', a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular position as the only standing international court of general jurisdiction. [Fn: Although there is no hierarchy of international courts and tribunals, decisions of the International Court of Justice are often regarded as authoritative by other courts and tribunals. See, for example, *Jones and Others v. the United Kingdom*, Application nos. 34356/06 and 40528/06, European Court of Human Rights, ECHR 2014, para. 198; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999, p. 10, at paras. 133–134; and *Japan — Taxes on Alcoholic Beverages,* WTO Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. D.]

...

> 7. Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law. This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States."

Submissions for the father

19 For the father, Lord Pannick QC submitted that the test for the identification of CIL was met in this case. He relied in particular on two decisions of the International Court of Justice ("ICJ"): the *Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of Congo v Belgium),* ICJ Reports 2002, p. 3 ("the *Arrest Warrant* case") and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France),* ICJ Reports 2008, p. 177 *("Djibouti v France").*

20 Lord Pannick noted that the ICJ was established by Article 92 of the UN Charter as the "principal judicial organ of the United Nations". As the passage quoted above from the ILC makes clear, it carries particular authority as "the only standing international court of general jurisdiction". In *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 UK, the House of Lords had to consider whether there was an exception to State immunity for claims in respect of acts that violate *jus cogens* norms. At [24], Lord Bingham noted that "the claimants are obliged to accept, in the light of the *Arrest Warrant* decision of the International Court of Justice… that state immunity *ratione personae* can be claimed for a serving Foreign Minister accused of crimes against humanity". Similarly, when the same case reached the European Court of Human Rights, that court considered it unnecessary to examine in detail the views of national courts because a recent judgment of the ICJ established that there was no *jus cogens* exception to State immunity; and the ICJ's judgment "must be considered by this court as authoritative as regards the content of customary international law". These decisions showed that, once the ICJ had spoken, it was not necessary to look further.

21 In the *Arrest Warrant* case – the same case treated by Lord Bingham as determinative in *Jones* – the ICJ had to consider an international arrest warrant issued by a Belgian investigating judge against the Minister of Foreign Affairs of the Democratic Republic of Congo. The ICJ held, insofar as material, as follows:

> "51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the

inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider."

22 At [52], the ICJ cited two parts of the VCDR: a passage from the Preamble noting that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States" and Article 32, which provides that only the sending State can waive the immunities for which it provides. In these respects, the VCDR "reflects customary international law". The ICJ then said that neither the VCDR nor the Convention on Special Missions contained any provision specifically defining the immunities enjoyed by Ministers of Foreign Affairs, so it was necessary to look to CIL. It went on:

> "53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these: functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.
>
> 54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.
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> 55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts

> performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an 'official' visit or a 'private' visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions."

23 In *Djibouti v France,* the ICJ held that a Head of State was in principle entitled to inviolability from a witness summons in proceedings concerning the death of a dual national abroad. At [170], it said this:

> "170. The Court has already recalled in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case "that in international law it is firmly established that... certain holders of high-ranking office in a State, such as the Head of State... enjoy immunities from jurisdiction in other States, both civil and criminal" (Judgment, I.C.J. Reports 2002, pp. 20-21, para. 51). A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another State which would hinder him or her in the performance of his or her duties' (ibid., p. 22, para. 54). Thus the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority."

24 At [174], the ICJ cited Article 29 of the VCDR, which provides for the inviolability of the person of a diplomatic agent. This, it said, "while addressed to diplomatic agents, is necessarily applicable to Heads of State" and "imposes on receiving states the obligation to protect the honour and dignity of Heads of State, in connection with their inviolability".

25 Lord Pannick's argument has three stages:

(a) The VCDR, and in particular Article 32, reflects CIL: *Arrest Warrant* case, [52]. Article 29 of the VCDR is also a rule of CIL, which applies not only to diplomats, but also to Heads of States: *Djibouti v France*, [174]. It would be surprising if the scope of the immunity enjoyed by Heads of Government was less than that enjoyed by diplomats.

(b) The reasoning in [51] and [53] of the *Arrest Warrant* case and [170] of *Djibouti v France* show that there is in this respect no relevant distinction between Heads of State, Heads of Government and Ministers of Foreign Affairs.

(c) Thus, a serving Head of Government enjoys in a foreign State:

(i) immunities from jurisdiction, both criminal and civil;

(ii) inviolability, including from being required to attend court to give evidence; and

(iii) immunity from execution of a judgment (see Article 32(4) of the VCDR).

26 In addition, Lord Pannick relied on decisions of US federal courts and US State practice as confirming the immunity of serving Heads of Government from civil and criminal jurisdiction. He accepts that US courts apply a constitutionally mandated deference to the executive on such questions (see e.g. *Republic of Mexico v Hoffmann* 324 US 30, 35 (1945)), but contends that the cases he relies on nonetheless serve to demonstrate the relevant State practice. The cases relied on are:

(a) *Doe v Modi* (US District Court, Southern District of New York), where District Judge Analisa Torres held on 14 January 2015 that, as Prime Minister of India, Narendra Modi had immunity from civil proceedings for acts committed in 2002 while serving as Chief Minister of Gujarat. The court treated as conclusive two "suggestions of immunity" filed by the US Government, the first of which recognised the *Arrest Warrant* case as authority for the proposition that the doctrine of Head of State immunity (which was "well established in international law") also applied to Heads of Government and Ministers of Foreign Affairs. It also listed previous US cases in which such immunity had been upheld: *Doe v State of Israel* 400 F. Supp. 2d 86, 1210 (2005) (which concerned Ariel Sharon) and *Saltany v Reagan* 702 F. Supp. 319, 320 (1988) (which concerned Margaret Thatcher and related to UK involvement in air strikes on Libya). In a supplemental brief, the US Government said that the immunity was based on Mr Modi's status as an incumbent officer holder, so it was irrelevant that the claim related to acts done before he became Prime Minister.

(b) *Jibreel v Hock Seng Chin* (US District Court for the Northern District of California), where District Judge Jon S. Tigar on 5 May 2014 upheld a claim to immunity in civil proceedings against the Prime Minister of Singapore. Again the "suggestion of immunity" demonstrates the view of the US Government that Head of State immunity under CIL extends also Heads of Government and Ministers of Foreign Affairs.

(c) *Howland v Resteiner* (US District Court of the Eastern District of New York), where Senior District Judge Glasser on 5 December 2007 upheld a claim to immunity by the Prime Minister of Granada and his wife. The US Government's "suggestion of immunity" said that "[u]nder customary rules of international law, recognised and applied in the United States, the head of a foreign government is

immune from the jurisdiction of United States courts under the doctrine of head of state immunity".

27 Lord Pannick referred also to Spain's Organic Law 16/2015 of 27 October 2015 on Privileges and Immunities of Foreign States, International Organisations with Headquarters or Offices in Spain and Conferences and International Meetings Held in Spain. This provides for the inviolability (Article 21) and immunity from jurisdiction and execution (Article 22) of the Head of State, Head of Government and Minister of Foreign Affairs of foreign States.

28 Finally, Lord Pannick cited two textbooks:

(a) O'Keefe and Tams, *The United Nations Convention on Jurisdictional Immunities of States and their Property: a Commentary* (Oxford, 2013), who said this at p. 87 about the *Arrest Warrant* case:

> "The Court, assimilating the immunity enjoyed by a serving minister for foreign affairs to that enjoyed by a serving head of State, a serving head of government, and a serving diplomat, rationalized these immunities by reference to the need 'to ensure the effective performance of [these persons'] functions on behalf of their respective States'—the need, that is, 'throughout the duration of his or her office', to 'protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties'. This functional necessity justified, in the Court's view, and immunity for the duration of the individual's office that was without regard to the capacity, public or private, in which the impugned acts were performed or, indeed, to whether they were performed before or during the period of office—in short, immunity *ratione personae*. Although the court formally restricted its conclusions to criminal proceedings, it is difficult to see how the rationale for and resultant nature of the immunity of the relevant state offices from foreign civil proceedings could be any different. The implication for the immunity of serving heads of state from civil proceedings in the courts of another state is that such immunity is an immunity *ratione personae* applicable as much to things done in an official capacity as to private conduct."

(b) Ziaodong Yang, *State Immunity in International Law* (Cambridge, 2012), who said this at p. 434:

> "Senior officials in particular are treated with especial reverence. With perhaps the rarest of exceptions, lawsuits against incumbent heads of State, heads of government or other high-ranking officials have met with no success. This bears vivid testimony to the tenacity of a traditional rule of international law whereby, according to the ICJ in the *Arrest Warrant* case:
>
> > 'certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs,

> enjoy immunities from jurisdiction in other States, both civil and criminal.'"

Submissions for the mother

29 For the mother, Mr Tim Otty QC submitted that there was nowhere near enough evidence to demonstrate, to the exacting standard required to identify a rule of CIL, a widespread, representative and consistent State practice, as accepted *opinio juris*, that Heads of Government enjoy immunity from civil proceedings relating to purely personal matters.

30 Mr Otty started with the opinion of Lord Millett in the House of Lords in *Pinochet*, where he said this at 268-269:

> "Immunity *ratione personae* is a status immunity. An individual who enjoys its protection does so because of his official status. It enures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available. It is confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo. It is reflected in English law by section 20(1) of the State Immunity Act 1978, enacting customary international law and the Vienna Convention on Diplomatic Relations (1961)."

31 As to the *Arrest Warrant* case, Mr Otty notes that the report does not record either party making any reference to civil proceedings in their submissions. The judgment at [51] records the Court's view that Heads of State, Heads of Government and Ministers of Foreign Affairs all enjoy "immunities from jurisdiction in other States, both civil and criminal" but in the very next sentence goes on to say that it was only the immunity from criminal jurisdiction that fell for decision in that case. Accordingly, the decision tells us nothing about the scope of the immunity from civil jurisdiction.

32 Nor can [52] properly be read as equiparating the immunities of diplomats with those of Heads of Government. A diplomat's primary immunity is enjoyed only in the State where he or she is posted. There is no immunity from the jurisdiction of third States save when travelling through those States in transit to or from a posting. The immunity claimed by the father, by contrast, is an immunity from suit in all foreign States. It is, therefore, a more extensive immunity than that enjoyed by diplomats under the VCDR.

33 Insofar as [53] and [54] help at all, they show that the scope of any immunity conferred on Heads of State, Heads of Government and Ministers of Foreign Affairs is defined by reference to its function: preventing foreign States from hindering or deterring those officers from performing their official functions. The jurisdiction from which the father claims immunity here has had and will have no effect whatsoever on the performance of his official functions.

34 When considering what the *Arrest Warrant* case established, it was important to look also at the Separate Opinion of Judges Higgins (the UK judge), Kooijmans (the Dutch judge) and Burgenthal (the US judge). At [80], they noted that under traditional CIL, the Head of State was seen as personifying the sovereign State and his immunity was therefore predicated on status. The immunity of Heads of Government and Ministers of Foreign Affairs, by contrast, "have generally been considered in the literature as merely functional". They continued as follows:

> "81. We have found no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State. In this respect, it should be pointed out that paragraph 3.2 of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property of 1991, which contained a saving clause for the privileges and immunities of Heads of State, failed to include a similar provision for those of Ministers for Foreign Affairs (or Heads of Government). In its commentary, the ILC stated that mentioning the privileges and immunities of Ministers for Foreign Affairs would raise the issues of the basis and the extent of their jurisdictional immunity. In the opinion of the ILC these immunities were clearly not identical to those of Heads of State."

35 At [82], Judges Higgins, Kooijmans and Burgenthal noted that the *Institut de Droit International* took a similar position in 2001 with regard to Foreign Ministers (though it did assimilate the position of the Head of Government to that of Head of State). They went on as follows:

> "83. We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States (Judgment, para. 53). During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and wherever engaged in the functions required by his office and when in transit therefor.
>
> 84. Whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear. Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled."

36 As to *Djibouti v France,* Mr Otty noted that the immunity at issue there was that of a Head of State and, even then, what was precluded was a "constraining act of authority": see [170]. The exercise of civil jurisdiction in the present case was not such an act. Even

if the father's position was such as to entitle him to inviolability, the VCDR showed that this was quite separate from immunity from jurisdiction.

37 Mr Otty accepted that ICJ judgments could be treated as definitive where they have declared the rules of CIL on a specific issue. Here, however, the ICJ judgments relied upon did not do that. He drew attention to the Divisional Court's judgment in the *Freedom and Justice Party* case, where Lloyd Jones LJ and Jay J had said at [105] that it was "unable to attach any weight to… oblique references" in the same ICJ judgments, when deciding issues not directly in point in those cases.

38 As to US practice, Mr Otty submitted that the practice of one State is unlikely to be sufficient to establish a rule of CIL. The case of *Benkharbouche* was an illustration of this point. There, Lord Sumption said at [66] that the UK was not unique in applying the principle in issue: seven other countries were party to a convention reflecting the principle and six others had enacted legislation containing similar provisions. This, however, was "hardly a sufficient basis on which to identify a widespread, representative and consistent practice of states, let alone to establish that such a practice is accepted on the footing that it is an international obligation". The need for caution in relying upon decisions of national courts as a source of CIL was also underscored by the ILC in para. 7 of the Commentary to Conclusion 13 of its *Draft Conclusions on the Identification of Customary International Law*.

39 Mr Otty submitted that the need for caution in drawing inferences from the practice of an individual State was even more pronounced when that State is the US. This is because the US Supreme Court has held at the courts of that country are bound by "suggestions of immunity" submitted by the executive branch. Thus, US courts do not review or decide the question whether a particular immunity is established as a rule of CIL. In any event, the cases relied upon do not advance the father's argument because:

(a) The outcome in the *Modi* case, and the other cases referred to in it, would have been justifiable from an international law perspective by reference to conventional doctrines of attribution and State agent immunity, without reliance on any notion of Head of Government immunity, in circumstances where the case apparently concerned official conduct.

(b) In *Howland v Resteiner*, the plaintiff conceded that the defendant had immunity and consented to the dismissal of the proceedings. Moreover, the US government's "suggestion of immunity" cited no case law from any other jurisdiction, nor any other State practice, in support of the assertion of immunity.

(c) In *Jibreel v Hock Seng Chin*, the US Government's "suggestion of immunity" relied on only one non-US case: the *Arrest Warrant* case. And, again, the outcome would have been justified on conventional State immunity grounds, as the allegations against the Prime Minister related to State surveillance.

40 Mr Otty cited a range of materials, which he said showed, at a minimum, that there was no consensus that a Head of Government enjoys immunity in respect of civil proceedings concerning non-official conduct.

41 First, as noted by Judges Higgins, Kooijmans and Burgenthal in their Separate Opinion in the *Arrest Warrant Case*, Article 3(2) of the ILC's *Draft Articles on Jurisdictional Immunities of States and their Property* (published in 1991) made clear that the draft Articles were "without prejudice to privileges and immunities recorded under international law to Heads of State *ratione personae*". Paragraph 7 of the ILC's commentary on Article 3(2) notes that:

> "...the present articles do not prejudge the extent of immunities granted by States to heads of Government and ministers for foreign affairs. Those persons are, however, not expressly included in paragraph 2, since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons. A proposal was made at one stage to add after 'heads of State' in paragraph 2, heads of government and ministers for foreign affairs, but was not accepted by the Commission."

My Otty says that this shows that, as at 1991, there was no consensus on the existence and extent of the immunity conferred by CIL on Heads of Government.

42 Second, Mr Otty relied on the study by the *Institut de Droit International* on *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, which led to a resolution adopted on 26 August 2001. The study was described by Judges Higgins, Kooijmans and Burgenthal as "based on a thorough report of all relevant State practice". The resolution broadly equated the position of Heads of State and Heads of Government but in both cases provided for absolute immunity only in respect of criminal proceedings; the immunity from civil jurisdiction was limited to cases where the suit related to acts performed in the exercise of official functions: see Articles 2, 3 and 15(1).

43 Third, Mr Otty relied on a selection of academic writings:

(a) Joanne Foakes (a former Counsellor to the FCO), in *The Position of Heads of State and Senior Officials in International Law* (Oxford, 2014), noted at pp. 119-120 that the special position of a foreign Head of Government was "more likely to be a matter of courtesy and respect... than a reflection of any belief by the host State that such treatment is required by international law". She accepted that there was "some evidence of a more far-reaching general acceptance that a head of Government should enjoy immunities similar to those of a head of State" (p. 122), but considered that the immunity enjoyed by a Head of Government in civil proceedings was "less straightforward" (p. 124). At p. 125, she said this:

> "While the functional rationale adopted by the ICJ in the *Arrest Warrant* case could be extensively applied, as it is in criminal proceedings, to cover private visits or circumstances where the persons concerned are outside the forum State, the arguments are less compelling. As we have seen, it remains questionable whether a head of State's immunity is absolute in this context".

(b) Brownlie's Principles of Public International Law (9th ed., 2019), edited by James Crawford (an ICJ judge), dealt at p. 478 with Heads of State, before saying: "The position of the immunity *ratione personae* of other serving senior officials is less settled".

(c) *Satow's Diplomatic Practice* (7th ed., 2017), edited by Sir Ivor Roberts (an experienced diplomat), notes that a Head of State enjoys immunity from civil and administrative jurisdiction of the courts of another State "in respect of acts performed as acts of the State in the course of official duties". He cites as authority the Institut's 2001 resolution.

Discussion

44 Having set out the opposing contentions relatively fully, we can express our conclusions briefly.

45 We start, as Lord Pannick did, with the *Arrest Warrant* case. We have no difficulty with the proposition that judgments of the ICJ are in general an authoritative source of CIL, particularly when they codify or crystallise existing State practice and are subsequently recognised as having done so. It is wrong to search an ICJ judgment for its *ratio*. That concept is an artefact of the common law. But to insist on the importance of reading a judgment in context is hardly to adopt a parochial approach. To understand the context, it is necessary to understand the issue before the court and the arguments advanced on that issue by the parties. Only then is it possible to separate those parts of the judgment which reflect the court's considered view on the question before it from "oblique references" of the kind to which Lloyd-Jones LJ and Jay J felt unable to attach weight: see the Divisional Court's judgment in the *Freedom and Justice Party* case, at [105].

46 In the *Arrest Warrant Case,* the ICJ made clear at [51] that it was "only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider". That focus, and the fact that the parties' submissions apparently did not refer at all to immunity from civil jurisdiction, affects the extent to which we can draw firm conclusions from the judgment about the scope of the latter immunity.

47 Even confining ourselves narrowly to the language of the judgment, we do not consider that the father is materially assisted by the statement in [51] that "it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal". It is not enough for the father to establish that he is entitled to *some* immunity from civil jurisdiction. He would have to go further and establish the scope of that immunity and, in particular, that it extends to immunity from jurisdiction in civil claims in respect of non-official acts and that it applies even when not visiting the country. The ICJ did not need or purport to resolve those issues.

48 Nor does the comparison drawn by the ICJ with diplomatic and consular agents provide the answer. As Mr Otty pointed out, the scope of their immunity is obviously different from that of a Head of State, Head of Government or Minister of Foreign Affairs in at

least one key respect: save when in transit to or from a posting, it applies in only one foreign State – the receiving State. The immunity of diplomats from the civil jurisdiction of that State protects them, among other things, from "the risk of trumped up or baseless allegations and unsatisfactory tribunals": *Reyes v Al Malki* [2019] AC 735, [12(3)]. The fact that a diplomat, who is posted to the receiving State, requires protection from these risks does not entail that the same is true of a Head of Government, who in most cases is likely to be based in his own State. There can be no automatic assumption that a Head of Government is entitled in *every* foreign State to immunities of precisely the same scope as are accorded by the receiving State to the head of a diplomatic mission while posted in that State.

49 Insofar as we can glean any assistance from the ICJ's judgment on the scope of the immunity from civil jurisdiction to which a Head of Government is entitled, it seems to us to tell against the father's case. As the ICJ said, the immunities accorded to Ministers of Foreign Affairs are granted "to ensure the effective performance of their functions on behalf of their respective States" (see [53]) in order to "protect the individual concerned against any active authority of another state which would hinder him or her in the performance of his or her duties": [54]. If these are the purposes for which the immunity is granted, it is easy to see why immunity from criminal jurisdiction is required: because "if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office": [55]. Applying the same logic to Heads of Government, it is possible to see why inviolability is required, whether in respect of criminal or civil proceedings: if the person concerned could be made the subject of a witness summons or subjected to the execution of a judgment against the property he carries with him or against the place where he is staying, that would be liable to deter him from travelling to transact the business of the State.

50 Articles 29-32 of the VCDR show that inviolability is distinct from immunity from civil jurisdiction. If it is right to regard the immunity of a Head of Government as "functional", then, provided he or she is personally inviolable while on official visits, we would incline to the view that the complete immunity from civil jurisdiction is *not* required to serve the purposes identified in the *Arrest Warrant* case. As Joanne Foakes notes at p. 125, the functional arguments for such a wide-ranging immunity are "less compelling".[1]

51 *Djibouti v France* does not advance matters. It concerned the inviolability of a Head of State who was the subject of a witness summons. Moreover, the determining factor was whether the Head of State had been subjected to a "constraining act of authority": [170]. Nothing in the judgment indicates that the exercise of civil jurisdiction in a case involving non-official conduct would constitute such an act, provided that inviolability was maintained.

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[1] To characterise the immunity as "functional" in this sense is merely to indicate that "it has a function in international relations to protect the ability of the [office holder] to carry out his functions and to promote international co-operation": *Aziz v Aziz*, [61] (Lawrence Collins LJ). The focus is on what is necessary for holders of the relevant office in general, rather than what is necessary in the individual case. So, it would not be appropriate to consider a question at one stage posed by Mr Otty: whether the immunity claimed would impede the father's own performance of his functions *in this case*.

52 The materials we have seen demonstrate a marked *lack* of consensus on three critical points:

(a) whether a Head of Government enjoys the same immunities as a Head of State: although Heads of State, Heads of Government and Ministers of Foreign Affairs are all regarded as plenipotentiary representatives of their States in Article 7 of the Vienna Convention on the Law of Treaties, that has not always been regarded as sufficient to conclude that their immunities are identical; the ILC sat on the fence on this point in its *Draft Articles on Jurisdictional Immunities of States and their Property* in 1991; Lord Millett drew a distinction between Heads of State and Heads of Government in *Pinochet* in 1999; the *Institut de Droit International* assimilated the two offices in 2001; Joanne Foakes considered the issue "less straightforward" in 2014; and James Crawford in the latest edition of *Brownlie* described it as "less settled" in 2019;

(b) whether the immunity enjoyed by a Head of State or Head of Government from civil jurisdiction extends to claims in respect of non-officials acts: the *Institut de Droit International* thought not in 2001; Sir Ivor Roberts cited the *Institut's* view as authoritative in the latest edition of *Satow* in 2017; O'Keefe and Tams, by contrast, said in 2013 that any immunity from civil jurisdiction must extend to claims in respect of non-official conduct;

(c) whether any immunity in respect of civil jurisdiction for non-official acts applies to exercises of jurisdiction by the forum State while the relevant individual is not on official business in that State: Judges Higgins, Kooijmans and Bergenthal in [84] of their Separate Opinion in the *Arrest Warrant* case considered this point "far less clear" in 2002; Joanne Foakes thought the arguments for absolute immunity "less compelling" in 2014.

53 We would not accord any less weight to the US cases simply because US courts are constitutionally required to defer to the view of the US Government on questions of immunity. When attempting to ascertain whether a particular rule satisfies the stringent requirements for identification as a rule of CIL, what matters is the practice of the State. It is irrelevant for these purposes whether the organ with responsibility for deciding questions of CIL is the executive or the judiciary. The cases relied upon by Lord Pannick therefore provide some support for the proposition that the US considers that Heads of Government, as well as Heads of State, are entitled to immunity from civil jurisdiction even when they are not present in the US. But this does not come close to the kind of evidence required for the identification of a rule of CIL, for two reasons. First, in the *Modi* and *Jibreel* cases at least (and also in the older cases cited, involving Ariel Sharon and Margaret Thatcher), the subject matter of the claims appears to have been conduct on behalf of the State; and it is not clear from the materials before us that the immunity being claimed and/or recognised was an immunity *ratione personae*, rather than an immunity *ratione materiae* (i.e. State immunity). Second, and in any event, the US is only one State. Even if one adds the States asserting the immunities recognised in these cases (India, Singapore, Grenada) and those involved in the cases cited to support the US Government's view (Israel and the UK) the number is considerably less than that which the Supreme Court in *Benkharbouche* considered insufficient to establish a rule of CIL.

54 The Spanish legislation is of some interest, but reliance on legislation is dangerous in this context, because, as *Benkharbouche* shows, States sometimes use domestic legislation to confer immunities that are wider than required by CIL. In any event, even if Spain's legislation could be taken as an indicator of its view about what immunities it believes CIL confers, the addition of one further State to the small list shown to adopt this view does not supply the "widespread, representative and consistent practice" required for identification of a rule of CIL.

55 For these reasons, we conclude that the father has not established to the standard required by the authorities the existence of a rule of CIL conferring immunity from civil jurisdiction on Heads of Government in respect of non-official acts.

Issue (b): Is the father precluded from invoking any immunity because he has initiated proceedings himself?

The law as to the test for implied waiver by initiating proceedings

56 In *High Commissioner for India v Ghosh* [1960] 1 QB 134, the High Commissioner for India sued the defendant for a debt. The defendant counterclaimed for slander. The Court of Appeal upheld the application to strike out the counterclaim on the ground that the plaintiff was immune from the jurisdiction of the court.

57 At pp. 140-1, Jenkins LJ (with whom Morris and Ormerod LJJ agreed) cited two passages in the notes to the Rules of the Supreme Court:

> "A foreign sovereign suing here submits to the jurisdiction so far as to subject himself not only to process of discovery and so forth, but to any set-off or cross-claim which the defendant may set up by way of defence against claim, and which it is necessary for the courts to entertain in order to do justice between the parties in regard to plaintive claim, but he does not let himself open generally to counterclaims or cross actions."
>
> "A similar rule applies with a sovereign prince or state over whom our courts have no jurisdiction (*Mighell v Sultan of Johore* [1894] 1 QB 149) submits to bring an action in this country. The defendant is allowed to plead any set-off or counterclaim against him which is an answer to his demand; but not to recover any judgment against him for the excess, or to raise any counterclaim which is 'outside of and independent of the subject matter of' the claim."

58 Jenkins LJ held at p. 141 as follows:

> "I am of opinion that this counterclaim cannot be maintained unless it is shown to be, as regards the relief it's claims, sufficiently connected with or allied to the subject matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim."

59 The VCDR, which has 192 States parties, provides further assistance as to the test for determining when immunity is waived by the initiation of proceedings. Article 32, which

is incorporated into UK law so far as relating to diplomatic agents by the Diplomatic Privileges Act 1964, provides insofar as material as follows:

> "1. The immunity from jurisdiction of diplomatic agents... may be waived by the sending State.
>
> 2. Waiver must always be express.
>
> 3. The initiation of proceedings by a diplomatic agent... shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.
>
> 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary."

60 Section 20(1) of the State Immunity Act 1978 confers the same immunity on a Head of State as is enjoyed by the head of a diplomatic mission, so the rule in Article 32(3) applies directly to Heads of State as a matter of UK law.

61 The formulation used in Article 32(3) of the VCDR ("any counterclaim directly connected with the principal claim") is also used in Article 45(3) of the Vienna Convention on Consular Relations (1963), which has 180 States parties and is incorporated into UK law by the Consular Relations Act 1968; and Article 41(3) of the UN Convention on Special Missions, which has 39 States parties.

62 A slightly different formulation was used in the European Convention on State Immunity (1972), which was ratified by the UK in 1979 and has eight States parties. There, Article 1(2) provides that a State cannot claim immunity in respect of any counterclaim "arising out of the same legal relationship or the facts on which the principal claim is based". That is given effect in UK law by s. 2(6) of the State Immunity Act 1978, which provides that a submission to the jurisdiction in respect of any proceedings extends to a counterclaim that "arises out of the same legal relationship or facts as the claim".

63 Similar wording is reflected in the UN Convention on Jurisdictional Immunities of States and their Property (2004), which was signed by the UK in 2005 and has 22 States parties and 28 signatories. It was described "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases": *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [26] (Lord Bingham). Article 9 of that Convention provides that a State which brings proceedings cannot invoke immunity "in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim".

64 In *Re RFN*, 77 ILR 452, the Supreme Court of Austria had to consider a claim by a father who enjoyed immunity equivalent to that enjoyed by diplomats under the VCDR. He had brought an application for custody of a child in the Austrian courts. The father withdrew his application, but the mother later filed a petition to be granted custody. In response to that, the father asserted immunity. The Austrian Supreme Court rejected the claim to immunity, applying Article 32(3) of the VCDR and holding:

> "A diplomat who initiates proceedings loses the right to invoke immunity in respect of a counterclaim directly connected with the principal claim. To that extent he therefore runs the risk of being subjected to a counterclaim by his opponent before the same jurisdiction."

65 According to the Court, it did not matter that the mother's application was not formally a counterclaim in the father's proceedings, because "[t]he term counterclaim [Widerklage] is dependent not so much on the specific legal proceedings in which the claims is raised but rather on the connection between two competing claims".

66 Lord Pannick submits that *Ghosh* and Article 32 of the VCDR establish: first, that by bringing a claim in this jurisdiction the father has not waived immunity in respect of other proceedings commenced by the mother if they are "outside of and independent of the subject-matter of the claim"; and second, that any waiver of immunity from jurisdiction does not amount to a waiver of inviolability (which is dealt with separately by Article 29) or of immunity in respect of execution (see Article 32(4)).

67 Mr Otty submits that the test is whether the mother's Part III and IJ Applications are "directly connected" with the father's applications or whether they "arise out of the same legal relationship or facts" as those claims.

68 For our part, we doubt whether there is any material difference between the various formulations we have set out. We have approached the matter as follows:

(a) The starting point should be the test enunciated by Jenkins LJ in *Ghosh*: are the mother's applications "sufficiently connected with or allied to the subject matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim"?

(b) This test seems to us to concentrate on substance, rather than form. In that respect, our approach follows that of the Austrian Supreme Court in *Re RFN*. The question whether a particular claim is formally regarded as a "counterclaim", or as brought within the same proceedings as another claim, is unlikely to turn on domestic procedural law. It would be incoherent if the application of a test derived from international law turned on the niceties of domestic procedural law, though procedural differences between the two claims may be of interest if and insofar as they reflect differences of substance.

(c) The focus of the inquiry should be on the directness of the connection between the father's and the mother's applications. That connection could be established because the applications arise out of the same legal relationship or because they arise out of the same set of facts. In either case, establishing the connection will require an exercise in judgment as to whether it is necessary in the interests of justice that the one should be dealt with along with the other.

The application of the test to the facts of this case

69 In considering Jenkins LJ's question (see para. 68(a) above), it is important to understand the nature of the applications the mother is making. Although the mother's Part III application for permission to bring financial remedy claims following a foreign divorce could be more widely drawn, she has expressly limited her application to provision for the ongoing "security, integrity and wellbeing" requirements of herself and the children. In this context, it being agreed and accepted that the father will submit to the court's jurisdiction with regard to the children's financial needs during their minority (and beyond) under Sch.1 to the CA 1989, reference to the "the children" is to J and Z once they are adults. In that regard, as is accepted by those who represent her, the mother's application seeks to establish an entirely novel manifestation of the court's inherent jurisdiction.

70 Turning to the first element of the test as we have cast it, "the claims" are the father's applications under the inherent jurisdiction and the father's application under CA 1989 for interim child arrangements. Insofar as the existing claims under the inherent jurisdiction and as to a "child arrangements order" relate to the children, they do so only during their minority (up to the age of 18 years): s. 1 of the Family Law Reform Act 1969, s 1; s. 105 of the CA 1989.

71 It is also of note that the mother's Schedule 1 claim is similarly limited to a child under the age of 18, subject to the exceptions in paras. 2 and 6 of Sch. 1, which enlarge the court's jurisdiction to cover a young person in education or training or where "there are special circumstances which justify the making of an order". In the unusual circumstances of this case, it has been accepted by the father that the exception in paragraph 2(1)(a) applies here and he has conceded that the court will have jurisdiction under Sch. 1 to make orders for the security and protection of J and Z for the whole of their adult lives. Subject to that concession, however, the existing claims made by both parties all relate to the protection and welfare of the children whilst they are under the age of 18 years. None of the existing claims relate to free-standing financial provision for the mother as an individual (as opposed to in her roles as the carer of the children during their minority).

72 In the context of this case, the question is, therefore, whether the father's applications relating to the welfare of the children during their minority are sufficiently connected with or allied to the claims that the mother now wishes to bring for financial provision for herself alone and for the children as adults under Part III and/or the IJ to make it "necessary in the interests of justice" for them to be dealt with along with the original claims?

73 The mother asserts that the answer to this question is in the affirmative because both sets of claims arise from the same circumstances, namely the risk posed by the father, and those instructed by him, to the security and wellbeing of the mother and the children. This risk, it is said, is continuing and, indeed, will be life-long and will not evaporate on the date that each child reaches the age of 18 years. Her claims therefore arise out of the same relationship and circumstances as the existing claims. The mother's position before the court in relation to all of the claims is said to be driven by the same desire to protect her human rights and those of the children in the face of the father's actions and his attempts to return them to Dubai.

74 Procedurally, the Part III and IJ applications are properly before the same division of the High Court as the father's claims. Although they could not be properly characterised as a "set off" or "counterclaim" (as that term is used in English civil procedure), they could be heard together. It is, however, of some note that they do not have to be. For example, the Schedule 1 application is listed to be heard by a different judge and the litigation is led for each party by different leading counsel from those who lead in the existing proceedings. Further, the children, who are parties to the current applications in wardship and under the CA 1989, and are represented by a children's guardian, would not be parties to the pending applications. These differences seem to us to reflect differences in substance between the father's claims and the mother's Part III and IJ applications.

75 Applying the test we have set out at para. 68 above, we are unpersuaded that there is sufficient connection between the pending applications made by the father and those made by the mother which are currently pending. The following specific factors support this conclusion:

(a) The father's applications relate to the children's welfare as children, whereas the mother's pending claims do not arise, with respect to J and Z, until they become adults.

(b) The mother's claim for provision for herself as an adult former spouse is of a different nature to the child welfare applications made by the father.

(c) Although the father's applications are made, in part, under the inherent jurisdiction, as is the mother's pending IJ application, the mother's application would require a wholly novel exercise of the jurisdiction to make financial provision for three mentally capable adults (mother and the grown-up children). The fact that, procedurally, both are brought under the inherent jurisdiction does not, of itself, establish a sufficient connection.

(d) As a matter of 'substance' the two competing categories of claim are distinct. One relates to the welfare of children, the other to financial provision for adults.

(e) Whilst, as a matter of process, the two categories of application could be heard by the same judge in the same overall court process, in reality they would be treated as separate elements and heard on different occasions. In the event, the financial matters are currently being heard by a different judge with the parties represented by leading counsel other than those who take the lead in the proceedings relating to child welfare.

(f) It is also of note that the children are parties and have separate representation in the father's applications, but would not be parties in the mother's Part III application.

(g) The two sets of applications do not arise out of the same legal relationships. In the father's applications, the parties are "mother and father", in the mother's applications they are former spouses. In the former, J and Z are dependant children, in the latter they would fall to be assessed as competent, non-dependant, adults.

(h) Whilst all of the applications arise from the same basic set of facts, those underlying facts have been, or will be, determined within the current proceedings

to which both parents are full parties. Insofar as any more detailed facts may need to be determined for the mother's pending financial applications (for example, the scale and cost of her security operation), those matters (almost by definition) will not relate to matters concerning the welfare of the children, but will focus on the long-term financial needs of the mother and J and Z once they are adults.

76 Taking all of these matters into account, we do not consider that it is "necessary in the interests of justice" for the mother's pending applications to be dealt with along with the applications made by the father which are currently before the court.

Issue (c): Are the Part III and IJ applications covered by the father's express waivers?

77 Article 32(2) of the VCDR 2 provides that "waiver must always be express". On 31 July 2019, the father filed a court statement setting out certain express waivers:

> "2. The Father's immunity is waived as to the following applications which are currently before the Court (and only those applications):
>
> (1) The Father's application for orders in relation to the children (Case Number FD19P00246).
>
> (2) The Mother's application for an inherent jurisdiction order in relation to the children (Case Number FD19P00380).
>
> (3) The Mother's application for leave to apply for a Forced Marriage Protection Order and for a Forced Marriage Protection Order (Case Number FD19F05020).
>
> (4) The Mother's application for a non-molestation order (Case Number FD19F00064).
>
> 3. The Father's immunity as to execution of any order made in the above applications and as to inviolability in relation to enforcement of any such order are also waived."

78 In a further document signed on 4 October 2019 by the father on his own behalf and on behalf of the UAE and the Emirate of Dubai it was stated:

> "The following matters are hereby confirmed by His Highness personally, by the UAE and by the Emirate of Dubai, subject to paragraphs 5 and 6 below:
>
> (1) The immunity of His Highness as to the Applications (and only the Applications) is waived.
>
> (2) The immunity of His Highness as to execution of any order made in the Applications is waived.
>
> (3) The inviolability of his Highness in relation to enforcement of any order made in the Applications is waived.

> (4) The inviolability of the premises of His Highness in the UK (including the suite at the [addresses given]) in relation to enforcement of any order made in the Applications is waived.
>
> 5. The waivers set out above apply only to the Applications and to orders made in the Applications.
>
> 6. Any privileges, immunities or inviolability which His Highness was or is entitled to and/or enjoyed or enjoys under international law and/or under English law in relation to giving oral evidence and/or in relation to attendance at any hearing or directions appointment have not been waived (whether by this document or by the statement provided on 31 July 2019 or otherwise) and are maintained."

79 The father's case on waiver is shortly put on the basis that a strict approach must be taken and that it is plain that the only express waivers that have been given do not, and cannot, relate to the Part III or new IJ applications that are now made by the mother.

80 For the mother, Mr Otty submitted that the waivers made by the father must, for obvious common sense reasons, embrace orders that had (and have) yet to be sought in the stated applications and that the waivers should be construed in a sufficiently broad manner so as to include the Part III and IJ applications.

81 With respect to the IJ application, Mr Otty makes two central points. First, that the father has clearly submitted to the court's inherent jurisdiction and has expressly waived any immunity with respect to such proceedings. The mother's pending IJ claim is also made under the inherent jurisdiction, and, indeed, uses the same case numbers. The father must therefore be taken to have expressly waived immunity to the further exercise of the court's inherent jurisdiction with respect to his children. Until the mother made her claim in June 2020, the father made no attempt to qualify his submission to the inherent jurisdiction, and it is now too late to do so. By waiving immunity with respect to the proceedings under the inherent jurisdiction, the father must be taken to have waived immunity in respect of any order that the court can legitimately make within those proceedings.

82 Second, Mr Otty submits that, as the court has allowed the proceedings to be issued under the existing case numbers, the court therefore has jurisdiction to make such orders as are available to it pursuant to its inherent jurisdiction in the existing proceedings – which are the subject to the father's express waiver.

83 This is, in our view, an adventurous submission. Save for the present preliminary consideration as to immunity and waiver, the court has yet to conduct any substantive hearing of the mother's IJ application. As we have already noted, her application for the court to exercise its inherent jurisdiction to provide financial relief to an adult former spouse and to adult children, none of whom is said to lack mental capacity, seeks to open up an entirely novel aspect of the court's jurisdiction. On that basis, it is, in our view, untenable to argue that, simply by allowing the application to be issued under the same court number as existing proceedings, the court has in some manner indicated that it has accepted jurisdiction to grant any of these new claims. In like manner, a waiver by the father cannot be said to encompass claims that were, at the time that the waiver was given, simply unknown as potential aspects of the court's inherent jurisdiction.

84 With respect to the Part III claim, Mr Otty accepts that the position is more complicated in that, before the claim can proceed, the mother must first obtain the court's permission. The mother nevertheless claims that the express waivers given do apply to the Part III claim as it is, properly understood, a counterclaim to the father's substantive applications.

85 The submissions on this part of the case were made economically by counsel, and we can be succinct in setting out our conclusion, which is that the express waivers given by the father in July 2019, and clarified in October 2019, do not encompass the mother's pending Part III claim, nor her claim under the IJ for financial provision for herself and the children once adult.

86 Both parties accept that, to be effective in this context, any waiver must be express. We accept the need for strictness in construing any waivers given. On that basis it is, in our view, simply not possible to stretch the wording of the waivers that the father has given with respect to the proceedings that were before the court to encompass either a financial claim by his former wife under Part III or the claim that is now made for financial relief under the IJ.

87 Mr Otty is right to indicate that the position with respect to waiver is complicated by the need for the mother to obtain the permission of the court before she can launch her substantive application. As such, the Part III proceedings have yet to commence as the permission application still awaits determination. It is not possible on any basis to read the father's express waivers as applying to a matrimonial financial remedy claim by his former wife which, nearly two years after the waivers were given, has not yet been fully launched.

88 In relation to the IJ claim, although it is possible to contemplate that a party who waives immunity with respect to a set of proceedings does so on the basis that they may therefore be bound by whatever orders that court may make that are within its jurisdiction, we consider that, in construing the waiver and thereby understanding that which is being waived, regard must be had to the understanding that the parties and the court would have had as to the extent of the court's jurisdiction at the time that the waiver was given. The claim now made by the mother under the IJ is wholly novel. There is no suggestion that the father (or the court) knew, or must have known, that the inherent jurisdiction proceedings with respect to the children would include a claim for free-standing financial relief for the mother, J and Z in the years after they ceased to be minors.

89 A separate but related point arises from the fact that the waivers made by the father with respect to the inherent jurisdiction both expressly state that they are made in proceedings "in relation to the children". That phrase does not encompass a free-standing claim by the mother, nor, in our view, a claim with respect to the children's needs once they have ceased to be minors.

90 Finally, we have only turned to consider express waiver after reviewing whether there is a direct connection between the two sets of claims. Given our conclusion that there is no sufficient direct connection, it is difficult to contemplate how, on the same facts, we could hold that waivers given in one set of proceedings could expressly apply to other, unconnected, claims.

Conclusion

91 For the reasons given at paras 44 to 55 above, we have concluded that the father has not established to the standard required by the authorities the existence of a rule of CIL conferring immunity from civil jurisdiction on Heads of Government in respect of non-official acts.

92 That determination is sufficient to dispose of, and reject, the father's claim for immunity, but, in the event that we are wrong on that primary issue, our conclusions on the other two issues are as follows: the father is not precluded from invoking immunity because he has waived it by initiating proceedings himself (see paras 56-76 above); and he has not expressly waived immunity with respect to the mother's Part III and IJ claims (see paras 77-90 above).